THE AMERICAN WAR CRIMES TRIAL OF FLOSSENBÜRG CONCENTRATION CAMP, 1946–1947

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I hereby declare that this dissertation contains no materials accepted for any other degrees in any other institutions and no materials previously written and/or published by another person unless otherwise noted.

Abstract

After eight decades since the capitulation of the Third Reich, Flossenbürg concentration camp is still one of the least known sites of Nazi atrocity on German soil. However, extensive eyewitness testimony, compiled during the American-administered war crimes trials, provides a significant amount of material with which to study the camp's involvement in the persecution of some 100,000 individuals and the murder of more than 30,000 over the course of seven years. The trial minutes depict the camp as an essential element in the development, practice, and ultimate collapse of the concentration camps as a collective system. But over the course of this case, the deliberation became increasingly sidetracked over the topic of social identity—pertaining to both the perpetrators and the victims. The overarching goals of these trials were to identify and prosecute 'lesser' war criminals of German National Socialism; to educate the public (both domestic and international) to the atrocities committed under the auspices of the Third Reich; and finally, to provide an example—through judicial means—for the democratization of post-war Germany. Yet the single-most important caveat to these goals was to do it as quickly and efficiently as possible during such a volatile and transitionary period. The trial of Flossenbürg concentration camp in particular would not follow this structure, as intended.

On 22 January 1947, forty-five defendants listened in silence as they were each read their judgments. Forty were found guilty of committing war crimes. This day marked the end of what became the longest running case of the so-called Dachau Trials. After seven months of deliberation, the Flossenbürg trial had amassed nearly 10,000 pages of transcript, consisting almost exclusively of eyewitness testimony. But it was still not enough evidence to convict all fifty-two suspects listed in the original indictment. Despite its prolonged duration, this was the first atrocities case, explicitly dedicated to the crimes committed under the auspices of a concentration camp, that did not result in a clean sweep of convictions.

To my wife Emese, for her everlasting support and patience

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Introduction

On 22 January 1947, in one of the smaller make-shift courtrooms on the grounds of what had been the Dachau concentration camp, the case of the *United States v. Friedrich Becker et al.*—better known as the Flossenbürg parent trial—finally came to its conclusion. It was the third successive so-called camp-atrocities trial, following the immensely successful Dachau and Mauthausen cases (both of which had been deftly led by chief prosecutor Lt. Colonel William Dowdell Denson). With a new prosecution to employ what had become a proven legal strategy, the Flossenbürg case was expected to follow suit with a quick and uncomplicated trial, ending in another clean sweep of convictions. Not three weeks in, however, Denson was brought back as a substitute, after the sudden and unforeseen death of his successor. After six more months of deliberation, not only had the case run nearly three times as long as the two previous trials combined, but it also became the single longest-running trial among the nearly 500 that made up the United States Military Government war crimes trial program, between 1945 and 1948.

Despite Denson leading the prosecution's best efforts, the court only found forty of the original fifty-two defendants guilty. One was excused on a language issue, six were dismissed just one month before judgement, and five were ultimately acquitted of all charges. This result may incidentally be brushed off as a mild upset for the prosecution, but given that Denson once again restored his perfect conviction rate in the following Buchenwald trial (his last case), and in considerably less time, the Flossenbürg trial was indeed a failure. All logic points to the first three weeks of the case as being the source of the problems, but how? And why was Denson unable to correct the mistakes? Critical examination of what happened and exactly where things went wrong for the Flossenbürg case reveals not only a poorly developed case, but a strategy of deliberate social stigmatization of victims. The Flossenbürg trial is crucial to acquiring a more comprehensive understanding of how the US Army approached its pursuit of justice for the atrocities of the concentration camps.

Despite its near-absent notoriety, the Flossenbürg trial was part of one of the largest war crimes trial programs in history and one of five primary cases in which the American military prosecuted crimes in the concentration camps. Before Nazi Germany met its final capitulation in 1945, the Allied nations promised retribution for the unspeakable atrocities that had recently been uncovered. The 1943 Moscow Declaration pledged that the perpetrators, both large and small, would be sent back to the location of their crimes, where they would be judged and punished. For

the United States, this undertaking took the form of three separate jurisdictions. The International Military Tribunal (IMT) at Nuremberg—a location chosen for its significance as one of the ideological centers of National Socialism—was by far the most publicized. Operating as a cooperative effort between the United States, Great Britain, France, and the Soviet Union, from November 1945 to October 1946, the IMT prosecuted twenty-two of the most prominent leaders of the Third Reich under an entirely novel legal process. The charges of crimes against the peace (which incorporated conspiracy to wage "aggressive war") and crimes against humanity were first introduced here.

Following the IMT, the United States proceeded alone to independently hold twelve subsequent Nuremberg Military Tribunals (NMT). From 1946 to 1949, the US prosecuted an additional 185 "major" war criminals, consisting of high-ranking Nazi officers, doctors, and other influential military and civilian luminaries of the regime. The two programs at Nuremberg greatly influenced the field of modern international criminal law. In addition to punishing those responsible, the Nuremberg Tribunals also sought to establish a historical record that documented the atrocities committed in the name of National Socialism.

Considerably less known, but exponentially larger in scale, was the US Military Government Courts (MGC)—commonly referred to as the Dachau Trials. Between summer 1945 and the very end of 1947, the US Army oversaw a series of 489 specially appointed military commission-style courts which prosecuted nearly 1,700 war criminals linked to Nazi atrocities. Like Nuremberg, the location of these trials carried a conspicuous symbolic significance, as almost ninety-five percent of the cases were held at the former grounds of the Dachau concentration camp, near Munich.[1] Unlike Nuremberg, however, the Dachau Trials focused their attention towards prosecuting rank-and-file Nazis and civilian accomplices. These "lesser" war criminals were generally the individuals on the ground (and in the camps), committing the atrocities themselves.

The impressive size and scope of the Dachau Trials was bolstered by its ambitious mandate to prosecute as many offenders as possible, in the quickest and simplest manners available. The Army courts, therefore, only utilized the existing internationally recognized charge of war crimes, as understood under the Geneva and Hague Conventions. Structurally, the courts would be

[1] Of the 489 trials held in various locations in the American occupational zones of Germany and Austria, 462 were held at Dachau. Other sites include: Ahrweiler, Augsburg, Darmstadt, Düren, Freising, Heidelberg, Ludwigsburg, Munich, Wiesbaden, and Salzburg, Austria.

modeled on long-standing US military judicial precedent. However, with intensions to keep things uncomplicated, the MGC were not strictly beholden to US military regulation or criteria in same ways as a standard court-martial or military commission. Defendants were denied the same legal protections guaranteed to US citizens and the discretionary power of presiding Army officers (most of whom were not legally trained) was broad. Novel charges, such as common design (a concept loosely associated to conspiracy), and notoriously unreliable hearsay testimony were both accepted. It was under these conditions that Denson was so successful in prosecuting the cases of Dachau, Mauthausen, and Buchenwald, achieving 132 convictions between the three of them. The prosecution had been afforded the exact same tools and conveniences in the Flossenbürg case but was somehow unable to produce the same results.

At first glance, it may appear to have simply been a poorly prosecuted case, which it was for several reasons, but a closer investigation of the nearly 10,000 pages of trial transcript reveals consequential problematic entanglements between the distinct circumstances under which Flossenbürg was liberated, the post-war judicial mandates of the US military government in Germany, the contentious strategies employed to prosecute the alleged atrocities that occurred in the camps, and the limitations of agency provided to the victims in the courtroom. By examining the unique attributes of the Flossenbürg trial, in relation to its perceived failures, this study looks to reconsider the prevailing qualified concepts of judicial success in the context of America's prosecution of the National Socialist concentration camps. The history of the United States war crimes trial program in Germany is, therefore, not complete without a critical review of this case.

In a field that is largely overshadowed by the likes of Auschwitz and Dachau, Flossenbürg concentration camp is practically unknown, considering how integral it was to the domestic camp system. Situated in the remote hills of the Upper Palatinate region of Bavaria, just a few kilometers from the border of (then) Czechoslovakia, *Konzentrationslager* (concentration camp, KL) Flossenbürg was one of the few major camps inside Germany not to be located on the periphery of a major city.[2] In fact, the establishment of the camp completely modernized the rural hillside village of Flossenbürg, bringing with it the first on-site physician, local post-office, and sewage-

[2] In addition to Flossenbürg, there were five other purpose-built *Hauptlagers* (main camps) established inside Germany and Austria before the war: Dachau (1933) sits just outside Munich; Sachsenhausen (1936) is located in Oranienburg, a suburb of Berlin; Buchenwald (1937) was established just north of Weimar, and Mauthausen (1938) is positioned in the hills overlooking Linz. Only Ravensbrück (1939, primarily a women's camp) was located a considerable distance from any major city: approximately 90 kilometers north of Berlin, in Fürstenberg an der Havel. Neungamme (near Hamburg) was established in December 1938 as subcamp of Sachsenhausen.

treatment plant. Within one year, the resident population increased from 1,200 to almost 2,300 inhabitants.[3] The camp was simultaneously isolated from general German public knowledge while intimately connected to and even depended upon by the immediate local community. Established in May 1938, KL Flossenbürg was originally envisioned to be a forced labor site for "criminals" of the Reich. Early arrivals also included prisoners identified as "a socials" and "homosexuals." From its inception, Flossenbürg was expected to play a major role in the SS's new economic endeavors.[4] Between 1938 and 1940, it primarily functioned as a stone quarry, providing prized granite for Hitler's audacious architectural redevelopment projects in Nuremberg and Berlin. During this time, it maintained a relatively homogenized prisoner community. Despite its modest beginnings, however, Flossenbürg would end up not only bearing witness to, but actively participating in, every major phase of the destructive KL system.

As the war developed, the camp demographic increasingly internationalized as more and more prisoners began flooding in from outside the Reich. Before long, prisoners from central and eastern Europe far outnumbered their domestic counterparts. Nevertheless, Flossenbürg would remain defined by its German minority population of brutal "criminal" prisoner-functionaries. Due in part to its remote location, the camp soon became a chosen site for organized executions. Flossenbürg participated in the Action 13f14 policy to "euthanize" prisoners no longer physically able to work,[5] and also carried out multiple directives of systematic execution. In 1941, the Reich Security Main Office (*Reichssicherheitshauptamt*, RSHA) ordered the murder of hundreds of Polish prisoners in what is presumed to have been the result of a reprisal.[6] Thousands more Soviet Prisoners of War (POWs) were systematically executed at the behest of the RSHA.[7] While it never contained gas chambers, the execution programs did require Flossenbürg to expand the number of ovens in its crematorium.[8] Eventually, this too was exceeded and mass pyres were erected just outside the grounds to compensate for the number of bodies.

[3] Jörg Skriebeleit, *Erinnerungsort Flossenbürg: Akteure, Zäsuren, Geschichtsbilder* (Göttingen: Wallstein, 2009) p. 41.
[4] See Michael Thad Allen, *The Business of Genocide: The SS, Slave Labor, and the Concentration Camps* (Chapel Hill, NC: University of North Carolina Press, 2002).
[5] Jörg Skriebeleit, "Flossenbürg—Hauptlager," in Wolfgang Benz, Barbara Distel, and Angelika Königseder, eds., *Flossenbürg: Das Konzentrationslager Flossenbürg und seine Außenlager* (München: C.H. Beck, 2007) 11–60, here p. 26.
[6] Skriebeleit, "Flossenbürg—Hauptlager," pp. 27-28.
[7] Ibid, p. 28.
[8] Ibid, pp. 28-30.

By 1944, total war had made it into the concentration camps, completely augmenting the entire disposition of Flossenbürg. Where Jewish prisoners were once few in numbers, they now made up approximately twenty percent of the total inmate population. In addition to changes in demographics, the camp's core economic interests in stone production were replaced by aircraft manufacturing for the war effort; in particular, the Messerschmitt ME 109 fighter planes were constructed and repaired by Flossenbürg inmates. As many as ninety subcamps of various sizes and objectives created an intricate constellation of satellites that orbited the Flossenbürg *Hauptlager* (main camp), spreading into German occupied Bohemia and Moravia, as well as parts of Saxony. One of the largest was Leitmeritz, which included cavernous underground factories providing security for twenty-four-hour production lines. The subcamp system also included approximately two dozen female camps, imprisoning some 16,000 women between them.[9]

In the last weeks of the war, Flossenbürg's strategic positioning was once again utilized, this time as the last transit hub on the southern prisoner-evacuation routes. Tens of thousands of inmates were forcibly transported on one of several death marches. Fleeing the steady advancement of US troops, most headed in the direction of Dachau. By the time American forces reached Flossenbürg on 23 April 1945, barely 1,500 sick and emaciated prisoners were there to greet their liberators. The transport marching columns were subsequently intercepted over several days throughout the Bavarian countryside.

In the days and weeks that followed, designated war crimes investigation teams arrived. They visited the *Hauptlager* and followed the death march routes, obtaining evidence, interrogating witnesses, and making reports. No other camp investigation incorporated such an expansive 'crime scene.' Despite being under-staffed and ill-equipped, investigators were able to glean valuable information by enlisting capable survivors to assist in collecting documents and conducting interviews. Just over a year later, many of these individuals delivered testimony as prosecution witnesses in the Flossenbürg trial.

In spite of its relative obscurity within the extensive field of Nazi persecution and the concentration camps, there is a fairly diverse assortment of focused studies by dedicated

[9] For an overview of the Flossenbürg subcamp system, see Benz, *Flossenbürg und seine Außenlager*; Geoffrey P. Megargee, ed., *The United States Holocaust Memorial Museum Encyclopedia of Camps and Ghettos, 1933-1945*, Part A (Bloomington: Indiana University Press, 2009) 559-692.

individuals on the history of Flossenbürg,[10] though publications in English are almost non-existent.[11] To date, the most comprehensive survey of the camp's seven-year period of operation remains Toni Siegert's chapter, "Das Konzentrationslager Flossenbürg: gegründet für sogenannte Asoziale und Kriminelle" ("The Flossenbürg Concentration Camp: Founded for so-called Asocials and Criminals"), published in 1979 in Martin Broszat's *Bayern in der NS-Zeit* ("Bavaria under National Socialism") series.[12] The study benefits from the then innovative micro-historical approach of *Alltagsgeschichte* (history of everyday life). Siegert consulted multiple witness statements taken by US investigators and Flossenbürg trial testimony to provide a detailed description of life in the camp from the position of both the victims and perpetrators.

Literature on the post-war years of the camp is significantly smaller. In 2009, Jörg Skriebeleit published *Erinnerungsort Flossenbürg: Akteure, Zäsuren, Geschichtsbilder*[13] ("Flossenbürg as a Place of Remembrance: Actors, Turning Points, Historical Images"), an exceptionally informative study on the post-war memory of Flossenbürg and how it was all but completely forgotten as a site of mass atrocity. His focus concerns the social and political space in which Flossenbürg sits, and its relationship to those who have been in control of memory production in the second half of the twentieth century. Together, these two studies contextualize the history of Flossenbürg concentration camp within the local region before, during, and after the Third Reich. While both works have gleaned source material from the American investigations

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[10] See, Hugo Walleitner, *Zebra: Ein Tatsachenbericht Aus Dem Konzentrationslager Flossenbürg* (Bad Ischl: Self-published, 1946); Toni Siegert, "Das Konzentrationslager Flossenbürg: gegründet für sogenannte Asoziale und Kriminelle," in Martin Broszat and Elke Fröhlich-Broszat, *Bayern in der NS-Zeit. Band II. Herrschaft und Gesellschaft im Konflikt* (München: De Gruyter Oldenbourg, 1979), pp. 429–492; Peter Heigl, *Konzentrationslager Flossenbürg: In Geschichte Und Gegenwart; Bilder und Dokumente; Gegen Das Zweite Vergessen* (Regensburg: Mittelbayerische Druckerei- und Verlags-Gesellschaft, 1989); Hans-Peter Klausch, *Widerstand in Flossenbürg: Zum Antifaschistischen Widerstandskampf der Deutschen, Österreichischen und Sowjetischen Kommunisten im Konzentrationslager Flossenbürg; 1940-1945* (Oldenburg: Universität Oldenburg, 1990); Johannes Tuchel, *Die Inspektion der Konzentrationslager 1938-1945: Das System des Terrors* (Berlin: Hentrich, 1994); Benz, *Flossenbürg und seine Außenlager* (München: C.H. Beck, 2007); Jörg Skriebeleit, *Erinnerungsort Flossenbürg: Akteure, Zäsuren, Geschichtsbilder* (Göttingen: Wallstein, 2009); Pascal Cziborra, *Frauen im KZ: Möglichkeiten und Grenzen der Historischen Forschung am Beispiel des KZ Flossenbürg und Seiner Außenlager* (Bielefeld: Lorbeer-Verlag, 2010); Jessica Tannenbaum, *Medizingeschichte im Kontext: Medizin im Konzentrationslager Flossenbürg 1938 bis 1945: Biografische Annäherungen an Täter, Opfer und Tatbestände*, (Frankfurt am Main: Peter Lang, 2016).

[11] Megargee, *Encyclopedia of Camps and Ghettos*; Ulrich Fritz et al., *Flossenbürg Concentration Camp 1938-1945: Catalogue of the Permanent Exhibition* (Göttingen: Wallstein, 2009).

[12] Siegert, "Das Konzentrationslager Flossenbürg."
Siegert later republished the chapter as an independent booklet. See Toni Siegert, *30000 Tote Mahnen! Die Geschichte des Konzentrationslagers Flossenbürg und seiner 100 Außenlager von 1938 bis 1945*, (Weiden: Taubald, 1984).

[13] Skriebeleit, *Erinnerungsort Flossenbürg*.

after liberation, neither Siegert nor Skriebeleit, however, address the war crimes trial program itself.

The only academic study that critically examines the Flossenbürg trial is *GeRechte Sühne? Das Konzentrationslager Flossenbürg: Möglichkeiten und Grenzen der nationalen und internationalen Strafverfolgung von NS-Verbrechen*, ("Just Atonement? The Flossenbürg Concentration Camp: Possibilities and Limitations of National and International Prosecution of Nazi Crimes"), published in 2001 by Rudolf Schlaffer.[14] As the title implies, Schlaffer questions the very legality of the American war crimes trial program, based on the confusing joint applications of both US military- and international criminal law.[15] Schlaffer takes an ambitious comparative approach by giving equal consideration to the state-municipal criminal trials (whose jurisdiction oversaw Flossenbürg) that began in the following decade, after the establishment of the Federal Republic of Germany (FRG). By employing the trials of Flossenbürg to juxtapose the American MGC against the German criminal courts, Schlaffer promotes an almost *longue durée* perspective of the varied approaches that each administration took in reaching the same goal of holding perpetrators of Nazi persecution accountable.

While not a piece of scholarly work by any means, Joshua Greene's 2003 biography of Lt. Colonel William Denson, *Justice at Dachau*,[16] nevertheless demands acknowledgment here. The book dramatically traces Denson's professional and private life during his time in Germany as lead prosecutor of the American-led war crimes trials of Dachau, Mauthausen, Flossenbürg and Buchenwald. Indeed, Greene should be commended for having been the first to explore the extensive personal records of his protagonist—now archived at Yale University.[17] As others have noted, however, certain aspects of the source materials were sometimes embellished.[18] Among the various subtle instances of artistic licensing, the most flagrant example is just how incorrect and insignificant the Flossenbürg trial is portrayed. Whereas the other three cases each receive an average of about eighty pages of text, barely one whole page on Flossenbürg is shoehorned in at

[14] Rudolf Schlaffer, *GeRechte Sühne? Das Konzentrationslager Flossenbürg: Möglichkeiten und Grenzen der nationalen und internationalen Strafverfolgung von NS-Verbrechen* (Hamburg: Verlag Dr. Kovac, 2001).
[15] Schlaffer, *GeRechte Sühne?* pp. 7–10, 133.
[16] Joshua Greene, *Justice at Dachau: The Trials of an American Prosecutor* (New York: Broadway Books, 2003).
[17] See, *William Dowdell Denson Papers Collection*, MS1832 (hereafter, *Denson Papers*), Manuscripts and Archives, Yale University Library, New Haven, CT.
[18] Greta Lawrence mentioned that Greene misquoted Congressional Senate Reviews for dramatic effect. Greta Lawrence, "The United States and the Concentration Camp Trials at Dachau, 1945-1947," Doctoral Thesis, (Cambridge, UK: University of Cambridge, 2019) p. 12.

the end of the Mauthausen section. Far less forgivable, however, is Greene's ability to completely mischaracterize the trial in such a short space. He writes that a "Colonel Clark" had been running a losing prosecution when half-way through the trial, he suddenly died of a heart-attack. Denson, Greene continues, was heroically brought in to save the case, thus maintaining his 100 percent conviction rate, before moving on to prepare the Buchenwald case.[19] Unfortunately, this narrative is a-historical.

Aside from the death of the prosecutor—whose name was not Clark, but Lt. Colonel Robert J. Shaw[20]—little else is remotely accurate. Greene's errors are so significant, in fact, that one is forced to ask why and how this was possible, even for an author of popular historical non-fiction. The simple answer is that even the most basic information is often (unintentionally) buried inside the primary source casefiles. In other words, understanding these trials requires extremely diligent reading. And Greene, who clearly read neither the case file nor Schlaffer's study, simply referenced Flossenbürg as little more than a footnote between the trials of Mauthausen and Buchenwald. Greene is, however, just one acute example in a general pattern of neglect when it comes to the academic value of the Flossenbürg trial. The majority of comprehensive research on the Dachau Trials has tended to subordinate this very case largely because of its perceived insignificance and its daunting size.

In the past seventy-five years since the program's abrupt ending in December 1947, the Dachau Trials as a whole have admittedly received only modest scholarly attention. Not only has the program been largely overshadowed by the Nuremberg Tribunals, but the National Archives only began declassifying trial transcripts in the 1980s. It wasn't until the early 1990s that the entire collection of the MGC program was made available to researchers.[21] In 1989, Frank M. Buscher was the first to incorporate the Dachau Trials (with the Nuremberg Tribunals) to examine the political fallout in occupied Germany due to the US war crimes trial programs.[22] Citing the fact that all convicted war criminals were released no later than 1958, he argues that the program

[19] Greene, *Justice at Dachau,* p. 226.
[20] In the thousands of pages of source material that I have gone through, I still have never come across a Colonel Clark.
[21] Elisabeth M. Yavnai, "Military Justice: The U.S. Army War Crimes Trials in Germany, 1944-1947" (Doctoral Thesis; London School of Economics and Political Science, 2007) p. 13.
[22] Frank M. Buscher, *The U.S. War Crimes Trial Program in Germany, 1946-1955* (New York: Praeger, 1989).

ultimately failed to achieve any of its set goals.[23] In 1992, Robert Sigel published the only comprehensive monograph on the subject of the Dachau Trials.[24] Sigel also concerned himself with the political environment under which the trials occurred. Given the sheer scope of his project, however, the study tends to provide little more than a brief survey of individual cases. As was the same for several others, the Flossenbürg trial received just two pages of text.[25] From their overhead vantagepoints, Buscher and Sigel both set a critical tone for future studies of the Dachau Trials. As others have since dug deeper, these two pioneering works remain some of the more cynical evaluations.

Conversely, three doctoral dissertations are among the most in-depth and optimistic studies of the collective Dachau Trials program. Elisabeth Yavnai's 2007 thesis, "Military Justice: The U.S. Army War Crimes Trials in Germany, 1944—1947"[26] examines the successes and failures of American objectives in conducting the Dachau Trials; specifically, the desire to punish war criminals and to establish "a coherent historical narrative" that would shape German collective memory.[27] While she concedes that the US Army failed in its attempt to generate national remorse and introspection, Yavnai departs from Buscher to insist that the Dachau Trials did succeed in offering a "timely measure of retribution to the victims."[28] Because the project incorporates the entire program, her chapter on the camp-atrocities cases treats the varied trials in a collective manner, rather than examining them individually.[29]

Wesley Hilton's 2003 thesis, "The Blackest Canvas: US Army Courts and the Trials of War Criminals in Post-World War II Europe"[30] takes a unique approach to Nazi criminality, from the level of the "lesser" perpetrators, as an exercise in 'bottom-up' justice by the US military courts (as opposed to the top-down justice exhibited at Nuremberg). Hilton models aspects of his

[23] From the perspective of 1989, Buscher had little trouble defending the position that the trials failed to establish an international code of conduct for governments and armies. However, he went further to insist that the war crimes trials also failed to adequately punish the perpetrators and to democratize Germany. Buscher, *U.S. War Crimes*, p. 2.
[24] Robert Sigel, *Im Interesse Der Gerechtigkeit: Die Dachauer Kriegsverbrecherprozesse 1945-1948* (Frankfurt am Main: Campus Verlag, 1992).
[25] Sigel, *Im Interesse Der Gerechtigkeit*, pp. 107–109.
[26] Yavnai, "Military Justice."
[27] Ibid, p. 2.
[28] Ibid, p. 243.
[29] Ibid, pp. 192–207.
[30] Wesley V. Hilton, "The Blackest Canvas: U.S. Army Courts and the Trials of War Criminals in Post-World War II Europe, (Doctoral Thesis; Texas Tech University, 2003).

methodological approach on Christopher Browning's *Ordinary Men*,[31] whose work also utilizes *Alltagsgeschichte* to examine the motivations and agency of the perpetrators. To be sure, Hilton flatly denies the Dachau Trials to have been a failure, insisting that,

> A substantial and compelling record of the atrocities of the Third Reich was created for future generations to understand. As long as records of the Dachau trials exist, they will serve as a rich source to refute the picture painted by Holocaust deniers.[32]

Most recently, Greta Lawrence's 2019 thesis, "The United States and the Concentration Camp Trials at Dachau,"[33] narrows the focus considerably to only the camp-atrocities cases. It is at this level, argues Lawrence, that one can critically identify the elements that made these trials "efficient and fair."[34] While her dissertation's strength is in the thorough background and analysis of the developmental processes that ultimately guided the five main, or "parent," camp-atrocities cases, it is apparent that each individual trial was far too large for in-depth investigation. Again, the Flossenbürg trial receives minimum focused attention.[35]

Indeed, some have chosen to concentrate on just one case in particular.[36] Tomaz Jardim's excellent 2012 study of the Mauthausen trial[37] meticulously traces the entire process of a war crimes case, from investigation to judgement. His case-study approach acknowledges the general failures of the American war crimes trial program but argues that justice was nevertheless rendered. Echoing Yavnai's conclusions on retribution, Jardim convincingly presents the Mauthausen trial as a vehicle to help provide judicial agency to the victims of the concentration camps, through their participation in the investigations and as trial witnesses. Above all, his study proves the utility in approaching the Dachau Trials from a micro-historical level.

[31] Hilton, "Blackest Canvas," pp. 23–24.; Christopher R. Browning, *Ordinary Men: Reserve Battalion 101 and the Final Solution in Poland* (New York: Harper-Collins, 1992).
[32] Hilton, "Blackest Canvas," p. 396.
[33] Lawrence, "Trials at Dachau."
[34] Ibid, p. 222.
[35] Ibid, pp. 136–137.
[36] Publications on specific MGC trials, *not* dealing with camp-atrocities include James J. Weingartner, *Crossroads of Death: The Story of the Malmédy Massacre and Trial* (Los Angeles: University of California Press, 1979); James J. Weingartner, *A Peculiar Crusade: Willis M. Everett and the Malmédy Massacre Trial* (New York: NYU Press 2000). Steven P. Remy, *The Malmédy Massacre: The War Crimes Trial Controversy* (Cambridge, Mass: Harvard University Press, 2017); Patricia Heberer, "Early Postwar Justice in the American Zone: The 'Hadamar Murder Factory' Trial," in Patricia Heberer and Jürgen Matthäus, eds., *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln: University of Nebraska Press, 2008). 25–48.
[37] Tomaz Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge, Mass: Harvard University Press, 2012).

Based on the existing literature, the prevailing consensus of the Dachau Trials is one of problematic heavy-handedness, but a nonetheless efficient rendering of justice for the guilty. What's more, the mistaken results and overlooked details of the Flossenbürg trial contribute to this perspective. Yet, considering the exceptionally protracted length and apparent failures by the prosecution, the Flossenbürg trial directly challenges this notion. This project looks to examine this disconnect through a detailed exploration of the trial itself. It will build on the successful use of the micro-historical approach to closely analyze the dynamics between the individuals involved.

The three overarching themes that will guide the project's attention are all familiar concepts within the subject of the concentration camps yet have received significantly less methodological consideration in the context of the camp-atrocities war crimes trials. The concepts of time and space are essential to obtaining a comprehensive understanding of the Nazi concentration camps (the death camps notwithstanding) and serve as a valuable point of entry into the subject. Nikolaus Wachsmann has asserted that not only were camps everywhere throughout the Reich and German occupied Europe, but the system was constantly evolving, as it reacted to the changing needs of the regime and the dynamic state of affairs during the war. The camp system progressed through various developmental stages between 1933 and 1945.[38]

In his study of the Mauthausen trial, Jardim demonstrates just how decisive the post-liberation investigation program was to the trial. Not only did it inform and guide the prosecution's case, but it also provided the opportunity for victims to participate in serving justice.[39] This was equally true for the war crimes investigation of Flossenbürg. However, the critical timing of the camp's liberation—corresponding with the convergence of US forces and the last of the major evacuations—expanded the physical space of the 'crime scene' to incorporate hundreds of square kilometers throughout rural Bavaria. As approximately half of the defendants in the Flossenbürg trial were directly implicated in the death marches, a considerable amount of the alleged crimes occurred outside the physical confines of the concentration camp. What's more, hundreds of former inmates had been deputized as armed guards to the convoys that left Flossenbürg just days

[38] Nikolaus Wachsmann, "The Dynamics of Destruction: The Development of the Concentration Camps, 1933-1945," in Jane Caplan and Nikolaus Wachsmann, eds., *Concentration Camps in Nazi Germany: The New Histories* (New York: Routledge, 2010), 17–43; Martin Broszat identified five distinct phases of the KL, Martin Broszat, "The Concentration Camps 1933-45," in Helmut Krausnick et al., *Anatomy of the SS-State* (New York: Walker, 1968), 397–504. See also Ulrich Herbert, Karin Orth, and Christoph Dieckmann, *Die nationalsozialistischen Konzentrationslager: Entwicklung und Struktur*, 2 vols. (Göttingen: Wallstein, 1998); Nikolaus Wachsmann, *Kl: A History of the Nazi Concentration Camps* (New York: Farrar, Straus and Giroux, 2015)

[39] Jardim, *Mauthausen Trial,* pp. 7–8.

before the arrival of American troops. Sixteen of the fifty-two original indictments were prisoners. These unique components of time and space distinguish the liberation of Flossenbürg from any other camp that fell under US judicial authority and crucially influenced the prosecution's case.

Running parallel to the dynamic physical world of the camps was the social-psychological space in which prisoners were also persecuted. Hannah Arendt famously recognized this feature as a deliberate aspect of the system's core purpose.[40] Building on these principles was Wolfgang Sofsky, who devoted an entire section of his book, *The Order of Terror*,[41] to defining space and time in the camps. He argues that both had become arbitrary units of measurement, controlled by the camp authorities, within the so-called structure of "absolute power."[42] The camps were, for all intents and purposes, presented as an isolated universe[43] where complete uncertainty reigned over blind obedience. Central to this world of contradiction was the organized hierarchy of prisoner categories, framed in part upon long-standing (albeit violently weaponized) prejudice and racism.

In 2001, Robert Gellately and Nathan Stoltzfus invited some of the field's leading scholars to contribute essays on each of the various "social outsider" groups targeted by the Nazis.[44] Wachsmann's chapter on "habitual criminals"[45] and Geoffrey Giles' chapter on "homosexual panic"[46] are particularly relevant here, as these two "identities" were further exploited through character attacks in the courtroom during the Flossenbürg trial. The stigmatization of perceived social deviants and gay men (and to a larger extent, the arbitrary catch-all label of "asocials") have had a post-war experience unique to those who fall within the categories of political, racial, and religious victims of Nazism. Following its co-occupation of Germany in 1945, the American military government eliminated Nazi-implemented laws, essentially restoring the nation to pre-1933 statutes. Not only did this preserve existing anti-gay laws, but perpetuated the stigma. As

[40] Arendt's theory of "total domination" suggests that the camps were laboratories of totalitarianism, whose goal was to "liquidate all spontaneity" from prisoners, thus colonizing their agency as individuals. Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1976) pp. 437–459.
[41] Wolfgang Sofsky, *The Order of Terror: The Concentration Camp* (Princeton, NJ: Princeton University Press, 1996).
[42] Sofksy, *The Order*, pp. 45-93.
[43] In 1946, David Rousset first likened the camp system to a universe. David Rousset, *L'univers concentrationnaire* (Paris: Fayard/Pluriel, 2011); Translated into English as *The Other Kingdom* (New York: Fertig, 1982).
[44] Robert Gellately and Nathan Stoltzfus, eds., *Social Outsiders in Nazi Germany* (Princeton, NJ: Princeton University Press, 2001).
[45] Nikolaus Wachsmann, "From Indefinite Confinement to Extermination: 'Habitual Criminals' in the Third Reich," in Gellately, *Social Outsiders*, pp. 165–191. See also Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven, CT: Yale University Press, 2004). pp. 112–164.
[46] Geoffrey J. Giles, "The Institutionalization of Homosexual Panic in the Third Reich," *Social Outsiders*, 2001, pp. 233–255.

well, former convicts (some of whom had spent a decade or more in the concentration camps as "preventative" prisoners) were still criminals in the eyes of the state. For decades, neither received restitution for their time in the camps. Historians like Dagmar Lieske[47] and Julia Hörath[48] have extensively researched the "criminal" category of KL prisoners. There is also a healthy body of work dedicated to researching gay camp prisoners who famously wore the pink triangle.[49] While consideration for the post-war treatment of these groups continues, there are no studies which focus attention on how they were portrayed in the war crimes trials. The MGC courtrooms, however, were not immune to perpetuating these stigmas.

The Flossenbürg case is an exceptionally applicable example to examine the relationships between social stigmatization in the camps and the in courtroom, due to the considerable number of former prisoners placed on trial. While the guilt of each defendant as an individual is not in question, one-third of the accused were nevertheless victims of National Socialism. Implying culpability based on one's arbitrary camp-identity distorted perceptions of agency among various groups, which often reverberated back to witnesses who coincidentally belonged to the same groups. This project looks to critically scrutinize the implicit and explicit use of social stigmatization at the Flossenbürg trial.

Lastly, it has been well established by countless historians that women occupied nearly every space of the Third Reich, including all aspects of the concentration camps. Studies critically sensitive to the gendered history of Nazi persecution are abundant and this includes the history of Flossenbürg. Between September 1944 and April 1945, some 16,000 female prisoners were dispersed throughout two dozen subcamps operating under the Flossenbürg administration. More than 500 *Aufseherinnen* ("overseers", female guards), about fifteen percent of all female camp-

[47] Dagmar Lieske, *Unbequeme Opfer? „Berufsverbrecher" als Häftlinge im KZ Sachsenhausen* (Berlin: Metropol-Verlag, 2016).
[48] Julia Hörath, *"Asoziale" und "Berufsverbrecher" in Den Nationalsozialistischen Konzentrationslagern 1933 bis 1938* (Göttingen: Vandenhoeck & Ruprecht, 2017).
[49] See Richard Plant, *The Pink Triangle: The Nazi War against Homosexuals* (New York: Henry Holt and Company, 2013); Heinz Heger and Klaus Muller, *The Men with the Pink Triangle: The True Life-and-Death Story of Homosexuals in the Nazi Death Camps* (Boston: Alyson Books, 1994); Rainer Schulze et al., *The Pink Triangle: The Long Shadow of the Nazi Persecution of Gay Men*, The Holocaust in History and Memory (Colchester: University of Essex, 2011); Günter Grau and Claudia Shoppmann, eds., *The Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933-45* (Chicago: Routledge, 1995); Erik N. Jensen, "The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution," *Journal of the History of Sexuality* 11, no. 1/2 (2002): 319–349; W. Jake Newsome, "'Liberation Was Only for Others': Breaking the Silence in Germany Surrounding the Nazi Persecution of Homosexuals," *The Holocaust in History and Memory* 7 (2014): 53–71.

guards, were employed by the SS at these subcamps.[50] Still lacking, however, is concern for how the war crimes trials dealt these women. That's not to say that the field is completely absent, Michael Bazyler and Frank Tuerkheimer, for example explore women as both perpetrators and victims in the British-led Ravensbrück trials.[51] From the prosecutorial side, Diane Marie Amann has had identified the contribution by female lawyers at the Nuremberg Tribunals.[52] Yet, there are currently no studies that acknowledge the mere presence of women professionals at the Dachau Trials.

The main empirical source material for this project—an accumulation of multiple collections from various archives in both the United States and Germany[53]—is centered primarily around the casefile 000-50-46, *The US v. Friedrich Becker et al.* (the so-called Flossenbürg parent trial).[54] The file is broken up into sixteen microfilmed rolls and consists of three groups: approximately 2,000 pages of pre-trial material, nearly 9,500 pages of trial transcript (plus a total of 181 exhibits[55]), and another 1,100 pages of post-trial records. Additionally, eighteen subsequent trial casefiles, each numbering between several hundred and a couple thousand pages in length, were reviewed. The court documents are further supplemented by various archival records from the US military government in Germany, as well as contemporaneous correspondences and miscellaneous reports that informed and/or mandated the case-study in question. The textual records of these files are all held at the United States National Archives and Records Administration (NARA), located in College Park, Maryland.

The source of the Flossenbürg parent trial's failures lie with the indictment of sixteen former prisoners alongside thirty-six SS and civilian camp personnel. Crucially, it was the decision

[50] Cziborra, *Frauen im KZ*, p. 183.
[51] Michael J. Bazyler and Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust* (New York: NYU Press, 2014). pp. 129–158. See also, Ljiljana Heise, *KZ-Aufseherinnen vor Gericht: Greta Bösel – «another of those brutal types of women»?* (Frankfurt am Main: Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2009).
[52] Diane Marie Amann, "Portraits of Women at Nuremberg," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2010)
[53] The main archival sources include (but are not exclusive to) the United States National Archives and Records Administration (NARA) in College Park, Maryland; the United States Holocaust Memorial Museum (USHMM) in Washington, D.C.; the Flossenbürg Concentration Camp Memorial Archive, in Flossenbürg, Germany; and the Yale University Manuscripts and Archives Repository in New Haven, Connecticut.
[54] *United States of America v. Friedrich Becker et al.*—Case No. 000-50-46 (hereafter *Becker Trial*), June 12, 1946—January 22, 1947, National Archives and Records Administration, College Park, Maryland (hereafter NARA), Records of the United States Army War Crimes Trials, M1204, 16 Rolls.
*When a citation includes page-numbered trial transcript, it will be labeled: M1204, *Becker Trial*, Roll number, Page number. For pre- and post-trial materials, which are included in the same file, it will only be labeled by M1204 and Roll number.
[55] 102 prosecution exhibits, 74 defense exhibits and 5 court exhibits. M1204, Roll 11.

to deputize hundreds of German prisoner-functionaries as armed guards on the evacuation marches, which led a disproportionate number of them charged with war crimes. Chapter one looks to identify the impetus for this. It will incorporate Jardim's approach to include the activities of the war crimes investigation teams in the aftermath of the camp's liberation. However, critical attention will be given to the circumstances under which Flossenbürg was operating in its final weeks, leading up to the mass evacuations, in order to illustrate how the specific space and time would be so influential to the trial. It will trace the various contingency plans and ad hoc decision making by SS leadership that only served to waste crucial time and ultimately lead to more prisoner deaths. Following the camp's liberation by US forces, the chapter will also examine the reports of three individuals; prisoner-functionary Emil Ležak, war crimes investigator Benjamin Ferencz, and lead war crimes investigator Lieutenant John J. Reid, who drafted the official report used to inform the prosecution's case. These three accounts represent the various observations and motives that went into recording the history Flossenbürg in the immediate wake of the liberation.

By the time the Flossenbürg case went to trial in June 1946, the success of the Dachau and Mauthausen parent trials had essentially provided a fool-proof methodology for prosecuting perpetrators of the concentration camps. This was particularly the result of William Denson's novel charge of common design and a meticulously prepared indictment list, which worked in conjunction with each other. It is argued that the Flossenbürg parent trial was therefore positioned to be yet another stellar trial for the US Military Government. Chapter two will go back to America's entry into the Second World War, and trace the diplomatic progress that ultimately laid the foundation for the Dachau Trials. It will identify the judicial precedents and the individuals responsible along the way, as well as analyze early applications of legal strategy in multiple trials.

Chapter three will introduce the prosecution's case in the Flossenbürg parent trial. It argues that, despite having all the available tools, the case was significantly handicapped from the very first day. The chapter will demonstrate how, within the first three weeks of the trial, the prosecution undermined its own charge of common design and introduced a strategy that targeted existing social stigmatizations against the sixteen accused who had formerly been concentration camp prisoners. After the sudden death of the lead prosecutor, however, William Denson was brought in to put the case back on track. Fortunately, he arrived just as a key prosecution witness, Carl Schrade, was testifying. The chapter will also look to problematize the idea of witness agency by analyzing the two primary witness groups: privileged functionaries (largely represented by Czech

clerks) and "general population" prisoners (most of whom were made up of Polish-Jews; it also comprised the only female prosecution witnesses).

Chapter four remains with the Flossenbürg parent trial yet shifts its focus to the perspective of the defense's case to ask how it was able to take advantage of the prosecution's missteps. Having recognized the apparent hypocrisies of the social stigmatization strategy, the defense adopted and further expanded upon the tactics in an attempt to discredit key prosecution witnesses. In particular, Carl Schrade is singled out as a victim of relentless character attacks by the defense, accused of sharing in the privileged life of the capo class, while sixteen of his former colleagues wait to hear their fates. This so-called 'smudge campaign' offers crucial insight into prisoner categorization and the potential unintended consequences of camp survivors participating as prosecution witnesses. The chapter carefully explores the closing arguments of both teams. It concludes with the judgement of parent trial, in which the charges of six defendants were dropped just two weeks earlier, and another five defendants were acquitted; the first time in a camp-atrocities case and a clear upset for the prosecution.

The American prosecution of Flossenbürg concentration camp did not conclude there, however. Eighteen so-called subsequent trials charged another forty-two defendants for war crimes associated with the camp and its satellites. Building on the underlying premise of this thesis project to highlight the general lack of historical study and understanding of the Dachau Trials, this chapter looks to further emphasize the need for further research on this subject. Chapter five will analyze a selection of these cases on the basis of multiple legal and social themes that are entirely unique to the Flossenbürg trial series. In particular, the indictment charges and particulars did not always follow the same common design format as the parent case. Furthermore, complex and technical legal strategies, such as double jeopardy and innocence by reason of insanity, were employed on multiple occasions in trials relating to Flossenbürg. These issues offer insight into the broad scope of authority held by the MGC and therefore demand further review over how such power was wielded.

Finally, the prevailing scholarship of women in the MGC is largely absent in the current historiography. It is argued here that the primary reason for this is the sheer amount of tedious archival research required just to identify individuals on the basis of gender, as it is not a description-feature anywhere to keyword search. On the contrary, countless women worked for and with the MGC in a multitude of capacities. The Flossenbürg sub-trials offer significant

evidence to this claim. In the immediate aftermath of the war, dozens of women were arrested in relation to Flossenbürg and interrogated as potential war criminals. Unfortunately, the Americans never brought the case to trial. On the other hand, the Flossenbürg sub-trial series also witnessed the debut of the very first female chief prosecutor in an American war crimes trial. This section will introduce prosecutor Capt. Irma von Nunes and apply this case-study as a way to recognize and contemplate the participation (and absence) of women at the MGC.

Chapter 1: Evacuation, Liberation, Investigation

The First Account – An Introduction

On the evening of 22 April 1945, Emil Ležak, a Czech prisoner in Flossenbürg concentration camp, sat down to a typewriter in the commandant headquarters and started to write.[1] It had been two days since the mass evacuations left the *Hauptlager* (main camp) all but completely abandoned. Barely 1,500 prisoners, most of whom were too weak to have made the journey, remained. Ležak had been a clerk (*Schreiber*) in the labor commitment department and through this privileged prisoner-functionary position, he had become intimately familiar with much of the operational structures, daily protocols and expansive subcamp system that existed under the Flossenbürg administration.

His twenty-page statement, written over the course of two days,[2] begins with Ležak tracing his personal history and the events that led to his own arrest by Nazi authorities.[3] He then provides a detailed history of prisoner life at Flossenbürg. The systematic dehumanization started immediately upon arrival. Prisoners were relieved of their clothing and personal items. They were disinfected, shaved, and quarantined before being released into the general population. Ležak then turns his attention to daily life for prisoners and confirms that forced labor was a central element at Flossenbürg. Not only was it the primary breaker of inmates, it was also an immensely lucrative economic endeavor for the SS.[4] He recognized the conspicuous paradox that existed between productivity and mortality, indicating that in spite of the financial value of prisoner labor, it never completely replaced the prevailing culture of annihilation that existed among the Camp-SS.[5] Ležak notes how Flossenbürg's population increased substantially from 1943. Thousands of men and

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[1] Emil Ležak. "Sworn Statement", M1204, Roll 1.

[2] See Fritz, *Flossenbürg Concentration Camp*, p. 227.

[3] In his adolescent years Ležak trained as a journalist and newspaper editor. After the German occupation of Czechoslovakia, he applied his skills as a member of the Czech resistance movement. While working in Stuttgart, Ležak regularly met with fellow Czech partisans. He was arrested and spent two and a half years in prison before being sent to Flossenbürg concentration camp in 1942, where he remained until liberation. Ležak, "Sworn Statement."

[4] For more on the financial endeavors of the SS via the concentration camps, see Allen, *The Business of Genocide*. For forced labor as a system of annihilation, see Jan Erik Schulte and Hans Mommsen, *Zwangsarbeit und Vernichtung: Das Wirtschaftsimperium der SS: Oswald Pohl und das SS-Wirtschafts-Verwaltungshauptamt 1933-1945.* (Paderborn: Schöningh, 2001); Nikolaus Wachsmann, "'Annihilation through Labor': The Killing of State Prisoners in the Third Reich," *The Journal of Modern History*, (1999). Vol. 71, No. 3 (September 1999), 624–659.

[5] Ležak wrote that, "although the SS trooper thought the camp was a place for destruction… It was an institution that tried to get as much as it can out of a man." Ležak, "Sworn Statement."; For Camp-SS culture and conditioning, see Christopher Dillon, *Dachau and the SS: A Schooling in Violence* (New York: Oxford University Press, 2015).

women were delivered to Flossenbürg from all over German occupied Europe.[6] Dozens of subcamps were established throughout northern Bavaria, parts of Saxony, and the Czech regions of Bohemia and Moravia.[7]

From life in Flossenbürg, Ležak shifts to death. The camp prison (*Arrestbau*) was a designated section within the larger prisoner camp complex, isolated from the general population. In addition to housing solitary confinement inmates, its walled courtyard also served as the site for ordered executions, away from the view of prisoners. Ležak recalled that just days earlier, the ground was covered in wood shavings to conceal the blood. Hooks used to hang prisoners were removed and the walls received a new lick of paint. But not all executions had been carried out in secret. Indeed, murder was also an intimidation technique. Ležak recalled that on one occasion in late December 1944, prisoners returning to the barracks after another full day of work were greeted by a large, fully decorated Christmas tree. Despite this incongruous display being an annual event, it was the first time it had been accompanied by six lifeless bodies suspended from a wooden gallows. Ležak remembers how "the hanging prisoners were silhouetted against the light."[8] In the final paragraphs, Ležak identifies the leading perpetrators of Flossenbürg, including their roles and reputations. The second-in-command, for example, was SS-*Obersturmführer* Ludwig Baumgartner, "a man with absolutely no human traits." SS-*Hauptsturmführer* and prisoner camp leader Karl Fritzsch was a "stark raving maniac," according to Ležak, and actively participated in the "sadistic" persecution of prisoners.[9] Both of these men would ultimately evade justice.[10]

Ležak's report is particularly significant among the hundreds of witness statements, interviews, and interrogations that were taken in the immediate aftermath of Flossenbürg's liberation because it actually pre-dated Allied arrival. Halfway into the draft, Ležak was

[6] Thousands of forced laborers were sent to Flossenbürg from the east, primarily Poland, Russia and later Hungary. From the west, came prisoners who had been arrested under the *Nacht und Nebel* (Night and Fog) policy in France, Belgium, Italy and Holland. Ležak, "Sworn Statement", M1204, Roll 1.
[7] For a near comprehensive list of the Flossenbürg subcamp system, see Benz, *Flossenbürg und seine Außenlager*. Much of the text has been translated into English and reproduced in Megargee, *Encyclopedia of Camps and Ghettos*.
[8] Ležak "Sworn Statement", M1204, Roll 1.
[9] Ibid.
[10] Fritzsch was transferred to the front in fall 1944. He was killed in the battle of Berlin. Baumgartner was able to evade capture after the war and has never been found. "SS Personnel," Flossenbürg Memorial Museum. https://www.gedenkstaette-flossenbuerg.de/en/history/flossenbuerg/ss-personnel. Accessed February 2021.

interrupted by American troops who had suddenly come upon the camp grounds, while investigating the surrounding area.[11] Before pausing to greet them, he typed,

> Now I have to interrupt, the Liberators are here. It is the 23rd of April 1945 at 1050 hours. I just hung up the sign which I had ready "PRISONERS HAPPY END" WELCOME. And gave information about hidden weapons. One lieutenant and four other soldiers looked everything over and now I can commence writing.[12]

1. Two US Soldiers greeted with a makeshift welcome sign upon entry to Flossenbürg concentration camp. United States Holocaust Memorial Museum, courtesy of National Archives and Records Administration, College Park. Copyright: Public Domain. Source Record ID: 111-SC-327750, Film Roll: 00112.

[11] Regimental Intelligence Officer, Major William J. Falvey was among the first US troops to enter Flossenbürg. He later recalled, "We knew well in advance about the concentration camp at Flossenbürg and since several other similar camps had already been liberated we knew that it was going to be very bad—(and it was). " Major William J. Falvey, correspondence letter, 26 July 1977. United States Holocaust Memorial Museum (hereafter, USHMM) *Records relating to the participation of the 90th US Infantry Division in the liberation of Flossenbürg*, RG-09.021.01—Liberation of Camps and Ghettos Collection.

[12] Ležak "Sworn Statement", M1204, Roll 1.

Given the timing and comprehensive detail of the document, Ležak's report is distinctly valuable because it is the source from which US investigators began their inquiries into uncovering war crimes at Flossenbürg. Not only was it entered into the investigation records, but it heavily informed the investigation team's own report,[13] subsequently determining much of the prosecution's content in the courtroom. Jörg Skriebeleit, director of the Flossenbürg Memorial Museum, has indicated that Ležak's report was indeed the very first historiography of Flossenbürg concentration camp.[14] In addition to its material value, the report further expresses the deliberate intent to document the atrocities as among the very first impulses for survivors. The compulsion to bear witness, whether it be for posterity or with explicit expectations of retribution (or both), is at least partially an exercise in reestablishing one's agency.[15] Ležak would add to that agency by later participating in the Flossenbürg trial at Dachau as a key prosecution witness.

In order to understand the state of Flossenbürg at the time of its liberation and how it directly informed the prosecution's case, it is imperative to retrace the camp's final operational period. Despite occupying a relatively minor role in the grand historiography of the Nazi concentration camps, Flossenbürg holds a central position in the history of the so-called Death Marches and is particularly critical within the context of America's involvement in prosecuting this "final phase" of the Nazi genocidal program.[16] Not only did Flossenbürg become the last primary transit hub through which much of the remaining prisoner population traveled in mid- to late-April 1945, but the SS's entire southern evacuation campaign all but collapsed just as the camp was being liquidated. American forces found tens of thousands of prisoners effectively

[13] John J. Reid, "Report on KL Flossenbürg w/ Appendix Numbers 1 to 5", 21 June 1945. M1204, Roll 1.
[14] Skriebeleit, *Erinnerungsort Flossenbürg*, p. 54.
[15] See Jardim, *Mauthausen Trial*, p. 8.
[16] The "final phase" refers to the subtitle of Daniel Blatman's book, *The Death Marches: The Final Phase of Nazi Genocide* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011).
The term "Death March", in the context of the camp evacuations (a Nazi euphemism itself), was first coined by the survivors themselves. Despite such transports occurring throughout the war (the first organized death march was in mid-1940 with 800 Jewish prisoners being forced to walk approximately 100 kilometers), most references denote the violent mass movements of prisoners in the final year of the war, during which time a quarter-million people are estimated to have died. Shmuel Krakowski, "Death Marches" in Israel Gutman, ed., *Encyclopedia of the Holocaust: Volume 1*, (New York: MacMillan, 1990) pp. 348-354. See also Shmuel Krakowski, "The Death Marches in the Period of the Evacuation of the Camps," in *The Nazi Concentration Camps: Structure and Aims, The Image of the Prisoner, The Jews in the Camps* (Jerusalem: Yad Vashem, 1984), pp. 475-489; Yehuda Bauer, "The Death Marches, January–May 1945," in Michael R. Marrus, ed., *The Nazi Holocaust, vol. IX, The End of the Holocaust* (Westport, CT: Meckler, 1989), pp. 503–505; Blatman, *Death Marches*, 2011. pp. 1-11; Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, (New York: Vintage Books, 1997) chaps. 13-14.

roaming the Bavarian countryside, and accompanying them were hundreds of former prisoners who had recently been drafted into a makeshift guard battalion. Many of these prisoners-turned-guards would be arrested and later tried on the Flossenbürg parent trial. What the Americans hadn't realized at the time, was that these mass groups of emaciated humans, as well as this new 'prisoner-police' group, were in large part the result of hesitant decision-making by SS leadership during the final weeks of the war. Inside Flossenbürg itself, first responders were called in to quell the extensive humanitarian crisis that plagued the few who had been left behind to die. Investigators like Benjamin Ferencz were simultaneously confronted with the remnants of a system that exploited social categorization through the reinforcement of power and authority through violence.

1.1 The Beginning of the End: Flossenbürg, 1945

By January 1945, the total prisoner population of Flossenbürg concentration camp, including its numerous satellites, swelled to over 40,000 for the first time ever.[17] In the remaining four months of the camp's operational life, the numbers steadily increased. Most of the new arrivals came from the eastern camps in Silesia—primarily Auschwitz,[18] Gross Rosen[19] and Stutthof[20]—each following a process of evacuation that had been taking place since late summer of the previous year. Tens of thousands of men, women and children were moved hundreds of kilometers westward, both by train and on foot, into the German heartland. In the chaotic mass exodus, Flossenbürg became an increasingly crucial reception center for these transports.[21] The remote hillsides of the Oberpfalz region continued to provide isolation in the ever-decreasing German controlled territory. Valuable inmates—including well known Nazi dissidents, high-ranking Allied

[17] 29,000 of the total prisoner population at this time were male. Siegert, "Das Konzentrationslager Flossenbürg," p. 480.

[18] Fritz Bracht, Gauleiter and Reich commissar for Upper Silesia, ordered the mass evacuation of Auschwitz on 21 December 1944; by 18 January 1945, approximately 56,000 prisoners were ready for transport. Blatman, *Death Marches*, pp. 79, 81.

[19] In contrast to the frantic and sudden abandonment of Auschwitz, Gross Rosen (~270 kilometers northwest) was evacuated over a period of months. Seventeen such transports, carrying some 12,000 prisoners, made their way to Flossenbürg in January and February 1945, where many were subsequently distributed between subcamps Helmbrechts, Hersbruck and Leitmeritz. Karin Orth, *Das System der nationalsozialistischen Konzentrationslager* (Zürich: Pendo, 2002). p. 314; Wachsmann, *Kl*. p. 556.

[20] Stutthof, 40 kilometers east of Gdansk on the Baltic Sea, was only partially evacuated on 25 and 26 January 1945, presumably under the expectation of a Soviet liberation any day. The Red Army, however, bypassed the camp entirely in their advancement toward Germany; Stutthof was only officially liberated on 9 May 1945. Wachsmann, *Kl*, p. 557.

[21] Between late 1944 and early 1945, at least seventeen transports from camps in the east, carrying approximately 12,000 prisoners, reached Flossenbürg. Blatman, *Death Marches*, p. 172.; Orth, *Das System*, p. 314.

POWs, and Jews—were brought to Flossenbürg, while their captors frantically deliberated over their fate.

Flossenbürg was never intended, nor was it equipped, to be the transitory powerhouse that it became in the last twelve months of the war. In spite of the horrendous treatment that prisoners incurred throughout its seven years of operation, Flossenbürg generally maintained a comparatively modest prisoner population and fairly close orbit of subcamps for the majority of its existence. From summer 1942, only about four hundred inmates filled the newly established satellites, and as late as 1943, Flossenbürg maintained a relatively constant average of 3,100 to 3,500 prisoners.[22] The numbers quickly swelled only a year later.

Strength reports (the daily head count of prisoners) from 31 March 1944 registered 7,322 prisoners, of which, approximately 4,000 were in the main camp. The remainder were distributed throughout what was still only a handful of subcamps. Two months later, the total population exceeded 10,000 for the first time. By September, it surpassed 25,000. Skriebeleit notes that, in addition to the overwhelming increase in population during the second half of 1944, not only had the ratio of prisoners between the *Hauptlager* and the subcamps completely reversed, but this trajectory continued to develop at an accelerated rate. In the time that it took the number of prisoners in the *Hauptlager* to double, it had increased sixfold in the subcamps.[23]

This exponential growth was not exclusive to Flossenbürg's male population either. The administrative takeover of five Ravensbrück subcamps in September 1944 automatically increased its registered female population by 10,000.[24] Flossenbürg was now situated to receive more female prisoners than ever before. Thousands of Jewish women were either transferred by train or marched to the subcamps directly from Auschwitz. Flossenbürg's constellation of subcamps, coupled with a *Hauptlager* whose location was situated both on the southern evacuation route and remained relatively deep behind German front lines, continued to increase its role in the shrinking concentration camp universe.

1.1.1 Location

The Hauptlager

[22] Skriebeleit, "Flossenbürg–Hauptlager," p. 39.
[23] Ibid, p. 40.
[24] Ibid, p. 41.

On 1 March 1945, prisoner strength reports in Flossenbürg reached its highest ever single-day record with 15,445 individuals at the *Hauptlager* alone. An additional 36,995 male and female prisoners were dispersed throughout Flossenbürg's subcamp system.[25] Reflecting the entire concentration camp structure as a whole, this was Flossenbürg's deadliest period.[26] The *Hauptlager* was in the middle of yet another typhus epidemic and despite select blocks being repurposed as designated quarantine areas, as well as hundreds of sick prisoners being transferred on so-called "ghost trains" (*Geisterzug*) to Bergen-Belsen,[27] Flossenbürg was still averaging some forty deaths per day.[28] Nevertheless, it continued to take in more and more prisoners. Those that survived the journey were met with devastatingly overcrowded conditions. The sheer number of prisoners completely overwhelmed the twenty-three dormitory blocks, which had a maximum capacity of only five thousand.[29] Between the virulent living conditions, the steady delivery of more dead and dying, and special action executions, Flossenbürg's crematory simply could not keep up with the deluge of bodies. Consequently, the camp-SS resorted to piling hundreds of corpses up at a time and burning them on open air mass pyres.[30]

The massive influx of prisoners was in part a result of belated opportunism by *Reichsführer*-SS Heinrich Himmler. In March 1945, Himmler met with the director of the SS-Main Economic and Administrative Office (WVHA) Oswald Pohl for the last time, at which point he instructed his subordinate to personally visit each of the remaining nine main concentration camps[31] and order the respective commandants to suspend all abuse and killing of Jews, effective immediately. At his war crimes trial in Nuremberg, Pohl later confirmed to prosecutors that it was both his and Inspector of Concentration Camps Richard Gluecks' understanding that Himmler was attempting to use the remaining Jewish prisoners for "bargaining purposes" in future peace

[25] Ibid, pp. 46–47. Though subcamps varied greatly from one to the other in terms of size, function, population, and period of operation, Flossenbürg administered a total number of 92 individual auxiliary sites between 1942 and 1945. For detailed histories of the Flossenbürg subcamps, see Benz, *Flossenbürg und seine Außenlager*.
[26] Flossenbürg recorded approximately 2,500 fatalities in January 1945, 2,758 in February, and 3,207 in March. Three quarters of these deaths occurred in the subcamps. Ibid, 47.
[27] Orth, *Das System*, 314. See also, Siegert, "Das Konzentrationslager Flossenbürg," p. 476.
[28] Skriebeleit, "Flossenbürg–Hauptlager," p. 46.
[29] Siegert, "Das Konzentrationslager Flossenbürg," p. 481.
[30] Klausch, *Widerstand in Flossenbürg*, p. 47.
[31] Pohl stated that he visited Neuengamme, Oranienburg, Gross Rosen, Auschwitz, Flossenbürg, Buchenwald, Dachau, Mauthausen, and Bergen-Belsen. Stutthof and Schirmeck were believed to have already been overrun by Allied forces. Office of United States Chief of Counsel for the Prosecution of Axis Criminality (USCC), *Nazi Conspiracy and Aggression: Supplement-B.* (U.S. Government Printing Office, 1947). pp. 1595–1596.

negotiations with the Allies.[32] Convoys arrived to Flossenbürg from the east, pushing the camp's Jewish demographic to almost twenty percent of the total prisoner population[33]—more than any other time in its history.

Flossenbürg became a particularly important hub for what remained of the concentration camp system at this time. Located in the strategically remote hills of eastern Germany, the site remained relatively distant from the front in early 1945. Flossenbürg's isolation had always given it a particular sense of privacy, and this feature was exploited until the very last days of operation. In January 1945, Chief of the Reich Security Main Office (RSHA) Heinrich Müller instructed Rudolf Höß to issue a directive on "dangerous prisoners" (*gefährliche Häftlinge*), which mandated camp commandants to identify any and all prisoners that may pose a threat to the Reich and neutralize them.[34] Authorized executions spiked in Flossenbürg. In the final year of the war alone, approximately 1,500 prisoners were either shot by firing squad or hanged.[35] Most of these executions were prisoners from Poland and Russia, however, several high-profile inmates were also murdered during this period. In late March 1945, thirteen British Secret Operations Executive (SOE) agents were executed by hanging. Their bodies were burned in the crematorium.[36]

By April 1945, American bombers could be seen flying overhead almost daily. One Flossenbürg prisoner later recalled that "there was an uneasiness in the manner of the SS guards."[37] For the concentration camps south of Berlin, all roads would eventually lead to Dachau. Flossenbürg accommodated transports moving along this southern route;[38] the camp was accepting new arrivals on a weekly, sometimes daily, basis.[39] On 8 April 1945, Dietrich Bonhoeffer, Wilhelm Canaris, and five other associates allegedly involved in the July 20 plot to assassinate Hitler[40] were

[32] USCC, *Nazi Conspiracy*, p. 1596.
[33] Skriebeleit, "Flossenbürg–Hauptlager," p. 47.
[34] Blatman. *Death Marches*, pp. 126–127.
[35] Fritz, *Flossenbürg Concentration Camp*, p. 206.
[36] Ibid, pp. 208–209. This event received a considerable amount of attention from US war crimes investigators, as early reports by eye-witness prisoners often confused the men for American paratroopers. See, Franz Poppenberger statement, 30 April 1945, Flossenbürg. 2309-PS Exhibits B-8a and B-8b, M1204, Roll 1. See also, eye witness several statements recorded by the British Judge Advocate General, London, 3 Aug 1945, M1204, Roll 1.
[37] Allied air raids often targeted the rail lines which directly contributed to the lack of food and supplies coming to the camp in the final weeks. Jozef Ernst Troffaes sworn testimony, 5 May 1945, M1204, Roll 2.
[38] The southern evacuation route is characterized by Karin Orth and describes the final days of Flossenbürg, Dachau and Mauthausen-Gusen. Of these three major camps, Flossenbürg is the only one to have been practically empty when Allied forces arrived. The final mass evacuations of Sachsenhausen, Ravensbrück and Neuengamme sent their prisoners further north. For both the southern and northern evacuation routes, See Orth, *Das System*, pp. 313–335.
[39] Franz Seraph Berger testimony, M1204, *Becker Trial*, Roll 9, p. 8015.
[40] The group also included Hans Oster, Dr. Karl Sack, Dr. Theodor Strünk, Ludwig Gerhe and Friedrich von Rabenau. Rabenau was executed six days later. Fritz, *Flossenbürg Concentration Camp*, p. 210.

privately chauffeured from Buchenwald (just three days before its liberation). Arriving to Flossenbürg that evening, the men were placed before a "summary court" trial, by which they were promptly convicted and sentenced to death. By mid-day on 9 April, they too had been reduced to ash.[41] Such treatments, however, were not reserved for men alone. On 13 April, just ten days before liberation, three women were accused of "sabotage" at the Deutsche Metallwerke factory at the Holleischen subcamp (located approximately twenty-five kilometers southwest of Pilsen, Czech Republic). Originally arrested for their alleged participation in the French Resistance, the women were systematically whipped before being transferred to the *Hauptlager* for execution.[42] This was one of the final special execution actions (*Sonderbehandlung*) performed at Flossenbürg before all evidence of the practice was removed and destroyed.

The Subcamps

The *Hauptlager* wasn't the only site to accept evacuation transports of prisoners. Many of Flossenbürg's larger subcamps remained operational to the bitter end. Hersbruck (established in May 1944 near Happurg) recorded more than 4,700 inmates in April 1945; almost double from the start of the year.[43] Conditions were so bad there that approximately one in two prisoners died during the 1944/45 winter season.[44] Leitmeritz (across the Elbe River from Theresienstadt) was nicknamed the "Death Factory" by prisoners and was among the largest of the Flossenbürg subcamps. In total, some 18,000 inmates (including 770 women) were registered there. Established in May 1944, Leitmeritz' forced labor program quickly grew into its own multi-site sub-network under the Flossenbürg administrative umbrella.[45] The grossly insufficient facilities, however, created an environment of extreme overcrowding and disease. Even as forty-five percent of prisoners were diagnosed with tuberculosis in winter 1944/45, the numbers continued to grow.[46] By late April 1945, prisoners numbered around 9,000.[47] The Leitmeritz camp was never

[41] Eric Metaxas, *Bonhoeffer: Pastor, Martyr, Prophet, Spy*, (Nashville, TN: Thomas Nelson, 2011).
[42] Alfons Adam, "Holleischen (Holyšov)," in Benz, *Flossenbürg und seine Außenlager*, 145–148. Here p. 147.
[43] The strength report for Hersbruck on 28 December 1944 was 2,754. The number jumped to 4,028 by 1 February 1945 and spiked to 5,863 on 28 February before dropping to 4,767 on 13 April. This dramatic fluctuation in numbers occurred at a time the Hersbruck witnessed up to thirty deaths per day. Alexander Schmidt, "Happurg und Hersbruck" in Benz, *Flossenbürg und seine Außenlager*. 130–134. Here p. 132.
[44] Schmidt, "Happurg und Hersbruck," p. 132.
[45] Leitmeritz even managed to create its own subsystem of camps. Jörg Skriebeleit, "Leitmeritz," in Megargee *Encyclopedia of Camps and Ghettos*, 626-628. Here, 626.
[46] Skriebeleit, "Leitmeritz," p. 628.
[47] Ibid, p. 627.

completely evacuated nor was it officially liberated.[48] Instead, it functioned as a transit hub for the region even after the Flossenbürg *Hauptlager* was emptied. An unknown number of death marches passed through Leitmeritz in spring 1945. The camp was dissolved on 8 May, with the unconditional surrender of the Third Reich.[49]

Helmbrechts and Zwodau, two of the women's camps under Flossenbürg authority, received several hundred Jewish female prisoners in early March 1945. The journey had originally started in Auschwitz, where approximately 1,000 women were marched to Schlesiersee (Sława), then to Grünberg (Zielona Góra)—both subcamps of Gross Rosen—where three hundred more women and girls were added to the convoy. They remained there one night before continuing on toward Helmbrechts, still some four hundred kilometers away. Two hundred women who could no longer walk were loaded on trains and transported by the SS to Zwodau. The remaining 1,100 women set off on foot on 29 January 1945. 621 survived the journey to Helmbrechts, arriving five weeks later on 6 March. The rest are presumed to have died en route, either by exhaustion or gun shot.[50] American authorities investigated Helmbrechts subcamp until 1947, but ultimately never prosecuted anyone.[51]

1.1.2 Time

Himmler's Ambivalence

Location was only half of the equation in determining how Flossenbürg became so integral to the final chapter of the concentration camps. Timing was equally as critical in this dynamic environment. In June of 1944—just days after the D-Day landings— Himmler sent out a directive demanding that all camp prisoners continue working for the war effort. The "Security of Concentration Camps in Case-A" (*Sicherung der Konzentrationslager A-Fall*) stated that,

[48] In late April 1945, seventy-seven open freight cars transported more than 4,000 male and female prisoners south, ultimately traversing the entire Protectorate of Bohemia and Moravia. The train, which had accumulated more cars on the journey, was liberated by US forces in the Czech town of Kaplice (more than 250 kilometers south) on 8 May 1945. Fritz, *Flossenbürg Concentration Camp,* p. 220.

[49] Skriebeleit, "Leitmeritz," p. 627. The semi-autonomous operation of subcamps was not exclusive to Leitmeritz, particularly after 1945. Much of the Natzweiler system in Alsace (including the *Hauptlager*) was evacuated in September 1944, removing some 10,500 prisoners in total. Yet, several subcamps on the right bank of the Rhine remained operational into January 1945. They continued to accumulate some 22,500 prisoners and even established new locations before entering into a second mass evacuation. Wachsmann, *Kl,* p. 546.

[50] Alexander Schmidt, "Helmbrechts," in Benz, *Flossenbürg und seine Außenlager*, 134–137. Here, pp 135–136. The Grünberg—Hemlbrechts death march is also referenced in Blatman, *Death Marches,* pp. –111; Daniel Goldhagen dedicates two chapters to the Helmbrechts subcamp and the subsequent evacuation. See Goldhagen, *Willing Executioners*. Chaps. 13 and 14.

[51] In 1969, the Hof district court tried and convicted Helmbrechts camp commandant Alois Dörr. Schmidt, "Helmbrechts," pp. 137.

> camp commandants continue responsible [*sic*] to the WVHA for all general administrative matters except during alert periods (A-Fall), when the HSSPF (*Höhere SS und Polizei Führer*) assumes complete control of Concentration Camps in his *Wehrkreis* and the camp commandants become members of his staff. The HSSPF is, henceforth, responsible for the military security (*militärische Sicherung*) of all Concentration Camps and Work Camps (*Arbeitslager*) in his district with the exception of Special Purpose Camps (*Sonderlager*) and Political Sections (*politische Abteilungen*).[52]

The instructions apparently lacked organization or logistical structure, ultimately leaving interpretation and thus critical decision making to the commandants themselves.[53] As the Allies advanced, contingency plans were hastily employed. According to Daniel Blatman, the resulting death marches "led to the savage murder of hundreds of thousands of prisoners."[54]

On 12 January 1945, the Soviet Army launched an offensive that would ultimately collapse the entire eastern front.[55] If the writing on the wall wasn't clear enough before, German defeat was now undeniably only a matter of time. Himmler sought an exit strategy by leveraging KL prisoners. He secretly lobbied the western Allies and various humanitarian organizations,[56] looking to unload prisoners in exchange for his own safe passage, following a German surrender. With the assistance of the International Committee of the Red Cross (ICRC), the negotiations did help to free some 20,000 thousand men, women and children (mostly from western European countries).[57] The majority of Jewish prisoners, however, remained in the camps and on the death marches, as

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[52] Quoted in Blatman, *Death Marches*, p. 52. For further analysis into Case A, see Eberhard Kolb, *Bergen-Belsen: Geschichte des "Aufenthaltslagers" 1943-1945* (Berlin: Lit Verlag, 2011) pp. 299-307.

[53] In his testimony at the IMT, Rudolf Höss (former commandant of Auschwitz), explained to the court that "The Reichsführer [Himmler] ordered the Higher SS and Police Leaders, who in an emergency case were responsible for the security and safety of the camps, to decide themselves whether an evacuation or a surrender was appropriate." Testimony of Rudolf Höß, April 15, 1946, Nuremberg Trial Proceedings, vol. 11. https://avalon.law.yale.edu/imt/04-15-46.asp. Accessed May 2019.
For more on the confusion and interpretation of Himmler's directive, see Blatman, *Death Marches*, pp. 51–57.

[54] Exactly what *Fall-A* (Case-A) actually stood for is unclear, but Blatman seems to suggest that the "A" stood as an initial for: *Angriff* (attack); *Aufstand* (revolt/uprising); or *Ausnahmezustand* (unexpected, "exceptional" development). Blatman, Death Marches, p. 52. See also, Daniel Blatman, "The Death Marches, January–May 1945: Who Was Responsible for What?" Yad Vashem Studies 28 (2000): 155–161.

[55] Wachsmann, *Kl*, p. 554.

[56] Between January and April 1945, Himmler solicited Count Folke Bernadotte, Vice-President of the Swedish Red Cross and nephew to the King of Sweden, on several occasions to broker a deal. Contributing parties included the World Jewish Congress and the Joint Distribution Committee. Himmler's offer of capitulation to the western front was, however, never seriously considered. Wachsmann, *Kl*, pp. 572–576. See also, Blatman, *Death Marches*, p. 137; Ian Kershaw, *Hitler, 1936-45: Nemesis* (London: Penguin Books, 2000). loc. 1173-1779 of 2633, Kindle.

[57] While a small number of Jews were freed (for example, 1,000 female Jewish prisoners were released from Ravensbrück in late April 1945), most of the prisoners were Swedish, Norwegian, and Danish nationals. Wachsmann, *Kl*, pp. 572–576.; Kershaw, *Nemesis*, loc. 1774 of 2633, Kindle.

hostages.[58] In March, Himmler pledged—in direct opposition to Hitler—that the camps would be left intact and handed over when Allied forces arrived.[59] This commitment coincided with Pohl's frantic tour of the camps, in which he instructed commandants to end all abuse of their Jewish prisoners.

At this point, however, decent treatment of inmates did little to prevent more death. Broken down rail lines meant that countless prisoners starved to death while waiting in stranded rail cars. Desperately needed food and medical supplies were delayed on the same tracks. And the surrounding countryside was soon littered with bodies, having perished from exhaustion or shot on the spot, during one of the innumerable death marches. In the camps, disease flourished with overcrowding and the scarcity of food brought many prisoners to an unprecedented low towards one another; particularly when the halting of work-details provided one with more time to think about their hunger.[60] Of course, years of violent conditioning of SS guards was not easily reversed either. Himmler's transparently self-serving attempt at compassion in the eleventh hour only exposes the absurdity of what he was asking his subordinates to do in the environment he had helped to create over the past twelve years.

By April, American forces were closing in on Buchenwald concentration camp. Himmler broke. On 6 April, he abruptly reversed his previous directive to surrender and instead ordered commandant Hermann Pister to abandon the camp and transfer the remaining prisoners to Flossenbürg.[61] Since Pister had already prepared the camp for surrender, this sent Buchenwald into logistical chaos.[62] Exemplifying the level of confusion, Pister was skeptical of whether the order had indeed come from the *Reichsführer*-SS himself, and was "not some local SD initiative."[63] Nevertheless, several convoys with an estimated 28,000 prisoners left Buchenwald in quick succession, leaving behind another 21,000 prisoners in the camp.[64]

[58] Himmler is said to have told the commandant of Mauthausen, Franz Ziereis, "Look after these Jews and treat them well… that is my best capital." Wachsmann, *Kl,* pp. 576.
[59] Blatman, *Death Marches,* p. 137; Kershaw, *Nemesis*, loc. 1174 of 2633, Kindle.
[60] One such account recalls a group of prisoners in the Mauthausen subcamp of Ebensee attacking a thirteen-year-old boy, killing him, over a loaf of bread. Wachsmann, *Kl*, pp. 563.
[61] Ibid, 579. For more on the evacuation of Buchenwald, see Katrin Greiser, *Die Todesmärsche von Buchenwald: Räumung, Befreiung und Spuren der Erinnerung* (Göttingen: Wallstein, 2008).
[62] In accordance with Himmler's gambit to leverage Jews, Pister had separated the Jewish prisoners (approximately 12,00-14,000) from the general population in preparation to transfer them to Theresienstadt. The remaining inmates would be left in the camp to be liberated by the Allies. Blatman, *Death Marches,* p. 144, 148.
[63] Ibid, p. 149.
[64] Wachsmann, *Kl,* p. 579.

The corresponding transfer documents are incomplete and due to the chaotic environment at Flossenbürg, prisoner registration was halted; it is unknown exactly how many actually made it to Flossenbürg.[65] The International Tracing Service (ITS), however, contains the files of three such convoys that left Buchenwald for Flossenbürg (a distance of approximately 190 kilometers), which provides a general sense of the frenzied evacuation program. Two convoys left by foot on 6 April 1945 with 1,500 and 1,605 prisoners. A third transport left the following day by train, carrying 2,400 prisoners. The 6 April convoys arrived to Flossenbürg on 18 April with approximately 1,000 prisoners, and 19 April with 1,400 prisoners, respectively. The 7 April transport abandoned its train at Zwickau and continued by foot, arriving at Flossenbürg on 16 April with approximately 1,900 prisoners.[66] Between these three transports alone, approximately 1,200 prisoners were lost en route.

As the convoys made their way in the direction of Flossenbürg, American troops reached the Buchenwald *Hauptlager*, arriving in the late afternoon of 11 April.[67] With more than 20,000 inmates suddenly freed, reports of rape and pillaging quickly spread throughout neighboring Weimar. Despite such accounts being grossly exaggerated, the rumors quickly made their way to Hitler who was said to have been enraged. He reiterated that "the entire camp should have been liquidated."[68]

Meanwhile, Flossenbürg was still preparing for a surrender.[69] With transports, including those from Buchenwald, continuing to arrive almost daily, Commandant Max Koegel ordered all document evidence to be destroyed, along with the various instruments of abuse that had been used

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[65] The last strength report at Flossenbürg was logged on 15 April 1945. 9,000 prisoners were recorded in the *Hauptlager* and 36,000 more (14,600 women) were dispersed throughout the remaining subcamp system. Skriebeleit, "Flossenbürg–Hauptlager," p. 47.

[66] "Evacuation Buchenwald," International Tracing Service Digital Archive (hereafter, ITS), 5.3.2—Attempted Identifications, File: 84612577.

[67] Wachsmann, *Kl*, pp. 579.

[68] Oswold Pohl testimony, Subsequent Nuremberg Trial No. 4, "Pohl Case," p. 1342. Nuremberg Trials Project, Harvard Law School Library, http://nuremberg.law.harvard.edu/transcripts/5-transcript-for-nmt-4-pohl-case?seq=1363&q=1341. Accessed May 2021. The same narrative was recounted by Rudolf Höß. Testimony of Rudolf Höß, April 15, 1946, Nuremberg Trial Proceedings, vol. 11. The Avalon Project, Yale Law School. https://avalon.law.yale.edu/imt/04-15-46.asp. Accessed May 2021. See also, Blatman, *Death Marches*, 153; Wachsmann, *Kl*, 579.

[69] Wachsmann, *Kl*, p. 768, n. 203. Referenced in Zámečnik, Stanislav, "'Kein Häftling darf lebend in die Hände des Feindes fallen', Zur Existenz des Himmler-Befehls vom 14./18. April 1945" in *Dachauer Hefte 1*, (Dachau: Verlag Dachauer Hefte, 1985) pp. 224–225.

on prisoners.[70] These items were thrown into the same pit fires that had been eliminating the bodies. The strength report for Flossenbürg and its subcamps on 14 April 1945 was 45,813; over 16,000 of which were female.[71] The following day, the remaining high-profile prisoners were quietly gathered and privately escorted to Dachau. That evening, Koegel met with his SS leadership in Flossenbürg and informed them that the guard battalion would be withdrawing from the camp to join nearby defense efforts against approaching Allied forces. Flossenbürg would be left in the hands of the local mayor (*Bürgermeister*) and civilian militia (*Volkssturm*). All Jewish prisoners, still considered valuable hostages, would be prepared for immediate evacuation to Dachau.[72] However, following the fiasco that occurred at Buchenwald and learning of Hitler's subsequent outrage, Himmler apparently ordered a complete evacuation of the remaining camps. While there is some discrepancy on exactly when and to whom the order was addressed, Flossenbürg evidently received a telecommunication from Himmler no sooner than 18 April 1945.[73] It stated in no uncertain terms,

> Surrender is out of the question. The camp must be evacuated immediately. Not a single prisoner must fall alive into enemy hands. The prisoners at Buchenwald have taken action against the civilian population. -Himmler[74]

The fate of Flossenbürg's prisoners rested in the ambivalent, opportunistic hands of Himmler. With much of the Reich crumbling around him, he hesitantly weighed his options while tens of thousands of lives unknowingly hung in the balance. The mass liberation of prisoners at Buchenwald was the primary catalyst for the oncoming chaos at Flossenbürg. Had Himmler maintained a policy of surrender, the frantic transports of prisoners from Buchenwald to Flossenbürg would likely have never occurred. Likewise, the evacuations-turned-death marches from Flossenbürg would have also been spared.

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[70] The wooden trestle over which prisoners were flogged was removed, several hooks used to hang prisoners by the wrists were ripped out of the walls and covered over with a new lick of paint, sawdust was thrown down to cover the bloodstained ground. Siegert, "Das Konzentrationslager Flossenbürg," p. 481.
[71] Ibid.
[72] Ibid, p. 482.
[73] Toni Siegert notes that the original order cannot be found. However, a sworn statement made on 24 April 1945 by SS company leader Bruno Skierka recalls that commandant Koegel called a meeting of Flossenbürg SS-leadership on the evening of 19 April, after receiving a message from Berlin, ordering the evacuation of Flossenbürg to Dachau. The message also demanded that "no prisoner is allowed to fall into the hands of the enemy." Ibid, p. 481.
[74] "Die Übergabe kommt nicht in Frage. Das Lager ist sofort zu evakuieren. Kein Häftling darf lebendig in die Hände des Feindes kommen. Die Häftlinge in Buchenwald haben sich gegen die Zivilbevölkerung benommen. (-) Himmler." Blatman. *Death Marches.* 154; 465, n. 131. See also, Zámečnik, "Kein Häftling," p. 219.

1.1.3 The *Lagerpolizei* and the Evacuation of Flossenbürg

The dramatic shifts in camp demography were not wholly exclusive to the prisoner community, as the camp personnel also went through several transitions.[75] According to head of the SS Main Leadership Office (SS-*Führungsamt*) and General of the *Waffen*-SS Gottlob Berger, from spring 1942, any member of the Death's Head Units (*Totenkopfverbände*) who was combat capable was deployed to the front, leaving only those unfit for front-line duty to guard the concentration camps. This included wounded and "old soldiers of the State."[76] In January 1945, as much as fifty-two percent of (male) camp guards were soldiers from the *Wehrmacht*.[77] Furthermore, in 1943 and 1944, replacement camp personnel were being fulfilled by *Volksdeutsche* draftees from Axis nations such as Romania, Hungary, and Yugoslavia.[78] As well, POWs from the German occupied Soviet Union volunteered to join the international battalions of the *Waffen*-SS. They too were deployed to the concentration camps as guard units.[79]

In the final weeks of the war, Germany was increasingly starved for adequate human resources with which to continue fighting *and* maintain control over the massive waves of

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[75] According to an official report drafted by American investigators in the immediate aftermath of Flossenbürg's liberation, the earliest guard troops at the camps were members of the SS Death's Head Units, all of whom were trained specifically for camp duty. Over time, however, replacements came increasingly from the international contingent of the *Waffen*-SS–primarily Ukrainian and Russian former POWs who volunteered for service. Towards the end of the war, more and more German combat soldiers from the *Wehrmacht* were brought back from the front and deployed to the camps. In the final weeks, *Reichsdeutsche* and *Volksdeutsche* prisoners were "drafted" into service. "Report about Flossenbürg Concentration Camp," 30 April 1945. M1204, Roll 1, 18 pages. p. 2. For more on camp personnel, see Karin Orth "The Concentration Camp Personnel," in Caplan, *The New Histories*. pp. 44–57.

[76] Gottlob Berger testimony, M1204, *Becker Trial*, Roll 8, pp. 6009–6080.

[77] This statistic is in contrast to the dedicated SS Death's Head units that operated the camp system almost exclusively in the pre-war years, and later by the *Waffen*-SS. On 15 January 1945, reaching the peak of camp prisoner population, there were a recorded 37,674 men and 3,508 women guarding the camps. This snapshot figure therefore supports an overall number that is several tens of thousands. Orth "Camp Personnel," p. 45; 48. See also, Bertrand Perz, "Wehrmacht und KZ-Bewachung", *Mittelweg* 36, 1995, no. 4, 69–82, here p. 80.

[78] Berger, M1204, *Becker Trial*, Roll 8, pp. 6009–6080.

[79] Stepan Sczetynskyi, Flossenbürg trial defendant number 45 was a Ukrainian *Waffen*-SS recruit. The charges were dropped, however, on the first day of the trial. During the trial of John Demjanjuk, the court tried to authenticate the defendant's "Trawniki card" through the submission of 6 auxiliary documents that could determine the whereabouts and circumstances of Demjanjuk's Trawniki Wachmann status. Four of these six documents were from Flossenbürg. Document 3 was a transfer roster, dated 1 October 1943, that included Demjanjuk as number 50 of 140 men sent from Trawniki to Flossenbürg. Rashke notes that Flossenbürg, due to its Messerschmitt contracts, desperately needed more labor and with more prisoners came more guards. Documents 4, 5 and 6 were a Flossenbürg weapons log, a roster of guards, and a work order report. The undated roster was determined to have been produced sometime between December 1944 and January 1945. This anecdote connects Flossenbürg to (several) Trawniki guards between late 1943 and early 1945. For direct connection between Ukrainian guards and Flossenbürg, see Richard Rashke, *Useful Enemies: America's Open Door Policy for Nazi War Criminals*, (Harrison: Delphinium, 2015). For foreign SS recruits, see Franz W. Seidler, *Avantgarde Für Europa: Ausländische Freiwillige in Wehrmacht und Waffen-SS* (Selent: Pour le Mérite, 2004); Christopher Ailsby, *Hitler's Renegades: Foreign Nationals in the Service of the Third Reich* (Staplehurst: Spellmount, 2004).

prisoners being shuffled from camp to camp. In the month leading up to Flossenbürg's evacuation, SS leadership apparently expressed interest in forming a military-trained unit of prisoners that could provide relief to the thinly stretched Camp-SS guard, in the event of an Allied confrontation. The so-called *Lagerpolizei* (camp-police) was established some time in early April 1945[80] and was composed of approximately four hundred *Reichsdeutsche* and *Volksdeutsche* prisoners, principally selected from the "green" triangle category of "criminals"[81] (though there were as many as thirty "red" political prisoners as well[82]). Koegel apparently insisted that he "did not want to spill German blood inside the camp,"[83] and even provided an incentive, assuring recruits that,

> all transgressions were erased, some who had previously stumbled in life had shown here that he could be accepted again as a worthy member of the national community (*Volksgemeinschaft*) and that he had been instructed to tell us that we would no longer be prisoners from today.[84]

Each recruit was outfitted with a military uniform and an assortment of barely functioning rifles; rarely did they come with proper ammunition. Within a week of its formation, the men were moved out from behind the barbed wire of the prisoner camp and into the SS barracks. They were also given crash-course training in military procedure, performed various exercise drills, and received firearms instruction. SS Lieutenant and Flossenbürg trial defendant, Bruno Skierka, was tasked with leading the battalion.[85] Many eyewitness accounts later claimed that the men dawned the Death's Head insignia on their caps.[86]

There remains uncertainty over the degree to which joining the camp police was compulsory. Testifying under oath, most defendants naturally insisted that they had been forcibly

[80] 1 April 1945, invitation to join camp police by Commandant Koegel. In Statement by Erich Hellbig, 23 May 1945, Cham, Germany, M1204, Roll 1. See also statement by Eller Beier, Cham, Germany, 30 May 1945, M1204, Roll 1.

[81] War Crimes Investigation reports, based on various witness statements, noted that approximately four hundred German and *Volksdeutsche* prisoners were drafted into the *Lagerpolizei*. This number is repeated in multiple witness testimonies during the trial. "Report about Flossenbürg Concentration Camp," M1204, p. 14; PW Inter team, 3rd US Army, Flossenbürg Camp, 1 May 1945, M1204, Roll 1. Heinrich Bodet testimony, M1204, *Becker Trial*, Roll 3, p. 1365; Willi Ruehlicke testimony, M1204, *Becker Trial*, Roll 9, p. 7822.

[82] Quote from Letter by Albert Buchmanns (n. 147), in Klausch, *Widerstand in Flossenbürg*, p. 50.

[83] Alois Jakubith testimony, M1204, *Becker Trial*, Roll 6, p. 3987.

[84] Walleitner, *Zebra*, pp. 176–178. Quoted in Klausch, *Widerstand in Flossenbürg*, p. 51.

[85] Bruno Skierka testimony, M1204, *Becker Trial*, Roll 10. p. 8157.

[86] This seemingly insignificant aspect actually carried with it critical value, as the SS (and the Death's Head Unit in particular) was deemed a criminal organization. Therefore, anyone confirmed to be a member was automatically criminally liable. See Articles 9, 10 and 11 of Charter of the International Military Tribunal. https://avalon.law.yale.edu/imt/judorg.asp#ss. Accessed April 2021. Statements made to US investigation team, Cham, Germany May 1945. M1204, Roll 1.

drafted.[87] Others admitted to volunteering, but maintained that they participated with ulterior intentions to desert as soon as the opportunity presented itself.[88] Skierka recalled each enlistee delivering the *Führer* oath.[89] Eyewitnesses from the general prisoner population largely confirmed that enlistment was indeed voluntary, but added that many took advantage of their newly empowered authority through increased abuse, extortion, and theft.[90] Coerced or not, the *Lagerpolizei* did offer eligible prisoners the perception of an increased agency in determining their own survival.[91] Above all, the creation of the *Lagerpolizei* dramatically complicated the victim-perpetrator dynamic for American prosecutors and would become a primary point of debate during the Flossenbürg trial.

Considering the Nazi principles of social engineering, enlisting concentration camp prisoners for any manner of defensive service to the Reich was indeed a glaring contradiction. As Nikolaus Wachsmann has put it, the "founding myth of the KL" was its function as the "bulwark against Germany's most evil enemies."[92] The justification for sending the perceived dregs of German society—particularly "criminals"—into indefinite incarceration was based on the ideological premise that such individuals were biologically deficient and therefore incapable of ever reforming safely back into the community.[93] As a camp established for so-called "asocials" and "criminals," this contradiction is especially relevant to Flossenbürg.

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[87] Defendant Georg Hoinisch claimed he was forced into the camp police, "There was no figment of voluntary enrollment there. We had to go into it. We were forced into it." He added that two men were shot to death over refusing the orders. Georg Hoinisch testimony, M1204, *Becker Trial*, Roll 6, p. 4494.
According to former prisoner Ernst Troffaes, German prisoners who volunteered were inducted into the camp police, given SS uniforms and armed. Troffaes notes that not all took the offer, but others were forcibly coerced. Jozef Ernst Troffaes statement, 30 Apr 1945, 5 pages, M1204, Roll 2, p. 3.

[88] Defendant August Ginschel maintained that he "ran along" for the sole purpose of escaping at the first opportunity. August Ginschel testimony, M1204, *Becker Trial*, Roll 6, pp. 4621. Former prisoner Clemens Diederich claimed to have successfully escaped from the SS barracks on 15 April with one other camp police and two SS men, Clemens Diederich testimony, M1204, *Becker Trial*, Roll 7, pp. 6000–6001.
M1204, 8129. Prosecution witness Karl Gautsch recalled being sworn into the SS (as he put it), "I had to take an oath to the Fuhrer… 'I swear that I will be obedient to the last to Adolf Hitler.'" Gautsch maintained that he was ordered to join, "we had to go, we did not volunteer." Karl Gautsch testimony, M1204, *Becker Trial*, Roll 4, pp. 2117, 2121.

[90] "PW Inter team," M1204, Roll 1.

[91] Despite their suspicion of Koegel's offer to apparently exonerate them, several political prisoners saw this as a potential imbalance of power in favor of the greens, if they did not participate. Additionally, they recognized it as an opportunity to arm themselves. Klausch, *Widerstand in Flossenbürg*, p. 52.

[92] Wachsmann was specifically referring to the possibility of simply releasing camp prisoners en masse. Himmler refused the proposal outright. Wachsmann, *Kl*, p. 578.

[93] For more on Nazi criminality and biology, see Richard F. Wetzell, *Inventing the Criminal: A History of German Criminology, 1880-1945*, (Chapel Hill: The University of North Carolina Press, 2000).

On the other hand, the camps often tended to take a functionalist approach to operations, when necessary. The *Lagerpolizei* is therefore a stark example of just how desperate things had gotten in the Third Reich. But why were these select prisoners suddenly offered instant redemption now? What was the specific function of the unit? The consequential significance for the establishment of the *Lagerpolizei* hinges primarily on the discrepancy of what to do with the tens of thousands of general population inmates still confined to the camps in mid-April 1945—specifically those coming into Flossenbürg.

The likely impetus for the formation of the camp-police in Flossenbürg was due to incoming reports that US forces had reached the greater Oberpfalz region and were quickly advancing on the *Hauptlager*.[94] Koegel never clarified a definitive purpose for the unit—all explanations are a composite of witness accounts and can be verified only through circumstantial pressures—but their varied applications illustrate the chaotic ad hoc approach to their application. There were two proposed functions that the *Lagerpolizei* could be called upon to perform in various capacities, depending on orders from Berlin and the immediate situation on-the-ground.

The earliest plan, circa the first two weeks of April, was to integrate at least part of the outfit into an existing *Waffen*-SS battalion at the nearest front.[95] Various trial testimonies claimed that the unit would be absorbed into either the infamous *Dirlewanger Brigade*[96] and/or support the

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[94] Multiple rumors claimed that Allied forces had taken the town of Bayreuth (approximately seventy-five kilometers north-west of Flossenbürg). Troffaes, Statement, 5 May 1945, M1204, Roll 2. See also "Report about Flossenbürg Concentration Camp", Troffaes, Statement, 30 Apr. 1945, M1204, Roll 1.
Evacuation of the Bayreuth subcamp began on 11 April 1945, destined for the Flossenbürg *Hauptlager*. Jörg Skriebeleit, "Bayreuth," in Benz, *Flossenbürg und seine Außenlager*, pp. 68–71. Here, p. 70. Subsequent research of "Action Reports" from the US Army 65th, 71st, 90th, 97th Infantry Divisions, as well as the 11th Armored Division, determined that as late as 16 April 1945, US Forces were still between 80 and 120 kilometers from Flossenbürg. Siegert, "Das Konzentrationslager Flossenbürg," p. 482. For more on the history of the Bayreuth subcamp, see Albrecht Bald and Jörg Skriebeleit, *Das Außenlager Bayreuth Des KZ Flossenbürg: Wieland Wagner Und Bodo Lafferentz im "Institut Für Physikalische Forschung"* (Bayreuth: Rabenstein, 2003).

[95] German prisoner and prosecution witness, Heinrich Bodet explained to the court, "We were told at that time that a part of the camp police might eventually join up with the SS, and another part of them would take over the duties of the guards in case there weren't enough guards at the end." Trial Testimony of Heinrich Bodet, M1204, *Becker Trial*, Roll 3, p. 1366. See also Willi Ruehlicke testimony, M1204, *Becker Trial*, Roll 9, p. 7822.

[96] Josef Hauser testimony, M1204, *Becker Trial*, Roll 5, p. 3755–3756. In 1944, the Waffen-SS began accepting certain concentration camp prisoners to join a special infantry outfit of misfits whose tactics bordered on guerilla warfare. The so-called *Dirlewanger Brigade*, named after its commander Oskar Dirlewanger (1895-1945), offered *Reichsdeutsche* and *Volksdeutsche* prisoners freedom in exchange for military service. Recruitment began with disgraced Wehrmacht soldiers, but the unit increasingly relaxed its acceptance criteria to include green triangle, and eventually red triangle prisoners. By spring 1945, the Dirlewanger Brigade, as one historian characterized it, was a ridiculous and desperate attempt to shore up weakened front-line units, as well as provide an exit strategy for the Camp-SS leadership. Klausch, *Widerstand in Flossenbürg*, pp. 50–51. A cable from Oranienburg was sent to Flossenbürg on 23 February 1945, soliciting potential recruits to "replenish" (*Nachschub*) Dirlewanger. Memo, ITS,

SS *Nibelungen* division.[97] Additionally, it was believed that in the short-term, promoting all German inmates to SS status would foster prisoner animosity inside the camps and eliminate any potential for a unified camp-wide revolt, at a time when the SS were most vulnerable.[98]

In the event of a surrender, the second plan would entrust the *Lagerpolizei* to maintain order in the camp until the Allies (or another organization equipped to ensure the wellbeing of the prisoners) arrived.[99] Ideally, this approach would provide a prudent handing-over of prisoners, while simultaneously giving the remaining camp-SS enough time to escape a direct confrontation. Of course, Himmler's about-face after Buchenwald ensured that this option would never come to fruition. What ultimately happened was an unsuccessful attempt at both, before finally initiating a last-minute comprehensive liquidation of the camp in which the *Lagerpolizei* would become escort-guards on the death marches.

Provided that Himmler's directive was received at Flossenbürg no sooner than 18 April, Koegel must have taken an advanced initiative—likely based on earlier, less formal direction from Berlin—when he ordered the very first evacuations of high-value prisoners on 8 April.[100] The Commandant did not deploy any camp-police as escorts on the convoy. What this early transport suggests, however, is that the camp leadership recognized Flossenbürg's days were limited and furthermore, that there was still a sense of value in keeping (certain) prisoners out of the hands of the Allies.

Flossenbürg Evacuates its Jews

Although Flossenbürg was operating in an increasingly confused and haphazard manner since the beginning of 1945, the deadly conclusion really developed out of the events that took

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1.1.8.0—Flossenbürg Concentration Camp, File: 82108294. For more on the history of the Dirlewanger Brigade, see Helmut Auerbach, "Die Einheit Dirlewanger." in Institut für Zeitgeschichte. *Vierteljahrshefte für Zeitgeschichte 1962-3.* (issue 10.), Special Print, Vol. 3, pp. 250–263. For enlistments into Dirlewanger, see Lieske, *Unbequeme Opfer?* pp. 291–306.

[97] Bruno Skierka testimony, M1204, *Becker Trial*, Roll 9, p. 8128. For more on the *Nibelungen* division, see Klaus Schneider, *Spuren Der Nibelungen 1945. Die Kämpfe Bei Bad Abbach Und Die Rettung von Regensburg. Eine Dokumentation über Soldaten Der 38. Grenadier-Division "Nibelungen" Der Waffen-SS.* (Potsdam: Vowinckel Verlag, 1999).

[98] Klausch, *Widerstand in Flossenbürg*, p. 51.

[99] Georg Hoinisch testimony, "The camp police was founded in order to protect the camp when the SS had left the camp. The camp police were supposed to turn over the camp to the Swedish Red Cross or the troops which were approaching." M1204, *Becker Trial*, Roll 6, p. 4494.

[100] Jörg Skriebeleit, "Flossenbürg–Hauptlager," p. 48.; See also, Jørgen Mogensen and Monika Wesemann, *Die große Geiselnahme: Letzter Akt 1945* (Copenhagen: Polnisch-Skandinavisches Forschungsinst, 1997) Nikolaus Wachsmann argues that the WVHA may have given instructions not to evacuate Flossenbürg. Wachsmann, *Kl*, p768, n. 203.

place on the evening of 15 April. Commandant Koegel called the ranking SS officers and explained that all Jewish prisoners were going to be transferred to Dachau and that those remaining would be turned over to the Allies when they arrived. In the meantime, the SS and the newly formed *Lagerpolizei* would abandon the camp and link up with defense battalions in the area.[101] The following morning, Koegel ordered all Jewish prisoners in the *Hauptlager* (approximately 1,700 in total) to assemble in preparation for the transfer.[102] The timing just precedes the arrival date of Himmler's cable. SS Major and deputy commandant of Flossenbürg Franz Berger was assigned to lead the convoy, he was accompanied by two officers and an additional 250 SS-men.[103] The excessive number of SS[104] on this transport suggests a preliminary evacuation of camp personnel, further supporting the expectation of a surrender.

A rail transport of forty covered freight cars was procured and set off from the Flossenbürg train station at approximately 8:00 in the morning and was likely expected to arrive at Dachau that evening. The train, however, got only as far as the town of Floss, some eight kilometers away, before incurring its first aerial attack by American bombers. Eighteen prisoners and two SS men died, approximately thirty more people were wounded.[105] Once the strafing had subsided, the dead were collected and sent back to the *Hauptlager*. The remainder of the convoy continued on by rail. A second strafing occurred just before the train reached Weiden, forcing yet another costly delay. As darkness fell, the convoy pulled into the station at Weiden; it had travelled a total distance of twenty-five kilometers.[106] Several days and multiple attacks later, the train—now on its third locomotive—finally made some distance, reaching the town of Schwarzenfeld, approximately fifty kilometers north of Regensburg.[107] Intending to rest for the evening, the convoy was caught completely off guard as Allied planes once again bombarded the area for a reported twenty

[101] Siegert, "Das Konzentrationslager Flossenbürg," p. 481–482.
[102] The post-trial report makes no reference to the transport containing any Jewish prisoners. Herbert E. Mueller and Paul J Goode, "Review and Recommendations," *United States v. Friedrich Becker et al.*—Case No. 000-50-46, 21 May 1947, 96 pages, M1204, Roll 12, here, p. 29
[103] Major Berger noted that when the convoy proceeded to exit the camp, six camp-police "practically smuggled themselves on to the transport." Franz Berger testimony, M1204, *Becker Trial*, Roll 9, p. 7973.
[104] According to Berger, only one hundred SS were assigned to guard duty. There other 150 were therefore catching a ride. Berger testimony, pp. 7951–7971.
[105] Ibid, p. 7956.
[106] Ibid, p. 7958.
[107] "Report of investigation of Alleged War Crime", 2 July 1945; M1204, Roll 1. pp 317-319.

minutes, leaving some 130 dead.[108] A local Schwarzenfeld resident later recalled that he witnessed multiple executions of prisoners by the SS during the tumult.[109]

Transport leader Berger made the decision to split the convoy into two groups; those who could make the rest of the journey on foot (about 150 kilometers), and those who could not. All capable prisoners were marched east to the adjacent village of Neunburg vorm Wald. The remaining prisoners would be taken west to Happurg, where they would be turned over to the city council and await further rail transport.[110] Neither the Happurg nor Neunburg civilian administrators were willing to assist in the boarding of the prisoners, claiming that the entire region was inundated with convoys of KL refugees.[111] While Berger's transport was bogged down from continuous air strikes, the rest of Flossenbürg was being evacuated and had started off a few days later on foot. By the third week of April, multiple convoys, carrying thousands of prisoners each, had converged in a handful of villages that dotted the Bavarian woodlands.[112]

Plan A

On the same day the Jewish transport set off, Koegel gave orders to the *Lagerpolizei*. It would appear that the original plan to support front-line defenses was indeed about to be activated. According to numerous witness accounts, Koegel, under the presumption that US forces were fast approaching Flossenbürg,[113] had decided the SS would abandon the *Hauptlager* altogether. Possession of the camp was handed over to the Mayor of Flossenbürg who was equipped with deputized support from the local *Volkssturm*. Flossenbürg would be turned over to the Allies upon their arrival. The rest of the *Lagerpolizei* accompanied the SS on their retreat.[114] Koegel and company left Flossenbürg *Hauptlager* and proceeded to march through the surrounding forest before lying-in-wait somewhere between the towns of Floss and Neunhammer. Hours later, upon

[108] Berger testimony, M1204, *Becker Trial*, Roll 9, p. 7961-7962. An exhumation of the site, ordered by US troops, revealed 133 bodies. They were all given a proper burial in the local cemetery. Sworn statement by Wilhelm Geldner (1st Burgermeister, Schwarzenfeld), 1 June 1945. M1204, Roll 1.
[109] Hans Greger sworn statement, 29 May 1945, M1204, Roll 1.
[110] Berger testimony, M1204, *Becker Trial*, Roll 9, p. 7962.
[111] Ibid, pp. 7964, 7967.
[112] On 20 April 1945, 14,000 prisoners (split into multiple columns) left Flossenbürg on foot, in the direction of Dachau. One column made it to its destination. Most, however, were liberated *en route* near Cham (less than thirty kilometers from Neunburg vorm Wald, where Berger had brought his convoy. Fritz, *Flossenbürg Concentration Camp*, pp. 212-213.
[113] One report (incorrectly) placed US forces only 8 kilometers away from the *Hauptlager*. "Report about Flossenbürg Concentration Camp", 30 Apr 1945., M1204, Roll 1, 18 pages, p. 15.
[114] The camp would be left to current lager-eldest and camp police chief, Anton Uhl, who was to turn the camp over to the Americans upon arrival. Some thirty *Lagerpolizei* draftees volunteered to return as prisoners and stay in the camp. "Report about Flossenbürg Concentration Camp," 30 Apr 1945. M1204, Roll 1.

learning that the location of US troops had been incorrect, Koegel ordered a return to the camp.[115] It is unknown exactly what, if any, direct orders prompted the turnaround, but the objective was clear; retake captivity of the prisoners.

Back at the camp, the prisoners' apprehensive excitement for their newfound emancipation was painfully short-lived. The SS made its way back in the early hours of 17 April and immediately retook control, tearing down the white flags that had been raised in their absence. It was only a matter of hours before Himmler's memo would reach Flossenbürg, prompting another frantic total evacuation. The camp-police would be repurposed as armed escorts on the transport convoys.[116]

Plan B

On the evening of the 19th, Koegel relayed Himmler's message to the camp-SS leadership.[117] There were still some 16,000 prisoners in the *Hauptlager*[118] and with the railways destroyed by the recent Allied bombings, all transports would be made on foot. On 20 April 1945, the prisoners were assembled into four columns of three to four thousand each before setting off about an hour apart in the general direction of Dachau.[119] The fortunate ones received either a piece of bread or a handful of grain. Accompanying the skeleton crew of SS guards was the several hundred strong *Lagerpolizei*.

The details of these marches are incredibly difficult to reconstruct. The massive columns were further segmented into smaller blocks of 1,000. The routes often changed and groups veered off from one another, sometimes putting hours of distance between the front and the rear.[120] Prisoners were exhausted and starved, with little knowledge of their direction. Backtracking and alternate routes were common. Guards had been given the order to shoot any prisoner who failed

[115] Troffaes claims that, while working in the hospital, he heard that the SS guards had abandoned the camp. No one knew what was going on, but the prisoners cautiously hung white flags from the buildings in anticipation of their liberators. The SS then returned to the camp and retook control. The white flags of surrender were all removed. Jozef Ernst Troffaes sworn statement, 30 April 1945, M1204, Roll 2.

[116] Skriebeleit, "*Flossenbürg—Hauptlager*", p. 49.; Daniel Blatman notes that Sachsenhausen also had a deficit of escorting guards prior to its evacuation on the evening of 20-21 April (the same day as Flossenbürg). The camp administration enlisted several German prisoners to keep order on the march. They were given uniforms and firearms. Blatman, *Death* Marches, p. 165.

[117] Bruno Skierka testimony, M1204, *Becker Trial*, pp. 8230-8231.

[118] It is estimated that a total of 25,000 to 30,000 prisoners, including the groups arriving from Buchenwald, were evacuated from Flossenbürg in April 1945. Siegert, "Das Konzentrationslager Flossenbürg," p. 485.

[119] Ibid, p. 481

[120] Brunko Skierka statement. Prosecution Exhibit-61, M1204, *Becker Trial*, Roll 11.

to keep pace;[121] the first of such casualties occurred before the end of the day.[122] The columns walked for several hours at a time, sometimes at night, with only short rests in the nearby woods, for four days.[123] For approximately 7,000, liberation came unexpectedly on 23 April, when American forces suddenly intercepted them near Cham—the same general area where the Jewish transport had been halted. One prisoner recalled the moment of liberation,

> The fourth morning … we had got about one kilometer and I heard some yelling at the end of the column and as I looked back through them came an American tank. [sic] All the prisoners were nearly crazy with joy. I didn't see one of the SS fire a shot. The tanks advanced and continued to fire at the SS over our heads into the woods … There were many, many tanks, and from all the tanks they threw out packages of food and delicacies to the prisoners.[124]

Not all the convoys were freed, however. Incurring more casualties with each day, one of the four columns that left the *Hauptlager* on 20 April ultimately arrived at their destination nine days later.[125] Some 350 were not accounted for. In total, 6,638 prisoners successfully completed the journey from Flossenbürg to Dachau.[126]

By the time it was decided to evacuate Flossenbürg, the entire KL system was on the verge of complete capitulation. With the liberation of Buchenwald, Flossenbürg's role (as well as many of its subcamps) was never more crucial, becoming the primary transit hub for both male and female prisoners on the southern evacuation route. Its location, nestled in the remote wooded hills of Northeastern Bavaria, ensured that tens of thousands would be funneled through its administrative auspices before being moved on. But this strategic positioning was only made relevant due to the timing at which critical decisions were made by SS leadership, both from Berlin and on the ground. Had Himmler allowed the camps to be liberated with their contents, many lives would have undoubtedly been preserved. Because of his hesitancy and last-minute policy-changes, however, valuable time was lost, allowing American forces to close-in on what remained of Nazi held territory. By the time the decision was made to evacuate, it was too late for Flossenbürg to

[121] One witness counted as many as 350 prisoners shot *en route*. Karl Gautsch testimony, M1204, *Becker Trial*, Roll 4, p. 2105.
[122] Unknown, "Report about Flossenbürg Concentration Camp," Langazenn, 30 April 1945. M1204, Roll 1.
[123] Ernst Troffaes statement, 30 April 1945, 5 pages, M1204, Roll 2.
[124] Troffaes statement, 30 April 1945, M1204, Roll 2.
[125] Hermann Pachen's column left the *Hauptlager* on 20 April with 3,000 prisoners. It arrived to Dachau on 29 August with 2,654. Hermann Pachen statement, Prosecution Exhibit-59. M1204, Roll 11.
[126] Siegert, "Das Konzentrationslager Flossenbürg," p. 485.

deliver its prisoners to Dachau. As a result, Flossenbürg was the only camp for which US forces liberated the majority of its prisoners *outside* of the camps.

As Wachsmann has noted, characterizations of the KL system during this volatile period are disputed among historians.[127] While some have argued that the evacuations were essentially a continuation of the camps themselves, thus demonstrating their incredible resilience,[128] others have maintained that the death marches were a new (indeed the *last*) chapter of the Nazi genocidal program.[129] Wachsmann is unconvinced by both of these interpretations, insisting that "[t]here was nothing stable about the KL system in spring 1945," but that the learned behaviors of the camp, performed by both guards and prisoners alike, cannot be isolated from what occurred on the transports.[130] Contrary to the carnage that came as a result, the objective of the evacuations was not to leave a trail of dead prisoners throughout southern Germany for all to see, but to desperately hold on to what had become a precious resource: a war time labor force.

On the ground, the *Hauptlager* was completely overwhelmed with few options left. The administration was even forced to independently evacuate its subcamps. Contingency plans were hastily employed with little positive effect. The special transport of Jewish prisoners was a concerted effort to buy leverage, but only in the event that the prisoners remained alive. This further contradicts any insistence that the death marches were a systematic continuation of a program of annihilation. And yet, the transport was administered too late to avoid Allied interception. As a result, more prisoners died, completely negating whatever efforts for diplomatic advantages were thought to be gained.

Not only did the establishment of the *Lagerpolizei* run counter to the ideological reasoning upon which Flossenbürg was established in the first place, it reveals just how much the camp-SS had been whittled down. Whatever resilience the KL system appeared to possess at this time was motivated by sheer desperation. This significant alteration to the prisoner dynamic was extremely consequential to the war crimes trial that followed. Because most of Flossenbürg's prisoners were

[127] Wachsmann, *Kl*, p. 577.
[128] Katrin Greiser, *Die Todesmärsche von Buchenwald: Räumung, Befreiung und Spuren der Erinnerung* (Göttingen: Wallstein Verlag, 2008). pp. 136-137.
[129]Blatman does, however, dispute Daniel Goldhagen's assertions that the Death Marches (Helmbrechts—a subcamp if Flossenbürg—in particular) were specifically a continuation of the Holocaust. Blatman, *Death Marches*, pp. 7-10; 411.
[130] Wachsmann points to the increased frequency of escapes and the complete absence of labor details or daily routine as examples of how the evacuations differed from the "stable" life in the camps., Wachsmann, *Kl*, p. 577; 767, n. 195.

liberated en route, the investigation area covered hundreds of square kilometers and incorporated dozens of civilian witnesses. What's more, approximately one third of the defendants at the Flossenbürg trial were former prisoners, many of whom were prosecuted for their participation as guards on the evacuation marches.

1.2 Liberation and Investigation

1.2.1 A Humanitarian Crisis

Flossenbürg was liberated on 23 April 1945, by the 358th and 359th Regiments of the 90th US Infantry Division, Third US Army. A brief half-page report details what they encountered.

> There are 1,600 political prisoners at this camp, 20 criminal prisoners who have served their terms and 5 religious prisoners. These prisoners are of various nationalities of German overrun territories. They have formed a commission among themselves, headed by a Swiss with each nationality as group [*sic*] represented.
>
> The health of the inmates is bad. All are suffering from malnutrition. There are 186 active typhus cases, 98 cases of tuberculosis, confined to bed, 2 cases of diphtheria, 2 cases of scarlet fever and several cases of other communicable diseases. The whole place is lousy. Dusting team has been requested from Corps and Corps medical channels have been notified of contagious diseases. There is a crematory now operating for disposal of the dead.
>
> Food is short, however, there are stocks of potatoes on hand, and there is a limited supply of bread available in two towns near the camp. Transportation and supply of this bread will be arranged for. Starting 24 April 800 rations per day will be supplied by the Division until such time as supplies can be brought up by teams under direction of Corps. This will not exceed 3 days duration.
>
> The records of the camp are at the camp and available for use and inspection. All sections of higher authority, Corps, have been notified of all details pertinent to their particular interest in the matter.[131]

US Army Field medic Dr. William McConahey later recalled that, as the first responders to the Flossenbürg *Hauptlager*, he spent no more than a few hours "doing what they could for the sick and injured," before needing to move on. The infantry division was headed in the direction of Czechoslovakia when they stumbled across the camp.[132]

The report reached headquarters three days later, which prompted a humanitarian aid and investigation case. Major Samuel S. Gray was dispatched to Flossenbürg to lead the assignment. Gray compiled a small task force consisting of himself, two more officers and five enlistments.

[131] Lt. Col. W. I. Russell, "Report on a Concentration Camp at Flossenbürg", 24, April 1945, ITS, 1.1.8.0—*General Information on Flossenbürg Concentration Camp*, US Army: Reports and compiled documents, File: 82107065.
[132] Interview with William McConahey, Oral Histories Collection, RG-50.156.0039. USHMM.

They reached Flossenbürg the following day, on 30 April 1945. The detachment came with no medical personnel, but were told that the "physicians among the inmates" (approximately thirty to forty) had control of the situation and were capable. All prisoners were dusted with DDT on a regular schedule. Military physicians arrived on 2 May. X-ray exams and surgeries were conducted at the hospital in Weiden. As the prisoner quarters were almost too contaminated to salvage, efforts were focused on moving the inmates into the SS barracks. At the same time, arrangements were made to transport healthier prisoners to the Auerbach DP camp; the first group of 169 left on 4 May. From 5 May, the camp was reported to be lice free. Attention was also given to food. Local farms were instructed to provide fresh eggs, milk and butter, and a strict meal plan was developed in collaboration with the doctors to ensure an adequate and safe diet.[133]

For sanitary reasons, bodies were still being burned in the crematorium when Gray arrived. He ended the practice immediately and ordered the burial of the remaining dead. As the local carpenter maker could only produce fifteen caskets per day, they had a significant deficit for some time. However, the burials were conducted in accordance with Army directives and Chaplains from the 97th Infantry presided over the funerals, to which the local community was obligated to attend. The entire male civilian population of Flossenbürg and the neighboring village of Floss were forced to dig the graves. By the end of April, the death rate had averaged about ten to fifteen people a day. The mayor ordered the wives of all SS men (approximately sixty-five) to work at the camp, as well as local farmers to help do any heavy lifting. By 7 May, the barracks had been adequately cleaned and were accepting tuberculosis patients. The following day, twenty-four German Army nurses arrived, further improving medical care. By 15 May, the camp was given a positive record of operation.[134]

1.2.2 Investigations

While Gray was managing the humanitarian efforts at Flossenbürg, Lieutenant John J. Reid arrived with a team of soldiers who were personally selected, trained, and deliberately tasked with investigating criminal activity and allegations of atrocities. Between 25 April and 2 May 1945, hundreds of witnesses were interviewed, a multitude of files were collected, and dozens of photos were taken. Working alongside Reid's team was Ben Ferencz, one of the Army's few war crimes

[133] Major Samuel Gray, "Reply to Report from Major Blum", 22 June 1945, 8 pages, ITS, 1.1.8.0, Files 82107067-82107075.
[134] Ibid.

legal experts, who had considerable experience in the field and was also familiar with the camps previously uncovered by the Americans. Ferencz kept a diary and wrote home often about his work. While he contributed immensely to the investigation of Flossenbürg, his private responses to what he witnessed offer a unique perspective and critical juxtaposition to the official reports that were later submitted to the war crimes branch in preparation for a criminal case.

The War Crimes Investigating Teams

In 1942, the War Department took over the summer training grounds of the Army National Guard to establish the Military Intelligence Training Center (MITC). "Camp Ritchie," as it was commonly referred,[135] was located in the Cascade region of Maryland's Blue Ridge Mountains.[136] Soldiers and officers were trained over the course of eight weeks in various intelligence skills such as evidence collection, interrogation techniques, German military identification, international laws and provisions on warfare, photography, and map reading.[137] Of the roughly 19,000 graduates, more than 2,500 were former European Jewish refugees who had been identified among new Army recruits and nominated to the course specifically for their language skills and personal experiences.[138] Paul Guth, an Austrian refugee, was only twenty-one years-old years old when he was sent to Camp Ritchie for intelligence training.[139] Many of these so-named "Ritchie Boys,"[140] were later assigned to investigate the various cases of atrocities that were being reported, particularly the concentration camps. Guth would later find himself working for the US Army War Crimes Branch (WCB) in Germany, alongside William Denson, interrogating suspects and preparing the trials of Dachau, Mauthausen, and Flossenbürg.

On 22 March 1945, with the approval of General Eisenhower, sixteen individual "war crimes investigating teams" (WCIT) were established to carry out zoned investigations of German

[135] The National Guard camp was named after Maryland Governor Albert C. Ritchie.
[136] Kevin Aughinbaugh, "The Castle of Intelligence: Camp Ritchie Maryland and the Military Intelligence Training Center during the Second World War." *The Gettysburg Historical Journal*, Vol. 17, Art. 5, (May 2018). pp. 14-51, here, pp. 15-16.
[137] Steven P. Remy, *The Malmédy Massacre: The War Crimes Trial Controversy* (Cambridge, MA: Harvard University Press, 2017), p. 50.; Aughinbaugh, "The Castle of Intelligence," p. 15-16.
[138] "History of Military Intelligence Training at Camp Ritchie, Maryland, Supplement for the Period 1 January 1945 - 15 October 1945, Volumes I-II," NARA, RG 319, Records of the US Army Staff, Assistant Chief of Staff G-2 Components, 1918-1959, Box 27. See also Remy, *The Malmédy Massacre*, p. 48.
[139] Guth would become the lead investigator for the Mauthausen war crimes case, as well as perform interrogations for the Flossenbürg case. Paul Guth interview by Joshua M. Greene, 24 February 2001, *Denson Papers*, Series V—Audio Visual Materials, Boxes 46U-49U, Cassette Tapes, Yale University Library, New Haven, CT.; See also George Robertie testimony, M1204, *Becker Trial*, Roll 7, pp. 5224-5228.
[140] For more on the Ritchie Boys, see Christian Bauer and Rebekka Gopfert, *Die Ritchie Boys. Deutsche Emigranten beim US-Geheimdienst* (Hamburg: Hoffmann und Campe, 2005).

territory currently occupied by US forces. WCIT 6832 was assigned to northern Bavaria, from the Hof River to the banks of the Danube.[141] This particular zone included Flossenbürg concentration camp, several of its satellites, and much of the death march routes. The teams were furnished by the Judge Advocate Office and consisted of around ten "Investigator-Examiners."[142] Working in conjunction with Reid and the WCIT, was a young war crimes specialist named Benjamin Ferencz.

Ben Ferencz and the Art of Investigating War Crimes

When US Army Corporal Benjamin B. Ferencz first entered the grounds of Flossenbürg Concentration Camp on 27 April, all the stories, photos, and prior intelligence briefings about what actually occurred at these places were immediately laid bare in the most explicit manner; sick and emaciated prisoners filled the hospital ward, the stench of feces and death was inescapable, and piles of bodies were left heaped one upon the other in the crematorium.[143] According to Ferencz, the time for grieving had to wait. He later recalled the process of burying his emotions while conducting his investigations,

> I think the human body has a capacity for survival which enables it to build up insulation ... mechanisms to prevent yourself from going mad. And I do not recall feelings of rage. I do not recall feelings of fear. I do not recall feelings of hatred. I do recall the urgency of doing something and getting the job done before it's too late. So I went about my business as best I could … by putting myself into a mental cocoon which was surrounded by an ice barrier which just enabled me to go on. And that little ice barrier lasted until it melted, you know, but as long as it was necessary to do the job it remained there, as a self-protective device, I think.[144]

Ferencz is representative of the many European-Americans that came to fill the ranks of the War Crimes Investigation department, though his education in international law was indeed uncommon. Ferencz was born in a Transylvanian village in 1920 just months before the political conclusions to the First World War would force the region to change hands from Hungary to Romania. Not long after, he and his family emigrated to the United States and settled in the Hell's Kitchen district of New York City.[145] After completing his undergraduate studies in sociology from City College

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[141] Victor Wegard interview with Mark Lender, 4 May 1987, Oral Histories Collection, USHMM, RG-50.002.0066.
[142] The numbering of the sixteen teams was labeled in succession from 6825 to 6840. Richard P. Fisk, Asst. Adj. Gen. "Organization Order No. 270". 24 April 1945. Exhibit 1, M1204, Roll 1.1.
[143] Ben Ferencz, "Flossenbürg Report", *Letters from Benjamin B. Ferencz to Gertrude Fried Ferencz, 1944 Apr. 20-1945 Aug. 8*, 7 pages, USHMM, Benjamin B. Ferencz Collection (hereafter *Ferencz Collection*), RG-12.001.03.01, Box 3, p. 4.
[144] Benjamin Ferencz interview with Joan Ringelheim, 26 Aug 1994, USHMM, Oral Histories Collection, RG-50.030.0269, tape 4 of 7.
[145] Ferencz interview, RG-50.030.0269, tape 1 of 7.

New York, Ferencz was admitted to study international criminal law at Harvard, under the Polish-American criminologist, Sheldon Glueck. Between 1940 and 1941, Glueck had worked as an American representative to the United Nations War Crimes Commission (UNWCC) and routinely received reports of atrocities coming out of Poland. Glueck shared the reports with his young protégé, who would in turn produce summaries. The work made Ferencz one of the leading experts in the country on the increasingly relevant field of international war crimes.[146]

Despite having close knowledge of the alleged atrocities attributed to Nazi Germany, Ferencz held sympathies for the anti-war protest movement that had gained considerable support in New York at the time. However, following the Japanese bombing of Pearl Harbor in December 1941—bringing the United States into the war—Ferencz was immediately compelled to support the cause.[147] Due to his ongoing studies, however, his enlistment was deferred. Ferencz remained at Harvard and was admitted to the New York State Bar in 1943,[148] after which, he returned to the enlistment office.[149] Ferencz was eventually admitted as a private into the 115th AAA anti-aircraft Gun Battalion and set off to prepare for what would become the D-Day landings. Recalling these experiences, Ferencz notes that his outfit was led by what he characterized as antisemites and that he received both verbal abuse and extra duties because he was Jewish.[150]

In early December 1944, Ferencz was fortuitously transferred to the newly established WCB, under the administrative authority of the Judge Advocate Section of the Third US Army.[151] Prior to the creation of the WCB, the office of the Judge Advocate primarily concerned itself with disciplinary violations for which American soldiers were tried by courts-martial.[152] The office's new objectives were to collect "evidence concerning cruelties and acts of oppression against Americans and members of the armed forces of the United States." As well, it would be responsible for "the apprehension and prompt trial of persons against whom a *prima facie* case could be

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[146] Ibid, tape 2 of 7.
[147] Ibid, tape 1 of 7.
[148] Benjamin Ferencz trial testimony, M1204, *Becker Trial*, Roll 3, p. 1443.
[149] Ferencz initially applied to serve in the Intelligence branch because of his fluency in multiple languages but was denied. As his citizenship was derived from his father's papers, issued in 1933, Ferencz had not been a U.S. citizen for the minimum 15 years. Tom Hofmann, *Benjamin Ferencz, Nuremberg Prosecutor and Peace Advocate*, (Jefferson, NC: McFarland & Company, 2013) p. 27.
[150] Ferencz interview, RG-50.030.0269, USHMM, tape 2 of 7.
[151] Benjamin Ferencz, *Diary, 1943 May 13-1945 Aug. 15*, Benjamin B. Ferencz Collection, RG-12.001.01.03, Box 1, pp. 80-83.
[152] Ben Ferencz, "How War Criminals were Brought to Trial", September 1945, in *BBF 1948*, Benjamin B. Ferencz Collection, RG-12.018.02.01, Box 167, USHMM.

established, and the execution of all sentences which were to be imposed."[153] All evidence relating to crimes committed against individuals belonging to other member states of the United Nations (UN) would be assembled for transmission to the respective government authorities.[154] In spite of what appears to have been an internationally coordinated approach to finding and prosecuting war criminals, in practice, it was developed in a far more ad hoc manner. Experienced investigators and interpreters were scarce but were desperately needed to fulfill the new objectives. Ferencz was one of a handful of soldiers that possessed such skills. The original outfit, located in Nancy, France, consisted of five Colonels and two privates (Ferencz and Yale law graduate, Jack Nowitz).[155] While the hierarchical structure of the WCB gave the appearance of a typical military outfit, the officers were merely there for legitimacy. With legal expertise and fluency in several European languages, the department's leadership, however, rested with men like Ferencz and Nowitz.[156]

For the first month, Ferencz researched international law and concepts of war crimes.[157] But as the Allies reclaimed more of German occupied Europe, reports of atrocities in liberated Belgium, Luxembourg and France began arriving at the WCB desk.[158] By March 1945, Ferencz was making trips to conduct field investigations. The objectives of the fact-finding missions were to gather enough evidence to produce a comprehensive report of a particular event. The report would then become the foundation upon which criminal indictments could be brought before a court at a later date. A further pragmatic objective of Ferencz' was to gather additional evidence that linked criminal responsibility to individuals "at levels above that of the immediate perpetrator."[159] In other words, Ferencz was investigating potential 'major' war criminals for what would become the IMT at Nuremberg.

These early investigations were routinely carried out as follows: The department would receive a report, either by an informer and/or through military intelligence—initially, most were

[153] Ben Ferencz, "How War Criminals were Brought to Trial."
[154] Ibid.
[155] Ferencz interview, RG-50.030.0269, USHMM, tape 2 of 7.
[156] In a private letter, sent to his wife (then girlfriend) Trudy, Ferencz referenced his value and consequential authority within the war crimes branch, "Were it not for my knowledge of French I fear I would be consigned to the drudging groundwork of legal papers, but since the officers assigned to investigate the stories of atrocities cannot speak the language they simply come along so there will be a person of sufficient rank present, while I find out what happened." Ferencz, "Letter to Trudy - Somewhere in Luxembourg, 28 Feb. 1945", in *Letters from Benjamin B. Ferencz to Gertrude,* RG-12.001.03.01, Box 3. USHMM.
[157] Benjamin Ferencz, *Diary, 1943 May 13 – 1945 Aug. 15*, RG-12.001.01.03, pp 80-83. USHMM.
[158] Ferencz, "How War Criminals were Brought to Trial."
[159] Ibid.

concerned with the killing of downed US airmen (i.e. crashed pilots and lost parachutists). The allegations would then be followed up by a war crimes investigator, like Ferencz, who traveled to the site and questioned the local authorities. Additionally, everyone who lived within a 500-meter radius of the crime scene (circa fifty to seventy-five people) would be detained, separated, and forced to write a statement on the event. The order was often accompanied with encouraging remarks such as, "anybody who lies will be shot."[160] The result of this practice typically yielded enough statements that, together, confirmed a general consensus of what had taken place. The corresponding narrative was then followed up at the local administrative headquarters (usually the former Gestapo offices) where relevant individuals were detained and documents confiscated. Once the narrative was established, the applicable documents recovered, and the suspected perpetrators identified, the search for the bodies commenced. The US Army Signal Corps was called in to document the exhumations.[161] With the entire crime effectively recreated, suspects were arrested and subsequently interrogated until they produced a confession.

The entire process of investigating murders of downed US airmen and preparing the evidence for trial was usually accomplished by one investigator. As Ferencz notes, however, "that [was] before we ran into the concentration camps, of course, that was a bigger operation."[162] Investigators were not equipped with proper forensics equipment and medical staff were obliged to treat the sick and dying at the expense of making autopsy assessments.[163] There were literally thousands of victims of varying nationalities who could contribute eye-witness accounts, yet most of whom, as Ferencz experienced, were either physically and/or psychologically incapable of providing a coherent statement, or were recipients of rapid national repatriation programs.[164]

Sometimes, tracking down a witness was in itself a considerable task. Ferencz expressed in a letter home the necessary routine to gain the trust of individuals. Upon receiving information as to the whereabouts of a potential witness, Ferencz drove out to a remote little village in Luxembourg. As he entered, he immediately noticed eyes peering out from behind curtains. Some

[160] Ferencz interview, RG-50.030.0269, USHMM, tape 2 of 7.
[161] Once reports of the concentration camps were confirmed by US investigators, the War Department mandated that still photography and moving picture film of the sites take precedence over all active combat footage. Signal Corp photographers were teamed up with advancing infantry forces in the anticipation of discovering another camp. Additionally, all documentation activities were accompanied by a war crimes officer and authenticated by a written affidavit in order to preserve evidentiary integrity. Ferencz, "How War Criminals were Brought to Trial."
[162] Ferencz interview, RG-50.030.0269, USHMM, tape 2 of 7.
[163] Ferencz, "How War Criminals were Brought to Trial."
[164] Ibid.

were less surreptitious, exiting their homes and making it known that he was being observed. Arriving at the correct address, Ferencz (wearing military fatigues) was then greeted suspiciously by a woman who became increasingly indignant when he asked about her husband. Unable to withhold his intentions, Ferencz conceded that he was from the US department of military justice and was looking for her husband in order to find and punish those guilty of his mistreatment. Immediately, the woman became a "new person" and invited Ferencz in to wait while she retrieved her husband who had just stepped out to see the doctor. Not only did the man promptly return home, but it was he who had contacted the US Army in order to provide a statement on his experience as a concentration camp prisoner.[165]

This anecdotal interaction is representative of the many challenges that investigators encountered while developing a body of evidence. On one hand, even after the official end to the war in Europe, Allied troops were still under at least a perceived threat of militia confrontation—particularly in southern Germany, the last territory to fall and the subsequent American occupation zone. On the other hand, the aggressive, apathetic, and sometimes retaliatory behavior of Allied troops toward German civilians occurred often enough to spread a legitimate level of fear and distrust throughout local communities. The most effective approach was a delicate combination of speed and patience. Obtaining access to valuable material was only the first step, however. There was still no coherent approach as to how the US Army would be prosecuting the crimes Ferencz and his colleagues uncovered.

It was essentially left to the investigators themselves in determining what information and evidence would prove valuable in court. Ferencz explained,

> ...the goal of my investigation was to describe what had happened, to collect credible evidence admissible in a court of law, which could be used to convict the persons responsible of a known crime under international law. That was the objective, and that's what we did. And there were very few of us doing that. Nowitz was one, I was one, and later we got a few more people in, but the total number was never more than half a dozen or a dozen, who were competent to know what represented a war crime and to prepare a report which would stand up in a court of law.[166]

The system of receiving the initial report, making arrests, and putting forth charges took anywhere from a couple weeks to several months. Ferencz' final point in the above passage is particularly

[165] Ferencz, "Letter to Trudy - Somewhere in Luxembourg."
[166] Ferencz interview, RG-50.030.0269, USHMM, tape 3 of 7.

significant. Evidence of atrocities were everywhere and finding it was not the difficult part. Rather the foremost crucial aspect to the job was collecting and properly preparing the evidence to be used in trial. Ferencz was among very few operatives to conduct field investigations *and* later prosecute German war crimes. The combination of his legal experience and critical sensitivity to what he witnessed is unique to any other investigation reports.

Entering Flossenbürg

In his personal field diary, dated 7 May 1945, Ferencz wrote,

> My most interesting case to date was the Flossenbürg concentration camp, and the death in which about 3,000 people were murdered. I saw more dead bodies than ever before and uncovered the mass graves where brutal SS had thrown the miserable victims. To go into all the details would fill several of these volumes, and since this is the last such book I have, the gory truth will have to be omitted…[167]

Approximately two weeks prior to this diary entry, Ferencz had arrived at the Flossenbürg *Hauptlager* to investigate reports of war crimes. By late April 1945, it is clear that Ferencz was acutely aware of the Army's prior concentration camp 'discoveries.'[168] In a letter dated 20 April, (one week before he would visit Flossenbürg) he referenced to the investigations at Buchenwald, "we have been uncovering dozens of Nazi murder camps," adding that "we are now working on a case … in which hundreds of men with tattooed skin were slaughtered and skinned so that the wife of the death camp [commander] could have lampshades made of the colored human tissues."[169] In light of having just confronted some of the most macabre examples of camp atrocities, what was it about Flossenbürg that made such an impression on Ferencz? All contemporaneous commentary suggests that Flossenbürg left a profound impression on Ferencz. In a private letter home, he wrote about Flossenbürg, "Had I not seen it with my own eyes, I might have been inclined to doubt it. But I have seen it."[170]

The WCB offices received a call on 27 April concerning a concentration camp near the town of Flossenbürg. Ferencz, having been stuck inside with case files, was desperate to get out of the administration office and volunteered to investigate. He was teamed up with a supervisor

[167] Ferencz, "7 May 1945," *Diary*. 95-96.
[168] Ohrdruf, a subcamp of Buchenwald, was the first concentration camp to be liberated by the Americans, on 4 April. US troops then liberated the Buchenwald *Hauptlager* on 11 April. Bergen-Belsen was discovered by British forces on 15 April 1945.
[169] Ferencz was undoubtedly speaking of Ilse Koch, the wife of Buchenwald commander Karl-Otto Koch. Ferencz, "Letter to Trudy-Somewhere in Germany, 20 April 1945", RG-12.001.03.01, Box 3, USHMM.
[170] Ferencz, "Flossenbürg Report," p. 1.

and driver and the three headed out. As they drove by the town of Wetterfeld (near Roding), they began to notice thousands of wandering individuals.[171] Despite wearing the telltale striped uniforms, Ferencz noted that it was their bewildered faces, upon seeing US servicemen, that gave them away as camp prisoners. Stopping to chat with some of them, Ferencz was led by a French prisoner to a shallow mass grave in the woods just outside a roadside village, where approximately fifty prisoners had been executed. Ferencz exhumed three corpses to find each of them with a gunshot to the head or neck.[172]

He also took a statement from a local woman who had seen a convoy march past and claimed to have subsequently heard dozens of gunshots coming from the nearby forest. Ferencz learned that the perpetrators had not even bothered to cover the pit; a local farmer and his son had thrown a layer of earth over the bodies—to prevent disease—after the SS moved on. Continuing along the road up to Flossenbürg, they periodically came across mounds of loose dirt that hardly concealed more bodies; others remained entirely exposed. Ferencz estimated that a total of two to three thousand people had met their end in this manner.[173]

[171] Ferencz testimony, M1204, *Becker Trial*, Roll 3, pp. 1431-1432.
[172] Ibid, pp.1432–1433.
[173] Ferencz, "Flossenbürg Report," p. 3.

2. Two U.S. soldiers with the 9th Armored Division stand in the middle of a field of graves, near the Flossenbürg concentration camp. E. Vetrone. 1945 May 01. National Archives and Records Administration (NARA), College Park. RG-153 (Case files, 1944-1949). Box 289, file 12-575.

Arriving at the village of Flossenbürg, Ferencz met several more former prisoners who had taken it upon themselves to commandeer private homes that had recently been abandoned by their German owners. These prisoners had established an ad hoc community, grouped together by nationality with an elected representative who would act as liaison between his constituents and the new occupying authorities; securing and distributing food, clothing, beds, medical supplies, etc. Many of the individuals he spoke to had originally come from Buchenwald and all agreed that it had been "paradise" compared to Flossenbürg.[174] The team continued on, finally making their way to the *Hauptlager* where they were met by the small Army detail that had been guarding the site. Ferencz spoke with a few of the prisoners; not one could explain why they hadn't been killed before the SS left.[175]

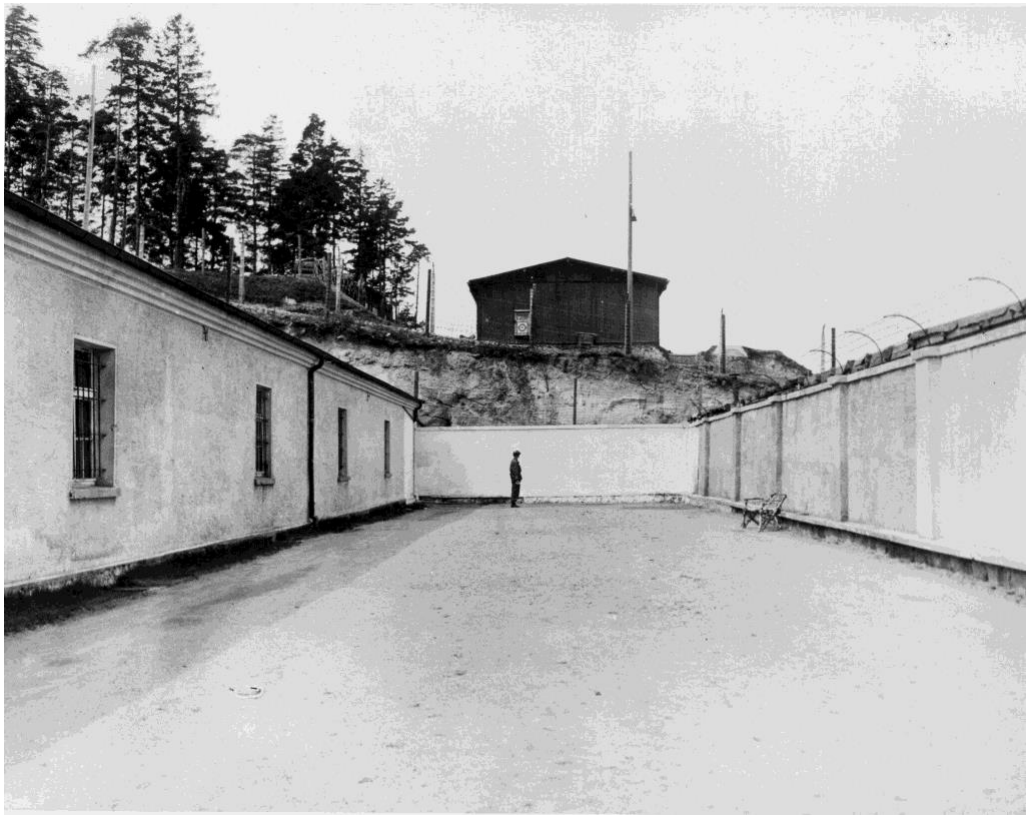
[174] Ibid, p. 4.
[175] Ferencz, "Flossenbürg Report," p. 4.

The team made their way around the perimeter of the grounds. They examined the system that was used to carry the dead from the camp to the crematorium for processing, located at the bottom of a hill just outside the camp walls. A quarry wagon would be filled with the recently deceased and rolled down a short decline on a set of rail-tracks to the crematorium. There, the bodies would be unloaded and stacked in preparation for cremation. Once processed, the ash byproduct was then thrown into a nearby pit. By the time Ferencz arrived, approximately sixty bodies were still waiting for cremation. Ferencz interrogated two former prisoners who claimed to be the crematorium operators. They were both imprisoned as Jehovah's Witnesses and recalled that they had recently been tasked with processing thirteen bodies that they understood to have been Americans.[176]

3. The crematorium in Flossenbürg, showing railway used to transport bodies. Unknown (US Army Signal Corps). 1945 April 23 - May 1945. NARA, College Park. Prosecution exhibit number 39, M1204, Roll 11. RG- 338 (Cases Tried), Box 503. File 000-50-46

[176] This was most likely the group of British SOE agents who were executed in March 1945.

This information led the investigation team to the *Arrestbau*. There, Ferencz found evidence of graffiti and markings inconspicuously left in the cells.[177] Extending outward was a courtyard, walled in on three sides. Upon inspection, Ferencz noticed various blemishes and discoloration on one of the walls. Witnesses claimed that until very recently, several hooks had been adhered to the wall and were used to hang prisoners. As well, the wall was often used as a backstop for firing squads during mass prisoner executions. The faint discoloration Ferencz had noticed were bloodstains that had stubbornly remained visible, despite being hastily whitewashed over.[178] Once the team had gotten a general overview, they called headquarters and requested more support; photographers, cinematographers and stenographers were needed to record every possible detail.[179] The camp was a crime scene and required a critical forensics approach.



[177] Ferencz testimony, M1204, *Becker Trial*, Roll 3. p. 1455.
[178] Ibid, pp.1423, 1436.
[179] Ferencz, "Flossenbürg Report,". p. 5
Jörg Skriebeleit provides critical analysis of the Signal Corps photographs and cinematography taken at Flossenbürg. Through the photographer's choice of imagery, much of which depicts gory scenes of corpses, Skriebeleit convincingly argues that the "standardized visual language" represented not only the shock of what GIs witnessed, but further legitimized Flossenbürg as a site of Nazi atrocity. Skriebeleit, *Erinnerungsort Flossenbürg*, pp. 58–62.

4. Detention building courtyard (*Arresthof*). Unknown (US Army Signal Corps). 4 May 1945. NARA, College Park. Prosecution exhibit number P-33, M1204, Roll 11.

5. Close up of the far wall in the detention building courtyard, used as a backstop for firing squads. Unknown (US Army Signal Corps). 4 May 1945. NARA, College Park. Prosecution exhibit number P-34, M1204, Roll 11.

For field investigations such as this, speed was still a primary characteristic for several reasons. From a forensics perspective, it was absolutely crucial that the entire camp be kept as untouched as possible. Of course, this was practically impossible to do when the site was still occupied by former inmates. Furthermore, not only was the war still on-going in the last weeks of April, but US forces were still uncovering new camps.[180] As critical as it was to conclude investigations quickly—for the sake of evidence—new leads required the small war crimes branch to continuously be on the move. Finally, speed was also a concern when trying to apprehend suspected war criminals. As Flossenbürg was effectively abandoned prior to liberation, the

[180] Mauthausen was liberated on 5 May 1945 and Ferencz personally made the drive out to investigate it. See Jardim, *Mauthausen Trial*, pp. 63–68.

perpetrators had either been captured on the evacuation route or fled before encountering US forces. It was crucial to maintain close communication and cooperation between investigation teams.

One particular strategy that Ferencz often utilized while investigating the camps was to employ former prisoners as assistants; not only did they know the ins-and-outs of the grounds, but they could also be used as translators. The first task was to collect all remaining physical documents for evidence. The SS had destroyed most of the camp records prior to evacuation but miraculously, the entire eight-volume collection of the so-called "Number Books"[181]—inmate lists that recorded such information as prisoner category, date of arrival, and date of death (when applicable)—had been secretly hidden by prisoner-functionaries during the chaotic last few days. Now recovered, Ferencz had several former prisoners work on tabulating the data. Others were tasked with writing a complete history of the camp, making a list of all SS personnel, and taking eyewitness statements from those still convalescing in the hospital.[182] Emil Ležak was one of these individuals.

Yet, despite such a coordinated effort to collect evidence, inter-prisoner grievances were soon brought to the attention of Ferencz. It was quickly made plain that not all prisoners were treated equally as fellow or even legitimate victims. The default "camp commander" of the post-liberation prisoner community was a Russian military captain who had been imprisoned in Flossenbürg for several years.[183] According to Ferencz' report, the captain wasted little time before he requested action from the Americans concerning the "problem of the homosexuals."[184] He claimed that many prisoners engaged in rape, that "homosexuality was rampant," and wanted to know how the US Army planned to punish the offenders. Ferencz acknowledged that the accusations were against American law but added that "punishing those already punished prisoners for things they did while on the verge of death would do no good to anyone."[185] Moving to the next issue, the Russian captain stated that several men among the liberated were actually former *Wehrmacht* soldiers or Gestapo agents who had been sent to Flossenbürg on suspicion of various crimes against the Reich. For this, Ferencz ordered a list of the corresponding names and promised

[181] The first volume recorded 7,000 names between 1938 and 1944. The other seven books (two of which recorded women) were used from 1944 to mid-April 1945. Fritz, *Flossenbürg Concentration Camp*, pp. 256-257.
[182] Ferencz, "Flossenbürg Report," p. 5.
[183] Ibid, p. 4
[184] Ibid, pp. 4–5
[185] Ibid, p. 5

that the suspects would be detained as POWs. Satisfied with the response, the Russian captain raised one last concern. He explained that "[m]any of the prisoner guards had been recruited from the prisoners themselves. These 'Trustees' had been even more brutal than the SS men. What was to be done about them?"[186] Ferencz recalled that his initial response was to treat them as standard war crimes suspects—witnesses were encouraged to make sworn statements on the behalf of the accused. However, it quickly became clear to Ferencz that the concepts of victim and perpetrator were neither mutually exclusive, nor could they be so strictly defined.

Two prisoner-functionaries in particular were implicated by several individuals of committing murder; one was accused of beating to death a fellow inmate and the other was alleged to have tortured and killed multiple prisoners in the infirmary. Upon bringing the accused in for questioning, Ferencz learned that the suspects had themselves been prisoners in the camp for six and four years, respectively, and that they likely sought to curry favor with the SS by mistreating others. "What punishment does that man deserve?"[187] Ferencz asked rhetorically in his report. He further noted that under normal circumstances, such behavior would be punished according to the law,

> …but in a context where murder is as common as eating how responsible is a persecuted victim who does only what he sees being done day in and day out? Can we apply the values and standards of a civilized world to people who have been subjected to a murder camp for 4 or 6 years? I could not decide that problem on the spur of the moment, so I placed both men in fairly comfortable jail cells in the camp itself, to await further judgement.[188]

Not only did Ferencz recognize the violent culture of the concentration camps and the psychological damage that prisoners endured as a consequence, but the issue was so great that he felt obliged to include it in his report.

The investigation team stayed in Flossenbürg for just under a week, collecting evidence and statements, before inevitably moving on to the next most recently discovered site. In a letter home, dated 1 May 1945, Ferencz spoke candidly on the few perks of the job, emphasizing the irreverence of his actions. Ferencz indulged himself by taking his quarters in the private apartment of former Flossenbürg commandant, Max Koegel. He recalls sleeping in the commandant's bed, wearing his robe and slippers, and taking a hot bath with his "inferior German bath salts."[189] It was

[186] Ferencz, "Flossenbürg Report," p. 5.
[187] Ibid.
[188] Ibid.
[189] Ferencz, "Letter to Trudy-Somewhere in Germany, 1 May 1945," RG-12.001.03.01, Box 3.

not lost on Ferencz that all this luxury was "only a stone's throw away" from the "miserable contaminated shacks" of Flossenbürg. Ferencz also noted that it had been a busy day at the camp. The remaining survivors (who weren't still bedridden) organized a liberation celebration, deliberately falling on the first of May. Led by the Soviet Communist POWs, the prisoners grouped themselves by nationality and paraded about the camp yard with their nation's flags and gave "long winded" speeches from a makeshift stage in the middle of the central roll call square (*Appelplatz*). Flags of the liberators were accompanied by painted portraits of Stalin, Churchill, and Roosevelt.[190] The event presents the stark paradox between reclaiming one's identity while simultaneously perpetuating the arbitrary categorization of prisoners by their former captors. On one hand, flying the flag of one's nation symbolically reestablished the respective country's sovereignty from Nazi occupation. On the other hand, not all prisoners were persecuted on a national basis. The surviving Jewish prisoners marched without a flag of their own. When Ferencz asked why they weren't marching as citizens of Poland or France or the Soviet Union, he was told, "No, no, the Jews, they're separate…"[191]

[190] Ferencz, "Letter to Trudy -Somewhere in Germany, 1 May 1945."
[191] Ferencz interview, RG-50.030.0269, USHMM, tape 4 of 7.

6. The speaker's platform for the liberation ceremony on the roll call square in Flossenbürg, containing images of Stalin, Roosevelt and Churchill with the inscription "Thanks to Our Liberators". Unknown (US Army Signal Corps). 1 May 1945. NARA, College Park. RG- 338 (Cases Tried), Box 503. File 000-50-46.

Ferencz' educational background in international law and war crimes provided him with a critical forensics eye when touring the crime scene. His work in processing reports of alleged atrocities instilled in him an effective method of speed and resourcefulness when collecting information. Ferencz would later make an appearance at the Flossenbürg trial to authenticate some two dozen photos of both the death marches and the *Hauptlager*.[192] And many of the witnesses he interviewed would later testify against multiple defendants for the prosecution. But it is Ferencsz' private records that are so significant to understanding the mental and emotional strain that investigators faced when confronted with the camps. His contemporaneous personal diary and correspondences illustrate an intensely honest response to his experiences. In particular, Ferencz expressed critical nuance and sincere empathy with all the victims of Flossenbürg when he reserved making immediate judgment against prisoners who had been accused of various atrocities and transgressive behaviors by their fellow inmates. He recognized the coercive pressures that existed in the camp, which, through desperate circumstances, often manifested in violence and abuse. In his writings are vestiges of what Primo Levi has so famously described at the "Gray Zone," where the "hybrid class of the prisoner-functionary constitutes its armature and at the same time its most disquieting feature… where the two camps of masters and servants both diverge and converge."[193]

The Reid Report

On 21 June 1945, Investigator-Examiner Lieutenant John Reid submitted an astoundingly brief six page "Report on KL Flossenbürg," based on the field investigations that took place between 25 April and 2 May 1945. Despite the brevity of the report itself, it was accompanied by an extensive appendix which compiled more than two dozen witness statements (including Ležak's), some thirty photographs, and a suspect list of 116 names. The complete file, collectively labeled 2309-PS, was almost two hundred pages in length and directly guided the prosecution's case. However, Reid's report was at times inaccurate and biased. Interestingly, the presence of subtle inaccuracies

[192] Ferencz authenticated prosecution exhibits 25 to 47. Ferencz, M1204, *Becker Trial*, Roll 3, pp. 1402–1411.
[193] Primo Levi, *The Drowned and the Saved*, (New York: Summit Books, 1988) p. 42

and embellishments appears to have been a pattern, as Tomaz Jardim has identified nearly the exact same practice in the primary investigation report for the Mauthausen case.[194]

The report begins by briefly outlining the general practices of abuse and murder of Allied nationals (both civilians and POWs), the unsustainable living and working conditions at the camp, and the deliberate starvation and malnutrition of prisoners by their captors. It then goes on to explain the methodology of using interpreters to obtain sworn statements by eyewitnesses, as well as the protocols employed in photographing the scenes. The subsequent "Summary of Facts" delves deeper into the history and structure of Flossenbürg. The report then gives attention to the perpetrators before providing its conclusions.

According to the report, Flossenbürg was founded in 1938 as a camp for political prisoners, with the first transport arriving in April 1940. From there, population numbers steadily increased to include Allied nationals from all over Europe, as well as the United States and Great Britain.[195] Flossenbürg's expansive subcamp network oversaw "outer-commandos" for both men and for women."[196] The report also alluded to Flossenbürg's systematic extermination practices, proclaiming that,

> Flossenbürg Concentration Camp can best be described as a factory dealing in death. Although this camp had in view the primary object of putting to work the mass slave labor, another of its primary objectives was the elimination of human lives by the methods employed in handling the prisoners [...] The system set up at this camp seemed to be one of mass elimination of the prisoners caused by devious means."[197]

In listing more than a dozen various abuses and killing methods, the report explicitly mentioned that "spite killing of Jews were common." Anecdotal events of particular cruelty include Christmas in 1944, when several prisoners were hanged from a gallows, which was backlit by a fully decorated Christmas tree. Another occasion of mass murder involved thirteen American or British parachutists who were captured and brought to Flossenbürg, where they were subsequently hanged in quick succession. While the camp was "controlled and run by one class of people, SS troops," they were, however, assisted by,

[194] The Mauthausen report was drafted by Maj. Eugene S. Cohen, between 6 May and 15 June 1945. See Jardim, *Mauthausen Trial*. p. 72–80
[195] John J. Reid, "Report of Investigation of War Crimes" (Hereafter *Report*), 6 pages, M1204, Roll 1, pp. 2-3.
[196] Reid, *Report*, p. 3.
[197] Ibid.

> a few civilian prisoners, who managed to gain favor with the SS by carrying out orders of execution and beatings upon their fellow inmates [...] these prisoners who obtained their immunity and privilege at the cost of other men's lives are deemed equally as guilty.[198]

The report continues, on 20 April 1945, just three days before the camp was liberated, some 15,000 prisoners were forcibly marched in the direction of Dachau. No provisions were made for food or sleeping, and thousands were executed along the way, leaving a trail of exposed corpses and shallow mass graves. The convoy was ultimately liberated by American forces near the towns of Cham and Roding. In total it is estimated that more than 29,000 prisoners died as a direct result of imprisonment at Flossenbürg. The report concluded "that the exploitation, killing and atrocities committed upon prisoners was a part of a well-regulated scheme or/plan of the NAZI SS GROUP, is clearly indicated by the evidence presented here and resulted in the death of thousands."[199] It insisted that Flossenbürg witnessed all forms of Nazi brutality and that practically every nationality in Europe was represented, particularly Russians and Poles, who made up the majority of the prisoner demographic.[200]

The various misrepresentations aside (Flossenbürg was categorically *not* established to hold political prisoners, and the earliest inmates arrived in May 1938), Reid's report closely parallels how Jörg Skriebeleit has come to characterize the US Army Signal Corps photographs—taken during the initial investigations at Flossenbürg—as purposefully graphic.[201] The base function of these investigations was to provide a forensics-like survey of the crime scene; an inventory for the casefile. In practice, however, Skriebeleit states that,

> The photos are not pure images immediately after the liberation, but representations that were created in real time for what was thought to be the camps, or what the photographers defined as their visual characteristic. The choice of motifs and perspectives in the photographs express attitudes that, on the one hand, reveal the stunned Allied view of the evidence of the crimes. In addition, they also speak of the search for the most impressive forms of expression of what has been seen.[202]

[198] Ibid, p. 5.
[199] Ibid, p. 6.
[200] Ibid.
[201] Skriebeleit, *Erinnerungsort Flossenbürg*, pp. 58–59. See Illustration 7.
[202] Ibid.

7. Pile of corpses, stacked outside the oven-room in the crematorium at Flossenbürg Concentration Camp. Signal Corps photo, no date, NARA, RG 208-AA—*Prints: Allies and Axis, 1942-45*, Box 129.

The photographers, distracted by the "mountains of corpses" (*Leichenberge*),[203] consequently allowed their disgust and anger to dictate what was deemed relevant for documentation. This interpretation can be applied in nearly equal measure to the Reid Report. Based on dozens of statements made by the victims themselves, the report included multiple heinous anecdotes that provide little more than shock value. The two mass hangings referred to above clearly exemplify this. Naturally, the alleged execution of Western Allied POWs was extremely important to prosecutors, not least of which was to identify the victims for their families. Despite the evidence only amounting to hearsay, the event was still prioritized in the brief. Equally as symbolic, though also relatively negligible within the larger purview, was the Christmas hangings in December 1944. According to multiple sources, it was not uncommon for the SS staff to erect a *Weihnachtsbaum* each season. It is hard to say whether it was simply a cynical joke or if the SS personnel genuinely overlooked the cruel irony. The decorated tree stood at the entrance to the prisoner's camp, greeting those who returned each day from their forced labor details. In 1944, prisoners returning home were confronted once again with a fully decorated tree. Yet this time, a large wooden gallows stood, from which, between several lifeless bodies hung in silhouette, before the illuminated tree. This powerful visualization *is* the point, clearly evoking deep emotions from

[203] Ibid, p. 60.

the majority Christian prosecutors, who would go on to reference the event at the trial in their opening statement. These two anecdotes, indeed powerful displays of the wanton brutality observed at Flossenbürg, are nevertheless snapshots of isolated events within a larger system of violence that characterizes the concentration camps. As such, they did little to illustrate the larger scope of Nazi atrocities.

For much of its operational life, Flossenbürg had occupied a modest, yet integral position within the domestic Nazi concentration camp system. By 1945, however, as Germany continued to cede more and more territory, its role had increased exponentially in importance. At the Third Reich's eleventh hour, Flossenbürg became the last central transit hub for evacuation transports working their way further south to Dachau. This was largely a result of the camp's increased strategic positioning (vis a vis the ever-encroaching front lines) and ambivalent decision-making from SS leadership at multiple levels. The combination of the two produced a series of ad hoc schemes that ultimately did little else than contribute to more unnecessary death. Had Himmler maintained his pledge to surrender the camp and its contents upon Allied arrival, thousands of lives lost on the death marches may have been spared. The last-minute decision to evacuate and the logistical schemes to make it happen, however, would go on to directly influence the entire disposition of the corresponding war crimes trial one year later.

While the leadership waffled over what steps to take, American forces continued to make ground. By the time the decision was made to evacuate the entire camp, US troops were just a few kilometers away. There was no other alternative than to head out on foot. This posed a new logistical issue for Commandant Koegel. At the time when surrendering the prisoners at the *Hauptlager* was still expected, hundreds of SS departed by train with the 16 April transport, presumably looking to avoid a confrontation with the US Army. When plans were changed, however, the SS guard had diminished to a level that would not be able to maintain order over thousands of prisoners in an open environment. The *Lagerpolizei* would therefore step in to fill the gaps.

Upon liberation of the marching columns, the hundreds of prisoner-functionaries who were deputized as armed guards were automatically constituted as potential war crimes suspects, particularly given how deadly the transports became. Prosecutors therefore had an increased impetus to pursue these individuals at a much greater rate than functionaries from camps that did not initiate such a scheme. That's not to suggest that any one of these individuals were innocent,

but rather that they were the ones caught at the time of liberation. Nearly the entire Flossenbürg SS leadership that was supervising the marches (including both Commandant Koegel and his adjutant Baumgartner) had successfully evaded capture. Of the fifty-two individuals originally indicted in the Flossenbürg parent case, sixteen were former prisoners, and all but one of them had been drafted into the *Lagerpolizei* and participated in the evacuations. The Dachau and Mauthausen parent cases, by contrast, only prosecuted three prisoner-functionaries each.

The atmosphere at the Flossenbürg *Hauptlager* immediately after liberation was a broad mix of intense emotions and the three voices above, all of which informed the prosecution's case, offer an intriguing juxtaposition to consider. The timing at which Emil Ležak began drafting his report expresses the lucid and motivated state of mind that some prisoners possessed. Ležak had been an important prisoner-functionary in Flossenbürg and through his work obtained a wealth of valuable knowledge on the entire administrative framework, including the expansive subcamp network. He observed how the paradox of the ideological system of dehumanization and destruction worked against the financial motivations of the SS. As well, Ležak illustrated daily life in the camp as a prisoner and recalled particularly horrific events in stark detail. But having included a list of names of the perpetrators, Ležak's report was indeed an indictment. Whether he had expected a criminal trial or summary execution, he actively contributed to the pursuance of justice. Ležak was exactly the type of prisoner investigators were looking for to include in their report and was later selected to testify for the prosecution.

Then there was Ben Ferencz, whose investigative and legal expertise were excellent, but nevertheless tempered by nuanced observation and an empathy for the victims, regardless of their transgressions while in the camps. His stoic approach allowed him to do his job quickly and effectively, even if his interrogation techniques were not always legitimate. With regard to the Flossenbürg trial, Ferencz' investigations, both in the camp and along the death march routes, were significant pieces of evidence. Yet, his personal reactions to what he observed were never communicated at the trial. Ferencz later claimed that he could put up an "ice barrier" to protect him from his own emotions, but the pain and anger, as well as his ability to contextualize the environment of the concentration camps, is legible in his private writings. His interactions with the survivors at Flossenbürg illustrate the toxic inhumanity that permeated the camps. Such critical distinction, however, would be jettisoned from the trial and replaced with malicious social stigmatization.

Both Ležak's statement and Ferencz' investigation files were incorporated into the annex section of the Reid Report. In fact, pieces of both can be found within the six pages of Reid's own synopsis. However, those segments consist almost entirely of the most shocking visualizations. The heaps of corpses waiting to be cremated and the notion of men hanging before a Christmas tree are hard to ignore, but these are anecdotal pieces within a much larger system of destruction. That is what both Ležak and Ferencz had communicated in their respective accounts, however, neither would be able to convey in the courtroom. The prosecution would indeed utilize these two individuals for their case, but their testimony would be guided by how their accounts were filtered through the lens of Reid's report.

Chapter 2: Judicial Structure and Legal Strategy

Having traced the chaotic final weeks of Flossenbürg concentration camp, as well as the subsequent liberation and war crimes investigations, it is equally necessary to identify the structural and legal advancements that made prosecuting the camps possible. This chapter will take the American perspective and follow the international collaboration on determining how to hold Germany accountable for its alleged atrocities. It will consider the US domestic debates over how to punish the scores of 'lesser' war criminals that fell under its post-war territorial jurisdiction and the establishment of the Military Government Courts program at the former Dachau concentration camp. It will also analyze how the Army's brightest legal experts developed the legal strategy of common design over the course of multiple trials.

By the time the Flossenbürg trial commenced in June 1946, the Dachau and Mauthausen parent trials, each yielding a 100 percent conviction rate, appeared to have perfected the common design charge to near flawless efficiency. Chief prosecutor William Denson had reinforced the strategy through what he called the cross-section indictment—a meticulous selection of suspects that represented the entire spectrum (or cross-section) of the camp-administration. As well, he resigned to withhold graphic details before the court had been properly "conditioned." This collection of tactics all came together to generate a comprehensive methodology that was essentially foolproof—so much so, that Denson retired just as the Flossenbürg trial was about to start. It is therefore argued here that the Flossenbürg prosecution team had all the necessary legal tools and judicial precedent to repeat the successes of its predecessors.

2.1 Uniting Nations

2.1.1 The Declaration of St. James' Palace and the Establishment of the United Nations

Before the United States entered the war, the country was struggling with an intense domestic debate over whether or not it should engage with European affairs. The shared release of the *Atlantic Charter* between President Roosevelt and Prime Minister Churchill on 14 August 1941 demonstrated the White House's position on supporting Allied efforts against "Nazi tyranny",

however, it kept a safe distance from making any material threats.[1] Meanwhile, Europe was also struggling to confront Germany as a collective group.

Reports of barbaric German aggression in Poland began surfacing in early 1940. The Polish government-in-exile called on the British and the French to support its cause to denounce the alleged war crimes and to threaten punishment to the perpetrators.[2] The outcry increased as Hitler surged through western Europe, but few nations were interested in making any consequential responses. Not until Germany invaded the Soviet Union in June 1941 did the international community begin to speak with one voice. By the end of the year, nine nations-in-exile established the *Inter-Allied Commission on the Punishment of War Crimes* and began lobbying others to join in drafting an official declaration.[3] With a little encouragement, Britain and the Soviet Union agreed to attend the summit, scheduled for January 1942.

The Commission was optimistic of US participation, given its own recent independent condemnation of Germany.[4] Delegates from Poland invited the Americans to take part, but Secretary of State Cordell Hull declined the offer in late November, responding, "as the President's statement of October 25 was made independently, we do not now wish to associate ourselves in a joint undertaking of any kind protesting violence against civilians in occupied countries."[5] The Japanese bombing of Pearl Harbor on 7 December changed everything. Isolationist views were largely abandoned by the public as everyone rallied in support of a military response. The following day, Congress approved Roosevelt's request to declare war on Japan. On 11 December,

[1] "Atlantic Charter", The Avalon Project, Yale Law School. https://avalon.law.yale.edu/wwii/atlantic.asp. Accessed April 2021. For a reproduction of the Atlantic Charter and commentary on America's pre-war attitudes, see Plesch, *America, Hitler and the UN*, pp. 11-29. For a collection of academic analysis on the Atlantic Charter, see Douglas Brinkley and David R. Facey-Crowther, eds., *The Atlantic Charter* (New York: Palgrave Macmillan, 1994).

[2] The Polish government-in-exile was among the first groups to call attention to Nazi atrocities in 1940. A year later, Russia added to the growing reports of brutalities. It wouldn't be until 1942, however, that reports of the extermination program of Jews could no longer be ignored. Jardim, *Mauthausen Trial*, p. 11.; Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, NC: University of North Carolina Press, 1998) p. 7.

[3] The nine participating nations-in-exile were Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland, and Yugoslavia. United Nations War Crimes Commission (UNWCC), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty's Stationery Office (HMSO), 1948) p. 89.; Yavnai, "Military Justice", p. 61.

[4] On 25 October 1941, Roosevelt made a public address after Germans shot 50 hostages in Nantes, France four days earlier, as retribution for the assassination of regional *Wehrmacht* commander, Lieutenant Colonel, Karl Hötz. Roosevelt declared that "Frightfulness can never bring peace to Europe. It only sows the seeds of hatred, which will one day bring a fearful retribution." Statement by the President, 25 October 1941. Quoted in Kochavi, *Prelude to Nuremberg*, p. 15. See also; Martin Gilbert, *The Second World War: A Complete History* (New York: RosettaBooks, 2014) loc. 254-255 of 950, eBook.

[5] Kochavi, *Prelude to Nuremberg*, p. 19.; Yavnai, "Military Justice", p. 62-63.

the US extended its declaration of war to Germany and Italy. With America now fully engaged militarily, Poland inquired a second time, to which Hull authorized US ambassador to the Polish government-in-exile Anthony J. Drexel Biddle Jr. to attend, albeit with instructions to refrain from any direct association with the declaration.[6]

On 13 January 1942, the *Declaration of St. James's Palace* was signed by the nine European nations-in-exile, making it the first internationally supported document to directly condemn Germany of war crimes[7] and forthrightly demand "punishment, through the channels of organized justice."[8] The occupied nations of Europe were desperate to loudly signal retribution for Germany's apparent lawlessness. Undercutting its precedent, however, the St. James Declaration was only passively endorsed by its host, Great Britain, as well as the United States, the Soviet Union, China[9] and the Dominions (Australia, Canada, New Zealand, the Union of South Africa, and India), who each sent delegates as mere observers.

Despite their restraint in making any substantive commitments in public, Roosevelt and Churchill had already been leading a campaign to form an international coalition of Allied countries to collectively fight the Axis powers. Their efforts ultimately resulted in the establishment of the United Nations (UN).[10] Signed on 1 January 1942 (two weeks prior to the meeting at St. James's Palace), the "Declaration by United Nations" committed each of the original twenty-six signatories to a unified victory over the Axis Tripartite and their allies, through military

[6] Ibid.

[7] The Anglo-Franco-Polish declaration (published 18 April 1940) was the first international denunciation of war crimes attributed to Germany. Due to reservations by the British and French governments, however, the declaration consciously stopped short of making any commitments as to retributive punishment. Kochavi, *Prelude to Nuremberg*, p. 8. On 25 October 1941, President Roosevelt and Prime Minister Churchill each issued non-binding statements of condemnation of German brutality towards "scores of innocent hostages" and referenced "retribution". Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, (New York: Alfred A. Knopf, 1992). p. 25.

[8] The contributing signatories included representatives of Allied governments-in-exile from German occupied nations. Kochavi, *Prelude to Nuremberg*, pp. 19-20. Sigel, *Im Interesse der Gerechtigkeit*, p. 12.

[9] China later formally gave its support. The remaining 'major' Allied nations never did. Daniel Plesch, *Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes* (Washington, DC: Georgetown University Press, 2017). p. 71.

[10] On 1 January 1942, twenty-six nations formally endorsed the Atlantic Charter (14 August 1941) via Joint Declaration, pledging full military and economic support in defeating the Axis powers, thus laying the foundations for the United Nations. Daniel Plesch, *America, Hitler and the UN: How the Allies Won World War II and Forged a Peace* (London: I. B. Tauris, 2011). p. 34.

and economic measures. Based on the eight points of the Atlantic Charter,[11] the UN Declaration did not stipulate any details on punishment.[12]

In the meantime, ever more credible reports of horrific atrocities by Germany continued to test the hitherto ambivalent public posture on retribution by the major Allied governments. By summer, with heavy pressure from the governments-in-exile to start investigating cases of war crimes, preliminary steps were indeed being taken.[13] The timing had not been coincidental. In early August 1942, credible evidence of the "Final Solution" had reached Washington.[14] Whatever preliminary discussions that were presented, concerning the possibility of punishing Germany, began to coalesce.[15] On 21 August, Roosevelt declared,

> When victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe and Asia. It seems only fair that they shall have to stand in courts of law in the very countries they are now oppressing and answer for their acts.[16]

Churchill and Stalin echoed the President's message on 8 September and 14 October, respectively.[17] Putting their words into action, President Roosevelt and British Lord Chancellor Sir John Simon both released statements on 7 October, proposing the establishment of a UN-mandated Commission for the Investigation of War Crimes to identify relevant suspects and to collect and organize evidence[18]—the precursor to United Nations War Crimes Commission (UNWCC). The Soviet Union initially showed interest in joining, provided each of its sixteen republics were given independent membership. When the commission rejected the proposed

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[11] "Atlantic Charter, 14 August 1941." https://avalon.law.yale.edu/wwii/atlantic.asp Accessed April 2021.
[12] The original 26 signatories included: the United States, the United Kingdom, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, Yugoslavia. See, "Atlantic Charter," 14 August 1941."
[13] Yavnai, "Military Justice," p. 65.
[14] For a history of the chain of events that informed the US to the Holocaust, see Arthur D. Morse, *While Six Million Died; a Chronicle of American Apathy* (New York, Random House, 1968) p. 3–23.
[15] Churchill had been floating the idea of the commission to investigate war crimes since June 1942. Kochavi, *Prelude to Nuremberg*, p. 27-28.
[16] UNWCC, *History of the United Nations*, p. 93.
[17] Ibid, p. 94.
[18] Taylor, *The Anatomy of the Nuremberg Trials*, p. 26. Lord Chancellor Simon characterized the commission's intended purposes, "to investigate war crimes committed against nationals of the United Nations, recording the testimony available, and to report from time to time to the Governments of those nations cases in which such crimes appear to have been committed, naming and identifying wherever possible the persons responsible." M. E. Bathurst, "The United Nations War Crimes Commission," The American Journal of International Law 39, no. 3 (1945): 565–570. p. 568.

preconditions, the Soviets withdrew and established their own "Extraordinary State Commission for the Investigation of Crimes Committed by the German-Fascist Invaders and their Associates" in November 1942.[19]

2.1.2 The United Nations War Crimes Commission

On 17 December 1942, the UN publicly confronted reports of German atrocities against Jews.[20] It released a scathing Joint Declaration, condemning Germany "in the strongest possible terms the bestial policy of cold-blooded extermination." It acknowledged Hitler's efforts in turning Eastern Europe, and Poland in particular, into a "slaughterhouse" of Jewish slave-labor, starvation, and deliberate mass-execution—what is now referred to as the Holocaust—and ended in unequivocal prose, "those responsible for these crimes shall not escape retribution."[21] Back in Washington, Roosevelt spent the first months of 1943 lobbying Congress to support his petition to pursue retribution.[22]

A year after initial proposals, the UNWCC[23] was officially established on 20 October 1943 at the London Foreign Office, in the presence of the sixteen participating government representatives.[24] The UNWCC would operate behind the scenes as the legal-advisory arm of the UN and central hub for exchanging information on prisoners and evidence.[25] The Commission was

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[19] Yavnai, "Military Justice", p. 66-67. For more on the disputes between the Soviet Union and the Western Allies concerning the UNWCC, see Kochavi, *Prelude to Nuremberg*, pp. 36-54.

[20] As early as August 1942, the Allies had begun receiving credible and detailed information on the Nazi extermination program of Europe's Jews, being carried out in Poland. Despite the evidence, Washington maintained a position of caution before publicly acknowledging the allegations. See Arthur D. Morse, *While Six Million Died; A Chronicle of American Apathy* (New York: Random House, 1968) pp. 3-14.

[21] The declaration was issued in the US by State Department and reprinted in full by the *New York Times*. "11 Allies Condemn Nazi War on Jews," *The New York Times*, 18 December 1942, pp. 1; 10. See also, Jardim, *Mauthausen Trial*, p. 12. In his memoir of the Nuremberg Trials, Telford Taylor recalled that in spite of being "front-page news, it made astonishingly—indeed shamefully—little impact on the public mind." Taylor added that he did not become aware of the Holocaust until the Nuremberg Trial. Taylor, *The Anatomy of the Nuremberg Trials*, p. 26.

[22] On 9 March 1943, the 78th Congress declared its commitment to hold the guilty accountable "in a manner commensurate with the offenses". Yavnai, "Military Justice", p. 70.

[23] In 1948, the British government commissioned an official history of the UNWCC. Just shy of six hundred pages, the publication is indeed a comprehensive anthology that places the organization and its activities within the larger historical context of international laws of war in the modern era. UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948).

[24] The participating representatives consisted of highly capable consortium of distinguished lawyers, judges and diplomats from Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, the United Kingdom, the United States of America, and Yugoslavia. Bathurst, "The United Nations War Crimes Commission," p. 568. For more information on the respective individuals and their accolades, see Plesch, *Human Rights after Hitler*, pp. 55-56.

[25] Ibid, p. 49.

The first meeting of the UNWCC took place in London on 11 January 1944. Taylor, *The Anatomy of the Nuremberg Trials*, p. 26. See also, Plesch, *America, Hitler and the UN*, Chap 5.

also authorized to recommend methods on capture of suspects as well as provide guidance in the development of trials and tribunals.[26] The groundwork, however, was to be exclusively performed by "official agencies best suited to conduct the investigations within the national boundaries and according to the laws of each country."[27]

In theory, this structure not only offered an efficient approach to investigating war crimes—and when the time came, prosecution—but also prevented the centralized international commission from assuming the domestic enforcement duties of the respective nations and overreaching its jurisdiction in sovereign territory. In practice, however, the UNWCC has been criticized for being considerably handicapped, many insisting that it had minimal political leverage.[28] What's more, Great Britain and the United States apparently viewed the Commission as a convenient tool to indulge the governments-in-exile while they continued to waffle over the very issue of prosecuting war crimes.[29] It appears that competing visions on the scope and function of the Commission ultimately contributed to the UNWCC's reputation of limited power.[30]

Operating during a time of extreme volatility, shifting occupational jurisdictions, and under a coalition with a less-than completely unified relationship with the Soviet Union, the perceived impotence of the UNWCC has been largely mischaracterized. Indeed, the UNWCC carried out its mandate on a shoe-string budget and with a small number of direct staff,[31] but as Dan Plesch has noted, the Commission was always meant to play an advisory role.[32] A primary source of frustration was that the UNWCC was not prepared to conduct investigations on its own. As the governments-in-exile were greatly under-resourced themselves, the burden of investigation largely fell onto the British and American forces,[33] both of whom were naturally more concerned with investigating crimes against their own citizens.

[26] Bathurst, "The United Nations War Crimes Commission," p. 568-569.
[27] Ibid, p. 569.
[28] Taylor, *The Anatomy of the Nuremberg Trials,* p. 26. Jardim, *Mauthausen Trial*, p. 13. See also, Kochavi, *Prelude to Nuremberg,* pp.133–1334 Yavnai, "Military Justice", pp. 75-–76.
[29] The stated ambivalence was caused by US and UK fears of German retaliation over an explicit pursuance to punish war criminals. Also, the two nations were reluctant to commit themselves to an ever-expanding trials program. Jardim, *Mauthausen Trial*, p. 13.
[30] Lord Wright is quoted to have said that the UNWCC was not given the jurisdiction to carry out "actual detective investigation of war crimes." Yavnai, "Military Justice", p. 75. Telford Taylor also expressed frustration in what was expected of the UNWCC and what it could accomplish. Taylor, *The Anatomy of the Nuremberg Trials*, p. 27.
[31] The total operational budget for the UNWCC was a mere £1.7 million (or $2.6 million). Plesch, *Human Rights after Hitler,* p. 50.
[32] Ibid.
[33] Taylor, *The Anatomy of the Nuremberg Trials,* p. 27

When it came to developing the courts, the UNWCC utilized its international team of legal experts to consider a wide range of jurisdictions and legal systems.[34] For instance, Commission members debated such critical issues as: whether initiating an aggressive war could be categorized as a crime of international law; how to hold a nation accountable for atrocities against its own citizens (later specified and prosecuted as crimes against humanity); what to do about violations with no physical crime scene; and determining the extent of war crimes motivations (i.e. racial, political and/or religious grounds).[35] With respect to the most vulnerable of member-states, the UNWCC actually provided them with a substantial collective voice.[36] The Commission was not without its faults, but this central office was nevertheless able to accumulate reports from dozens of nations on five continents, during an active war and completely out of sight of the public.[37]

2.1.3 The Moscow Declaration

Despite the Soviet Union's contentious refusal to join the UNWCC, Stalin nevertheless presented a unified approach to the public when it came to developing a system to punish war criminals.[38] In fall 1943, the foreign ministers of the Big Three came together in Moscow to draft the "Declaration of Atrocities," which was then signed by Roosevelt, Stalin and Churchill on 1 November.[39] Subsequent to the passive endorsement of the Saint James Declaration, the so-called Moscow Declaration was the only substantive accord, signed prior to the end of the war, between the major Allies promising to hold Germany accountable.[40] The document specified two approaches to the punishing of war criminals, following a German surrender. The first stipulated that,

> ...German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be

[34] Plesch, *Human Rights after Hitler*, p. 50. In 2017, Plesch gained unprecedented access to previously restricted UNWCC material. For a background on accessing the notoriously closed-off archive of the UN in New York City, see the Acknowledgments section, pp. xv-xvii.
[35] Taylor, *The Anatomy of the Nuremberg Trials*, p. 27. See also, Bradley F Smith, *The Road to Nuremberg* (New York: Basic Books, 1981) p. 18.
[36] Smith, *Road to Nuremberg*, p. 10.
[37] The UNWCC approved its first indictments and charge-files from member-states in February 1944. Between 1944 and 1948, the commission was directly involved in over eight thousand cases involving some thirty-six thousand individuals. Plesch, *Human Rights after Hitler*, pp. 46, 212.
[38] Kochavi, *Prelude to Nuremberg*, p. 49-57.
[39] The Declaration was the result of a conference between foreign ministers V. W. Molotov (Soviet Union), Anthony Eden (Great Britain) and Cordell Hull (America) from 19-30 October 1943. The Chinese ambassador to Moscow Foo Ping-Sheung also participated in the conference. For the text, see "Declaration on German Atrocities", 1 November 1943, NARA, RG 549, Cases Tried, Box 298.
[40] Kochavi, P*relude to Nuremberg*, p 57.

> sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein.[41]

Thousands of these so-called "lesser" war criminals would later be charged in multiple national military commissions including the US Military Government Courts at Dachau. The second provision proclaimed that "...German criminals whose offenses have no particular geographical localization... will be punished by joint decision of the government of the Allies."[42] This included high-ranking Nazi policy makers—so-called "major" war criminals—and would ultimately materialize as the International Military Tribunals at Nuremberg (IMT).

Nearly two years had passed since the United States entered the war. In that time, however, the military dominance of Hitlers *Wehrmacht* had all but completely reversed to the Allies. As a result, pointed yet relatively empty rhetoric demanded material promises of action once Germany surrendered. The UNWCC was established to process the multitude of war crimes allegations but was limited by the ambivalent attitudes of US and UK forces to fully participate. Nevertheless, it proved to be a valuable resource to future war crimes programs for former nations-in-exile. While the Moscow Declaration was indeed the crowning achievement for Allied assurances of retribution up to this point, it still lacked specific details on exactly how and when that would take place. The Big Three would continue to make progress on how to jointly deal with the likes of Hitler, Himmler, Goering, and others of the Nazi elite; this route would evolve into the IMT. As for the scores of the lesser war criminals, it was left with each nation to decide exactly how they would prosecute.

2.2 From Summary Executions to War Crimes Trials

With little more than a mere promise to hold Germany accountable for their alleged atrocities, the Big Three had yet to determine exactly what prosecution and punishment would look like. The two competing prospects were summary executions or to develop a judicial tribunal. Throughout the remainder of the war, ideas on what to do with Nazi leadership consistently leaned towards execution.[43] But what was to be done with the tens of thousands of lesser perpetrators?

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[41] "Declaration on German Atrocities", 1 November 1943, NARA, RG 549, Cases Tried, Box 298.
[42] "Declaration on German Atrocities."
[43] The Second Quebec Conference in September 1944 ended with both Roosevelt and Churchill approving summary execution for major war criminals. Not until the Big Three met in Yalta, in February 1945, did the consideration for an international tribunal gain the upper hand. Lawrence, "Trials at Dachau." pp. 54–57.

From 28 November to 1 December 1943, the Big Three met in Tehran for what was the first summit since signing the Moscow Declaration. Over dinner, Stalin proclaimed that the general German military personnel must be executed, casually throwing out the number of 50,000.[44] When Churchill refused to support what he characterized as mass killing, Roosevelt facetiously offered a compromise of only 49,000. Outraged, Churchill excused himself from the table.[45] In spite of such flippancy over the severity of the discussion, Stalin's initial proposal does characterize the sheer number of potential war criminals for whom the Allies would soon be responsible.

Two weeks later, Stalin would directly test the two western nations' commitments to upholding the Moscow Declaration. Between 16 and 19 December 1943, a Kharkov military court prosecuted three Germans and one Russian collaborator for allegedly killing thousands of Soviet citizens by way of "gas cars."[46] All were found guilty and sentenced to death. The event, which was reminiscent of the 1930s Soviet show-trials, was made a public spectacle as the case was heard in an auditorium before an estimated 6,000 spectators, including international press.[47] While Soviet journalists promoted the trial as the "first realization" of the Moscow Declaration,[48] American and British officials were skeptical of its legitimacy and felt that its premature timing—before German surrender—had violated the spirit of the agreement. Furthermore, they were also concerned with German reprisals against their own POWs.[49] In order to maintain the impression of cooperation and solidarity, the western Allies refrained from publicly condemning the trials. Besides, the US was considerably behind in developing its own program.

Plans for Operation Overlord (the D-Day landings at Normandy) were already being laid out in earnest from January 1944[50] and US infantry forces would soon need guidance on how to engage with instances of war crimes. In the summer of that year, the War Department produced a selection of manuals on American interests in post-war Germany. The most influential was *The*

[44] Kochavi notes that there is no telling whether Stalin was actually serious about executing 50,000 Germans, but given his track record on his general value of human life towards his own citizens, as well as the Katyn massacre of 15,000 Polish officers, his sincerity cannot be ruled out. Kochavi, *Prelude to Nuremberg*, p. 63–64.
[45] Kochavi, *Prelude to Nuremberg*, p. 63.
[46] Ibid, p. 66.
[47] Ibid, p. 66-70; Lawrence, "Trials at Dachau," pp. 48–52.
[48] Edmund Stevens, *Russia is No Riddle* (New York: The World Publishing Company, 1945), p. 116.
[49] Frank M. Buscher, *U.S. War Crimes*." p. 11.
[50] Maurice Matloff, *Strategic Planning for Coalition Warfare, 1943-1944* (Washington, D.C.: Office of the Chief of Military History, Dept. of the Army, 1959), pp. 403–404.

Handbook of Military Government for Germany (September 1944).[51] Originally prepared by General Eisenhower's staff at the Supreme Headquarters Allied Expeditionary Forces (SHAEF), the *Handbook* called for the immediate arrest of some 250,000 high-ranking Nazis, including all members of the Gestapo and the *Sicherheistdienst* (SD).[52]

In Washington, Roosevelt's cabinet debated policy. Above all, was the safety of military personnel who would be tasked with governing the defeated nation. The ever-diplomatic State Department, under Secretary Cordell Hull,[53] initially saw America's occupation as a long-term project, in which Germany would eventually be reintegrated back into the international democratic community, following a comprehensive exorcism through denazification and demilitarization.[54] While the end goal seemed to hit the intended mark, no one in Washington was particularly interested in a protracted post-war American presence in Europe. The War Department, under the leadership of Henry Stimson, contrastingly promoted a quick restoration of the German economy and civil administration, as not to interfere with America's occupational obligations, nor the safety of her occupying military personnel.[55] Stimson promoted the idea of judicial due process to Nazi elites as an expression of America's moral character, while the trials themselves would inform the world to the genocidal realities of the Third Reich.

Secretary of Treasury Henry Morgenthau Jr. approached US occupation with far more suspicion towards the German people, insisting that nothing short of a complete demilitarization and deindustrialization of the country would ensure the past six years would not have been in vain.[56] He further contended that all leading figures of the Third Reich be summarily executed upon confirmation of their identity.[57] At a time when US forces were breaching the western frontiers of German territory for the first time, and the Soviets had just discovered Majdanek in

[51] The War Department also published the *Interim Directive on Occupation Procedures* in August 1944. It explicitly called for the arrest, investigation and "subsequent disposition" of leading Nazi officials and collaborators, including Hitler himself. Smith, *Road to Nuremberg*, pp. 16-17. See also, Buscher, *U.S. War Crimes*, pp. 13-16.
[52] The *Handbook* also promoted a strong centralized military administration and a restoration of the German economy, both of which would facilitate a safe and efficient occupation of the defeated nation. Curiously, the *Schutzstaffel* (SS) was not included in the blanket organization arrests, nor was the *Sturmabteilung* (SA) or the *Wehrmacht* (Army); the latter expected to be given prisoner-of-war status. Buscher, *U.S. War Crime*, p. 13; Smith, *Road to Nuremberg*, p. 17.
[53] Due to waning health issues, Secretary Hull was replaced in December 1944 by Edward Reilly Stettinius Jr.
[54] Buscher, *U.S. War Crimes*, p. 7.
[55] Ibid.
[56] Ibid.
[57] Jardim, *Mauthausen Trial*, p. 16.

the east,[58] the demand for accountability was at an all-time high. Stimson, on the other hand, continued to point out the long-term consequences of Morgenthau's short-sided approach and insisted that justice—not blind retribution—be a guiding principle in America's post-war relationship with the defeated German nation.[59]

Between August and September 1944, Stimson and Morgenthau each lobbied tirelessly to build support within Washington for their contrasting programs. The decision, however, ultimately rested with the President who had been increasingly leaning towards Morgenthau's uncompromising approach. Between 10 and 15 September 1944, Roosevelt met with Prime Minister Churchill in Quebec to discuss how the US would help prevent Britain from economic bankruptcy. He took the face-to-face opportunity and (secretly) invited Morgenthau to personally lobby the Prime Minister on his plan of "pastoralization"; the British delegation was not so easily persuaded.[60] By the end of the summit, however, the two leaders had apparently agreed on summary executions of Nazi elites (a position enthusiastically promoted by Lord Chancellor Simon[61]) and a comprehensive deindustrialization of Germany with the understanding of a US financial aid package going to Britain.[62] Roosevelt also felt that a showing of resolute strength would be taken kindly by Stalin, thereby reinforcing a positive post-war relationship. These assumptions were proven entirely misguided, however, when it became apparent that such a plan would directly interfere with the Soviet Union's intentions of recouping reparations—a bankrupt Germany couldn't possibly pay off the costs of losing the war.[63] Tomaz Jardim also calls attention to the fact that Morgenthau's punitive proposal was leaked to the press, causing public condemnation.[64] A *New York Times* front-page article, dated 24 September 1944, emphasized the controversy between the Treasury and War secretaries,

> President Roosevelt's Cabinet committee on German peace policy has split wide open … over a plan sponsored by Secretary of the Treasury Henry Morgenthau Jr. for completely destroying Germany as a modern industrial state and converting it into an agricultural

[58] Soviet forces discovered Majdanek, near Lublin, on 23 July 1944. Despite there being only 500 prisoners left behind, the camp itself remained virtually intact. Soldiers uncovered gas chambers, crematoria, storehouses full of personal items, and even unused canisters of Zyklon-B, all of which provided evidence of the entire extermination program. The *New York Times* ran a four-column editorial, with a font-page heading, on 30 August 1944. W.H. Lawrence, "Nazi Mass Killing Laid Bare in Camp" *New York Times*, 30 August 1944, pp. 1, 9.
[59] Smith, *Road to Nuremberg*, p. 48.
[60] Ibid, p. 44.
[61] Lawrence, "Trials at Dachau," 54.
[62] Smith, *Road to Nuremberg*, pp. 44-47.
[63] Buscher, *U.S. War Crimes*, p. 17.
[64] Jardim, *Mauthausen Trial*, p. 16.

> country of small farms… It has failed to win support, however, from Secretary of State Cordell Hull and is violently opposed by Secretary of War Henry L. Stimson.[65]

Never letting an opportunity pass, Nazi Minister of Propaganda Joseph Goebbels characterized the document as proof that Germany was in a fight to the bitter death.[66] Thereby forced to rethink his decision (and six weeks away from the presidential election), Roosevelt quickly warmed to Stimson's even-handed approach of judicial prosecution.

2.2.1 What Crimes to Pursue?

As the Allies initiated their campaign to invade German occupied France, the US still lacked a national policy on the investigation of war crimes and the subsequent punishment of those responsible. Furthermore, it entirely failed to appreciate the magnitude of the problem at hand.[67] Not until October 1944, did the War Department manage to devise a standardized program to effectively process relevant cases. For several months, Army field officers—none of whom were trained in law—were essentially forced to rely on their best judgments when confronted with a potential war crimes case, while simultaneously ensuring that nothing interfered with the primary mission of winning the war.[68] The preceding summer was therefore a chaotic scramble behind-the-scenes to coordinate a system of efficient investigation, evidence collection, and the arrest of suspects.[69] SHAEF quickly realized that it needed its own investigation agency to manage reports coming in from the field. On 20 August 1944, it had managed to establish a Court of Inquiry,[70] specifically tasked with investigating crimes committed against British and American nationals;

[65] "Morgenthau Plan on Germany Splits Cabinet Committee," *New York Times*, 24 September 1944. pp. 1, 8.
[66] Jardim, *Mauthausen Trial*, p. 16.
[67] Lt. Col. C.E. Straight, *Report of the Deputy Judge Advocate for War Crimes, European Command, June 1944 to July 1948*, NARA, RG 549, General Admin, Box 13, p. 3.
[68] This very issue was referenced in the concluding section of the Judge Advocate report on war crimes trials in Europe, "It is impractical to assign investigation and apprehension responsibilities to agencies already burdened with assigned primary missions. Effective combat operations are of such dominant interest to the commanders of lower commands and tactical units… during operations against the enemy that it is futile to expect under the operational control of such commands to receive effective direction and support in war crimes work." Straight, *Report of the Deputy Judge Advocate*, p. 35.
[69] Elisabeth Yavnai identified four primary obstacles that impeded progress: First, the organizational structure of SHAEF obliged the US military to coordinate its war crimes investigations with its British counterparts. Second, investigations into war crimes were never to interfere with the primary objective of defeating the Axis. Third, there was no standardized consensus between the Allies (including the UNWCC) as to the definition of exactly what constituted a war crime. And fourth, the US had yet to determine the type of court system to prosecute either major or lesser war criminals. Yavnai, "Military Justice", pp. 85-88.
[70] Straight, *Report of the Deputy Judge Advocate*, p. 14.

crimes involving other Allied citizens continued to be forwarded to the UNWCC.[71] The volume of reports became so great, however, that only "more flagrant and heinous cases" were submitted.[72] Still fearing reprisals, however, SHAEF issued a ban on prosecuting any suspects until the end of the war.[73]

After months of frustrating internal debates among the various Washington departments, an executive decision was made by Assistant Secretary of War John J. McCloy to establish a new agency—guided by the office of the Judge Advocate General (JAG)—to begin evaluating war crimes cases through a legal lens. On 6 October 1944, the United States National War Crimes Office (NWCO) was officially up and running with orders to begin processing every available source of evidence.[74] Back at the JAG offices, concerns over how to treat war crimes suspects and what to do with them upon detainment were hashed out.[75] On the ground, however, the Allies had greatly underestimated the scope of Germany's criminal activities. Two events in particular helped to bring the gravity of German atrocities into focus.

On 17 December 1944—the second day of the Battle of the Bulge—a select *Kampfgruppe* from the First *Waffen*-SS *Panzer* Army, led by Colonel Joachim Peiper, ambushed the Belgian village of Honsfeld, where American front-line soldiers were taking refuge.[76] Taken completely by surprise, the Americans attempted to fight back, but were quickly overwhelmed. More than 100 GIs were taken captive and marched past the village to a field before being indiscriminately fired upon. Few survived only by playing dead.[77] The following evening, multiple newspapers had

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[71] *Law, Order, and Security, Occupation Forces in Europe Series, 1945-1946*, NARA, RG 549, General Admin. Box 13, p. 3. See Yavnai, "Military Justice", p. 88.
[72] Straight, *Report of the Deputy Judge Advocate*, p. 15.
[73] Yavnai, "Military Justice", p. 9
[74] Ibid, p. 74-79.
[75] JAG lawyers concluded that neither the "Manual for Courts-Martial, US Army" (1928) nor the guidelines for trial, punishment and imprisonment of POWs (as stated by the Geneva Conventions), applied to war criminals. Such conclusions were later upheld by the UNWWC and in the Supreme Court ruling of Yamashita (1945). Lawrence, "Trials at Dachau," p. 86.
[76] Maj. Richard D Reynolds, "Review and Recommendations", *United States v. Valentin Bersin et al.*—Case No. 6-24, 20 October 1947, 220 pages, International Research- and Documentation Centre for War Crimes Trials at Philipps University Marburg, Germany (hereafter, ICWC), "Dachau Trials" databank, https://www.online.uni-marburg.de/icwc/dachau/000-006-0024.pdf. Accessed April 2021. See also Remy, *The Malmédy Massacre*, pp. 5-6.
[77] "Captured Americans Shot in Open Field by Germans", *New York Times*, 18 December 1944.

already begun printing the story.[78] The event, labeled the Malmédy Massacre,[79] was a particularly motivating affair for the US war crimes program.

A week later, the Department of War ordered the establishment of a dedicated war crimes branch, operating under the auspices of the European Theater Judge Advocate, to investigate and collect evidence of war crimes against all UN nationals.[80] This directive led to the creation of multiple war crimes investigation teams, which could be deployed to the field as necessary. While Malmédy increased attention toward crimes committed against American servicemen, it wouldn't be until the final month of the war that US forces encountered the concentration camps and the widespread atrocities carried out against civilians.[81]

On 4 April 1945, the 4th Armored Division and the 89th Infantry of the Third US Army liberated Ohrdruf, a subcamp of Buchenwald.[82] The men were clearly unprepared for what they found. From the moment they entered the camp, they were confronted with corpses at various levels of decay. More piles of bodies were found hidden away in barracks.[83] A week after its discovery, US Generals George Patton, Omar Bradley, and Dwight Eisenhower toured the camp. They too were in disbelief, with Patton becoming physically ill.[84] Eisenhower ordered every nearby unit that was not on front-line duty to visit, proclaiming, "[w]e are told that the American soldier does not know what he is fighting for. Now, at least, he will know what he is fighting *against.*"[85] British and American government representatives, as well as the international press, were also summoned to document the scene.[86]

As 1943 came to a close, it appeared that the Big Three had come to an agreement on how to deal with German war crimes, once victory was secured. Multiple issues, however, would

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[78] The *New York Times,* the *Washington Post,* the *Washington Evening Star,* and the *Stars and Stripes* all published columns on 18, December 1944.
[79] The "Malmédy Massacre" was actually one episode in what amounted to a string of German atrocities committed in 12 different locations throughout Belgium, between 16 January 1944 and 13 January 1945, that resulted in the deaths of about 350 unarmed US servicemen and another 100 Belgian civilians. United States Senate, *Malmédy Massacre Investigation: Report of the Subcommittee of the Committee on Armed Services* (Washington, DC: Government Printing Office, 1949). p. 2. See Lawrence, "Trials at Dachau," p. 84, n. 257.
[80] The War Crimes Branch was originally located in Paris. Straight, *Report of the Deputy Judge Advocate,* pp. 18; n. 16, p. 84.
[81] Jardim, *Mauthausen Trial*, p. 20
[82] In November 1944, the French First and American Seventh Armies discovered the abandoned concentration camp of Natzweiler-Struthof. Abzug, *Vicious Heart*, p. 3-4.
[83] Ibid, pp. 21-23.
[84] Ibid, p. 27.
[85] Italics in original. Charles R. Codman, *Drive* (Boston: Little, Brown and Company, 1957), p. 283
[86] Dwight D. Eisenhower, *Crusade in Europe* (Garden City, NY: Doubleday, 1948), p. 409.

demonstrate that there was much more work to be done. Stalin took the negotiations as license to immediately proceed with prosecutions. Unable to condemn what was widely considered a political stunt, the western Allies remained silent. Meanwhile, Washington had not developed a judicial program of its own. All departments agreed that punishment of both major and minor war criminals was necessary, but tense debates ensued over the process, as well as how to deal with the nation as a whole.

With US forces pushing their way into Germany, the severity of Nazi atrocities began to reveal itself. The reports of Malmédy and scenes from Ohrdruf provoked a considerable expansion to the war crimes investigation program. No longer were American officers only concerned with incidents of abuse toward captured servicemen, but they had now been confronted with mass atrocities. The number of investigation teams was increased from seven to nineteen.[87] Once hostilities had subsided, the WCB offices were relocated from Paris to Wiesbaden, Germany. By 1945, German defeat was inevitable, and the US military was thoroughly motivated to begin holding the country accountable.

2.2.2 Establishing the Dachau Courts

With German surrender imminent, the necessary authorities began laying the groundwork for trials in earnest. The two programs to prosecute major and minor war criminals, as indicated in the Moscow Declaration, would begin to take shape. On 2 May 1945 President Truman appointed Supreme Court Chief Justice Robert Jackson as Lead Counsel to the American war crimes program.[88] The following day, Judge Samuel Rosenman, special counsel to the President, met with the British and Soviet foreign ministers in San Francisco to present plans of establishing an international military tribunal to prosecute major criminals.[89] Less than a week later, on 7 May, Germany formally surrendered, dissolving the ban on holding trials. That same day, Congress passed House Concurrent Resolution 39, giving its blessing to begin proceedings against suspected war criminals.[90] Jackson and a team sixteen staffers traveled to London, where they met with their

[87] Straight, *Report of the Deputy Judge Advocate*, p. 5
[88] Jackson was assigned to represent the US at the IMT by President Harry Truman on 2 May 1945. Harry Truman, *Executive Order 9547*, 2 May 1945, Donovan Nuremberg Trials Collection, Cornell University Library. http://lawcollections.library.cornell.edu/nuremberg/catalog/nur:01305. Accessed August 2021.
Robert H. Jackson, *Report by Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington DC: US Government Printing Office, 1945), pp. 42-54.
[89] Taylor, *The Anatomy of the Nuremberg Trials*, p. 40.
[90] Yavnai, "Military Justice," p. 114.

major Allied counterparts to begin constructing what would become the London Charter. After months of intense deliberation, the US, Great Britain, the Soviet Union, and France finally signed the Charter on 8 August 1945, authorizing the establishment of the IMT at Nuremberg.[91] The men tasked with overseeing what would become the military government courts program at Dachau were Theater Judge Advocate General Edward Betts and Deputy Theater Judge Advocate Colonel Claude Mickelwait. They were not, however, afforded the same luxury of time as Jackson and had already begun proceedings.[92]

With thousands of suspects in custody, the undertaking that stood before Betts and Mickelwait was immense. Any plans to use the trials for 'educational' purposes were jettisoned, as courts would be single-mindedly focused on doling out punishment in quick succession.[93] Unlike the IMT, which looked to meet the unprecedented crimes of the Third Reich by establishing a new paradigm of international criminal law,[94] the Judge Advocate reached for the long-standing laws of warfare, as codified in the Hague Convention of 1907 and the Geneva Convention of 1929.[95] Germany was a signatory of both and was therefore liable to retribution for breaching its engagements. According to William Denson, it was actually America's legal obligation to uphold the ascendancy of the relevant treaties, as a signatory herself.[96] While they did provide the legal grounds to for prosecution, the treaties did not, however, stipulate what the proceedings should be or how they were to function.

In October 1942, Betts had already determined that military commissions would best serve the Army's judicial needs.[97] Between five and eight high-ranking officers (who were not

[91] The Charter of the International Military Tribunal, commonly referred to as the London or Nuremberg Charter, was signed between the US, Great Britain, Soviet Union, and France on 8 August 1945, authorizing the establishment of the International Military Tribunal to prosecute major war criminals in Germany. See Taylor, *The Anatomy of the Nuremberg Trials*. pp. 56-77.
[92] The earliest military commission was held in Ahrweiler, Germany between 1-2 June 1945. Yavnai, "Military Justice," p. 267.
[93] Jardim, *Mauthausen Trial*, p. 34.
[94] In addition to enforcing the traditional violations of laws and rules of war, the London Charter introduced two new violations to the international legal community: "crimes against the peace", which comprised conspiring, initiating and waging "war of aggression"; and "crimes against humanity", which incorporated deportation, enslavement, murder, and extermination. Robert H. Jackson, *Report by Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington DC: US Government Printing Office, 1945). pp. vii-ix.
[95] Straight, "Report of the Deputy Judge Advocate," pp. 54-55; See also, Denson, interview by Horace Hansen, Transcript, 69 pages, *Denson Papers*, Series I—Personal, Box 2.pp. 4-8.
[96] Denson, interview by Horace Hansen, p. 5.
[97] The formal authorization to establish the courts was provided by General Eisenhower. *Eisenhower to Commanding Generals*, 25 August 1945, NARA, RG 549, General Admin., Box 13.

necessarily trained in law) would preside over the trial as judge *and* jury. Unlike the standard court-martial, which is generally reserved for domestic military-legal purposes, military commissions were more flexible in their regulations:

> Military commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings, consistent with the powers of such commissions, and with the rules of procedure herein set forth, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, rules of procedure, and evidence proscribed for general courts-martial.[98]

The history of the American military commission courts actually stretches as far back as the American Civil War, to a particularly relevant trial involving the death of thousands in a POW prison. In 1863, President Abraham Lincoln signed an executive order accepting the *Instructions for the Government of Armies of the United States in the Field*, as the official legal framework of the American military. Better known as "General Orders 100" and the "Lieber Code," (so named for its author, German-American political scientist Francis Lieber), the document comprises 157 articles which outline basic practices and regulations, regarding military occupation, the legal uses of martial law, military jurisdiction, and military necessity, as well as the legal status of deserters, POWs, hostages, partisans, and civilian scouts.[99] In the aftermath of the Civil War, the Lieber Code was applied in the trial of Henry Wirz, in the first significant military commission court.[100] As the supervisor of a Confederate POW prison in Andersonville, Georgia, Wirz was convicted and hanged for the death of approximately 13,000 Union soldiers between February 1864 and March 1865.[101]

Due in part to the size and scope of the program ahead, further liberties were added to the judicial structure. Standardized Anglo-American protocols, around which military commissions were generally framed, would not necessarily apply. As a matter of policy, the courts would not be bogged down in legal technicalities or complicated formalities. On 8 July, the first comprehensive directive was issued to the Judge Advocate offices. JCS 1023/10, *Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders* instructed courts "…to the greatest practicable extent, adopt fair, simple and

[98] Col. H. F. Newman, Memo: "Military Commissions", APO 757, 25 August 1945, M1204, Roll 1.
[99] Hilton, "Blackest Canvas," pp. 36-37.
[100] Military commission courts had been utilized to try Mexican civilians after the Mexican American War, albeit before the Lieber Code had established systematic rules and regulations. Jardim, *Mauthausen Trial*, p. 25
[101] Ibid.

expeditious procedures designed to accomplish substantial justice without technicality."[102] The language used is conspicuously open to interpretation, and would leave the courts with a considerable amount of leeway on ruling over abstract or obscure legal precedent. This issue would prove particularly problematic for the Flossenbürg subsequent trials, for example, as some defendants would later complain of being subjected to double jeopardy.[103] The most commonly used and widely criticized addition, however, was the admission of hearsay evidence, as long as it was deemed of "probative value."[104] Provided that nearly all of the relevant material documents were purposefully destroyed, and thousands of valuable witnesses had been murdered, hearsay testimony was an essential component of the camp-atrocities cases. Having established the judicial authority and legal protocol, the final task was determining location.

Maintaining the stipulations first laid out in the Moscow Declaration, perpetrators would be brought back to the nation in which their crimes were committed. For the US, this comprised atrocities that had occurred within the post-war American occupation zone, camps that American forces had liberated, and any incidents of crimes against US citizens. At first, the Third and Seventh US Armies established the military government courts in various cities in the American occupational zone, including Ludwigsburg, Darmstadt, Munich, Augsburg, Ahrweiler, Heidelberg, Freising, and Wiesbaden.[105] Each location was selected based on proximity to the alleged crimes, as well as having the necessary facilities. It was soon realized, however, that the former concentration camp at Dachau (a suburb of Munich) could accommodate the entire program, from the arrest and detainment of thousands of suspects, to providing office space for counsel and large interiors in which to conduct the trials. As well, it was a short distance to Landsberg prison, where convicted war criminals would serve out their sentences.[106] By July 1946, nearly all war crimes sections were consolidated at Dachau.[107]

[102] JCS 1023/10, *Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders*, July 8, 1945, NARA, RG 549, General Admin., Box 1.
The authority of the directive, under the auspices of the Executive Branch, was upheld by the US Supreme Court in the case of Yamashita. See Straight, "Report of the Deputy Judge Advocate," p. 52.
[103] See section 5.2.1
[104] Straight, "Report of the Deputy Judge Advocate," p. 175.
[105] From summer 1946, a few trials were held in Salzburg, Austria. Yavnai, "Military Justice," p. 117.
[106] Landsberg was also the very prison where Hitler was incarcerated after his failed coup attempt in 1923.
[107] Lawrence, "Trials at Dachau," p. 89.

2.3 Common Design

The most prolific legal strategy of the camp-atrocities cases was the charge-particular of a "common design" to commit war crimes. Simply put, the concept stipulated that the entire concentration camp administrative personnel actively participated in a plan (or design) to abuse, starve, torture, and kill innocent civilians and POWs. This approach essentially allowed prosecutors to charge large numbers of defendants for one collective crime, resulting in a significant reduction in deliberation time and a lower threshold for the court to reach a guilty verdict. The origins of common design derive from the legal conception of criminal conspiracy and its innovative application (as a feature of crimes against the peace) at the IMT. The British war crimes courts also relied on an early manifestation of common design to indict forty-five suspects simultaneously in the Bergen-Belsen case. At the Dachau Trials, lead prosecutor Leon Jaworski argued that the hospital personnel at the Hadamar 'euthanasia' center implemented a common plan to murder hundreds of Polish prisoners. The concept was later adapted by William Denson in the camp-atrocities trials. This section will present the charge of common design and identify the aspects that made it so successful, prior to its use in the Flossenbürg case.

2.3.1 Origins and Development

Despite appearing in several manifestations before its application in the camp-atrocities cases at Dachau, the origins of the common design charge can be traced as far back as the Stimson plan. In mid-September 1944, the same time that Morgenthau's heavy-handed plan to punish Germany appeared to have won over the British delegation in Quebec, Pentagon staffer Lt. Colonel Murray C. Bernays was drafting a proposal to approach Nazi war crimes as an international criminal conspiracy. Bernays was born to a Lithuanian Jewish family and immigrated to the US in 1900 at the age of six.[108] After serving as a US artillery lieutenant in the First Word War, he received his undergraduate from Harvard and a law degree from Columbia.[109] Bernays was motivated by the opportunity to hold Germany accountable and educate the world to the atrocities committed under the Third Reich. In 1970, the *New York Times* ran an obituary for Bernays, in which it quoted him,

> There has always been very real agreement among the Allies that well-run trials are far preferable to courts-martial and field executions, [he proclaimed,] "Fascist myths would

[108] Lawrence, "Trials at Dachau," p. 72.
[109] "Murray Bernays, Lawyer, Dead; Set Nuremberg Trials Format," *New York Times*, 22 September 1970, p. 48.

> be more likely to spring up if defendants weren't given their day in court, and in any case it goes against the grain to condemn even the lowest criminal without trial.[110]

As a War Department legal specialist, Bernays had been tasked with monitoring reports of German mistreatment of American POWs and in the process, became familiar with various Nazi organizations like the Gestapo, the SA, and the SS.[111] He had been working on the problem of how to prosecute thousands of suspected war criminals for crimes carried out all over Europe when he was introduced to the writings of Rafael Lemkin, the man responsible for the concept of Genocide. In addition to creating a new manner in which to characterize mass-atrocity, Lemkin had theorized that the Nazi regime was made up of various "criminal organizations of volunteer gangsters."[112] Between what he had observed in the reports and Lemkin's characterizations of the Nazi regime, Bernays concluded that the barbarous treatment of Jews in Auschwitz and Allied POWs in Normandy were not unrelated acts of violence but the collective result of an organized criminal conspiracy.[113] On 15 September 1944, Bernays forwarded a six-page memo proposing that the Nazi regime, particularly the SA, SS, and Gestapo, "should be charged before an appropriately constituted international court with conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war."[114] He argued that by convicting the organizations themselves as criminal entities, merely an individual's membership in one of the said groups would serve as *prima facie* proof of guilt.[115]

The strength of Bernays' approach was not only in its simplicity, but its ability to scale up. The "Nuremberg Trial Plan,"[116] as it was later referred, would first establish an international court with which to prosecute the various organizations of the Third Reich under the charge of criminal conspiracy. Only the highest-ranking representatives of each organization would be brought before the tribunal, where evidence would focus on proving both criminal intent and conduct. The entire process would be widely publicized to the world, as a display of judicial transparency as well as an illustration of the horrific atrocities committed in the name of National Socialism.[117] Provided

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[110] Ibid.
[111] Smith, *Road to Nuremberg*, p. 50.
[112] Robert E. Conot, *Justice at Nuremberg* (New York: Carroll & Graf, 1988) p. 12.
[113] Conot, *Justice at Nuremberg*, p. 12.
[114] Murray C Bernays, "Trial of European War Criminals," 15 September 1944, Document 16, in Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944—1945* (Stanford: Hoover Institution Press, 1982). p. 36.
[115] Conot, *Justice at Nuremberg*, p. 12
[116] Smith, *Road to Nuremberg*, p. 52.
[117] Bernays, "Trial of European War Criminals," p. 36.

that the tribunal found the relevant agencies guilty of conspiracy—by virtue of the organizations' leadership—all subordinates could be subsequently held criminally liable on the basis of membership alone. Finally, Bernays indicated that national courts of UN countries would be authorized to prosecute any individual identified as having been a member of one of the criminal organizations—no further basis of guilt need be established.[118] From one trial, thousands of war criminals could subsequently be held to account. Even in these early blueprints, the "parent-case" structuring, applied to the camp-atrocities cases at Dachau, is evident.

Though there are many similarities, the legal charge of conspiracy is not the same as common design and each holds their particular value.[119] Whereas conspiracy demands that the participants consciously enter into an agreement (i.e. conspire) to commit a crime, under US constitutional law, it is not imperative that the said crime be committed.[120] For example, if a group of individuals robs a bank and the plans to do so are later uncovered, the perpetrators are liable for two crimes; robbing the bank *and* the conspiracy to rob the bank. Conversely, if the plan to rob the bank is foiled before the act is committed, those individuals who planned it are still liable for the conspiracy to do so. Common Design does not require such a threshold as to demand the perpetrators preemptively agree on committing a crime. Simply participating in a system that is proven to promote illegal activities is grounds for criminal prosecution, and it is this fairly low threshold of guilt that bolsters the charge with its inherent strength.

The other critical aspect to the common design charge (shared with conspiracy) is the necessary preposition that follows: i.e. "common design *to*… [in this case,] ...violate the laws and rules of warfare." In other words, both require a clarification as to the illegal nature of the *plan* (in the case of conspiracy) or the *system* (in the case of common design). Chief prosecutor Denson was continuously compelled to reiterate this preposition, as the defense consistently complained

[118] Ibid.

[119] US conspiracy statutes were first passed in 1909. Lawrence, "Trials at Dachau." p. 79.
Deputy Judge Advocate Lt. Col. Straight stated that, "[t]he legal characteristics of common design are in all material respects the same as conspiracy… except that a previously conceived plan is not an essential element." Straight, *Report of the Deputy Judge Advocate*, p. 62.

[120] "An agreement between two or more people to commit an illegal act, along with an intent to achieve the agreement's goal. Most U.S. jurisdictions also require an overt act toward furthering the agreement. An overt act is a statutory requirement, not a constitutional one. See Whitfield v. United States, 453 U.S. 209 (2005). The illegal act is the conspiracy's target offense. Conspiracy generally carries a penalty on its own." Cornell Law School, Legal Information Institute (LII), Wex Digital Dictionary and Encyclopedia, https://www.law.cornell.edu/wex/conspiracy. Accessed June 2021.

about the apparent confusion and arbitrary nature of the naked "crime." In his closing argument at the Flossenbürg trial, Denson insisted that,

> The prosecution has never contended that there is an offense known as 'Common Design' … The criminal, intent or state of mind of the offense charged in the particular… states that each of these accused entertained a state of mind or intent which was common to the intent or state of mind of the other accused. And that intent or state of mind which was mutual among the accused was of the type heretofore described.[121]

Bernays' plan, however, was not always well received or even entirely understood. Early concerns from leadership in the Justice Department led to multiple redrafts before it was ever discussed with Allied leaders.[122] One major problem was the fact that conspiracy was only a conception of Anglo-American law, with no relative correlations in continental or international law.[123] How were counsel expected to defend a charge that did not exist within their legal spheres? On the other hand, as 1945 approached, the US was running out of time to present a cogent plan with which to hold Germany accountable after the war. Incidentally, the outrage sparked by the Malmédy Massacre, coupled with the upcoming conference at Yalta, enticed Roosevelt to accept the Bernays concept.[124]

2.3.2 Early Applications

The Rüsselsheim Death March Trial

In the twelve months prior to the start of the Flossenbürg trial, both the British and Americans had made significant progress in their respective war crimes trial programs. Three cases in particular proved instrumental in the legal and strategic development of the MGC camp-atrocities trials. The so-called "Rüsselsheim Death March Trial" was the first American case to prosecute civilians for war crimes, whereas the "Hadamar Murder Factory Trial" set a significant precedent by successfully applying existing international laws of war to prosecute Nazi atrocities. As well, both trials were early models in the advancement of the common design charge. Occurring just two

[121] Denson, M1204, *Becker Trial*, Roll 11, pp. 9218-9219.
[122] Assist. Attorney General and head of the War Division of the Department of Justice Herbert Wechsler believed that Bernays was conflating conspiracy as a crime with conspiracy as a mode of complicity. Wechsler also advocated for punishing the crimes themselves, rather than the plans to commit them. Bernays forwarded several revised drafts of his proposal between November 1944 and January 1945. Shane Darcy, *Collective Responsibility and Accountability under International Law*, The Procedural Aspects of International Law Monograph Series, Vol 27 (Ardsley, NY: Transnational Publishers, 2007) pp. 201-202.
[123] Smith, *Road to Nuremberg*, p. 52.
[124] "Presidential Memorandum for the Secretary of State," 3 January 1945, Document 29, Bradley F. Smith, *The American Road to Nuremberg*, p. 92.

months before the start of the Dachau parent trial, the British military commission of Bergen-Belsen not only motivated the Americans to begin proceedings against the camps, but it served as a kind of test-case.

The *United States v. Josef Hartgen et al.*—known as the Rüsselsheim Death March Trial—was among the first cases of considerable legal significance for future camp-atrocities cases.[125] The trial took place in Darmstadt (not far from the where the purported incident had occurred) between 25 and 31 July 1945. The case alleged that, on 26 August 1944, six US airmen, in the custody of the *Wehrmacht*, were murdered while being marched through the town of Rüsselsheim on their way to a POW camp. The killing of unarmed combatants was a fairly straight-forward violation of the Hague[126] and Geneva conventions.[127] Yet, the culprits in this instance were not the military captors, but eleven enraged local residents (including two sisters who allegedly incited the attack) apparently seeking retribution for a recent Allied air raid on their town that left hundreds dead.[128]

This would be the first instance in which US prosecutors charged civilians with war crimes. Having supervised the preliminary legal preparations, the case was given the chief of the WCB Investigation and Examinations Divisions Lt. Colonel Leon Jaworski, formerly a corporate lawyer from Texas.[129] Jaworski validated the prosecution of non-military offenders for war crimes by citing a previous JAG ruling against making distinctions between principal perpetrators and aiders and abettors.[130] This provision paved the way for the US to convict hundreds of civilian

[125] Patricia Heberer, "The American Military Commission Trial of 1945," in Nathan Stoltzfus, Henry Friedlander, eds., *Nazi Crimes and the Law Nazi Crimes and the Law* (New York: Cambridge University Press, 2008) pp. 43-62, here p. 46. For a comprehensive study on the Rüsselsheim incident and the subsequent war crimes trial, see August J Nigro, *Wolfsangel: A German City on Trial, 1945-48* (Washington, DC: Brassey's, 2001). The lead prosecutor of the case has written about his experience. Leon Jaworski, *After Fifteen Years* (Houston, TX: Gulf Publishing Co, 1961). pp. 65-101.

[126] Specifically, Article 23 of Annex: "…It is expressly forbidden to… to kill or wound an enemy who, having laid down his arms, or having no longer any means of defense, has surrendered at discretion." C. Robert Bard, "Review of the Staff Judge Advocate," *United States v Josef Hartgen et al* (hereafter *Hartgen Trial*), 23 August 1945, 8 pages, here p. 2. ICWC. https://www.online.uni-marburg.de/icwc/dachau/000-012-1497.pdf. Accessed June 2020. p. 2

[127] Specifically, Chapter 6, Article 2: "Prisoners of war are in the power of the enemy power, but not of the individuals or bodies or troops who capture them. They must at all times be treated with humanity and protected particularly against acts of violence." Bard, "Staff Judge Advocate," p. 2.

[128] While the total number of deaths reported were 198 people, only twenty-one were German. The rest were forced laborers who were refused access to the air raid shelters. About ninety percent of the town had been destroyed. Lawrence, "Trials at Dachau," p. 110.

[129] Jaworski would later earn considerable notoriety as special prosecutor to the Nixon-Watergate scandal in the early 1970s. Heberer, "Military Commission Trial," p. 48.

[130] Ibid, p. 51

perpetrators who may have otherwise escaped justice. As well, the court used its discretion, authorized by the JCS 1023/10 directive, to admit hearsay testimony. During the trial, for example, residents testified to having heard the defendants boasting about hitting and kicking the men. One witness claimed to have heard the gunshots that supposedly ended the victims' lives.[131]

Such sweeping discretion, which had been all but arbitrarily added to the military commission framework, did appear to lean in the prosecution's favor. The accused were, however, guaranteed certain legal protections familiar to the American judicial system, all of which was printed on the reverse-side of every charge sheet. Defendants had the right to see the indictment in advance of the trial, to be present at the trial, to be allowed to present evidence and call witnesses in one's own defense, and to cross examine any opposing witnesses. As well, all trials would be conducted in English, but translated (in real time) into a language understandable to each of the accused. Finally, all trials would be open to the public, though armed guards were present to ensure everyone's safety.[132]

The most influential aspect of the Rüsselsheim case over later trials, firmly validating the legal aptitude of Jaworski, was his novel application of common design. The language in the charge-particulars stated that, "acting jointly… [the accused] did willfully, deliberately and wrongfully encourage, aid, abet, and participate in the killing" of the victims.[133] In other words, criminal liability rested not with each defendant independently, but with the collective group; only sentencing (after conviction) should determine the extent of individual responsibility.[134] Jaworski later articulated this concept in his closing statement,

> All who join in a common design to commit an unlawful act, the natural and probable consequences of which involve the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of in furtherance of the common design, although not specifically contemplated by the parties.[135]

[131] Ibid, p. 6.
[132] Heberer, "Military Commission Trial," pp. 49-50. See also Eli E. Nobleman, "American Military Government Courts in Germany," *The Annals of the American Academy of Political and Social Science* 267 (1950): 87–97. Here p. 89. For armed guards, see Jaworski, *After Fifteen Years*, p. 77.
[133] James D Murphy "Review and Recommendations," *United States v. Josef Hartgen et al.*—Case No. 12-1497 (hereafter *Rüsselsheim Trial),* 12 pages, NARA, RG 549, Box 167, p. 1
[134] Heberer, "Military Commission Trial," p. 51.
[135] Leon Jaworsky, quoting JAG 20 Corpus Juris, Section 46, in Murphy "Review and Recommendations," *Rüsselsheim Trial,* p. 8.

Within one week of deliberation, the strategy yielded ten convictions and one acquittal.[136] The post-trial "Review and Recommendations" explicitly acknowledged that the court conceded to "slight deviations" from the customary rules governing military commissions and common law criminal procedure in certain instances but insisted that it practiced fairness, impartiality, and humanity in its pursuit of justice; a concession, the reviewer added, ostensibly denied by both the defendants and the German state.[137] The Rüsselsheim trial was just one of more than 200 MGC cases concerning murdered Allied servicemen. However, it was the prototype for multiple legal strategies and judicial provisions that would be applied in later trials. With regard to the prosecution of civilians, it is important to note that, in spite of the criminality of the event and the guilt of those involved, the US was nevertheless pursuing justice for American victims against individuals who were themselves victims of Allied aggression. From this perspective, subtle parallels emerge between these perpetrators and the prisoner-functionaries who were later prosecuted in the Flossenbürg trial.

The Hadamar Murder Factory Trial

From October 1945, the first so-called mass-atrocities case came before the courts. The *United States v. Alfons Klein et al.* (8-15 October 1945), known as the "Hadamar Murder Factory Trial," convicted seven individuals for their collective participation in the systematic execution of 476 Polish and Soviet forced laborers, between June 1944 and March 1945.[138] The *Landesheilanstalt Hadamar* (Hadamar State Sanatorium) near Limburg, was one of several centers throughout Germany and Austria that carried out the Nazi T-4 program to "euthanize" patients deemed unfit for life. Between January and August 1941 alone, more than 10,000 German patients (designated as being mentally or physically disabled) were murdered through asphyxiation by carbon monoxide in a gas chamber disguised as a shower room.[139] The program was abruptly

[136] Five men were sentenced to death, one to twenty-five years prison, one to fifteen years prison, and the two women had their sentences reduced from death to life in prison. The four who were sentenced to prison terms were all paroled by 1954. Lawrence, "Trials at Dachau," p. 111.
[137] Murphy, *Rüsselsheim Trial*, p. 9-10.
[138] See Samuel Sonnenfeld and James D Murphy, "Review and Recommendations," *United States v. Alfons Klein et al.*—Case No. 12-449 (Hereafter *Hadamar Trial*), 1 February 1946, 28 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-012-0449.pdf, Accessed April 2020. For a comprehensive study on the Hadamar facility, see Patricia Heberer, "'Exitus Heute in Hadamar': The Hadamar Facility and 'Euthanasia' in Nazi Germany" (Doctoral Thesis, University of Maryland, 2001); for the Hadamar trial, see Patricia Heberer, "Early Postwar Justice in the American Zone: The 'Hadamar Murder Factory' Trial," in Heberer and Matthäus, *Atrocities on Trial*, pp. 25-47.
[139] "Hadamar," USHMM, *Holocaust Encyclopedia*, https://encyclopedia.ushmm.org/content/en/article/hadamar. Accessed June 2020.

halted after public outcry. One year later, however, the killings resumed unimpeded right up to the arrival of American troops on 29 March 1945. In this second phase, the types of victims were expanded to also include disabled children and juveniles, as well as children identified as Jewish *Mischlinge* ("mixed" or half Jewish). The method of killing was also changed to overdoses of medical injections and deliberate neglect.[140] Finally, several hundred *Ostarbeiter* (forced laborers from eastern Europe) who were no longer able to carry-on working, were dispatched to Hadamar for execution.[141] In total, approximately 15,000 people were murdered at Hadamar, behind a façade of compassionate care.

Despite an ardent motivation to prosecute those responsible, the WCB initially struggled to figure out how to charge the perpetrators with war crimes. Nearly all the victims had been German, and the existing international laws did not hold jurisdiction over crimes committed by a state on its own people. As well, the murderous program did not explicitly reflect a direct correlation to the war. It was determined, however, that the US *could* prosecute the hundreds of murders of eastern workers who, coming from Poland and the Soviet Union, were not only citizens of Allied nations but that the labor they had been doing prior to their deaths was directly supporting the German "total-war effort."[142] Due to his success in the Rüsselsheim trial, Leon Jaworski was once again assigned as lead prosecutor.

Jaworski took the Hadamar case as an opportunity to further develop the common design approach. For the first time, the charge-particulars explicitly asserted that the accused had "act[ed] jointly *and in pursuance of a common intent*."[143] Accompanying the collective guilt approach, was a carefully curated indictment list; an early impression of what would become the cross-section strategy.[144] Through the seven accused, the indictment essentially laid-out the entire execution program, which Jaworski likened to an "assembly line." The defendants included the facility's chief administrator Alfons Klein, who had carried out the orders to kill the workers upon arrival; the chief physician who had overseen the deaths; the head female nurse who prepared the injections of morphine and scopolamine; two assistant male nurses who had administered the killings; an administrative clerk who falsified the death reports to read tuberculosis as the cause; and a

[140] "Hadamar," USHMM, *Holocaust Encyclopedia*."
[141] Prior to 1943, these workers were usually sent back to their country of origin, but this became impossible with the advancing Allied front. Heberer, "Military Commission Trial," p. 52-53.
[142] Sonnenfeld, *Hadamar Trial*, p. 15
[143] Italics added. Sonnenfeld, *Hadamar Trial*, p. 1.
[144] Heberer and Matthäus, *Atrocities on Trial*, p. 32.

handyman who supervised the victims before execution.[145] According to the indictment, each individual occupied a specific role that was integral to the execution of the crime itself. After a week of deliberation, all seven defendants were found guilty.

The Bergen-Belsen Trial

At the very same time the Americans were prosecuting the Hadamar case, the British military courts were 500 kilometers away in Lüneburg (near Hamburg), holding the *Trial of Josef Kramer and 44 others*. The "First Belsen Trial," as it is more commonly known, ran from 17 September to 17 November 1945, and is particularly significant in the judicial progression of camp-atrocities cases. Not only was it the very first such trial by the western Allies, [146] but it too incorporated a prototypical common design charge. William Denson has acknowledged that it was the catalyst needed to get the Dachau parent trial up and running,[147] and the post-trial review later cited the Belsen case as legal precedent, insisting that the American courts must adjudicate based on its decisions.[148]

Bergen-Belsen, roughly fifty kilometers north of Hanover, was the only major camp to be liberated by the British army. It was originally established in 1940 as a POW camp but was significantly expanded upon from 1943. In the final year of the war, Belsen accepted thousands of Jewish prisoners from camps like Auschwitz and Gross-Rosen, and later served as a virtual dumping ground for the remaining domestic camp system, including Flossenbürg, to send their sick and dying.[149] By the time the Eleventh British Armored Division arrived on 15 April 1945, Belsen was overflowing with more than 60,000 prisoners, many of whom were barely alive.

[145] The seven defendants were: Alfons Klein (chief administrator), Heinrich Ruoff and Karl Willig (male nurses), Adolf Wahlmann (chief physician), Irmgard Huber (head female nurse), Adolf Merkle (clerk) and Philip Blum (handyman). Heberer, "Early Postwar Justice," pp. 32-34. For more on Irmgard Huber, see section 5.3.
[146] The Soviets technically held the "first" camp trial with the Majdanek case, 27 Nov - 2 Dec 1944.
[147] Chief prosecutor William Denson recalled that the USFET directly cited the Belsen case when it asked why the Third Army had yet to bring camp cases to trial. Denson interview by Horace Hansen, *Denson Papers*, pp. 3-4. Lawrence, "Trials at Dachau," pp. 91-95. Lawrence, "Trials at Dachau," pp. 91-95; Jardim, *Mauthausen Trial*, pp. 36-37; Yavnai, "Military Justice," pp. 177-180; Hilton, "Blackest Canvas," pp. 274-275.
[148] Samuel Sonnenfeld, "Review and Recommendations," *The United States v. Martin Weiss et al.*, Case No. 000-50-2, (Hereafter *Weiss Trial*) March 1946, 84 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-050-0002.pdf. Accessed July 2020. p. 60.
[149] Flossenbürg prisoner-functionary Emil Ležak recalled SS administration selecting prisoners for transfer to Belsen. Emil Ležak testimony, M1204, *Becker Trial*, Roll 3, pp. 1056–1070.

Another several thousand corpses littered the grounds.[150] The horrific imagery that was documented by British liberators has since established Belsen a symbol of Nazi genocide.[151]

The trial was structured in much the same way as the US military commissions. A panel of ranking officers presided over the court as judge and jury.[152] The prosecution pursued the long-established charge of violating of the laws and usages of war—so committed explicitly against Allied nationals—as established by the Hague and Geneva conventions.[153] Hearsay testimony, described in court as "secondhand evidence," was also accepted.[154] As it relates to future American camp-atrocities cases, the Belsen trial established two fundamental legal precedents: the prosecution successfully charged defendants with a common intent, thereby establishing Bergen-Belsen as a criminal enterprise.[155] These became the very objectives by which the Americans assembled the parent trial structure. The Belsen case was not without its challenges, however, and careful analysis of the issues reveal some intriguing correlations to the Flossenbürg parent trial in particular.

Despite its nickname, the Belsen trial was actually a joint case, with two identical but separate indictments; the second of which concerned crimes committed at Auschwitz. Within each of these indictments, the accused were alleged to have *either* personally killed or abused Allied nationals, *or* have shared responsibility in the death and abuse of Allied nationals, due to the general conditions of the camp.[156] Therefore, the charge was essentially a hybrid of both a 'standard' criminal offense charge and a more general common design charge. Because these allegations were written into the same indictment, however (albeit one for Belsen and one for Auschwitz), there is no definitive way of determining to whom the 'individual offense' or the 'collective responsibility offense' had been applied at the time of judgement. This is a crucial distinction from the fully developed common design charge that would accompany Denson's indictments at the Dachau parent trial a few months later.

[150] "Bergen-Belsen," USHMM, *Holocaust Encyclopedia*, https://encyclopedia.ushmm.org/content/en/article/bergen-belsen. Accessed August 2021. See also Suzanne Bardgett and David Cesarani, *Belsen 1945: New Historical Perspectives* (Middlesex: Vallentine Mitchell, 2006); Kolb, *Bergen-Belsen*.
[151] Yavnai, "Military Justice," p. 178.
[152] UNWCC, *Case No. 10—Trial of Josef Kramer and 44 Others, Law Reports of Trials of War Criminals: Volume II: The Belsen Trial* (London: HMSO, 1947) p. 127.
[153] UNWCC, *The Belsen Trial*, pp. ix-x.
[154] Ibid, p. 138.
[155] Hilton, "Blackest Canvas." p. 273-274.
[156] Raymond Phillips, *Trial of Josef Kramer and Forty-Four Others: (The Belsen Trial)* (London: William Hodge and Co, 1949). p. xxx.

Of the forty-five defendants, only forty-four reached judgement (thirty-two SS and twelve prisoner-functionaries). Twelve were charged with crimes at both camps.[157] These parallel charges created two unintended issues for the prosecution that are of concern here. First, the defense strongly criticized the charges of each camp as being completely independent from one another, prompting a demand to divide the trial into separate cases. Second, there were critical distinctions between the operational nature of Belsen and Auschwitz; this was particularly evident with respect to the latter's gas chambers. The fact that Auschwitz was an extermination camp tended of overshadow the conditions that existed at Belsen, thus undermining the perceived level of collective responsibility attributed to the Belsen defendants.[158]

The prosecution defended its dual-indictment approach by emphasizing its intentions to hold the defendants collectively liable. Lead prosecutor Colonel T.M. Blackhouse retorted,

> With regard to the question of the joint trial of individual persons, I want to make it quite clear that the Prosecution in this case will allege that this is a joint and collective offense by a group of people. Individual atrocities committed by individual persons were put forward to show that they were taking part in and acquiescing in the system which a group were carrying on. They were a unit acting in common, under a commanding officer, Kramer, who was the Kommandant of that camp.[159]

While this response was satisfactory for the court to overrule the defense's motion, it does not necessarily address the second issue. With respect to allegations in which a defendant was *personally involved* in the death or abuse of a prisoner, there was little difference between whether it occurred at Auschwitz or Belsen. In both instances, it was a matter of the evidence supporting the specific allegation. With respect to allegations of contributing to the *general conditions* in which a prisoner was killed or abused, the distinction between the two camps is more apparent.[160] Not matter how inhumane Bergen-Belsen was, no defendant—be they a commandant, a cook, or a capo—could escape the fact that the gas chambers (and the perpetual smoke rising from the crematoria) were an integral part of the "general conditions" at Auschwitz. This leads into the second major concern of the trial.

[157] One defendant was only charged with crimes at Auschwitz. One was dismissed before the end of the trial. UNWCC, *The Belsen Trial*, p. 4.
[158] Phillips, *Trial of Josef Kramer*, p. xxx.
[159] Phillips, *Trial of Josef Kramer*, p. 11.
[160] Phillips, *Trial of Josef Kramer*, p. xxx

Upon inspection of the forty-four accused, one will find a rather disproportioned demographic of defendants. Indeed, the balance of gender was near equal, with an even sixteen male-to-female ratio among SS-men and *Aufseherinnen*; and a seven-to-five split between male and female prisoner-functionaries, respectively.[161] However, closer scrutiny will reveal that while the twelve accused prisoners (six of whom were Polish) make up approximately twenty-seven percent of the total defendants, only five (or eleven percent) were SS officers, and that includes the two female leaders.[162] The rest of the SS-men were mostly conscripts in subordinate positions, while the remaining fourteen women were primarily factory worker-turned-supervisor to the forced laborers who replaced them.[163] The twelve prisoners were all veterans of the camps and had been part of the 'general population' for a significant period before being promoted to capo.[164] It is entirely acceptable that these individuals were deemed by the prosecution to be the best-suited candidates for a conviction, but in this lies the crucial issue of how each defendant relates to each other, as deftly exemplified in the Hadamar trial. Upon judgement, fourteen (ten SS/*Aufseherinnen* and four prisoners) were acquitted of both individual and collective mistreatment of prisoners. Eleven were sentenced to death by hanging and the remaining nineteen received prison sentences ranging between one and fifteen years.

While the courts left no explicit guidance to their rulings (yet another feature shared with the American military courts), it can nevertheless be presumed with relative certainty that the death sentences are likely attributed to those who were found to have personally killed or abused prisoners, while the prison sentences went to those whom the court believed had contributed to the inhumane general conditions (or the common design part of the indictment(s)). Naturally, the fourteen acquittals were found to have been innocent of both.[165] As intimated above, this is not how the (fully formulated) common design charge is supposed to work. Rather, its primary objective was to achieve maximum convictions in a fast and efficient manner. At fifty-four days

[161] Phillips, *Trial of Josef Kramer*, p. xxxviii-xxxix.
By contrast, it must be noted that Isle Koch, the wife of the Buchenwald commandant, was the sole female defendant (out of 183 indicted) in all four of the camp-atrocities trials that Denson prosecuted.
[162] The three SS officers were Belsen commandant Josef Kramer, camp doctor Fritz Klein, and Belsen-2 camp commandant Franz Hössler. The two female leaders were Women's camp commandant Irma Grese and *Oberaufseherin*, Elisabeth Volkenrath. Phillips, *Trial of Josef Kramer*, p. xxxviii
[163] Phillips, *Trial of Josef Kramer*, pp. xxxviii-xxxix.
[164] Phillips, *Trial of Josef Kramer*, p. xxxix.
[165] Phillips, *Trial of Josef Kramer*, p. xliv.

of deliberation and under a dual indictment, which included two completely different categories of camps, the Belsen trial achieved neither.

When compared directly to the successive American camp-atrocities cases, there are indeed many similarities. But the one glaring difference is the conviction and sentencing statistics. The Dachau parent trial convicted all forty defendants and sentenced thirty-six to death within a single month. The Mauthausen parent trial only took six weeks to convict all sixty-one of its defendants and subsequently sentenced fifty-eight to hang. And within four months, the Buchenwald parent trial also ended in a clean sweep of convictions, sentencing twenty-two of its thirty-one defendants to death. One more crucial statistic shared between the three cases above is that each trial convicted just three prisoner-functionaries each, making-up no more than between five and ten percent of the total individuals indicted.

Next to these trials, the Belsen case appears to show just how underdeveloped its legal strategy was. Curiously, however, the Flossenbürg parent trial more closely resembles the Belsen trial than any of the others above. Superficially, the protracted duration and multiple acquittals automatically justifies this assessment. But when one considers that the Flossenbürg case also had an uncommonly high number of prisoner indictments, as well as an incredibly mismanaged approach to its common design charge (which will be examined in chapter three) the parallels to the Belsen case begin to look more significant. From this perspective, the Belsen trial was as much a model for future camp-atrocities cases as it was a first draft. The question is why was it not the Dachau trial (the first US camp-atrocities case) to stumble on the road to a 'flawless' case? And why did the Flossenbürg case digress so much thereafter? The strategic lessons of the Belsen case appear to have been identified and rectified by Denson and his team. Such were to keep the indictment concise (focusing exclusively on the 'common intent' aspect of the camp) and to consider how the defendants collectively project the perception of a common intent to the court.

As Denson and his team prepared the Dachau case for trial, he had three strong models from which to develop his strategy. The Rüsselsheim and Hadamar trials both helped to establish a stable foundation of judicial license including hearsay testimony, the prosecution of civilians for war crimes, and the recognition of atrocities as war crimes under the established international treaties. It was also at these two trials that Leon Jaworski pioneered crucial prosecutorial strategy that delivered quick and efficient justice to dozens of accused, simultaneously. This included early

renditions of the common design concept and a calculated cross-section indictment that carefully considered how the defendants' roles in the crime related to each other. While the British Belsen case incorporated much of these very aspects into the first post-war concentration camp trial, it had not yet perfected the common design approach to a level that could successfully convict a large number of war criminals in a short period of time. Nevertheless, it served as a valuable model from which to further develop prosecutorial strategy.

2.3.3 Camp-Atrocities Parent Cases: The Trials of Dachau and Mauthausen

The British trial of Bergen-Belsen, and the public attention it had garnered, reinvigorated US interests in moving forward with its own atrocities cases. On 25 September 1945, a week after the Belsen trial had commenced, General Betts and Colonel Mickelwait reviewed the status of the Army's pending mass-atrocities cases. With the Hadamar trial commencing just two weeks later, it was determined that preparations for the Dachau concentration camp case be a priority "over all other activities." Orders were issued to try suspects currently in the Army's possession within one month's time.[166] By the time the camp-atrocities cases went to trial, American prosecutors had established a clear structural format. Denson would implement a number of specific legal strategies, loosely developed in preceding cases; the result was a near flawless exercise in prosecuting atrocities as war crimes. Where Dachau established the formula, Mauthausen proved its capabilities.

Lt. Colonel William Dowdell Denson was born in 1913 in Birmingham, Alabama, to a long line of distinguished legal and political professionals.[167] In 1930, he graduated high school and entered the prestigious Military Academy at West Point. Upon completion, he was granted a resignation from further military obligations, by which he took the opportunity to pursue legal studies at Harvard Law School.[168] With his law degree in hand, Denson returned to Alabama and passed the state Bar before entering his family's firm.[169] With the expert guidance of his father and

[166] Yavnai, "Military Justice," p. 180.
[167] Denson's father owned a law practice. His paternal grandfather was a US district attorney and state congressman in Alabama. His maternal grandfather was a chief justice for the Alabama State Supreme Court. Denson's great-grandfather (on his mother's side) was also a state congressman, from 1851 until Alabama seceded from the Union in the lead-up to the Civil War. Denson interview by Mark Goldberg, 12 March 1996.
[168] According to Denson, the Army was so overwhelmed at the time with incoming officers that they were forced to retire many of the older ones. To mitigate this, the Army offered resignation from officer duties to any new graduate. Denson took the offer. Ibid.
[169] Ibid.

influence from his family pedigree, Denson was soon arguing before the Alabama State Supreme Court.[170]

In November 1941, Denson returned to West Point to teach constitutional law.[171] There, he also participated in nearly 100 court-martial cases, earning him valuable trial experience. In February 1945, he received orders to join the Third US Army JAG section in Europe.[172] From summer of 1945, Denson worked for the Military Justice Administration in Bavaria, under the Third Army. In addition to participating in some of the early military commissions, Denson regularly received field reports from the WCB investigation teams and soon became familiar with the atrocities stories coming out of in the concentration camps.[173] In fall 1945 the office of the JAG, motivated by the Belsen trial, ordered Denson to begin preparing the case against the Dachau concentration camp. He was given a team of approximately thirty people and one month to do so.[174]

The first objective was to decide on a charge. The MGC program continued to work exclusively under the established international laws of warfare; like the Belsen and Hadamar trials, the Dachau case would constitute its criminal indictments on breaches of the Hague and Geneva conventions. The imposed periodization for the criminal offenses were determined to be from 1 January 1942 to 29 April 1945.[175] As camp personnel changed considerably over time, this not only had a direct effect on who the prosecution could indict, but how they would prove criminal liability. Pursuing hundreds of suspects individually across a spectrum of criminal offenses was an impossible task logistically; the prosecution needed a blanket charge with which it could convict dozens simultaneously.[176] However, Denson understood that in spite of the organizational structure of the camps, the lack of an explicit agreement between those involved would have made a charge

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[170] Denson recalled having defended three criminal trials in his profession as a state's attorney, prior to returning to West Point. Ibid.
[171] Despite touching on international treaties, such as the Hague and Geneva conventions, Denson conceded that during his time as a West Point instructor, he didn't even know what a war crime was. Denson interview by Mark Goldberg, 12 March 1996.
[172] Ibid.
[173] Ibid.
[174] William Dowdell Denson, *Justice in Germany: Memories of the Chief Prosecutor* (New York: Meltzer, Lippe, Goldstein, Wolf, Schlissel and Sazer, PC, 1995). 30 pages, here p. 3.
[175] Although the US officially declared war on Germany in early December 1941, it was decided that only crimes committed after the establishment of the UN would be pursued. Dachau was liberated by US forces on 29 April 1945. However, as Dachau was established in 1933, nearly a decade of criminal activity would be omitted as evidence in court. See, Sonnenfeld, "Review and Recommendations," *Weiss Trial*, p. 2.
[176] Denson estimated that the US Army had around 3,500 suspects under arrest in connection with Dachau. Denson interview by Joan Ringelheim, 25 August 1994.

of conspiracy difficult to prove. On the other hand, he was familiar with the legal strategies of common intent that had been applied in the Hadamar and Belsen trials.[177] Denson elected to charge the Dachau trial defendants with two identical indictments of common design to aid, abet, and participate in war crimes; one for civilian Allied nationals and stateless peoples, and one for POWs.[178]

Despite its evident strengths, the common design charge was not on its own faultless. The Belsen trial had shown that it required the accompaniment of a carefully prepared indictment list to emphasize the cooperative nature of the alleged crimes. The idea, which Denson labelled the "cross-section" indictment, implied that each defendant was integral to the said common design and that it was essentially the sum of the camp's various administrative parts that advanced the criminal operation as a whole.

In his own words Denson explained,

> The Dachau case… would serve as a basis for the condemnation of that camp as a criminal operation in its entirety. In order to do that I had to have representatives of each administrative aspect of the camp as well as its functional aspects. We therefore selected individuals from the commandant of the camp, protective custody department, the labor allocation department, the medical department, the crematory and the documentation department. Such representatives from the Gestapo and administrative aspects of the camp as well as the medical side of the camp which was involved in conducting experiments on the prisoners there gave us a cross-section of the whole.[179]

On a smaller scale, this strategy had proved immensely convincing during the Hadamar trial. But the Dachau trial looked to prosecute much more than seven people.

One of Denson's closest colleagues, Paul Guth, helped in the selection process of both the Dachau and Mauthausen trials.[180] First, Guth proclaimed that his strategy was generally "a matter of exclusion rather than inclusion… I picked the easy cases," meaning that they went after suspects whose incriminating evidence was near absolute.[181] This tended to cover the camp leadership, medical staff, and administrative personnel. The remaining spaces, typically around twenty percent of the indictments, were filled by a handful of low-level, rank-and-file guards and prisoner-functionaries (out of hundreds) being held under arrest. According to the principles of common

[177] Denson interview by Mark Goldberg, 12 March 1996
[178] Sonnenfeld, "Review and Recommendations," *Weiss Trial*, pp.1–2.
[179] Denson, interview by Horace Hansen, *Denson Papers*, p. 4.
[180] For Paul Guth, See section 1.2.2
[181] Paul Guth, interview by Joshua Greene, 24 February 2001, four cassette tapes, *Denson Papers*, Series V—Audiovisual Materials, 1918-2004, Boxes 46U-49U.

design, this group was just as essential to the criminal operation as its leadership. The selection process for these "slobs" and "local thugs" (as Guth referred to them), however, was far less scrupulous. In fact, Guth characterized it as being "a throw of the dice or spin of the roulette wheel to choose the one who went before the court … unless there were a large number of other trials, the punishment in some ways would be unfair."[182] While Guth never questioned the associated guilt of each defendant, he did have concerns over the possibility that some very deserving individuals potentially avoided justice due purely to this arbitrary selection process. As Jardim has critically pointed out, this is the primary difference between a comprehensive indictment list and a representative one.[183] Taking a moment to reflect back on the Belsen trial,[184] the decision to incorporate Auschwitz into the case, as a parallel indictment, illustrates the potential consequences of a prosecution being too comprehensive. Furthermore, Guth's explanation confirms that the level of guilt among the lower levels of perpetrators came second to their hierarchical positioning within the criminal operation, when putting together the indictment list. Another key element to this strategy that was overlooked by the Belsen prosecution was the consciously determined percentage of this group, relevant to the whole.

Armed with the common design charge and a perfectly composed indictment sheet, Denson had to contend with one last major obstacle before the case went to trial. Despite having had unlimited access to various casefiles and field reports from war crimes investigators, Denson was simply unprepared for what he read in the files pertaining to Dachau. He later recalled,

> …the biggest problem that I had after I was designated to prosecute these case, [sic] …was believing or getting testimony that could be believed. Because of its nature. Not that it wasn't true; it was true. But the events that were depicted were so horrible, were so sadistic, were so monstrous, that they were incredible. That's the only way to describe it. And I was a skeptic. I didn't believe it at that time. I didn't start believing it until I really started digging into with the concept and with the authority that I was going to prosecute the Dachau concentration camp case.[185]

Denson's apparent realization that he would have trouble simply getting the jury to believe the fantastic testimony led to the concept of court conditioning. The idea was to begin the case with evidence that could be easily comprehensible, and incrementally temper the court to the more

[182] Guth, interview by Joshua Greene, 24 February 2001. See also, Jardim, *Mauthausen Trial*, p. 96.
[183] Jardim, *Mauthausen Trial*, p. 95.
[184] See section 2.3.2
[185] William Denson interview by Joan Ringelheim, 25 August 1994. USHMM, Oral Histories Collection, RG-50.030.0268.

"bizarre" events that occurred in the camps. Throughout the trial, Denson and his colleagues even held meetings to discuss the opportune moments to reveal ever more heinous evidence.[186] The point was not to shock the court with anecdotal atrocities, but rather to present the most disturbing acts as part of the overall system. For example, the victims who died from medical experiments had first been undernourished by the kitchen staff, overworked by the labor allocation office, physically abused by their immediate superiors, and selected for the deadly "experiments" by the administration office.[187]

On 2 November 1945, forty individuals were formally indicted for war crimes in relation to Dachau.[188] Among the accused, were nine camp commandants or deputy commandants, three *Rapportführers* (office clerks), six labor allocation officers or subordinates, five medical officers and two orderlies, three non-commissioned administrative staff, four *Blockführers* (SS men in charge of the prisoner barracks), the head of the political department and one adjutant, a commanding officer of the prison guard, one supply officer, three guards from prisoner transports, and three prisoner-functionaries.[189] Just before the trial started, General Lucian Truscott[190] called the prosecution together for a brief word of encouragement. Denson later recalled,

> The lecture was about the importance of being fair. He told us that there are two ways to play a game. But… this game involved life and death and the highest stakes. He said he wanted the prosecution to discharge our responsibilities to the best of our abilities in a fair manner consistent with the ethics and code of the legal profession ... I had just finished preparing a case with the most mind-boggling evidence of the most brutal mistreatment by some human beings against others. Of course I would be fair, I thought. But I would also do whatever I had to do to lawfully get convictions.[191]

The Dachau trial began on 15 November 1945 and took just one month for the court to find all forty defendants guilty. Thirty-six were sentenced to death.[192] The speed of the trial, coupled with the 100 percent conviction rate, all but proved the efficacy of Denson's prosecutorial strategy. It would not be long before future camp-atrocities cases further tested his formula. But this was not the only lasting innovation that the Dachau trial spawned.

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[186] Denson interview by Joan Ringelheim, 25 August 1994.
[187] Dr. Klaus Schilling was a once renowned expert of tropical diseases and experimented on Dachau approximately 1,200 prisoners in his search for an immunization for malaria. Sonnenfeld, "Review and Recommendations," *Weiss Trial.* p. 23.
[188] Lawrence, "Trials at Dachau," p. 98.
[189] Greene, *Justice at Dachau*, p. 36.
[190] Truscott succeeded General George Patton as the commanding general of the Third US Army.
[191] Denson, *Justice in Germany.* p. 10.
[192] Ibid, p. 15

While the WCB was preparing its camp-atrocities cases, it recognized that hundreds of suspects had carried out offences at an untold number of subcamps.[193] It was therefore realized that the courts would be best suited for swift prosecutions if they could bypass all of the obligatory repetition that each trial would inevitably demand. Thus, the "parent trial" format was developed. The general premise was to try a case against the *Hauptlager* and establish the site as a criminal operation. Thereafter, any number of so-called subsequent cases could be prosecuted, based explicitly on the findings from the main (or parent) case without having to revisit the existing evidence. This format generated hundreds of relatively small trials—as little as one defendant, and no more than a dozen, at a time—which often only lasted a single day. Between October 1946 and March 1947, the Dachau parent trial alone charged 492 defendants in 118 separate sub-trials.[194] The specific rules read as follows,

> In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars, the findings and the sentences pronounced in the parent case. Thereupon, such Military Government Courts will take judicial notice of the decision rendered in the parent case, including the findings of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beatings, tortures, etc., and no examination of the record in such parent cases need be made for this purpose. In such trials of additional participants in the mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof.[195]

Whereas establishing the burden of proof in a criminal case is generally an obligation of the prosecution, this responsibility was shifted to the defense in the sub-trials, who had little course of action other than to deny their client was present at the place and time they were said to have been.[196] Denson explained that the idea for the parent trials was "born of necessity more than anything else," and that it wasn't the brainchild of any one individual.[197] This closely corresponds to the early concerns Guth expressed when detailing the selection process for low-level suspects. The above 'rules' passage was dated 14 October 1946, three days after the first Dachau sub-trial

[193] Yavnai, "Military Justice," p. 195.
[194] Hilton, "Blackest Canvas," p. 297.
[195] Peter Peters, "AG 000.5JAG-AGO, Subject: Trial of War Crimes Cases" 14 October1946, in Straight, "Report of the Deputy Judge Advocate," Appendix X, 119-123. Here p. 122.; quoted in Jardim, *Mauthausen Trial*, p. 49.
[196] Jardim, *Mauthausen Trial*, p. 49; Yavnai, "Military Justice," p. 196
[197] Denson interview by Joan Ringelheim, 25 August 1994.

commenced.[198] By this time, the Dachau and Mauthausen parent trials had already concluded and the Flossenbürg parent trial was four months into deliberation. While it is indeed possible that the concept had been developed well ahead of time, the Flossenbürg case was the first trial in which the prosecution could actively employ the parent trial format to its strategic advantage, which may help to explain the last-minute nolle prosequi requests by the prosecution.[199] In total, the MGC used the parent trial format to *subsequently* charge 812 defendants in 219 separate cases connected to Dachau, Mauthausen, Flossenbürg, Buchenwald and Nordhausen.[200]

With the success of the Dachau trial, Denson was selected to lead the next camp-atrocities case, Mauthausen. This time he would have three months to prepare, but the indictment sheet was increased to sixty-one.[201] The Mauthausen trial would offer a definitive assessment over the efficacy of his innovative prosecutorial formula. In addition to the increased scale of the case, the defense was now intimately mindful of the prosecution's strategy and would be able to advise their clients on what to say and do. Despite this, Denson followed through with his previous strategy in nearly every possible manner and even tightened his approach wherever he could. For example, whereas the common design charges in the Dachau case were separated between civilian Allied nationals and POWs, the Mauthausen case submitted the exact same language, but combined both groups into a single charge.[202] With regard to selecting the accused, Denson maintained his cross-section strategy by choosing individuals who would stand as representatives for one of the several administrative components of the camp, including the office of the commandant,[203] the SS clerical offices, the labor allocation department, the political department, the hospital, the kitchen personnel and supplies staff, the SS guard units and the prisoner-functionaries.[204] The one noteworthy adjustment made to the indictments was the number of defendants from various

[198] The first subsequent camp-atrocities case was held on 11 October 1946. Yavnai, "Military Justice," p. 196.
[199] See section 4.5.1
[200] In addition to the 117 Dachau sub-trials, another 60 trials involved 238 accused from Mauthausen; 18 trials involving 42 accused from Flossenbürg; 24 trials involving 31 accused from Buchenwald; and 5 trials involving 5 accused from Nordhausen. Yavnai, "Military Justice," p. 196–197, n. 62
[201] Jardim, *Mauthausen Trial*, p. 88.
[202] Richard D. Reynolds and Herbert E. Mueller, "Review and Recommendations," *The United States v. Hans Altfuldisch et al.*, Case No. 000-50-5, (Hereafter *Altfuldisch Trial*) 30 April 1947, 81 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-050-0005.pdf. Accessed June 2020, p. 2.
[203] The commandant of the Mauthausen *Hauptlager* Franz Ziereis had evaded capture during the camps liberation. He was spotted by former prisoners and shot by US troops on 23 May 1945, after trying to flee. He died in custody before the case went to trial. See Jardim, *Mauthausen Trial*, p. 69.
[204] For a detailed listing of the Mauthausen defendants, see Jardim, *Mauthausen Trial*, pp. 96-104.

subcamps. According to Jardim, this was a pragmatic strategy to expand the range of the Mauthausen parent trial to ensure future convictions of many more suspects in later subsequent trials.[205]

Whatever minor adjustments Denson had made, they only worked to further strengthen the strategy and definitively prove its efficacy. With a third more defendants than the Dachau case, it took the prosecution only six weeks to secure another perfect conviction rate. Of the sixty-one accused, fifty-eight were sentenced to death. In an interview decades later, Denson recalled that, "we almost hit the jackpot in the Mauthausen case … if all of them would have been sentenced to hang."[206] With a veritable blueprint for the quick, simple, and effective prosecution of as many suspects as would fit into the courtroom, Denson was granted his request to retire from the Army, leaving the Flossenbürg case to a successor. Lt Colonel Robert J. Shaw, a veteran of both world wars and established lawyer, was selected to take over.

Still in the midst of the Second World War, 1942 opened with the establishment of one of the most prominent international organizations dedicated to the maintenance of peace and security in modern history. The United Nations brought together twenty-six countries in a consolidated commitment to defeat the Axis Powers as one. The subsequent Declaration of St. James' Palace, while failing to obtain key Allied notaries, issued the first internationally supported document to openly condemn Germany of war crimes and demand retribution through organized justice. While neither went so far as to provide substantive threats, the year witnessed increasingly credible reports of unimaginable atrocities, leading to the discovery of the Final Solution, which heightened the pressure to earnestly consider options of retribution. 1942 would close with the UN characterizing Germany of turning Poland into a "slaughterhouse" of Jewish extermination.

The need to collect and document all the reports led to the organization of the UNWCC. Although the agency struggled to receive the support needed to reach its full potential, it nevertheless proved to be a valuable resource. By fall of 1943, rhetoric turned to material action with the signing of the Moscow Declaration, which for the very first time promised punishment to German war criminals. Of particular significance, was the identification of both major and minor offenders. All subsequent policy concerning retribution against German aggression, including the

[205] Ibid, pp. 96-97.
[206] Denson interview by Joan Ringelheim, 25 August 1994; See also, Jardim, *Mauthausen Trial*, p. 185-186.

Dachau Trials, stemmed from the stipulations expressed in this document. What hadn't yet been determined, however, was what punishment would look like.

For many, it was as easy as lining those responsible up against a wall and shooting them. For others, the sheer magnitude of the Germany's crimes and the flagrance with which it committed them made some think that only a legitimate judicial program could return Germany to a peaceful nation. Such trials would also serve the purpose of creating a historical record from which the world would be educated to the atrocities that occurred in the name of National Socialism. With much strain and consternation, it was agreed upon that the Nazi elite would be tried in an international military tribunal, while the so-called lesser criminals would be tried by military commission. In keeping to the stipulations of the Moscow Declaration, Dachau concentration camp became the preferred site for the US Army, due to its symbolism and applicable facilities. As these debates were being had, a few particularly innovative legal experts devised a scheme that would allow them to minimize the time and legwork needed to prosecute literally thousands of suspects while simultaneously maximizing the number of convictions.

The idea behind applying the charge of criminal conspiracy to Nazi leadership, crucially functioned on the premise that by labeling the various organizations that facilitated Nazi atrocities as criminal enterprises, those individuals holding membership would automatically be liable for prosecution. Before this ingenious idea could be employed as intended, however, it was taken up by war crimes prosecutor Leon Jaworski, who looked to apply it in his MGC case against several German civilians accused of murdering US servicemen. While not claiming conspiracy per se, Jaworski implied in the indictment that the accused had acted with common intent to kill the soldiers. The strategy worked and was subsequently reapplied with even greater success in the trial against the Hadamar murder factory. While the Americans were making steady progress with their war crimes trial program, the British nevertheless beat them to try the first camp-atrocities case. The trial of Bergen-Belsen became a valuable test-case for future trials involving concentration camps as it further progressed the legal strategy of common design.

Grabbing the proverbial torch with both hands was William Denson, whose extraordinarily successful Dachau trial was only superseded by a near flawless case against the Mauthausen camp. At the center of his approach was a fully developed and confident charge of common design. But there were two additional strategic devices that proved essential to achieving a 100 percent conviction rate. First, a meticulously prepared indictment list, illustrating a representational cross-

section of the entire camp operation, was fundamental in prioritizing collective responsibility over varying degrees of personal criminal behavior. Second, a patient introduction to the fantastic brutality that was almost too incredible to believe for the uninitiated ensured that gruesome anecdotes would not overshadow testimony pointing to a coordinated system of destruction. This was the structural and legal pedigree from which the Flossenbürg case would emerge.

Chapter 3: The Prosecution

On the opening day of the Flossenbürg trial, the prosecution entered the courtroom with confidence. Based on the successes of the two former camp-atrocities cases, there was little reason to predict that the result would end any different. However, if the Mauthausen trial proved the strengths of Denson's legal strategy, the Flossenbürg trial revealed its vulnerabilities. This chapter will identify the multiple ways in which the prosecution undermined the established methodology to ensure a quick and efficient case. It argues that the prosecution made a series of strategic mistakes early on in the trial that would ultimately cost convictions.

Beginning with the indictment list, Denson's so-called representative cross-section approach was significantly weakened by a disproportionately large segment of the accused being former concentration camp prisoners. In order to convince the court that so many of Flossenbürg's own prisoners had voluntarily participated in the common design scheme to systematically abuse and murder thousands, the prosecution relied on characterizing the entire "criminal" category of prisoners as willful collaborators with the SS. As well, specific acts of violent mistreatment were illustrated in great detail as early as the opening statements. Not only was this a complete abandonment of Denson's 'court conditioning' strategy, but it had the effect of individualizing the alleged offences of each defendant, further undermining the common design charge.

Three weeks into the trial, lead prosecutor Robert Shaw suffered an unexpected heart attack and died soon after. William Denson was reinstated as Shaw's substitute, which uniquely allows for a critical assessment of his expertise. With more experience in such cases than anyone else in the Army, Denson tried to reset the case, but was ultimately unable to do so.

3.1 Opening Statements

3.1.1 A New Prosecutor, A New Courtroom

Exactly one month after the Mauthausen case had ended, the Flossenbürg trial was getting under way. The venerated chief prosecutor, William Denson, would not be leading the team this time. He had produced and argued—not once, but twice—a seemingly foolproof strategy which could theoretically be replicated by any prosecutor thereafter. Denson was honorably discharged from the Army with plans to return home.[1] The man to take his place was Lt. Colonel Robert J. Shaw.

[1] Denson, *Justice in Germany*, p. 4

Shaw was born in Chicago, Illinois in 1891, making him fifty-five years old in the summer of 1946. By contrast, Denson had been just thirty-two when he led the Dachau case. Like many men of his time, Shaw's history depicts an engaged American who believed in service to his country. He fought in France in the First World War, before returning to America to teach military science and strategy. In 1921, he received his law degree from Northwestern University and served as a county attorney in Iowa. He was also active among the veterans' groups of the interwar years, serving a leadership role for over a decade in the American Legion,[2] as well as becoming president of the regional Reserve Officers Association.[3] Until 1940, Shaw split his time between practicing law and operating a stock farm until he moved to the state capital to serve on the Iowa State Selective Service Board. At forty-nine years old, Shaw re-entered active service in the US Army. After the bombing of Pearl Harbor, Shaw was granted a request of transfer to ground forces, where in 1943, he actively participated in front-line combat in Tunisia, Algeria, Italy, and France.[4] As an individual with so much military accolades and practical legal training, Shaw was the archetypal individual the Army was looking for to prosecute Nazi war-criminals.

Despite the incredible precedent set by the Dachau and Mauthausen cases, the Flossenbürg trial never held the same interest. It would appear, based on the prior victories, that the WCB felt it could simply replicate the operation as needed. Focus shifted away from the camp-atrocities trials to other more captivating cases.[5] Even the hallowed courtroom where Denson had claimed over 100 convictions was swapped for a more modest venue. On the grounds of the former Dachau concentration camp stood a single story, U-shaped brick building that had been converted into three makeshift courtrooms for the "Dachau Detachment War Crimes Group." The grand two-hundred-meter-long Courtroom A, with its movie set overhead-lighting and theater-seating spectator section, accommodating up to three hundred viewers, was currently being used for the

[2] The American Legion is a nonprofit organization chartered in 1919 by Congress originally for military veterans of the First World War. It is still in operation today. For historical studies on the interwar American Legion, see Alec Campbell, "The Sociopolitical Origins of the American Legion," *Theory and Society* 39, no. 1 (2010). See also, William Pencak, *For God & Country: The American Legion, 1919-1941*. (Boston: Northeastern, 1989).

[3] The Reserve Officers Association is an organization made up of commissioned and non-commissioned military officers, primarily from the Reserve Corp and National Guard. It was established in 1922. See John T. Carlton and John F. Slinkman, *The ROA Story: A Chronicle of the First 60 Years of the Reserve Officers Association of the United States*. (Washington, DC: ROA, 1982).

[4] Shaw was awarded several national and international awards, including the combat infantryman's badge, the French Croix de Guerre, and the Brazilian Order of Military Merit. "Robert J. Shaw" Obituary, *The Annals of Iowa.* 28 (1946). p. 161.

[5] At the time the Flossenbürg case began, the so-called Malmédy Massacre trial was one month into deliberation.

infamous "Malmédy Massacre" trial.[6] Flanking off the main section, however, in one of the two ancillary courtrooms, the Flossenbürg case was coming to order.

Though smaller in stature, the courtroom shared similar decorative attributes to its high-profile next-door neighbor. All who entered were greeted by an imposing American flag hanging on the opposite wall, directly above the judge's bench—a commanding wooden desk that sat all seven of the acting court members. To the right of the judges' line of sight, guarded by the so-called "London Poles,"[7] were the defendants' bleachers. Sitting directly in front of them was the defense counsel. On the other side of the room, sat the prosecution. And separating the two, alone in the middle, was a solitary wooden chair perched about a foot off the ground on top of a carpeted stage. Over the course of the trial, more than three hundred witnesses would provide testimony from that seat.[8] Occupying the remaining floorspace were a few modest rows of mismatched wooden chairs and benches that were never completely filled.

[6] The Malmédy trial ran from 15 May 1946 to 16 July 1946. See, Weingartner, *Crossroads of Death*; Weingartner, *A Peculiar Crusade*; Remy, *The Malmedy Massacre*.
[7] The "London Poles" were commissioned Polish military police, provided by the formerly exiled Polish Government in London. Denson interview by Mark Goldberg, 12 March 1996.
[8] William Denson, M1204, *Becker Trial,* Roll 11, p. 9215.

8. Interior of Flossenbürg Trial courtroom, Chief Prosecutor Lt. Colonel Robert Shaw (standing, far left) questions prosecution witness Dr. Alain Legaeis (sitting, far right on platform) through a French interpreter (sitting middle frame). 20 June 1046. SC NARA, 24705. "German Trials" Book #8 241790.

Day 1 of 142[9]

At 10:00 am on Wednesday, 12 June 1946, President to the Court, Colonel Walter A. Elliott entered the courtroom, accompanied by assistant judges Colonel Edward B. Jackson, Lt. Colonel James W. Smyly Jr., Lt. Colonel Clyde A. Burcham, Lt. Colonel Walter H. Skielvig, and Lt. Colonel Lewis S. Sorley. The obligatory position of "Law Member"—the only one on the bench required to have a law degree—was held by Major Clyde B. Lanham.[10] After all were seated, President Elliot called the court to order.

Shaw, speaking on behalf of the prosecution, proceeded to introduce his team, including Sergeant Henry L. Newell, and civilian attorneys Harry Berkowitz and Stephen Pinter. He then repeated the same for the defense, represented by chief defense counsel Lt. Colonel Robert W. Wilson, and his team; Major Ernst Oeding,[11] and civilians Albert W. Hall and Russell S. McKay.[12] McKay was tasked with defending the sixteen accused prisoner-functionaries. Of the entire court detail, defense counsel Wilson and Oeding were the only two individuals to have worked on a prior camp-atrocities case.[13]

Following the introductory statements, chief defense counsel Wilson broke from the standard protocol by presenting his first motion before the court even had the opportunity to hear the charges. Wilson argued to have them quashed outright as they were not legally supported by the particulars.[14] The desperate attempt to throw the whole trial out was more performance than a sincere pursuit. With the prosecution's urging however, the court determined that it would be incapable of ruling on such a motion without having first heard the charges. A compromise was settled that Shaw would be allowed to read the charges and particulars as they were written, but that the official indictment would be postponed,

[9] The Flossenbürg trial lasted from 12 June 1946 to 22 January 1947. Taking weekends, holidays, and a 19-day recess into account, there were 142 trial days within the seven month-long period. Sigel, *Im Interesse der Gerechtigkeit*, p. 107.
[10] "Military Government Court—Case Record," Vol. 2, M1204, Roll 1.
[11] German attorneys, Dr. Richard Wacker and Dr. Wolfgang Engelhorn joined the defense after the start of the trial. Major Oeding would be replaced by Civilian attorney Charles E. O'Conner.
[12] Robert Shaw, M1204, *Becker Trial*, p. 8.
[13] Both Wilson and Oeding had served in their same respective capacities in the Mauthausen trial. Jardim, *Mauthausen Trial*, p. 118.
[14] Robert Wilson, M1204, *Becker Trial*, p. 6.

> Friedrich Becker and fifty-one others, [naming them,] German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses and indignities, did, at or near the vicinity of Flossenbürg Concentration Camp, near Flossenbürg, Germany, and at or near the vicinity of the Flossenbürg out-camps, particularly Hersbruck, Wolkenburg, Ganacker and Leitmeritz, and with transports of prisoners evacuating said camps, all in Germany or German-controlled territory at various and sundry times, between the 1st of January 1942, and the 8th of May, 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of Poles, Frenchmen, Jugoslavs, citizens of the Soviet Union, Norwegians, Danes, Belgians, citizens of the Netherlands, citizens of the Grand Duchy of Luxembourg, British subjects, stateless persons, Czechs, citizens of the United States of America 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 then 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, starvation, abuses and indignities, the exact names and numbers of such persons being unknown, but aggregating many thousands.[15]

In spite of its long-winded and repetitive legal rhetoric, the prosecution's charges were fairly straightforward. It accused the defendants of having participated in various forms of physical mistreatment and murder of unarmed civilian prisoners from non-German nations. The same accusations were also extended to all non-German prisoners of war. Finally, all this happened within a particular period of time and geographic area.

What the charges did not clarify were any specific unlawful acts by anyone in particular to anyone in particular, but rather emphasized a conscious criminal environment in which all defendants actively participated. Based on that premise, Wilson complained to the court that "the principles of American jurisprudence which this court follows have as one of the most basic features that a defendant can be tried only for a defined crime which was a crime when committed."[16] He maintained that the charge-particulars of common design, synonymous in his own interpretation of conspiracy, was not an acceptable indictment in this case, since there was absolutely no evidence of an agreed upon policy to commit such offenses by any of the accused. Furthermore, Wilson added that not only did the particulars fail to report any specific crime, but

[15] Shaw, M1204, *Becker Trial*, pp. 10–11.
[16] Wilson, M1204, *Becker Trial*, 16. Wilson cited the Allied agreement, Control Council Law No. 10 (December 1945), which was supported by the Moscow Declaration and the London Agreement on War Trials. See "Nuremberg Trials Final Report Appendix D: Control Council Law No. 10", "The Moscow Conference; October 1943", and "Nuremberg Trial Proceedings Vol. 1: London Agreement of August 8th 1945," in *The Avalon Project at the Yale Law School: Documents in Law, History and Diplomacy.* Lillian Goldman Law Library Online Archive, Yale Law School. New Haven, Conn. 2008 http://avalon.law.yale.edu/imt/imt10.asp. Accessed March 2020.

that the administration of the camps had legal jurisdiction by the German state to "punish actual criminals."[17] Wilson had been lead defense counsel in the prior Mauthausen trial, where similar objections to the common design charge were raised. However, none of the presiding justices here had previously sat on the bench of a camp-atrocities trial and were not bound to uphold any stipulations or rulings from a preceding case. While it was entirely under the purview of the courts to refer to prior cases for guidance in a particular ruling, the justices were only legally bound to the rules and regulations stated in Directive JCS 1023/10 and the Military Government Regulations Manual.[18]

In the prior Mauthausen case, Denson had responded to similar motions with shrewd legal prowess, invoking various international legal articles and precedents which contradicted the defense's applied interpretations.[19] Shaw's response, however, aptly expresses the choreographed routine that the courts were put through time and again, "If it please the court, this matter has been determined so many times in the past six months that it should be unnecessary to take up the time of the court with a reply argument. Unless the court wishes us to make a resistance in the form of an argument we will waive a reply."[20] President Elliott, clearly in agreement, proclaimed that indeed a reply would not be necessary and promptly overruled the motion.[21]

Next on the agenda was a roll-call of the fifty-two accused on the dock, followed by a verbal confirmation by each of the legal stipulations awarded to them as defendants. Stepan Sczetynskyi (defendant 45), a Ukrainian national and *Waffen*-SS guard, claimed he was unable to follow the court, on account that he didn't understand German. It was quickly realized by Shaw and his team that this would develop into a major obstruction in the progression of the case, as per the stipulations; every defendant was entitled to complete comprehension of the case brought before them.[22] Thus, a dedicated full-time team of Russian translators would be needed to ensure Sczetynskyi could understand every word uttered on the record. Such a task was simply too much

[17] Wilson, M1204, *Becker Trial,* 18.
[18] "Manual for Trial of War Crimes and Related Cases," Appendix XX, in Straight, "Report of the Deputy Judge Advocate," p. 179
[19] Denson referred the court to *Black's Law Dictionary* for clarification on the charges and noted the precedent set on the dispute of a prolonged period of criminal activity at the Yamashita Trial (8 Oct. - 7 Dec. 1945). Jardim, *Mauthausen Trial,* pp. 11–-119.
[20] Shaw, M1204, *Becker Trial,* 17.
[21] Walter Elliot, M1204, *Becker Trial,* 18.
[22] See, Trial Stipulation No. 7; under the Law of Military Government, each defendant is entitled to "have the proceedings translated when you are otherwise unable to understand the language in which they are conducted." M1204, *Becker Trial,* p. 48.

time and energy to be wasted on one defendant.[23] As the defense team naturally concurred with the prosecution's request to drop the charges against defendant number 45, the court sustained the motion. Sczetynskyi was removed from the dock and escorted back to his holding cell. Sczetynskyi was later extradited to Poland, no other information is available in the casefiles.[24] With fifty-one defendants, the court proceeded.[25]

Returning to the trial overtures, the defendants were instructed to hang a white index card around their necks, upon which their corresponding number would require witnesses to identify them by sight alone, preventing the possibility of wrongful accusations based solely on having heard one's name.[26] President Elliott read aloud the charges and particulars, this time in its official capacity, before confirming with each defendant that they understood the accusations being presented against them. Forty-nine defendants replied with a simple "yes". Peter Bongartz (defendant 5) and Theodor Retzlaff (defendant 37) both protested that they failed to comprehend the charge of common design. As a former inmate, Bongartz insisted that he could never have entered into such a relationship with the SS,[27] while Retzlaff impassionedly proclaimed that he had lost both his wife and brother in the concentration camps, and that he had been incarcerated in the camps for eight years himself. On that basis, he absolutely refused to acknowledge the charges until the court conceded to the "false justice" being extorted upon him.[28] Such outbursts were nothing new to the courts, as one of the defendants in the Mauthausen case had earlier protested in an almost identical fashion. There are, however, fundamental distinctions between the two instances.

Hans Altfuldisch, an SS prison compound commander at Mauthausen, defiantly replied "Nein!" when asked if he understood his charges. The defense counsel insisted that they had done their best to explain the indictment to their clients, but equally confessed their own failures to completely comprehend the charge. One counsel proclaimed, "I couldn't make my people

[23] Unsigned, "Background of Accused in Flossenberg Case," 29 July 1947. M1204, Roll 12.
[24] Ibid.
[25] In order to avoid having to reconfigure the corresponding numbers for defendants, the court decided to simply delete 45 from the group. This explains why the last defendant, Wurst, was referred to as number 52 for the duration of the trial. M1204, *Becker Trial,* pp. 48-51.
[26] It did happen occasionally that a witness would describe an event to the court, during which time one of the accused was named. When asked to point them out, the witness identified the wrong defendant. *Becker Trial,* 8756.
[27] Peter Bongartz, M1204, *Becker Trial,* p. 59.
[28] Theodor Retzlaff, M1204, *Becker Trial,* p. 61.

understand… I don't understand myself, and I have practiced law for many years."[29] Denson had responded to the challenge by citing the definition of common design from *Black's Law Dictionary* as "a community of intention between two or more persons to do an unlawful act."[30] Regardless of how well the confusion was actually cleared up, Denson nevertheless relied on judicial literature to defend his position, and at the very least, confirmed the existence of the charge as a legitimate indictment. Altfuldisch would ultimately be convicted of his crimes and sentenced to death.[31]

Shaw, by comparison, approached the same scenario in a far more cavalier manner. To the defendants' refusals to accept any accusation of collusion with the SS, he responded,

> A common design is when all of you, working together, brought about the extermination of prisoners who were under your jurisdiction and control. Now that's not a legal definition but the evidence will show that each and every one of you did your part toward killing off your fellow men.[32]

The emotional retort was hardly effective. Shaw's statement clearly evokes the traumatic experience that tens of thousands of individuals succumbed to inside Flossenbürg and attempting to weaponize these emotions was undoubtedly applied by the prosecution as rhetorical strategy. At such an early point in the trial, however, proper judicial elocution was imperative, not only in keeping the obligatory court affairs moving in a forward direction, but any other tone served to discredit the professionalism that the MGC was compelled to present to the international community.

Furthermore, defendants Bongartz and Retzlaff were both former prisoner-functionaries at Flossenbürg, and could objectively claim to be victims of Nazism. Precisely what category of prisoners they were, and how they behaved towards others while in a position of authority would be teased out as the trial progressed. Unlike Altfuldisch's contemptuous but ultimately futile protest at the Mauthausen Trial, the exchange between Shaw and the two accused prisoner-functionaries is extraordinarily telling of things to come. The vehement denial of active collaboration between the camp-SS and inmates would be a fundamental point of contention in the trial as a whole. This very debate, revolving around the concept of criminal identity as an indicator of guilt, would push the Flossenbürg trial to become the longest single deliberation of the entire

[29] Jardim, *Mauthausen Trial*, p. 118.
[30] Ibid, p. 119.
[31] Ibid, p. 118. Altfuldisch was executed on 28 May 1947. See, Yavnai, "Military Justice", p. 282.
[32] Shaw, M1204, *Becker Trial*, p. 59.

program, between 1945 and 1947.[33] The defense counsel insisted that they had explained the matter to their clients, and that they had in turn understood. With that, the court accepted the pleas one-by-one. An (almost) unanimous "not guilty!" came from the defendants' dock.[34] Only one, former Capo[35] Johann Lipinski (defendant 23) answered, "guilty, because I hit him [*sic*];"[36] to which his counsel Russell McKay quickly interjected a not guilty plea on his behalf.

The next action of the court was the direct interrogation of the defendants. Before anyone could submit to questioning, however, defense counsel Wilson brought it to the court's attention that some of his team had only been assigned to the case just days earlier. Wilson himself admitted that he had become lead defense counsel only five days prior.[37] He appealed that it would not be prudent for the court to interrogate the accused before all had at least some private consultation with counsel. The prosecution concurred and added that such interrogations would greatly delay the trial, not to mention, it wasn't a necessary procedure at the Mauthausen case.

The Prosecution's Opening Statement

With all the obligatory formalities out of the way, the prosecution was finally invited to make an opening statement. As one of the most decisive rituals of the American judicial performance, a brief reflection on the opening statements in the prior two camp cases will help to trace the development of the practice and to identify precisely how it transformed during the Flossenbürg trial. In the Dachau case, Denson had kept his statement to a minimum. In one typewritten page, he first paraphrased the particulars of the charge before presenting the Dachau concentration camp as a "machine of extermination" that persecuted a veritable spectrum of victims:

> ...We expect to show that here at Dachau the individuals who were brought here fell into many classes… there were criminals, political prisoners, prisoners here by virtue of religious belief and persons unwilling to submit themselves to the yoke of Nazism… these people were subjected to experiments and used in a medical way as guinea pigs. That these same persons were starved to death and at the same time worked as hard as their physical bodies permitted with the food that they received… the conditions under which these people were housed were [*sic*] such as disease and ultimate death was inevitable. That in spite of the prevalence of disease, little or no preventative measures were taken to prevent

[33] There were 489 individual cases, with 1,672 indictments, that fell under the auspices of the MGC. Straight, *Report of the Deputy Judge Advocate,* p. 50.
[34] M1204, *Becker Trial,* p. 68–70.
[35] The term kapo can be loosely translated to foreman. While the spelling is typically with a "k", the trial transcripts us a "C". I have chosen to use the k-spelling in the text, but have kept the original C-spelling when the quotation is such.
[36] Ibid, 68.
[37] Ibid, 71.

> its spread or cure the disease then in existence. Further, we expect the evidence to show that during the time of the overrunning of Europe by Germany these people were subjected to utterly inhuman treatment… each one of these accused constituted a cog in this wheel, or machine of extermination.[38]

Denson's characterization of the Dachau victims acutely recognized the social diversity of the prisoner community. Yet, he also referred to them as "these people"; one homogenous victim-group that all suffered the multitude of abuses that existed in the camp. Furthermore, Denson emphasized the separation of the victims from their persecutors. By replacing "these people" with "these accused," he took care to clearly segregate one group from the other.

Analyzing Denson's opening statement at the Mauthausen trial, the overall address remained brief at under five minutes,[39] but there was an apparent shift in the way he portrayed the prisoner dynamic. The statement began by repeating the prosecution's primary intentions. Denson then went on to provide a description of the camp structure,

> We expect the evidence to show that this Mauthausen Camp was operated by the SS [who] employed in minor capacity prisoners to do their dirty work. In other words, these SS men put in charge of the political prisoners who were brought to Mauthausen, German criminals who were many times much more dangerous… and that they permitted these German criminals to exercise authority over the prisoners… and to commit atrocities that are alleged in the particulars.[40]

Denson's modified approach to the role of the prisoners is indeed conspicuous. His concise portrayal still emphasized a concerted effort of collusion toward criminal activity (maintaining a strong conceptual association to the common design charge), but this time, it also included a distinct prisoner component. Denson refrained from providing any specific details, implying only that the SS employed certain members of the prisoner community as tools to carry out abuse. Nevertheless, he was creating the impression of a standardized criminal identity, devoid of any individual agency or context. The premise of Dagmar Lieske's 2016 study, *Unbequeme Opfer? „Berufsverbrecher" als Häftlinge im KZ Sachsenhausen* (Inconvenient Victims? "Professional Criminals" as prisoners in Sachsenhausen Concentration Camp) looks to problematize and dispel the prevailing characterizations of the "criminal" (or "green"[41]) prisoner category as a monolith in

[38] William Denson, *The United States v. Martin Weiss et al.*, Case No. 000-50-2, NARA, RG 549—War Crimes Trials Case Files (Cases Tried), Box 258, p. 91.
[39] Jardim, *Mauthausen Trial*, p. 122.
[40] Ibid, 121.
[41] The label "green" refers to the color-coded triangle patch that concentration camp prisoners identified as "criminals" were given.

the exact way Denson refers to them above.[42] While Lieske had the benefit of seventy years of hindsight with which to conduct her research, it was precisely the Dachau camp-atrocities trials that helped to crystalize the stereotype she has worked so diligently to untangle.

Shaw's prosecution team would build on Denson's subtle generalizations of a German criminal identity, but present it in a way that greatly expanded the implications. Just after 4:00 pm on the first day of trial, Shaw began his monologue, "The prosecutor desire[s] to make an opening statement, very much in detail, so that the court, counsel for the defendants, and the defendants themselves, can be fully advised of what we expect to prove."[43] For an hour, Shaw attempted to present what he referred to as a "blueprint of the trial." He began by providing a historical account of the Flossenbürg concentration camp. "Flossenbürg was built in the year 1938, by the German Government as a working camp for habitual criminals of German nationality…"[44] He then traversed the seven years of the camp's history, noting particular milestones along the way. In 1941, the camp began receiving political prisoners from Poland. In 1942, the prisoner population had reached 5,000, with forty-eight subcamps under its authority. Just before the camp's mass evacuation in spring 1945, approximately two-fifths of the 36,000 total prisoners were women. In the final days of the camp, about 15,000 prisoners were evacuated, while exactly 1,527 were left behind, physically incapable of making the journey. Shaw provided the conservative estimation that 25,000 prisoners had died from abuses inflicted during the life of Flossenbürg and its satellites.[45]

Satisfied with his overview, Shaw continued his address by mentioning some of the particularly perverse events that occurred at Flossenbürg concentration camp. He referenced the Christmas tree hangings in December 1944,[46] as well as the "sadist" physician Dr. Heinrich Schmitz, who was said to have practiced numerous unnecessary surgical operations without any anesthetic and little to no sanitation. The procedures were allegedly conducted in the presence of

[42] Dagmar Lieske, *Unbequeme Opfer?: „Berufsverbrecher" als Häftlinge im KZ Sachsenhausen* (Berlin: Metropol-Verlag, 2016). p. 11.
[43] Shaw, M1204, *Becker Trial*, Roll 2, p. 72.
[44] Ibid.
[45] The accepted number of deaths attributed to Flossenbürg (and its constituent camps) is approximately 30,000. While Shaw was not far off, most reports at the time were wildly inaccurate. Take for example, Denson's margin-of-error was set at a million lives during the Mauthausen trial. Jardim, *Mauthausen Trial*, p. 122. For death statistics at Flossenbürg, see Siegert, "Das Konzentrationslager Flossenbürg," p. 490.
[46] Shaw, M1204, *Becker Trial*, Roll 2, p. 73.

several camp-SS administrators, who cracked jokes while smoking cigars.[47] Shaw proclaimed that many of these often fatal operations were carried out for no other reason than "curiosity."[48]

Having completely abandoned the "conditioning" strategy, Shaw looked instead to unsettle the court with accounts of savage cruelty before providing the structural aspects of the prisoner camp authority. Of the accused prisoner-functionaries, he said,

> There was placed in charge of the prisoners, as Capos or Blockeldests [*sic*], German nationals who had a long record of convictions and had been placed by the German Government in the category of habitual criminals. The record will be filled with the recital of the cruel, inhuman, fatal treatment accorded to their victims.[49]

The statement implied not only that the criminal category was developed entirely to dominate others, but that there was a stronger sense of agency among them, in comparison to the rest of the prisoners, than had been previously inferred by Denson.

With little delay, the chief prosecutor then changed course yet again, turning his focus to the evacuation transports from Flossenbürg in April 1945. He explained that just as American forces were approaching the camp, several transports left in the direction of Dachau. Shaw told the court that a typhus epidemic had swept through the camp just prior to the evacuations, and that guards were ordered to kill anyone unable to keep pace while on the march. He added that only after local villagers began complaining of the gruesome scenes left behind in their wake, were orders given, insisting on changing from headshots to a single bullet through the heart.[50] Hundreds of corpses had since been exhumed in hastily buried mass graves, all found along the path taken by some of these transports. Shaw stated that, of the 12,000 [*sic*, the number was closer to 16,000] prisoners that left Flossenbürg with no food or water and the threat of death constantly looming, less than 1,000 prisoners ever made it to their destination.[51] Shaw neglected to mention that many of these convoys were liberated by US forces before reaching Dachau, which could reasonably be interpreted by the courtroom to mean that the rest had perished. This, however, would be a

[47] Dr. Alain Legeais testimony, M1204, *Becker Trial*, Roll 2, p. 488-496.
[48] Shaw, M1204, *Becker Trial*, Roll 2, p. 73.
[49] Ibid, p. 73-74.
[50] Ibid, p. 75.
[51] Ibid, p. 75.

mistaken conclusion, as most were freed by American troops and subsequently disappeared on their own accord.[52]

Shaw transitioned back to episodes of depravity, explaining in detail that the forthcoming testimony would recall stories of cannibalism, of physicians' refusals of medicine to prisoners despite having a surplus, and of various forms of punishment that seemed to serve no other purpose than the simple amusement of the SS. Only after the prosecutor exhausted himself of the most barbaric scenes that played out in Flossenbürg, did he then undertake the process of introducing each one of the fifty-one defendants. A few of them deserve closer attention. Shaw began from the top,

> #1, Friedrich Becker, was a lieutenant in the Waffen SS. He was stationed at the Concentration Camp Flossenbürg from 1941 to 1945. He was in charge of the work detail rosters. Under his direction the inmates of Flossenbürg were sent to the various factories to work. He kept the records on the inmates sent to each outcamp and consolidated his reports monthly, forwarding them to the Economic Division of the Waffen SS in Berlin. He burned all the work statistics and correspondence with factories immediately prior to the arrival of the Americans. He loaded the indexed records on trucks for shipment to Dachau at the time he was burning the other files. His assignment of sick, undernourished, emaciated prisoners to strenuous work over the objection of physicians accelerated their death."[53]

This type of profile would be patiently and comprehensively replicated fifty more times. In fact, Shaw would only work his way through defendant number eighteen before conceding to time for the day. In his depiction of these first few men, however, much can be analyzed as to the prosecution's intended trial strategy.

Taking Becker's abovementioned profile as an example, Shaw made sure to incorporate a very specific checklist of sorts when introducing the defendants. He began each one by stating the accused's number (which corresponded to the card around their neck) and name, typically only their last. The chief prosecutor then followed up by stating the accused's position within the camp before recording any specific criminal acts attributed to them by witness statements (including, when available, any confessions by the accused himself). When he could not reproduce any explicit

[52] It is estimated that between 25,000 and 30,000 prisoners were evacuated from Flossenbürg and its satellites in April 1945. No more than 25 percent reached Dachau, leaving approximately 20,000 prisoners that have more or less vanished from the records. While these figures do not correspond with Shaw's numbers, it would take decades of excavation and interpretive calculations to gain even a semi-confident summation. For exact figures and methodology. Siegert, "Konzentrationslager Flossenbürg," p. 485-486.

[53] Shaw, M1204, *Becker Trial*, p. 77-76.

events, Shaw relied on generalizations of abuse. The fluctuating antagonism between noting specific acts of murder and an implied culture of prevailing violent behavior would prove consequential to the prosecution's approach, as it only worked to confuse the charges. Becker's profile can be viewed as a textbook representation of a common design to commit war crimes. The defendant is never implicated in a specific act of violence or mistreatment, but rather his administrative activities caused the death of thousands. The issue, however, is that Shaw had inadvertently introduced a degree of guilt, which could subsequently be measured and compared between defendants.[54] Contrasting this description with those of the accused prisoner-functionaries will further demonstrate the prosecution's self-induced conflicts.

Shaw presented three more SS-men to the court, before coming to defendant number 5, Peter Bongartz. "[He] was a Capo at Hersbruck, an outcamp of Flossenbürg. He has beaten prisoners who were in his work detail until they died."[55] In stark contrast to how Becker was portrayed, the accusations leveled against Bongartz are rather unconvincing. While the existing allegations against him would normally warrant an indictment, it is evidently subordinate in severity when compared to the number of deaths attributed to Becker, for example. As Shaw made no reservations on limiting himself to time during his opening statement, it is therefore logically presumed that this was an exhaustive representation of Bongartz' alleged criminal activity. His profile is a principal example of how Shaw, in deviating from Denson's concise yet comprehensive strategy, started down the road of arguing fifty-one individual cases, which ultimately condemned the trial to months of prolonged deliberation. In the process of recognizing each defendant on their own criminal merits, one can see how Shaw began to contradict his original common design charge by introducing a measurable scale of guilt between each of the accused, as demonstrated by defendants Becker and Bongartz. Shaw then went on to further confuse the charge by attempting to characterize the prisoner-functionaries on the dock as criminals-by-nature, thus conflating identity with guilt.

> #8, [Karl] Buttner, is a habitual criminal. He has been in confinement for the last twelve years. He was Block eldest in Block 12, where the kitchen was. He has beaten prisoners who were working for him until they died. He would allow food to spoil in the kitchen and

[54] William Denson later expressed this very issue as being a potentially major hazard, and therefore needed to be avoided. "So the problem that the prosecution had was trying to equalize the testimony before the court, so that there would be some degree of uniformity in the sentences that were imposed." Denson interview by Mark Goldberg, 12 March 1996.
[55] Shaw, M1204, *Becker Trial*, p. 79.

> after it was spoiled would feed it to the prisoners, producing dysentery. He has dragged sick prisoners out of bed, beating them with a riding whip and kicking them with his feet and then forcing them to work. He told one of the inmates, who will so testify, that he would not send sick people to the hospital but would finish them himself.[56]
> […]
> #10, [Christian] Eisbusch, is a habitual criminal and has been in jail or prison for the last ten years. He was a Capo at Camp Ganacker. On the transport evacuating Ganacker he was made a guard and as a guard on that transport, the evidence will show he shot and killed prisoners who were marching there. The evidence will also show that as a Capo at Ganacker he killed prisoners by beating them to death.[57]
> [...]
> #14 [Karl Friedrich Alois] Gieselman, is a habitual criminal. He wore the green triangle, having been convicted as a felon at least five times. He was the Block eldest in Block 19, which contained young prisoners, known as the Kindergarten. He was known for his brutality towards boys in his block and we will have ample evidence to show that he killed many young boys under his jurisdiction.[58]
> #15 [August] Ginschel, started out in the reformatory as a young boy. He lost his arm when he was in the reformatory, in 1938, either through an accident or attempted suicide. He was a block orderly and has beaten many prisoners and as a transport guard on the evacuation he shot many of the prisoners who were too weak to continue.[59]
> [...]
> #18, [Josef] Hauser. He had been in the penitentiary before his arrival at Flossenbürg but there he became a Capo in the armament factory, and as a Capo or a work leader he has beaten prisoners until they died. He has stated that 'if an already finished product was damaged by carelessness or stupidity, it was considered sabotage by my superior, then instead of reporting the man, I would beat them.' He admits beating prisoners with a rubber hose until some of them bled from the nose and then he joined the SS on the 3rd of April, 1945.[60]

Among the initial eighteen names listed by Shaw, six were former prisoner-functionaries at Flossenbürg. All of these men held a position of authority in some capacity over their fellow inmates, and all had been accused by those very same fellow inmates of abuse, mistreatment, and murder. Curiously, all but one of them were characterized as "Habitual Criminals"; note the odd man out, Bongartz, was never attached to any prisoner category at all. Reminiscent of Denson's description in the Mauthausen case, Shaw made a conscious attempt to connect the "criminal" prisoner category as a sign of guilt associated to the current trial. What separates the two, however, is that Shaw added specific incidents of criminal activity to his individual characterizations. In so

[56] Shaw, M1204, *Becker Trial*, p. 79.
[57] Ibid, p. 80.
[58] Ibid, p. 81.
[59] Ibid.
[60] Shaw, M1204, *Becker Trial*, p. 81

doing, the court's attention was steered toward these singular events, thus creating a situation that would demand indisputable proof of their occurrence. Such evidence was often impossible to procure, which is precisely why Denson kept his distance from specifics when arguing the existence of a common design in the first place. Incredibly, Shaw had managed to recreate what was essentially the prosecution's approach in the Belsen trial; a hybrid indictment that was simultaneously a blanket charge over all fifty-one defendants, *and* fifty-one individual criminal cases.

With time expired, Shaw ended for the day and would pick up where he left off the following morning. President Eliot and the rest of the bench would have much to consider in the meantime.

Day 2: The Color of Culpability

The court reconvened the following day at 9:00 am. Before the floor was given to Shaw, President Elliot addressed the chief prosecutor,

> The Court feels it necessary, at the present time, to caution the Prosecutor with reference to any statements as to the bad character of the accused… The Court is not referring to overt acts which will be later substantiated by testimony… the Court is particularly referring to any such statements relative to certain specified members of the accused as being habitual criminals.[61]

Shaw retorted that he had said nothing he didn't expect to prove, and that the evidence would demonstrate a clear distinction between what he referred to as the "civilian internee[s]" and the capo clique that was designated by those "with ten years penitentiary service before [coming to the concentration camps]."[62] Elliot nevertheless stood firm, maintaining that all evidence would be considered in due time, but that baseless accusations of "bad character" would not be tolerated. This exchange is indeed fundamental to the overall trajectory of the Flossenbürg trial. Shaw's initial strategy for the prisoner-functionary defendants was essentially refused outright before he could argue his case. A subtle adjustment in rhetoric, however, was all that was needed to get the prosecution's approach back on track.

Shaw proceeded, "If it please the court, number 20, Georg Heinisch [*sic,* Hoinisch], after his arrival at Flossenbürg became a capo in a Messerschmitt factory and an assistant to the block

[61] Elliot, M1204, *Becker Trial,* p. 83.
[62] Shaw, M1204, *Becker Trial,* p. 84.

eldest in Block 4."[63] The chief prosecutor continued to recall specific abuses attributed to Hoinisch, including dowsing dozens of prisoners with cold water and making them stand outside all night; an act that left several dead. Acquiescing the court's demands, Shaw made no reference to the defendant's prisoner category, which was indeed a habitual criminal.[64] It would appear however that Shaw didn't actually know to what group Hoinisch actually belonged, because as the following will show, the chief prosecutor continued his strategy of concentrated character attacks,

> Number 21, Alois Jakubith, was a Capo in the quarry where he killed prisoners by beating them to death or throwing them into the danger zone near the wire where they would be shot by the guards. Jakubith wore the green stripe on his uniform or clothing. We will show when the time comes what the green stripe or triangle represents. Jakubith wore that green stripe and would beat prisoners with a club or a piece of iron or anything that he could lay his hands on. He was a member of the guard at the time Flossenbürg was evacuated. Although he wore the green stripe for years, at the time Flossenbürg was evacuated he was wearing a uniform and carrying a rifle. As a guard he killed many prisoners in that transport.[65]

In describing defendant number 21, Shaw appeased the court's censorship on prisoner category, but it didn't stop him from referencing prisoner color no less than four times. With no objections, he proceeded to build on the green references.

> No. 30, Walter Neye, the evidence will show that Neye was Block eldest in Block 7 at Flossenbürg and a Capo in both the Messerschmitt factory and the stone quarry during the time covered in these charges, and that during that time he wore the green stripe…[66]
> No. 31, Willi Olschewski, the Government of the United States will show that during the time covered by these charges, at Flossenbürg he wore... the green triangle.[67]
> [...]
> No. 48, Georg Weilbach. During the time covered by these charges Weilbach wore the green triangle.[68]

Shaw did not mention the color categories of five other prisoner-functionaries: Johann Lipinski (defendant 23); Karl Mathoi (defendant 25); Gustav Matzke (defendant 26); Raymond Maurer (defendant 27); and Theodor Retzlaff (defendant 37). Aside from unverified pre-trial witness

[63] Ibid.
[64] According to his Flossenbürg prisoner transport card, Hoinsich was listed as "preventive police custody," and his WVHA card indicates Hoinisch as a professional criminal, "Häftlingskarte des WVHA–File Nr. 19837," WVHA_019837_barch_07a_fl_de.jpg, GFMA, Victims database. Accessed January 2021.
[65] Shaw, M1204, *Becker Trial*, p. 85.
[66] Ibid. 87-88.
[67] Ibid. 88.
[68] Ibid. 93.

statements and suspect interrogations, it is not entirely clear what other sources of information Shaw relied on when he identified the defendants by triangle-color. After cross-referencing the contemporary source material (trial testimony, the accused's prisoner file-cards, and prisoner register books) there were inconsistencies with Shaw's initial identifications. Number 30, Walter Neye, for example, shows no evidence of ever having worn a green badge. On the contrary, there are multiple sources confirming that he was a political prisoner and actually wore a rather unique red triangle with a black stripe over it; indicating that he was a repeat camp prisoner.[69]

It is certainly no coincidence that the only color mentioned during Shaw's monologue was green. In this sense, Shaw never actually changed his original strategy toward the prisoner-functionaries. By referring to an entire sub-group of the prisoner community through a one-dimensional identity that was arbitrarily mandated by the camp-SS itself, the prosecution was actually working to reify that very identity once more. Through a systematic repetition of condemning the "green criminal," the prosecution attempted to convince the court that the "criminal" category not only sat at the top of the prisoner social hierarchy in Flossenbürg, but that by design its members were employed by the SS explicitly to cultivate a perpetual environment of violence. As both perpetrator and victim, the green-criminal identity would find itself caught between these two poles of representation. Indeed, many of the greens were extremely abusive and deserved prosecution side-by-side those who proudly dawned the swastika. But contrary to Shaw's prevailing narrative, they were not the only prisoner category to have wielded authority over others, nor were they the only group to apply that authority in a physical and often deadly manner. Likewise, as would be made evident in the trial, there were also greens who refused to participate in the omnipresent culture of violence. Reducing individuals to their prisoner categories, and those categories to criminality, was a dangerous strategy for the prosecution, but this would only become apparent later on during witness interrogations.

[69] One witness identified Neye as a political prisoner. Paul Toermer, M1204, *Becker Trial,* pp. 2697, 2724.
Several other defense witnesses recalled Neye wearing a red triangle with a black stripe, which indicated Neye was a repeat prisoner. Trial testimony of Karl Koenig; Walter Kalleideit; Ernst Jaeger. M1204, *Becker Trial,* pp. 2978, 3359, 3345. See also, Illustration 9.
Neye (having heard all the previous references) repeated that he wore a red triangle with "a bar across", and even states that he was specifically targeted by the SS as a repeat offender M1204, *Becker Trial,* pp. 3388, 3427-3428.
The prisoner register book designates Neye as "Sch. Rückf", which means "Schutzhaft, Rückfall" (Protective custody, relapse). *Number Book,* Vol. 1, entries 1711-1740, ITS, 1.1.8.1, File: 10794216.

At 10:30 am, Shaw finally ended his case overview, insisting that over the course of the trial, the prosecution would provide enough evidence to prove the allegations he had raised."[70] In total, he devoted approximately two and a half hours for his opening statement. In that time, however, the chief prosecutor presented a disorientating composite speech consisting of scattered historical narrative, isolated anecdotes of graphic brutality, and character attacks addressed to an entire prisoner category. Above all, however, he unwittingly forfeited the most powerful tool in his prosecutorial arsenal—the charge of common design—before the trial deliberations even started. Shaw proceeded to itemize each defendant, removing them from the conception of a conglomerate criminal enterprise, and offering their judgment on unequal terms. To be clear, there is little reason to doubt the accusations brought before each of the fifty-one defendants. Such an unbalanced portrayal of criminal culpability, however, was a mistake.

Shaw first described his opening statement as being a "blueprint". Yet, his protracted monologue felt more like a handful of hastily made sketches rather than a single comprehensive rendering. Of course, his architectural allusion was only a subjective projection of the prosecution's expectations. Nevertheless, it was somewhat prophetic, as Shaw's initial accusations concerning criminal identity would become an enduring topic of debate throughout the duration of the trial. It is also interesting to note that his prolonged introduction, particularly in comparison to Denson's two succinct examples, somewhat reflects the duration of the seven-month-long trial that now stood directly before him and his team.

3.2 The First Three Weeks

3.2.1 Kurt Goltz and the French Doctors

As standard practice, the defense only presented their opening statement after the prosecution had rested its case. Shaw was therefore free to proceed with witness testimony. Nearly all of the early prosecution witnesses had worked as prisoner-functionaries in the hospital. Kurt Goltz, for example, was a clerk in the prisoner hospital and as such, possessed an expansive knowledge of the daily administrative operations of the camp.[71] Consequently, he was asked to identify no less

[70] Shaw, M1204, *Becker Trial*, p. 95.
[71] The 34-year-old Goltz was arrested in Zagreb by the SD in June 1941 and was transferred to Berlin central prison. He was released a year later and immediately sent to Sachsenhausen concentration camp. Goltz only reached Flossenbürg, his final transfer, in March 1943. Kurt Goltz, M1204. *Becker et al.*, Roll 2, p. 101.

than twenty-six defendants.[72] As a German prisoner, however, any abuse Goltz personally received would not be accepted—per the judicial limitations that crimes committed by a nation on its own citizens were not prosecutable. Therefore, his testimony would be presented as an eye-witness observer and remain relatively broad in scope, emphasizing a system of oppression. This was, however, a problematic use of the witness, since the prosecution clearly overlooked the fact that they were employing the testimony of a German prisoner-functionary, while simultaneously assigning guilt to sixteen individuals who were essentially his colleagues, based heavily on their privileged prisoner categories. Following Goltz, was an entire week of testimony provided exclusively by French prisoners of Flossenbürg, most of whom had also worked in the prisoner hospital and could confirm the allegations made by the previous witness.

Centering attention on the prisoner hospital served several practical purposes. As violence and injury were both prevalent occurrences, the hospital naturally became an integral component of camp society, with patients coming, going, and dying on a daily basis. Goltz and his colleagues gained critical access to many of the prisoners, for which they could garner a broader perspective of both the hazards of the forced labor program and the general status of the prisoner community. As well, Goltz was tasked with managing the so-called "Death Books" (*Totenbücher*) which allowed him to keep track of the mortality rates.[73]

From a narrative perspective, the hospital was also a core aspect of the prisoners' arrival experience. Inmates were typically brought to the neighboring village of Flossenbürg via train where they were often 'greeted' by SS guards with both verbal and physical abuse. It was then a short march to the camp itself, where they were searched for any personal items and sprayed with a delousing agent before being directed to one of the quarantine blocks. No food was distributed at this time. The next day they would be sent to the shower room, where the new arrivals would then endure an either scalding hot or ice-cold shower before the camp physician came for inspections. This experience usually consisted of waiting, completely naked, for several hours before a momentary encounter with the doctor. It was testified that Dr. Heinrich Schmitz (defendant 40), accompanied by hospital eldest Karl Mathoi (defendant 25), marked each prisoner on the forehead in red paint with a 1, 2, or 3, signifying the physical condition of the prisoner vis

[72] Kurt Goltz, M1204, *Becker Trial*, Roll 2, pp. 105-107.
[73] Carl Schrade testimony, M1204, *Becker Trial*, Roll 3, p. 920.

a vis their ability to work.[74] Within approximately one week of arrival, the "Labor Commitment Office" would assign the individual prisoner to a work detail, based on their number. It was through this introductory 'procedure' that the hospital was shown to play a critical role in the destructive forced labor system at Flossenbürg.

In addition to describing the function of the hospital during arrivals, Goltz and the French doctors also spoke at length to various instances of abuse, torture and murder, all masquerading as medical procedure. Whereas hospitals are universally recognized as places of care and rehabilitation, the prisoner hospital at Flossenbürg was anything but those things. Testimony, time and again, presented an environment where dozens of sick and injured prisoners visited the hospital daily—as a last desperation in many cases—in need of common medical attention. Some issues were as mundane as needing a cycle of antibiotics or dressing a superficial wound. Many were simply exhausted from malnutrition and over-work and only needed a couple days of uninterrupted rest. The lucky ones were immediately turned away. Others were arbitrarily admitted, only to endure entirely unnecessary and extremely dangerous surgery (almost always without anesthesia) which often ended in the death of the patient. Goltz provided specific examples of medical malpractice by multiple defendants. Schmitz and Mathoi were the two primary perpetrators, among the accused, who worked in the hospital. On one occasion, Dr. Schmitz injected a female Hungarian Jewish prisoner, who had broken her leg, with a lethal amount of Evipan (Hexobarbital), killing her instantly.[75] Goltz recalled Schmitz' treatment of another "old Russian prisoner,"

> [who] presented himself in the morning at a general consultation and insisted on being taken to the hospital because he could not work any more [*sic*]. Dr. Schmitz got bored about him and put him on the table and asked to fill a syringe with phenol and made him, right in front of everybody, without taking care of the other prisoners present in the consultation room, made an injection on him immediately. The inmate died immediately.[76]

Of Mathoi, Goltz explained that despite having charge of the entire hospital administration (which incorporated the responsibilities of maintaining order, discipline, property, and cleanliness

[74] Francis Dufour testimony, M1204, *Becker Trial*, Roll 2, pp. 647-651; George Marcel Buhler testimony, M1204, Becker Trial, Roll 2, p. 779; Henry Pellet testimony, M1204, *Becker Trial*, Roll 3, p. 823.
[75] Kurt Goltz testimony, M1204, *Becker Trial*, Roll 2, pp. 114-115.
[76] Goltz, M1204, *Becker Trial*, Roll 2, p. 115.

throughout the adjoining convalescent wards) he preferred to carry out his own dissections, performing "at least one or even two postmortems every day," on recently deceased patients.[77]

Describing such apathetic behavior and morbid detail were all part of the prosecution's strategic approach. The prosecution endorsed a portrayal of the hospital as a place of wanton negligence and death, for which it was an integral component of the larger criminal system. Goltz spoke for two days, amounting to approximately ten hours of testimony, before he was finally excused.[78]

There were however unanticipated vulnerabilities in demonstrating the criminal activities of the hospital as the prosecution's opening strategy. As a consequence of the high number of deaths in the hospital, there were naturally few surviving victims who could provide witness testimony. What's more, if a particular prisoner survived a medical procedure, they were literally "living-proof" of the operation's success. Instead, the prosecution relied almost exclusively on former prisoners who worked alongside the accused and had personally witnessed the alleged crimes. Goltz, however, was not a doctor. The paradox is that the average individual could not possibly determine the efficacy of a particular medical procedure, as it was performed by a qualified physician such as Dr. Schmitz. Of course, among the prosecution's French witnesses, several were in fact themselves trained medical doctors.[79] That, however, did not prevent the defense from spending much of their cross-examination on verifying the educational background and professional expertise of the witnesses. For example, when the French prisoner Dr. Michel Bommelair explained that "about half of the patients who were operated on [by Dr. Schmitz] didn't need any operation whatsoever," assistant defense counsel Albert Hall objected to the statement as mere inference, lacking any evidence to be a legitimate conclusion in court.[80]

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[77] Ibid, p. 193-194.

[78] Goltz' testimony began on 13 June 1946 at 11:00 and concluded for the day at 17:00. The questioning started right where it left off the following day at 9:00 and lasted until the court convened at 17:15. Providing for the various recesses, the whole testimony amounted to approximately ten hours. Goltz, M1204, *Becker Trial*, Roll 2, pp. 96-238.

[79] In mid 1944, seven hundred French prisoners were transferred from Buchenwald to Flossenbürg, several of whom were trained medical physicians and quickly found themselves working as medical assistants in the hospital. See, Dr. Jean Michelin testimony, M1204, *Becker Trial*, Roll 2, pp. 277-278; Dr. Michel Bommelair testimony, M1204, *Becker Trial*, Roll 2, pp. 282-377; Dr. Alain Legeais, M1204, *Becker Trial*, Roll 2, pp. 477-548.; Pellet, M1204, Becker Trial, Roll 3, pp. 822-858. Although not part of the French prisoner transfer from Buchenwald, see also, Dr. Franz Wenzel Polak testimony, M1204, *Becker Trial*, Roll 2, pp. 602-646.

[80] The motion required a brief recess by the court. Upon return, the court ultimately sustained the objection by defense counsel Hall. Bommelair, M1204, *Becker Trial*, Roll 3, p. 303.

Dr. Henry Pellet, another French prisoner, worked as the head of the convalescent ward. He recalled witnessing eighteen various unnecessary amputations by Schmitz, all of whom suffered from "little abscesses."[81] In one particular case, Schmitz amputated a prisoner's leg just above the knee. Pellet explained,

> The muscles and the nerves were bound together, knotted together all at the same time, in a very gross way, and the blood was not stopped, and everything was done in not a clean way, and that is why in the two following days, almost every time, there was a general poisoning [...] Normally the blood vessels and the nerves should be knotted together, separately, but he [Schmitz] knotted them together in one bundle.[82]

During cross examination, defense counsel Hall compelled Pellet to not only recount step-by-step what Schmitz had done, but to then explain the *proper* procedural method to tie off an amputation.[83] The defense cynically disputed at every opportunity the medical competence and the veracity of what the witnesses claimed to have observed.

Through this early hospital staff testimony, a general picture of the prosecution's strategy begins to emerge. The hospital was presented as a central hub within the camp, not only through which all prisoners passed, but whose various activities were depended upon by nearly all other departments. As one of the first locations a newly arriving prisoner encountered, the hospital was a logical place to start the narrative. From these initial hospital records, the forced-labor program selected 'employees'. Whenever one was injured on the job, beaten by a foreman, or simply became too weak to work, they returned to the hospital for treatment. Some of them would be taken to the surgery room, which often served as a source of entertainment for SS leadership. Several hospital staff were forced to witness the 'performances'. In the event that a treatment was unsuccessful, the hospital was responsible for confirming the cause, performing the autopsy, and drafting the death certificate. The clerks recorded the death and added it to the camp's numerous statistical reports. The body was then transferred to the crematorium for disposal. All of this work was largely performed by the hospital functionaries, which evidently gave those who worked there a substantial wealth of operational knowledge. In other words, the prosecution implied that practically the entire criminal system of Flossenbürg was either connected to or firmly rooted in the prisoner hospital. From there, the other departments would be explored.

[81] Pellet, M1204, *Becker Trial*, Roll 3, p. 834.
[82] Ibid, pp. 832-833.
[83] Ibid, pp. 842-848.

3.2.2 An Unfortunate Tragedy

On Friday 28 June 1946, not three weeks into the trial, Shaw called Carl Schrade to take the witness stand. Schrade was a Swiss-German prisoner who, like Goltz, had obtained a relatively safe and influential position as a senior prisoner-functionary in the hospital and was therefore expected to be another key witness for the prosecution. He identified more than a dozen of the accused, introduced new spaces of atrocity, including the so-called execution detail—led by *Waffen*-SS guard Erhard Wolf (defendant 51), and verified multiple administrative records that had survived.[84] Schrade explained that instead of following SS orders to destroy them prior to evacuation, he buried them in a coal storage bin until liberation. Schrade personally handed them over to investigators.[85] After another long day of testimony, court was adjourned for the day, as normal, until 9:00 the following Monday.

On Sunday 30 June, Shaw suffered a heart attack and was subsequently diagnosed with coronary thrombosis at an Army hospital in Munich. He spent the entire month of July in the hospital before finally passing away on 2 August at the age of 55 years old.[86] From the trial minutes, however, one would be hard pressed to notice such a sudden and tragic outcome had even occurred. The court was opened the following Monday 1 July, as scheduled, with a brief address by Staff Judge Advocate of the Third US Army and officer-in-charge of the War Crimes Branch Colonel Frank Corbin,

> ...due to the sickness of Col. Shaw and as provided by recent directives, by verbal orders of the Commanding General of USFET, Col. [William] Denson is announced as assistant Trial Judge Advocate and will proceed with this case.[87]

By Wednesday, it was apparent that Shaw would not be returning. Denson requested a two-day recess, stating, "I am new to this case, having come into it for the first time the morning of July 1st

[84] Schrade authenticated prosecution exhibits P-2, "Morning Report of Flossenburg" and P-3 "Daily Death Reports," Carl Schrade testimony, M1204, *Becker Trial*, Roll 3. pp. 912-925. For prosecution exhibits P-2 and P-3, M1204, Roll 11.
[85] Schrade, M1204, *Becker Trial*, Roll 3, pp. 920-921.
[86] Shaw was visited by his wife and son in the Munich hospital, as well as his brother, medical corps colonel Dr. William Shaw (a surgeon with the 11th Army battalion in the Pacific theater) "Robert J. Shaw," *The Annals of Iowa* Vol. 28, Iss. 2 (Fall, 1946), p. 161.
[87] Col. Corbin, M1204, *Becker Trial*, Roll 3, p. 924.
For a brief biography of Frank Corbin, see "General Frank P. Corbin, Jr." Biographies, US Air Force, https://www.af.mil/About-Us/Biographies/Display/Article/107335/general-frank-p-corbin-jr/. Accessed June 2021.

and am not sufficiently acquainted with the details of the case to properly present it without this additional time."[88]

There is no telling exactly how the Flossenbürg trial would have gone had Shaw been there at its conclusion. Nevertheless, the consequences of his leadership in the first three weeks remained present throughout. Shaw had all but completely abandoned the hitherto reliable methodology established by his predecessor in the prior camp atrocities cases. Of the fifty-one accused, approximately one-third were former prisoners, a ratio that presented the court with a disproportionate portrayal of power and criminal agency in Flossenbürg. It completely skewed the cross-section indictment theory, intended to provide a comprehensive representation of the hierarchical criminal system that was essential to the prosecution's common design charge. Furthermore, in an early and heavy-handed attempt to underscore the violent brutality that was indeed commonplace at Flossenbürg, Shaw had neglected the concept of conditioning the courtroom.[89] The prosecution therefore denied the court a foundation from which to appreciate the brutal development of camp society and the corresponding prisoner hierarchy. Finally, by emphasizing anecdotal acts of atrocities in his opening statement, Shaw ultimately sacrificed the central concept of a common design to prolonged deliberation over fifty-one individual cases of alleged war crimes. Incredibly, it was Shaw's predecessor, William Denson, who would replace him.[90] The damage, however, was already too great to reverse.

3.3 William Denson - A Strategy of Crime and Space

On 1 July 1946 (twelve court days into the Flossenbürg trial) Denson addressed the court as lead prosecutor for the first time. A brief acknowledgement of Shaw's absence[91] was made before assistant prosecutor Henry Newell proceeded with the witness examination.

Whether or not Denson looked for a complete re-setting of the prosecution strategy, it cannot be determined for sure. What is irrefutable, however, is that Denson was bound to two

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[88] Lt. Col. William Denson, M1204, *Becker Trial*, Roll 3, pp. 1148-1149. Coincidentally, the court would later enter into a two-week recess (on behalf of the defense team) when Shaw died. The hiatus apparently allowed enough opportunity for all pronouncements on his death to be given prior to reconvening the court on 19 August.
[89] Denson interview by Joan Ringelheim, 25 August 1994.
[90] Having just been discharged from the Army, Denson was scheduled to return to the States at the very time Shaw fell ill. Because a large number of witnesses had already arrived from all over Europe to testify, Denson was asked to take over, in a civilian capacity. Denson, *Justice in Germany.*
[91] It only took three days before the court acknowledged that Shaw would not be returning to the case, leaving Denson to officially take over as chief prosecutor. Denson, M1204, *Becker Trial*, Roll 3, pp. 924, 1148-1149.

invariable factors: the defendant list, which had broken away from a coherent cross-section indictment, and Shaw's long-winded and confused opening statement that undermined the premise of the common design charge. Denson later acknowledged that the Flossenbürg case was by far his most difficult trial, on account of not having the proper time to prepare. He added that Shaw had formulated the case "as though he had forty-five [*sic*[92]] separate murder cases" and directly attributed this approach to the prolonged duration of the trial overall.[93] What's more, the defense team, led by counsel Wilson and Oeding (both of whom worked against Denson on the Mauthausen trial), was acutely aware of his strategies.

3.3.2 Carl Schrade Testimony: A Structural Overview

After critical examination of the transcript, it appears that while Denson was constrained in his ability to completely restart the case, he nevertheless attempted to at least (re)contextualize the 'crime scene'. Coincidentally, Carl Schrade was the perfect witness with whom to proceed on this revised course. Denson began by asking about the organizational hierarchy in Flossenbürg, starting from January 1942. The court learned *for the first time* that the entire Flossenbürg administration was under the authority of the camp commandant, who was also the highest-ranking SS-officer. The commandant was assisted by his adjutant and the prison compound chief (*Schutzhaftlagerführer*), both of whom were also SS-officers. The prison compound chief dictated his orders to the report leader (*Rapportführer*) who oversaw the block leader (*Blockführer*). These mid-level positions were mostly filled by SS non-commissioned officers. The block leader was the direct liaison between the SS and the prisoner community and as such, oversaw the prisoner-functionary camp eldest who subsequently supervised the various prisoner-functionary block eldests. Denson also confirmed with Schrade that the entire administrative pyramid, from the commandant down to the guard battalions, was composed entirely of SS-men and almost exclusively from the Death's Head division.[94] Within approximately ten minutes of interrogation,

[92] Denson is referring to the forty-five defendants that made it to judgement. He does not take into account the six accused that were dismissed as *nolle prosequi* on 17 December 1946, mere weeks before the end of the trial. M1204, *Becker Trial,* Roll 10, p. 8253.

[93] Denson expressed his frustration with the Flossenbürg trial decades later, stating, "the activities in that case [Flossenbürg] followed the same pattern of conduct on the part of the accused as that existed in Dachau and Mauthausen which were tried in not over two months in each one of them." Denson interview by Horace Hansen, *Denson Papers,* p. 36.

[94] Carl Schrade testimony, M1204, *Becker Trial,* Roll 3, pp. 933-934. For more on the development of the Death's Head Units as concentration camp administrators, see Dillon, *Dachau and the SS.*

Denson presented to the court the entire administrative cross-section of Flossenbürg and established the Death's Head Unit as the primary authoritative organization.

Once the personnel structure was established, Denson shifted his interests to the departmental architecture inside Flossenbürg, systematically asking for clarification of each department's function and faculty. Schrade explained that the medical department was indeed established for "the health welfare of the prisoners" and that it also had the responsibility of managing sanitary conditions, so far as it related to the prisoners' health. The Effects department stored all the prisoners' personal items and valuables. The Food department allocated meals, the Labor Commitment department assigned work details, and the Political department drafted progress reports as well as conducted prisoner interrogations.[95] Schrade also explained that the report leader recommended a prisoner's promotion to the position of capo, which was then certified and appointed by either the prison compound chief or the Adjutant.[96] With the entire organizational framework of Flossenbürg presented to the court (refraining from any mention of the individuals accused), Denson directed his next line of interrogation to the arrival experience of prisoners, effectively reproducing the information that Shaw had gleaned from witnesses like Goltz.

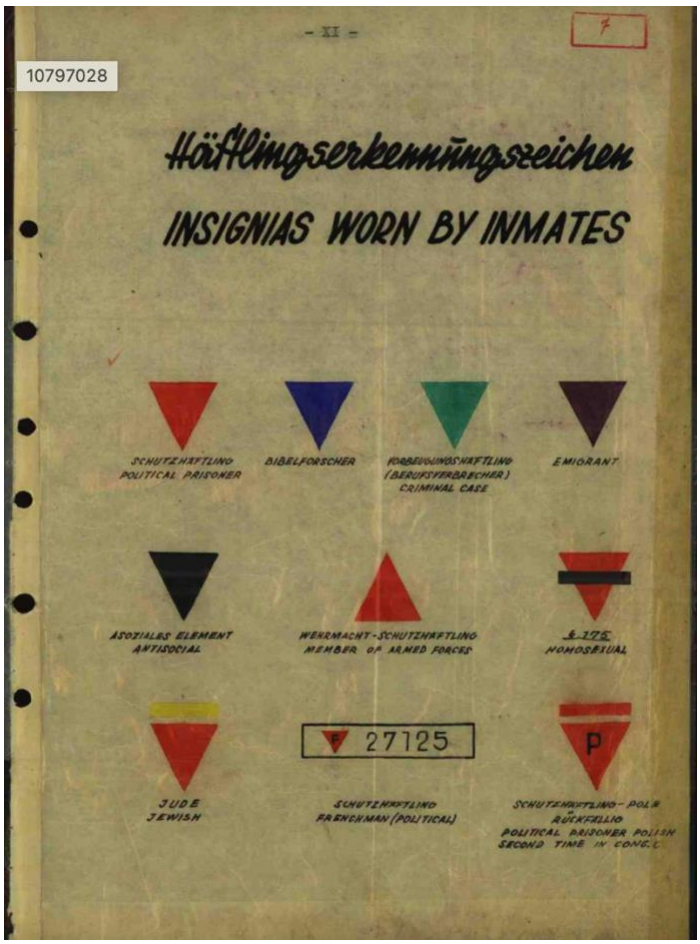
The patiently delivered line of questioning by Denson eventually led Schrade to clarify the various markings on the prisoner uniforms, particularly the function of the triangles. Each inmate received two numeric patches to sew on to their coat and pants. They also received one of several "descriptive" triangle patches, for which Schrade defined,

> The red triangle belonged to the so-called protective custody prisoner, the green triangle to the so-called preventive prisoner, the black triangle belonged to the so-called anti-social prisoner, the blue triangle to the so-called Jehovah's Witness, the red triangle with a yellow line through it belonged to the so-called Paragraph 175, the homosexual,[97] and the prisoner

[95] Schrade, M1204, *Becker Trial*, Roll 3, pp. 934-935.
[96] Ibid, pp. 936.
[97] Schrade makes no mention of the famous pink triangle so often attributed to male homosexual camp-prisoners. While the pink triangle has become synonymous with this prisoner category, Klaus Müller explains that there are currently no known examples in existence that can be authenticated or traced to an individual prisoner. As homosexuality was still illegal in most countries throughout post-war Europe (including occupied Germany), many prisoners who wore the pink triangle discarded any identifiers as soon as possible. The only known surviving patch belonging to a paragraph 175 offender is attributed to the late Josef Kohout, who was the inspiration behind the very first memoir of a gay concentration camp prisoner, *The Men with the Pink Triangle* (1972). Not only was Kohout a former prisoner of Flossenbürg, but his patch (now preserved at the USHMM Shapell Collections Conservation and Research Center in Bowie, MD) is red and his corresponding prisoner effects card depicts a red triangle with a yellow dash over it, just as Schrade had explained in court. Klaus Müller, "Documenting Nazi Persecution of Gays: Josef Kohout/Wilhelm Kroepfl Collection," (Film), 2013, USHMM, *Curators Corner #13*, https://www.ushmm.org/collections/the-museums-collections/curators-corner/documenting-nazi-persecution-of-

> with a star belonged to the Jewish race. These various prisoners' triangles in the subsequent times received imprints according to their nationalities, that is, the first letter of the nationality of the prisoner was imprinted upon the triangle and later on[,] also on the number of the prisoner.[98]

Despite prior references to triangle color, this was the first time that a witness was allowed to comprehensively speak on the subject of prisoner categorization, which naturally developed into the topic of victimization.



9. Reference guide to prisoner color-categories in Flossenbürg concentration camp. ITS, 1.1.8.1, *Prefaces, Transcripts of Camp Administration Documents*, File 10797028.

In early 1942, Flossenbürg was occupied primarily by Czechs and Poles. Only later did the camp accommodate Russians, Yugoslavs, Bulgarians, Greeks, Italians, French, Belgians, Dutch,

gays-the-josef-kohout-wilhelm-kroepfl-collection. Accessed November 2021. See also, Heger and Muller, *The Men with the Pink Triangle*. For Kohout's prisoner patch, see USHMM, Accession Number: 2012.482.1, RG-33.002—Josef Kohout/Wilhelm Kroepfl papers. For Kohout's prisoner-effects card, see ITS, 1.1.8.3, File: 10911547.

[98] Carl Schrade testimony, M1204, *Becker Trial*, Roll 3, pp. 940.

Luxembourgers, Lithuanians, Slovenes and Hungarians.[99] Additionally, thousands of Russian POWs were interned in Flossenbürg and kept in isolation from the rest of the 'general population'.[100] Between the international prisoner community and the POW camp, Schrade had effectively presented the two victim groups to the court, as recognized in the trial charges and particulars. Denson continued to refrain from connecting individuals to the broad topics being discussed. Satisfied with the testimony, Denson concluded his interrogation and submitted the floor to the defense for cross examination.

The Cross-Examination

In spite of Schrade's extensive "court-conditioning" testimony, Denson could not expunge the underlying damage that Shaw's earlier character attacks had inadvertently caused to their own witnesses. In their cross examination, the defense was particularly interested in exploiting Schrade's status as a prisoner-functionary, pressuring him to concede that he was in an "exceptional position and should not be compared with the other prisoners."[101] Schrade had held several roles throughout his six years in Flossenbürg and was eventually promoted in July 1944 to chief administrator and Eldest of the prisoner hospital complex (which included the convalescent wards). This appointment had directly replaced Karl Mathoi (defendant 25)—a detail that Schrade was also forced to admit.[102] Building upon yet another apparent conflict of a prisoner-functionary, testifying on behalf of the prosecution against sixteen of his former colleagues (one of whom was his immediate predecessor), Schrade underwent an onslaught of probing interrogation dedicated to impeaching him as a witness.[103]

Schrade was asked to confirm where he resided and under what conditions, prior to 1942. Not only did he repeat that he had been a concentration camp prisoner since 1934, but was clearly insulted by the insinuations. On his own accord Schrade retorted,

> I should like to explain in the first place that I am the possessor of the rights of a citizen. I should like to state further that my internment was illegal and arbitrary, that I was never

[99] Ibid, p. 948.
[100] Schrade rather conveniently disregarded any mention of German or Austrian prisoners in his list. Yet, as most Reich nationals had arrived to Flossenbürg in the first three years, prior to the court's arbitrary judicial start date of 1 January 1942, Schrade's answer was correct. Nevertheless, this conspicuous omission evidently presupposed the boundaries between victim and (perceived) perpetrator. Ibid.
[101] Ibid, p. 951.
[102] Schrade would maintain this position through the evacuation phase and several weeks into the post-liberation period of Flossenbürg, "up until the time that the last sick persons were taken back to their nations or were taken to Weiden." Ibid, pp. 955-956.
[103] Defense Counsel Hall, M1204, *Becker Trial*, Roll 3, p. 965.

> put before a court of justice, that I never had an occasion to defend myself, that I, as much as a hundred thousand and millions of others, am a victim of Fascism. The court must know that people who were placed in concentration camps were not previously put before a court.[104]

Undeterred, the defense asked Schrade a further series of questions that continued to undermine his credibility as a witness. Had he ever been placed under arrest by US authorities in connection with his standing in Flossenbürg? Had the prosecution made any promises of government immunity in exchange for his testimony?[105] Had he always been treated as a German national while imprisoned in Flossenbürg?[106]—perpetuating the perception that all German prisoners were opportunity-seeking collaborators. Schrade denied any collusion with the American courts and further proclaimed that as a concentration camp prisoner, he was beaten and still had the scars to prove it.[107]

In a final series of questions, defense counsel Wacker asked about the corresponding triangle colors of political prisoners, "asocials," and "security custody" or "preventive custody" prisoners. According to Schrade, "security custody is a legal term which could not have any significance to a concentration camp."[108] The issue concerns whether or not prisoners were at any point sentenced by a court to serve time in a concentration camp. Whereas the political and "asocial" prisoners were seen as having been unlawfully persecuted, the defense denied the same interpretation toward the 'criminal' category.

Nikolaus Wachsmann has addressed this very misconception. So-called "habitual criminals" were seen to possess biologically deficient traits that compelled them to commit crimes. It was therefore determined by criminologists of the day that permanent removal from society (i.e. "preventive confinement", *Vorbeugungshaft,*) was the only solution. In November 1933, the Nazi regime introduced the "Law against dangerous habitual criminals." What first authorized courts to sentence known criminals to indefinite incarceration in the prisons, eventually facilitated an entire program that sent thousands to the concentration camps.[109]

Indeed, counsel Wacker asked if Schrade could provide the name of any prisoner that wore a green triangle who had not been sentenced by a German court (prior to their incarceration at a

[104] Schrade, M1204, *Becker Trial*, Roll 3, p. 966.
[105] Carl Schrade testimony, M1204, *Becker Trial*, Roll 3, p. 967–71.
[106] Schrade identified as a Swiss national of German descent. Ibid, p. 899, 981.
[107] Ibid, p. 981.
[108] Ibid, p. 996.
[109] Wachsmann, "Indefinite Confinement," pp. 165–191.

concentration camp) and furthermore, if Schrade could reveal what color triangle he wore. Both questions were objected to by President Elliot himself,[110] effectively blocking the defense from exposing what they perceived as a hypocrisy between victim and war criminal. Yet, the court's protection from witness self-incrimination only went so far. For all his invaluable contributions to the prosecution's cause, Schrade's testimony overwhelmingly presented observers with an uncomfortable depiction of his prisoner status. Defending his own actions in the camp, Schrade was forced to argue the legitimacy of his victimization in spite of having been a prisoner-functionary. Nevertheless, in the context of common design, Schrade's authority as a hospital eldest thoroughly complicated his credibility as a prosecution witness.[111]

3.4 Witness Typologies

Under the leadership of Denson, the prosecution witnesses were split into two primary categories. The first group was largely made up of former prisoner-functionaries of various levels. This included Kurt Goltz and Carl Schrade as well as the French doctors. As shown, their collective role was to testify primarily on the broad structural and operational aspects of Flossenbürg. To further complement this strategy, Denson also questioned several Czech clerks. From 1944 to the evacuations, approximately half a dozen Czech inmates filled some of the most crucial administrative positions in Flossenbürg. Their intimate knowledge of the entire camp network proved invaluable to the prosecution's common design narrative. Four of their testimonies will be analyzed in greater detail below.

The second witness group can be categorized simply as "general population" prisoners. As the label implies, this comprised the majority of the camp inmates; they held no official authority over others and received little to no privileges. In court, they were often presented as having minimal agency of their own. Their testimony was distinctly different from the functionaries in that it concentrated almost exclusively on describing specific allegations of criminal behavior committed by the defendants, ranging from routine beatings to indiscriminate murder. This group made up less than a third of the prosecution's witness pool and among them, included the only

[110] Schrade, M1204, *Becker Trial*, Roll 3, pp. 996–997.

[111] In 2014, the Flossenbürg Memorial Museum, in cooperation with Wallstein Verlag, published Schrade's memoir. While referencing the arrest that led to his eleven-year odyssey in the German domestic concentration camp system, Schrade never explicitly reveals his prisoner category. Through much archival research, however, the Flossenbürg memorial presents the book as the very first published memoir by a green "criminal" prisoner. Carl Schrade, *Elf Jahre: Ein Bericht aus deutschen Konzentrationslagern* (Göttingen: Wallstein, 2014).

Jewish and female prisoners who testified against the accused. Furthermore, many of these witnesses were questioned about their experiences in the subcamps and on the evacuation transports.

The conspicuous division in prisoner categories, between the functionary class and the general population inmates, is largely a consequence of the developmental trajectories of the Flossenbürg camp system. There were relatively few Jews at Flossenbürg for most of its operational life.[112] Not until August 1944, did the camp begin accepting Jewish men and women by the thousands, all of whom had started their journey from the camps in the east. In the final year of the war, Jews comprised the largest group in Flossenbürg at around 22,000, constituting twenty percent of the total number of prisoners.[113]

A similar phenomenon occurred with female prisoners. Flossenbürg's prisoner community was exclusively male for the first five years. Not until 1943, did the administration register its first female inmates. By September 1944, approximately 10,000 women were dispersed throughout to a small number of subcamps. With the influx of the Jewish transports, however, Flossenbürg continued to accumulate female prisoners. In total, more than 16,000 women were sent to Flossenbürg over the course of just two years.[114]

The relatively high saturation of Jewish and female prisoners (approximately fifty percent of whom were Jewish[115]) in the last weeks of the war helps to explain why the topics of their testimony tended to incorporate the subcamps and the evacuations. But what can this dynamic tell us about the prosecution's strategy? How were the topics of Jewish persecution and female imprisonment examined in the courtroom?

Roughly marking the halfway point in the prosecution's case, was the only witness not to have been in Flossenbürg during its operational period. Ben Ferencz testified for the prosecution as the lead investigator of the Flossenbürg war crimes case. In addition to recalling his investigative process, nearly two dozen US Army Signal Corps photographs, some distressingly graphic, were presented to Ferencz for authentication. Intended to provide the court with a visual context of the

[112] Between 1938 and 1942, less than one hundred Jews were imprisoned at Flossenbürg. Skriebeleit, "Flossenbürg—Hauptlager," p. 41.
[113] Skriebeleit, "Flossenbürg—Hauptlager," p. 47; Fritz, *Flossenbürg Concentration Camp*, p. 276.
[114] Siegert. "Konzentrationslager Flossenbürg," p. 481; Cziborra, *Frauen*, p, 25.
[115] Cziborra, *Frauen*, pp. 26.

violent and inhumane treatment of prisoners, the amateurish cataloging of the photos worked to undermine the value of the images as evidence.

3.4.1 Czech Clerks

Czechs occupied a unique position within the social hierarchy of the concentration camps. According to Nazi racial ideology, the Slavic "race"—to which Czechs belonged—was considered one of three primary groups of European *Untermensch* (subhumans), along with Jews and Romani.[116] Hitler was particularly resentful towards Czechs and the intelligentsia was specifically persecuted under the Nazi regime.[117] Nevertheless, Czechs and Germans have historically practiced a considerably intermingled existence prior to the establishment of the Third Reich.[118] During Nazi occupation, the majority of non-Jewish Czechs were able to live a relatively normal life.[119] Inside the camps, Czechs were first among their Slavic brethren in the social pecking order,[120] which generally contributed to less abuse from guards.[121] As Wolfgang Sofsky has pointed out, in the final years of the war, treatment of Czech prisoners was approaching that of *Reichsdeutsche*.[122] During the Flossenbürg trial, a former Czech functionary testified that he had obtained his position from an SS detail leader who claimed to like Czechs, due to their decency and ability to speak German.[123] On another occasion, the former Flossenbürg camp eldest Karl Mathoi (defendant 25), insisted that Germans got along best with the Czechs because they "caused the least trouble. They were clean and they never caused any attention."[124] This generally positive

[116] Sofsky, *Order of Terror,* p. 119.
[117] John Connelly, "Nazis and Slavs: From Racial Theory to Racist Practice," *Central European History* 32, no. 1 (January 1, 1999): 1–33. p. 3.
[118] Before 1939, 3 out of every 10 people living in the Bohemian crownlands (that is, Hapsburg controlled Bohemia, Moravia and Silesia) were German. Germans and Czechs were so integrated in the region that Nazi anthropologists considered a broad spectrum of the (non-Jewish) population to be so-called *Amphibians*—"people who could switch nationalities or whose nationality was unclear." Chad Bryant, "Either German or Czech: Fixing Nationality in Bohemia and Moravia, 1939-1946," *Slavic Review, 61*(4), 2002, 683-706. pp. 683-684.
[119] John Connelly notes that under Nazi occupation, the so-called Czech "Protectorate" maintained a profit-making business market, working class earnings inflated with wartime production, and the birthrate increased. Even the Czech administration was among the most autonomous German occupied nations in Europe, with the exception of Denmark. Connelly, "Nazis and Slavs," p. 5.
[120] Sofsky, *Order of Terror,* pp. 119-120.
[121] This is not to say that Czech prisoners were treated well. Approximately one-fifth of the 3,800 Czech prisoners in Flossenbürg died between 1940 and 1945. 700 of them were identified and categorized as Jews. Fritz, *Flossenbürg Concentration Camp*, p. 268.
[122] Sofsky, *Order of Terror,* p. 119.
[123] Emil Kaminak testimony, M1204, *Becker Trial*, Roll 3. p. 1208.
[124] Karl Mathoi testimony, M1204, *Becker Trial,* Roll 6. p. 4235.

attitude helps to explain the phenomenon of a relative Czech dominance within the clerical class of prisoners at Flossenbürg.

The premier functionary positions in the concentration camps were the ones with authority over others; the camp eldest, block eldests and capos. Each of these roles came with a limited amount of power and the application of that power was violence. Literacy, however, was not a prerequisite. With some exceptions, these roles were primarily filled by the German "criminal" category.[125] Below these positions of enforcement, were the positions of responsibility; clerks, hospital nurses, kitchen staff, block orderlies. These roles did not typically accord direct authority over others, but they often required a learned skill set. Clerks were expected to keep meticulous records, and of course, be proficiently literate in German. Such prerequisites suited many from the Czech intellectual class that were sent to the camps.

As Czechs were the first "foreign" prisoners to arrive at Flossenbürg in January 1940, many were subsequently promoted to preferential status and assigned functionary positions when groups from further east began arriving en masse. By 1944, several Czech inmates, including Emil Ležak, Alois Valoušek, Karl Prochazka, and Miloš Kučera, occupied various clerical positions in nearly every administrative department in the camp. The job of clerk was indeed a prestigious position and amounted to a rather significant measure of indirect power.

Emil Ležak[126] (the same Emil Ležak who was in the process of writing his statement at the exact moment the American Army arrived at the *Hauptlager* gates[127]) was a clerk in the Labor Allocation office (also referred to as Department 3) in 1944. He worked directly under SS-*Oberscharführer* Friederich Becker (defendant 1), managing prisoner labor records throughout Flossenbürg and its subcamp system.[128] His record-keeping duties included drafting lists of prisoners for removal from work details, often resulting in a one-way transfer to Auschwitz or

[125] Skriebeleit, "Flossenbürg—Hauptlager," p. 41.
[126] Emil Ležak was the son of a politically active family of Social Democrats. As a university student, he studied journalism in Prague and worked for several political newspapers, including *Narodni Politika*. In 1938, at nineteen years old, Ležak worked for Czech army intelligence. After Germany annexed the Sudetenland, Ležak moved to Stuttgart, where he got a job in a factory and organized with fellow Czech partisans on the weekends. He was eventually arrested by German authorities and spent several months in jail before ending up in Flossenbürg in June 1942. He worked in various forced labor details before being promoted to clerk in 1944. Emil Ležak Sworn Statement, 23, April 1945, 12 pages, 2309-PS, Exhibit-B, M1204, Roll 1, p. 1.
[127] See chapter 1.
[128] Emil Ležak testimony, M1204, *Becker Trial*, Roll 3. p. 1053.

Bergen-Belsen.[129] Ležak testified that it was "common knowledge" among the prisoners of Flossenbürg that such transports were effectively a death sentence for those selected.[130] Whenever possible, he secretly manipulated the lists.[131] Over the course of one year, Ležak noted that three transports "liquidated" approximately 12,000 prisoners in this manner.[132]

The death transports were usually made in conjunction with the Medical Department. Dr. Schmitz (defendant 40) assessed the health of a particular prisoner, and his conclusions would be registered by the Czech clerk Alois Valoušek.[133] Transferal to Auschwitz and Belsen were, however, not the only death sentences that Ležak and Valoušek were obliged to record. Both testified at length as to the so-called *Sonderbehandlung* (special treatment) practices, a euphemism for execution. Ležak explained that such execution orders typically arrived by teletype from the RSHA in Berlin, to the offices of the Political Department in Flossenbürg. They were then overseen by the commandant before being implemented. Sometimes these killings were performed on the roll call square, in front of the entire prisoner population.[134] Other times, they were carried out in private, behind the walls of the *Arrestbau*. As part of the Medical Department, Valoušek recorded the deaths of prisoners from *Sonderbehandlung*.

Valoušek also transcribed approximately three hundred individual killings, via euthanasia, carried out by Schmitz in the hospital.[135] From May to September 1944, he further recorded between twenty-five and thirty tuberculin injections per week; half died within a day of receiving the shot.[136] Valoušek was also responsible for keeping the so-called "Death Records," personally recording some 16,000 names.[137] He was able to recall the figure because, in addition to the official

[129] Ležak confirmed that he was often required to accompany Becker on transport selections. Ležak, *Becker Trial*, Roll 3. pp. 1056-1071.
[130] Ibid, p. 1057.
[131] If, for example, there was a father and son, Ležak tried to make sure they were not separated. Ibid, p. 1066.
[132] Ibid.
[133] Alois Valoušek was a civil servant (*Beamter*) in Prague before being arrested by the Gestapo, as he explained, for "help[ing] comrades illegally." He was sent to Flossenbürg in November 1943 and was assigned the position of clerk in both the prisoner hospital (*Revier*) and the special arrest building (*Sonderbau*). Alois Valoušek testimony, M1204, *Becker Trial*, Roll 2. pp. 579-580. See also, "Valoušek prisoner index-card", ITS, 1.1.8.3, File: 11033757.
[134] "There were some periods of time when such a public special treatment, as it was called, took place in the public twice a week. For this purpose, the prisoners sometimes had to get up earlier and had to stand at attention on the roll call place, and had to wait until the prisoners who were working during the night returned to the camp, and when all the prisoners were assembled on the roll call place and at the place surrounding the roll call place the execution would take place. Sometimes it was in the morning and sometimes in the evening." Ležak, M1204, *Becker Trial*, Roll 3, p. 1074.
[135] Valoušek, M1204, *Becker Trial*, Roll 2. pp. 580–581, 601.
[136] Ibid, pp. 581–83.
[137] Ibid, pp. 584–588.

reports, the prisoner hospital staff collectively kept a secret record between them to maintain an account of the total number.[138]

Karl Prochaska was among the first Czech prisoners at Flossenbürg, having arrived in January 1940.[139] By 1943, he had worked his way out from the quarry detail to become clerk in the Political Department.[140] Like his fellow Czech counterparts above, Prochaska worked closely with the department chief—in this case, Konrad Blomberg (defendant 4). The Political Department (also referred to as Department 2) was the internal intelligence bureau in Flossenbürg. One prisoner referred to it as "a kind of Gestapo office of the camp."[141] It housed the prisoners' personal files and statistical records.[142] Fluent in German, Prochazka was often used as a translator and stenographer during prisoner interrogations; many of which also resulted in *Sonderbehandlung.*[143]

After liberation, Prochazka—who had evaded the evacuation marches—remained in Flossenbürg to assist US Army investigators in collecting evidence. In a storage closet, he discovered more than 100,000 individual prisoner index cards,

> One part consisted of those prisoners who were in the camp; the other part consisted of those who were not in the camp, who died, who had been destroyed or had been released… [the contents included] Name, the entire personal data, the day when they were delivered to the camp, and then all the things were listed which he had brought to the camp, his clothes and so forth […] in the case of those who were no longer in the camp, the date of their release, the date of their death, or the date of their transfer was put there.[144]

A sample of them were introduced as prosecution exhibits.[145]

The prosecution also called chief camp clerk, Miloš Kučera[146] to testify. In addition to managing prisoner camp files, Kučera performed the roll call and recorded the strength statistics.[147]

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[138] Ibid, p. 592.
[139] Karl Prochazka was the director of a bank in Místek, Moravia prior to his arrest by Nazi authorities. "Prochazka prisoner index-card," ITS, 1.1.8.3, File: 10978217.
[140] Prochazka claimed that he received his post on account of his ability to translate German, Czech and Polish. Karl Prochazka testimony, M1204, *Becker Trial*, Roll 3, p. 1165–1166, 1172.
[141] Goltz, M1204, *Becker Trial*, Roll 2. p. 236.
[142] Prochazka, M1204, *Becker Trial*, Roll 3, p. 1148.
[143] Ibid, pp. 1165-1166.
[144] Prochazka, M1204, *Becker Trial*, Roll 3, pp. 1156-1160.
[145] Four prisoner index-cards were submitted to the court as prosecution exhibits: P-6, P-7, P-8 and P-9. Prochazka was asked to authenticate each. Ibid, pp. 1156-1159. Photocopies of the exhibits are, however, missing from the microfilmed trial documents. See, M1204, *Becker Trial*, Roll 11. Prosecution exhibit P-10 included a statistical analysis on the complete collection, prepared in part by Prochazka. See "Prosecution Exhibits", M1204, *Becker Trial*, Roll 11.
[146] Miloš Kučera was a merchant (*Kaufmann*) from Prague. He arrived at Flossenbürg in December 1942. "Kučera prisoner index-card", ITS, 1.1.8.3, File: 10923860.
[147] Miloš Kučera Testimony, M1204, *Becker Trial*, Roll 2, p. 1237.

Kučera worked in the clerk's office, located in the orderly room of the VIP prisoner barracks Block 1.[148] As most files were catalogued by multiple departments simultaneously, Kučera produced and distributed as many as ten copies of each daily report.[149] These were the same reports that were received and filed in the medical department, the labor allocation department, and the political department.

Kučera also co-authored the so-called Number Books,[150] which catalogued the entire prisoner register of Flossenbürg (including its subcamps), from 1938 to about ten days before the evacuation in April 1945. In the chaotic final days, Kučera defied orders and saved the books from destruction, personally handing over all eight volumes to US authorities upon liberation.[151] The books were later submitted as evidence at the Flossenbürg trial.

The above testimonies not only identify the interconnectedness of the various administrative departments at Flossenbürg, as well as their collaborative relationships in committing war crimes, but they essentially expose the entire prisoner-annihilation program of the Flossenbürg concentration camp system. In particular, the Czech clerks collectively revealed, via the *Sonderbehandlung* policies, a coordination between multiple Flossenbürg departments and the pinnacle of SS leadership in Berlin. Exposing such systematic organization was a primary objective of Denson's strategy.

Yet these testimonies also reveal critical insight into the social strata of prisoners in Flossenbürg. The roles of the Czech clerks were presented as victims-with-agency and their administrative knowledge of Flossenbürg, awarded to them based on obtaining a rare proximity to SS camp leadership, provided a macro-level perspective of the criminality that existed. In combination with the material evidence they were able to preserve, these Czech clerks had passively amassed an incredible level of power against their captors. Due to their perceived professionalism, they occupied a space often above the German criminal group, who was far more disposable. Through their clerical positions, they actively engaged in resistance, sometimes indirectly, sometimes deliberate. Their efforts resulted in the preservation of sixteen pieces of

[148] Kučera, *Becker Trial*, Roll 3, pp. 1281; 1284-1285.
[149] Ibid, p. 1265.
[150] Six volumes record the male prisoner population and two volumes record the female prisoners. "Prosecution Exhibits, P-12—P-19," M1204, *Becker Trial*, Roll 11.
[151] Kučera, *Becker Trial*, Roll 2. pp. 1247-1248

crucial documents which were used to verify not only the number of victims connected to Flossenbürg, but the types.[152] These textual records *proved* the (inter)nationality of the victims.

3.4.2 The War Crimes Investigator

It was approaching mid-July when the Czech clerks completed their testimony. The prosecution was approximately half-way through presenting its case. By comparison, the Dachau Trial had concluded within the same amount of time, and the Mauthausen trial would have been in its final two weeks. The Flossenbürg case, however, had another six months to go.

Looking ahead, the prosecution began to shift its focus away from the prisoner-functionary witnesses in anticipation of hearing specific examples of abuse committed by the defendants. Before doing so, Denson called former war crimes investigator Ben Ferencz to speak about his observations in the immediate aftermath of Flossenbürg's liberation. As well, twenty-two photographs documenting the investigation were introduced as prosecution exhibits, for which Ferencz was asked to provide commentary.[153] These were the only contemporaneous scenes of the camp (which included depictions of dead and severely malnourished prisoners) presented to the court. The defense, however, refused to accept even the most logical circumstantial implications evidenced by the images. How, inquired defense counsel McKay, was one to confirm with absolute conviction that exhibits P-46 and P-47—each graphically depicting extremely thin prisoners—were in fact inmates of Flossenbürg? Ferencz responded that such scenes were "typical of many of the prisoners found [there]," but could not verify the location beyond that, leaving open the prospect that these specific photos may have been of another camp.[154] In reference to exhibits P-42, P-43, and P-44—each showing piles of corpses stacked upon one another, apparently in preparation to be cremated—the defense disputed their legitimacy as well, based on a lack of any identifying features with which to confirm the location.[155] McKay argued that,

> ...the scenes which these exhibits appear to portray are not definitively attached to the conditions which he [Ferencz] saw in Flossenbürg … he has admitted that these three photographs could just as well portray the conditions which he saw in the four other camps

[152] See "Prosecution Exhibits": P-2—*Morning Report* (pdf: R11.1 358); P-3—*Daily Death Reports* (1239); P-6 thru P-9—*Prisoner Index-Cards*; P-10—*Memorandum of Statistics*; P-11—*Daily Reports of death, new arrivals, releases and transfers*; P-12 thru P-19—*Number books*. M1204, *Becker Trial*, Roll 11.
[153] See "Prosecution Exhibits": P-25 thru P-47. M1204, *Becker Trial*, Roll 1.
[154] Ferencz, M1204, *Becker Trial*, Roll 3. pp. 1441-1443. See also Prosecution Exhibits P-46 and P-47. *Becker Trial*, Roll 11.
[155] Ibid, pp. 1426, 146-1461.

> which he investigated as well as Flossenbürg, and for that reason these particular photographs have no material bearing to any of the issues in this case…[156]

Despite their efforts to adequately document the scene, Signal Corps photographers were not forensics specialists. Rather, their mission was to establish a visual inventory of the site as it was found at the time of liberation. Consequently, the process of thoroughly labeling the provenance of each individual image was poorly managed.[157] Ferencz was again, forced to concede that he could not state unequivocally that the piles of corpses he had personally observed at the Flossenbürg *Hauptlager* were indeed depicted in these very photographs.[158] The defense was ultimately successful in getting two of the three photos rejected.[159]

This rather frivolous exchange provoked a larger rhetorical discrepancy on how the court should interpret the extent of criminal liability in the absence of qualified provenance. What, the defense challenged, were the precise requisites for determining that a prisoner 'belonged' to Flossenbürg; thereby contributing their victimization to *that* camp?[160] The debate quickly transcended the petty disputes over pictures and moved to the expansive undefined territory of the death march routes.

During his investigations, Ferencz claimed to have spoken to some fifty prisoners along the roads and in villages between Flossenbürg and Dachau. He encountered prisoners wearing the telltale striped uniforms as well as prisoners who had appropriated civilian clothes. He recalled interviewing people of all nationalities, including Germans, whose time in Flossenbürg varied from years to barely a week. Some of them claimed to have started their journey in Buchenwald, merely passing through Flossenbürg. Of course, the dead offered no identifying features by which Ferencz could confirm their nationality or if they had indeed come from Flossenbürg.[161] The defense applied the same reductive strategy they used against the photographs to challenge how many prisoners, particularly the dead, had actually been victims of the defendants in *this* case.

[156] Defense Counsel McKay, M1204, *Becker Trial*, Roll 3, pp. 1460-1461.
[157] Jörg Skriebeleit notes that photographers impulsively gravitated to explicit displays of atrocity (i.e. the crematorium, the piles of corpses, the masses of shoes and other personal items, etc.) in order to validate Flossenbürg as a legitimate Nazi concentration camp of the same magnitude as what was discovered at Buchenwald. Skriebeleit, *Erinnerungsort*, pp. 58-60.
[158] Ferencz, M1204, *Becker Trial*, Roll 3. p. 1437.
[159] M1204, *Becker Trial*, Roll 3. p. 1464.
[160] Ferencz, M1204, *Becker Trial*, Roll 3, pp. 1437-1447.
[161] Ibid, pp. 1445-1447.

The death marches were an integral part of the criminal activity that took place under the authority of Flossenbürg. However, it was becoming apparent that the existing strategies with which to prosecute crimes committed systematically under the auspices of a concentration camp were entirely inadequate. The tortured experience of the death marches and the excessive numbers of dead left in their wake were incomprehensible, but did any of it amount to a common design? Due to the chaotic mass movement of tens of thousands of prisoners, incorporating hundreds of square kilometers, there was no way to definitively confirm to which camp a particular prisoner 'belonged'. What's more, the hundreds of inmates that were drafted into the *Lagerpolizei* as armed escorts further illustrates the level of breakdown in the hierarchical organization. Nothing about the evacuations seemed to have been 'planned'. In the previous Dachau and Mauthausen trials, the constraints of criminal jurisdiction generally confined each camp to its own respective dominion. In the Flossenbürg case, however, the exploded crime scene, coupled with attempts by the defense to reduce countless victims to abstractions, successfully undermined the prosecution's strategy. The only response by the prosecution, going forward, was to adopt Shaw's original approach and link specific criminal behavior committed on the evacuation transports to the individual defendants.

3.4.3 "General Population" Witnesses on the Death Marches

To this point in the prosecution's case, the emphasis had largely centered on providing evidence that presented the camp as a network of departments whose personnel systematically collaborated in committing acts of abuse, starvation and murder. Time and again, Denson argued that the crime-as-charged was a common design *to commit war crimes*, and that each and every one of the accused had unequivocally taken part. But how did this narrative relate to the capricious chaos of the evacuations? Nearly all of the witnesses prior to Ferencz' testimony had been able to remain in the camp while the able-bodied of the general population set out toward Dachau.[162] Yet, nearly half of the defendants were directly implicated in various evacuation transports from Flossenbürg and its satellites.[163] The prosecution therefore called several witnesses who could speak to the events. In particular, multiple Jewish inmates and the only two female prosecution witnesses testified to

[162] Before Fernecz' testimony, only three witnesses so much as referenced the evacuations. See Mueller, "Review and Recommendations," M1204, *Becker Trial*, Roll 12, pp. 14–15.
[163] Twenty-four defendants were accused of having participated in various evacuation transports from Flossenbürg, in April 1945. Mueller, "Review and Recommendations", 21 May 1947, M1204, Roll 12.

their experiences on the death marches. How were these groups represented in the courtroom and what does it say about the prosecution's strategy?

Jewish Witnesses — 16 April 1945 Evacuation

Between August 1944 and January 1945, some 20,000 mainly Polish and Hungarian Jews were transferred to Flossenbürg, most of whom were subsequently dispersed throughout the subcamp system.[164] Many had traveled hundreds of kilometers on foot and perished either on route or shortly after arrival.[165] Nevertheless, these transports ultimately pushed Jewish prisoners to become the largest group in Flossenbürg.[166] On 16 April 1945, the decision was made to evacuate the group from the *Hauptlager*. 1,700 Jewish prisoners were mobilized and transported by train in the direction of Dachau. After several days of delayed travel, suffering multiple strafings by Allied bombers, the group was finally liberated by US forces in the region surrounding Schwarzenfeld. Soon thereafter war crimes investigators conducted hundreds of interviews with the survivors. Over a year later, prisoners Leopold Landsberg, Erich Rosenthal, and David Tannenbaum were among several Jewish victims who testified to their experience on the 16 April transport at the Flossenbürg trial.

Between these three witnesses, five defendants were accused of forcing prisoners on a death march and actively carrying out executions of prisoners along the way. Following the destruction of the train and stranded near the town of Schwarzenfeld, the group broke up into five smaller columns and prepared to continue on foot. SS-*Obersturmführer* Hermann Sommerfeld (defendant 47) and SS-*Oberscharführer* Karl Graeber (defendant 16) were each identified as transport leaders for two of the new marching columns. Both were heard ordering their subordinates to shoot any prisoners who could not continue marching.[167] Rosenthal and Landsberg testified to having witnessed over a hundred prisoners executed and left on the side of the road. Graeber was accused of shooting two inmates, himself.[168]

August Ginschel (defendant 15) was a former prisoner who had been drafted into the *Lagerpolizei.* Rosenthal testified to having seen Ginschel hitting prisoners with his rifle and

[164] Fritz, *Flossenbürg Concentration Camp*, p. 276.
[165] Siegert. "Konzentrationslager Flossenbürg," pp. 469-470.
[166] Skriebeleit, "Flossenbürg—Hauptlager," p. 46.
[167] Leopold Landsberg testimony, M1204, *Becker Trial*, Roll 3, p. 1550.; Eric Rosenthal testimony, M1204, *Becker Trial*, pp. 1521-1522.
[168] Rosenthal, M1204, *Becker Trial*, p. 1522.

shooting another who had fallen to the ground.[169] In one instance, a son was holding up his exhausted father as they walked. An unnamed SS guard noticed the man leaning and promptly removed the father from the column and shot him, leaving the collapsed body in a ditch.[170] Of the two hundred prisoners assigned to his marching column, Landsberg counted a mere ninety-five after a distance of approximately forty kilometers.[171]

David Tannenbaum, a nineteen-year-old Polish Jew, who was also on the 16 April evacuation transport, testified that he barely escaped with his life when the SS-*Rottenführer* Joseph Wurst (defendant 52) allegedly participated in a mass shooting during the march. On the morning of 23 April 1945 (a whole week since the convoy had left Flossenbürg) Tannenbaum and his marching column were brought into the woods and quickly abandoned by their captors. Without hesitation, he and six other comrades fled to a nearby farmhouse and hid for several hours. Later that afternoon, however, Wurst returned to the farmhouse and ordered the seven men outside where they were met with dozens more prisoners. The group of approximately sixty individuals were led back into the forest and told to sit down. Wurst and his colleagues then opened fire on the group. The shooting stopped only because at that very moment, US tanks suddenly emerged. Seven prisoners, including Tannenbaum, survived the massacre.[172] Another Jewish prisoner and prosecution witness independently confirmed Tannenbaum's testimony the very next day.[173]

The testimonies of these men are representative of around two dozen Jewish witnesses that spoke for the prosecution about their experiences on the evacuations. The number is approximate because the prosecution never specifically asked witnesses of their race, ethnicity, or religion. Rather, every confirmed Jewish eyewitness had voluntarily identified themselves to the court, typically when asked their nationality. The prosecution's general ambivalence over the issue of ethnic and/or religious identity illustrates the distance the prosecution kept from engaging with explicit instances of antisemitic persecution, as a distinct feature of Nazi war crimes. This was not isolated to the Flossenbürg trial, however. Tomaz Jardim has acknowledged as much in the Mauthausen trial, while Elizabeth Yavnai and Donald Bloxham have identified the behavior to be a common feature of the Dachau Trials in general. Their collective analysis maintains that the US

[169] Ibid, p. 1523.
[170] Landsberg, M1204, *Becker Trial*, Roll 3, p. 1551.
[171] Landsberg, M1204, *Becker Trial*, Roll 3, pp. 1550-1551.
[172] David Tannenbaum testimony, M1204, *Becker Trial*, Roll 3, pp. 1793-1794.
[173] Josef Szlamkiewicz, M1204, *Becker Trial*, Roll 4, pp. 1885-1904.

Military Government feared the trials would be perceived as being motivated by Jewish revenge or were in some way influenced by Jewish interests.[174] In this case, the Flossenbürg trial was merely consistent with Yavnai's claim that the MGC "did not treat the Jews as a separate group of victims nor did they attach any special significance to their suffering."[175]

Female Prisoners

The imprisonment and forced labor of women in Flossenbürg was a relatively short period within the camp's seven-year history. In spite of this, more than 16,000 women were registered between the summer of 1943 and spring of 1945. In July of 1943, the Flossenbürg *Hauptlager* officially registered its first ten female inmates to work in the newly established brothel.[176] For over a year, the number of women (all of whom were forced into sexual slavery) remained negligible, never surpassing more than twenty at a time. On 1 September 1944, Flossenbürg took administrative possession of five subcamps, previously belonging to Ravensbrück, which automatically added 10,000 female prisoners to its registry.[177] By April 1945, Flossenbürg had further increased its number of women's subcamps to more than twenty-five sites. The last strength report on 15 April recorded 14,600 female inmates dispersed throughout the Flossenbürg universe.[178] Given these numbers, it is a disappointing detail that so few female witnesses later testified at the Flossenbürg trial.

In the ten weeks it took the prosecution to present its case, only two women testified against the accused.[179] Michaelina Fajfel and Genowefa Cyranowska had both been arrested in the aftermath of the Warsaw Ghetto Uprising and sent to Auschwitz before receiving a transfer to the Wolkenburg subcamp in late 1944.[180] Located northwest of Chemnitz, Wolkenburg was one of the five original women's camps to be administratively transferred from Ravensbrück in September 1944. The women of Wolkenburg, which included Poles, Russians, Germans, Jews and Romani, worked twelve-hour days alongside German civilian employees in a factory that produced

[174] See Jardim, *Mauthausen Trial*, pp. 188-189; Yavnai, "Military Justice," pp. 204-207; Bloxham, *Genocide on Trial*, pp. 66-68

[175] Yavnai, "Military Justice.," p. 204.

[176] Between ten and twenty women worked in the brothel at Flossenbürg until 1945. Skriebeleit, "Flossenbürg—Hauptlager," pp. 37-38.; See also Cziborra, *Frauen Im KZ*, pp. 174-176.

[177] Skriebeleit, "Flossenbürg—Hauptlager", p. 41.

[178] Ibid, p. 47.

[179] Merely a semantic notation; a female court interpreter was sworn in to translate a document from Czech. Gitka Vanhova testimony, M1204, *Becker Trial*, Roll 3, pp. 1007-1008.

[180] Cyranowska was actually a member of the Polish Counter movement. Genowefa Cyranowska testimony, M1204, *Becker Trial*, Roll 4, p. 2356

electrical instruments.[181] They suffered from malnutrition and were physically abused for the slightest of infractions.[182] The camp Commander occasionally toured the facility, observing the women, but it was the unnamed chief female supervisor (*Oberaufseherin*) and the nearly two dozen overseers (*Aufseherinnen*) who managed the operation "at all times."[183]

Fajfel and Cyranowska each testified against Romanian SS-guard Joseph Becker (defendant 2), Waffen-SS *Oberscharführer* Wilhelm Brusch (defendant 6), and Yugoslav SS-guard Josef Oswalt[184] (defendant 32) for the murder of six women on an evacuation march. According to Fajfel and Cyranowska, approximately four hundred mainly Polish women departed southbound from Wolkenburg on 13 April 1945, in the general direction of Flossenbürg.[185] They were accompanied by camp commander Brusch and guards, Becker and Oswalt.[186] The group had been traveling for over a week when one prisoner fell to the ground in fatigue. Several women attempted to help their fallen comrade, but were quickly ordered to "go ahead" by Brusch, who himself hung back. Moments later, the women heard a gunshot, after which Brusch caught back up with the group, alone.[187] Having made it to Weiden, the convoy was getting ready to continue their journey by a "40-and-8" railcar when they were bombarded by Allied planes.[188] In the chaos, prisoners ran for cover in all directions. After the attack had subsided, some returned, others did not. Fajfel and Cyranowska recalled that hours later, three women were returned to the group.

[181] Michaeline Fajfel testimony, M1204, *Becker Trial*, Roll 4, p. 2347.
[182] A typical day's menu consisted of a coffee for breakfast (sometimes), carrot soup for lunch and in the evening, flour soup and a slice of bread which, in the beginning was accompanied by a spoon of margarine. After complaining about the food, the women were forced to stand outside barefoot for three hours in February, wearing nothing but summer dresses. Prisoners were often slapped for being late or if their hair tie wasn't worn properly. Fajfel, M1204, *Becker Trial*, Roll 4, pp. 2346, 2352, 2354.; Cyranowska, M1204, *Becker Trial*, Roll 4, p. 2360.
[183] Fajfel, M1204, *Becker Trial*, Roll 4, p. 2348.
[184] Josef Oswalt was hospitalized several weeks prior to Fajfel and Cyranowska testifying. He never returned to court and would subsequently be dropped from the prosecution's indictment list before the conclusion of the trial. William Denson, M1204, *Becker Trial*, Roll 10. pp. 8257-8262; "Prosecution Exhibit P-93," M1204, *Becker Trial*, Roll 11.
[185] Neither witness was told where they were going when they disembarked. Given the route taken and the date at which they set off, it can logically be assumed that they were headed to Flossenbürg *Hauptlager*. Yet after multiple air raids that disrupted their route and significantly slowed their progress, the convoy did not make it to the camp before it had started to evacuate its own prisoners. According to the testimony the group reached Weiden, which is less than twenty kilometers from Flossenbürg, on the same day the camp was liberated. Cyranowska, M1204, *Becker Trial*, Roll 4, pp. 2357-2370.
[186] Fajfel, M1204, *Becker Trial*, Roll 4, pp. 2183, 2329-2330; Cyranowska, M1204, *Becker Trial*, Roll 4, pp. 2357.
[187] Cyranowska, *Becker Trial*, Roll 4, p. 2358.
[188] Fajfel, M1204, *Becker Trial*, Roll 4, p. 2334.

Brusch and a guard subsequently escorted the three into a nearby wood and again, gunshots rang out. Only Brusch and the guard returned.[189]

The following day, the convoy incurred another air raid (almost a daily occurrence at this point) which caused another mass scattering of the group. After everything settled, more prisoners were missing. The two witnesses recalled that a young local German boy brought back a pair of prisoners and for his efforts, Brusch rewarded him with cigarettes. The two escapees, Susanna Carbiec and Cecylia Janiec, were allegedly friends of Fajfel and Cyranowska. They too were executed with no hesitation.[190] Upon his return, Brusch addressed the remaining women, "...every one who attempted to escape would be shot."[191] The entire journey, from Wolkenburg to Dachau, took approximately two weeks, during which time the women were fed twice.[192] Ultimately, 116 of the original 400 made it to their destination.[193] The testimonies of Fajfel and Cyranowska depict a terrifyingly violent and unpredictable culmination to their concentration camp experience. This, however, is the extent to which the court heard of Flossenbürg's female prisoners.

On one hand, Fajfel and Cyranowska had provided the prosecution with the testimony it sought. Three defendants were forthrightly implicated by multiple eyewitnesses in the unlawful execution of allied nationals. It was 19 August (one day before the prosecution rested its case) at this point in the trial and there was little desire to spend more time on context or background. On the other hand, the accounts of Fajfel and Cyranowska can hardly even be characterized as a token concession to the court's acknowledgement of Flossenbürg's systematic persecution of women. Apart from the objective circumstances of men killing women, the allegations themselves were entirely devoid of a gendered dynamic. The two women's testimonies therefore reveal a general ambivalence, by the prosecution, toward a sincere concern for gendered criminality. Not one of the hundreds of female guards throughout Flossenbürg's subcamp system was ever indicted for war crimes by the MGC.

Taken together, the testimonies of the Jewish witness and Fajfel and Cyranowska (both of whom were also Jewish) reveal striking similarities in the prosecution's general ambivalence

[189] Ibid, p. 2332; Cyranowska, *Becker Trial*, Roll 4, pp. 2367-2368.
[190] Fajfel, M1204, *Becker Trial*, Roll 4, pp. 2332-2333; Cyranowska, M1204, *Becker Trial*, Roll 4, pp. 2369.
[191] Fajfel, M1204, *Becker Trial*, Roll 4, p. 2335; Cyranowska, M1204, *Becker Trial*, Roll 4, pp. 2372-2373.
[192] According to her testimony, Falafel claims that some women received some potatoes from a farmhouse and the group was given some bread approximately two or three days before arriving at Dachau. Fajfel, M1204, *Becker Trial*, Roll 4, p. 2338.
[193] Ibid, pp. 2329.

towards these victim groups. As noted earlier, the Dachau Trials were categorically uninterested in establishing a historical narrative. However, Mark Osiel argues that mass atrocities trials "indelibly influence collective memory of the events they judge."[194] The Jewish and female populations of Flossenbürg, in the final year of the war, was into the tens of thousands and comprised a significant portion of the overall prisoner population. What's more, the trial benefited greatly from the testimony provided by these two groups. However, their contribution, as well as their suffering, was often subordinated.

The last witness to testify for the prosecution was the Hungarian General of Police for the city of Budapest and Flossenbürg prisoner Josef Sombor.[195] Despite only being interned for ten months leading up to the evacuations, Sombor's distinction ensured that he was immediately integrated into the camp's privileged prisoner-class. He was housed in the VIP barracks of block 1 and given a clerical position in the prisoners' supply room, both of which offered him access to various camp intelligence.[196] The content of his testimony closely resembled that of Kurt Goltz and Carl Schrade, touching upon such topics as the stratified SS hierarchy and the integrated system of administrative departments; the centralizing gravity of forced labor and its relationship to the local civilian community; living conditions and prisoner community; and prisoner health and mortality.[197]

The decision to hear from Sombor last was neither a coincidence nor merely a matter of timing. Rather, it was a strategic effort by Denson (in light of the recent anecdotal testimony on the death marches) to bring the court back to the original argument that the entire Flossenbürg camp system was an organized criminal enterprise which incorporated and actively encouraged violent abuse, starvation, torture and murder as its modus operandi. In ten weeks, the prosecution had done its best to convince the court of a collective guilt shared equally by the fifty-one defendants in the case. Compared to the two preceding trials, however, this had been a significant challenge.

[194] Mark J. Osiel, ed., *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Routledge, 1999). p. 2.
[195] Sombor was technically the last *scheduled* prosecution witness. Due to the continued hospitalization of defendant Josef Oswalt, the court heard from his physician, as well as his primary accusers Michaelina Fajfel and Genowefa Cyranowska, after it was determined acceptable for them to testify in his absence. M1204, *Becker Trial*, Roll 4, pp. 2322-2373.
[196] Josef Sombor testimony, M1204, *Becker Trial*, Roll 4, p. 2254, 2295.
[197] Sombor, M1204, *Becker Trial*, Roll 4, pp. 2258–2282.

Even before the trial got underway, the prosecution's case was desperately flawed. While the number of former camp prisoners among the defendants did reflect some of the unique attributes of Flossenbürg concentration camp—most notably, the disproportionate number of greens in positions of authority and their subsequent entry into the *Lagerpolizei*—it completely undermined the balanced "cross-section" approach that had proven so successful for the Dachau and Mauthausen trials. Thereafter, Shaw's opening statement flatly rejected the second proven strategy of conditioning the court, opting instead to underscore the most abhorrent examples of abuse. What's more, his generalized interpretation of the "criminal" prisoner category as guilty-by-nature was not only a gross misrepresentation of the group as a whole—denying any acknowledgment of their victimization as concentration camp inmates—but greatly compromised some of the prosecution's star witnesses. Shaw's tragic death, and his subsequent replacement by William Denson, was not enough to stave off the aggressive counterstrategies of the defense. Even photographic evidence was deemed inconclusive.

Denson tried to reset the prosecution by centering the case around the spaces in which the crimes were committed—less so on the individual defendants—and the Czech clerks appeared to have provided testimony relevant to this approach. Yet, the abstract and overlapping zones of the evacuation transports challenged this narrative. Forced to employ anecdotal encounters of abuse and murder on the death marches, the prosecution called on prisoners of the "general population." However, their potential to provide crucial insight into Flossenbürg's treatment of Jewish and female prisoner was largely dismissed.

Of the Jewish prisoners that did testify (nearly all of whom were Polish), their testimony was significantly constrained to specific affairs. This was not necessarily intentional. The prosecution, desperately looking to wrap up their case and conscious that the common design charge was weakest when involving the death marches, was solely interested in specific incidents of abuse and murder. The Jewish prisoners were not brought in to testify as Jewish victims. The plight of Jewish prisoners is extraordinary in the current context.

Flossenbürg's involvement in the Holocaust (the program to exterminate European Jewry) was relatively small. Indeed, Jews were oftentimes singled out for abuse and were typically selected for the most dangerous jobs. However, there were no official policies to systematically kill Jewish prisoners at Flossenbürg, nor were there any gas chambers. As mentioned above, not until 1944 did the camp begin to receive Jewish prisoners in any significant capacity. Nevertheless,

Flossenbürg's so-called final chapter was largely composed of Jewish victims. Such details, however, were widely supplanted by the prosecution for explicit incidents that criminally implicated the accused. David Tannenbaum, who voluntarily self-identified to the court as a "Polish Jew" when asked his nationality,[198] had been a prisoner of Flossenbürg from July 1944. However, the prosecution restricted his testimony to the alleged mass shooting by the defendant Wurst. Indeed, it was this very incident for which Tannenbaum was called to testify. Yet, this encounter is an example of how the prosecution failed to consider the Holocaust in the courtroom.

The general exclusion of women at the trials is an even more conspicuous oversight. From 1944, Flossenbürg amassed a truly significant female forced-labor program with thousands of women producing war materials for the fledgling Reich. Hundreds more women were employed by the SS to oversee the more than two dozen women's subcamps. Not one was ever prosecuted by the US military government for war crimes.

At the Flossenbürg trial, Michaelina Fajfel and Genowefa Cyranowska were the only two female prisoners to testify. And yet, their testimonies parallel the very same issue as David Tannenbaum's. There was minimal interest from the prosecution on the subject of women as concentration camp prisoners. Rather, the questions focused primarily on the execution of the six individuals during an evacuation march. To the 16,000 women who were persecuted under the Flossenbürg administration (including the several dozen sex slaves of the *Hauptlager* bordello), justice was largely denied.

[198] Tannenbaum, M1204, *Becker Trial*, p. 1791.

Chapter 4: The Defense

On 20 August 1946, ten weeks (fifty-one court days) since the start of the trial,[1] the prosecution rested its case.[2] After a brief thirty-minute recess,[3] it was now the defense's turn. In a conspicuous reference to the prosecution's encumbered two-day introductory address, lead defense counsel Wilson announced that he would "not take the time of the court with an opening statement."[4] This concession, however, in no way signified that he would keep an expeditious pace. Rather, the defense would spend a total of four months, calling more than 130 witnesses. Thirty-six of the accused (twenty-two SS and fourteen prisoner-functionaries[5]) also testified under oath in self-defense.

The central focus to the defense's strategy was to conflate the perception of criminal agency among the SS defendants though false equivalencies and character attacks of the prisoner-functionaries. The approach was in large part a direct response to the prosecution's social stigmatization tactics that had originally targeted the "criminal" class of prisoners. This began with identifying the glaring paradox of the prosecution's own case in which nearly a third of the defendants had been imprisoned in Flossenbürg entirely against their will and forcibly subjected

[1] The court granted an extended nineteen-day recess to the defense in order to assemble their case. Associate defense counsel Major Oeding had prepared the preliminary materials on his own in three weeks, prior to the 12 June start date. Chief defense counsel Wilson and assistant counsel McKay had both signed on five days before the court convened (the former only having been released from the hospital for an unstated reason on 7 June. Counsel Hall reported that he was assigned to the case only two days prior and German defense counsel, Dr. Wacker and Dr. Engelhorn entered the case after the trial had already started, on 26 June and 9 July, respectively. M1204, *Becker Trial*, Roll 4, pp. 2313-2319.

[2] Due to defendant 32 Josef Oswalt's prolonged hospitalization, for which he had been absent from trial since 7 July, the prosecution was granted a conditional stay by the court to continue its testimony against him (and associated defendants: 2 (Joseph Becker), 6 (Wilhelm Brusch), and 36 (Josef Pinter)) after the defense had concluded its case. M1204, *Becker Trial*, Roll 4, pp. 2016; 2312; 2400. That concession, however, was never invoked. On 17 December 1946, the prosecution filed a *nolle prosequi* for Oswalt (along with five other defendants), dropping all charges against him. M1204, *Becker Trial*, Roll 10, pp. 8253-8258.

[3] Returning to court after the nineteen-day hiatus, Denson took a day and a half (19-20 August 1945) to conclude before finally handing over control to the defense. Dr. Naim Khuri, physician to the accused Oswalt took the stand and under oath maintained that it was still too dangerous for his patient, Josef Oswalt, to leave the hospital. Therefore, Denson carried on with Fajfel's postponed testimony, calling next Cyranowska who confirmed much of her comrade's allegations. Polish survivor, Morris Pinkas gave an impromptu testimony after having alerted the prosecution that he had coincidentally recognized one of the defendants while sitting in on the trial as a public observer. The examination, however, was cut short when the defense noted that Pinkas had obviously obtained an unfair advantage by watching the trial prior to testifying. Finally, the expert witness Dr. Ludwig Krieger returned to certify pprosecution exhibits P-65 and P-65a, thus concluding the prosecution's direct examination. M1204, *Becker Trial*, Roll 4, pp. 2322-2396.

[4] Defense Counsel Wilson, M1204, *Becker Trial*, Roll 4, p. 2401.

[5] Of the total 16 accused prisoner functionaries, only Gustav Matzke and Willi Olschewski refrained from providing testimony under oath. Olschewski was hospitalized for the majority of the trial and his case was ultimately never prosecuted to its conclusion.

to a coerced society that encouraged violence.[6] Wilson proclaimed, "every prisoner in the camp … participated in the common design every time he answered to a roll call or stepped forward one pace in order to do so."[7] By undermining the voluntary participation in the camp's violent operations, particularly among the accused prisoner-functionaries, explicit allegations of criminal behavior were disassociated from the presumption of willful cooperation. It was further expected that this would have a trickle-down effect to the accused SS, who argued that they too had been sent to Flossenbürg by no fault of their own.

The second aspect to the strategy was to challenge the credibility of key prosecution witnesses through aggressive character attacks, reminiscent of the very practices first introduced by Shaw at the beginning of the trial. In one instance, counsel introduced a theory that hospital eldest and prosecution witness Carl Schrade had actually been a member of the "criminal" category and lied about it in court. Such tactics implied a double-standard between the prisoner-functionaries on trial and those testifying against them. The defense also played on public perceptions of immoral behavior as a way to discredit witnesses. Fellow hospital functionary Kurt Goltz received numerous accusations of being a predatory homosexual. This chapter will detail these tactics and consider the long-term consequences of the approach.

As the trial surpassed the half-year mark with no clear end date, the Military Government leadership stepped in to expedite in its conclusion. No other trial required an intervention from the Judge Advocate Offices. Six defendants were suddenly dropped from the case, to be retried at a later date. Yet it would still take another month to finally conclude the trial. In the closing arguments, both the prosecution and defense repeated their character attacks. This chapter argues that while the defense's cynical tactics did expose a considerable contradictory oversight on account of the prosecution's primary strategy, both were ultimately responsible for the ensuing advancement of prolonged post-war stigmatization of many survivors, based on their assigned camp identities.

[6] See Sofsky, *Order of Terror*, pp. 223-240.
[7] Wilson, M1204, *Becker Trial*, Roll 4, p. 2401.

4.1 False Equivalencies and Character Attacks

4.1.1 A Futile Motion?

The defense opened with no apparent strategy that could comprehensively contend with the prosecution's case. The very first witnesses called, for example, were four high-ranking camp administrators, who were questioned about the overall concentration camp structure, its chain of command, and the various oversight policies that existed to ensure the health and safety of both the SS and prisoners.[8] Each presented testimony that suggested all actions in the camps were carried out under direct instruction of SS leadership in Berlin. Such responses were simply a reproduction of the so-called "superior orders" excuse.[9] As the prosecution's case was weakest with the sixteen prisoner-functionaries, the defense quickly adjusted its approach and adopted an aggressive strategy that looked to stress the glaring paradox of their indictment.

As demonstrated at the start of the trial, the defense was not above throwing out ridiculous demands in the extremely unlikely chance that the court would rule in their favor. In that same manner, Russel McKay, counsel to each of the sixteen accused prisoner-functionaries, opened by filing a motion to dismiss each of his clients' cases outright on account that the prosecution had failed to provide evidence of voluntary participation in the so-called common design.[10] He stated that all criminal offences are predicated upon two necessary elements; "intent" and the "over act,"[11] and insisted that the prosecution had established neither. Therefore, McKay concluded, "if this Prosecutor would establish in the case of these sixteen accused an individual crime of every one [*sic*], he still has not established a conspiracy."[12]

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[8] Commandant of Buchenwald from 1942 to 1945 Hermann Pister explained that both the labor and discipline functions of the camps were directed by SS leadership in Oranienburg. Chief of the SS courts in Munich Dr. Werner Wilhelm Hansen further confirmed to the court that the camp personnel merely enforced the orders with without knowledge of their legitimacy. Chief Justice of the SS and Police courts in Nuremberg Dr. Heinrich Wolfgang Wilhelm Pinder proclaimed that a strict code of conduct was enforced from the safety of both personnel and prisoners. And Wilhelm Beyer, who had been the legal officer for Flossenbürg from November 1944 to April 1945, claimed to have investigated hundreds of cases pertaining to the conduct and accountability of the SS staff. He denied ever seeing any violent abuse of prisoners. See M1204, *Becker Trial*, Roll 4, pp. 2430-2632.

[9] The MGC determined that compliance of superior orders did not a constitute an acceptable defense against war crimes charges, though, under certain circumstances, it may be considered during sentencing. See Straight, *Report of the Deputy Judge Advocate*, pp. 63–64.

[10] "...the Prosecution has failed to establish in its evidence the commission of a crime in violation of the rules of International Law covering the conducting of warfare as set out in the Charge and Specification; and ... the Prosecution has failed to establish by its evidence any participation by any of these accused in a common plan or design as alleged in the Charge and Specifications." McKay, M1204, *Becker Trial*, Roll 4, p. 2404.

[11] Ibid, p. 2406.

[12] Ibid, p. 2407.

To the numerous allegations of unprovoked physical abuse and murder, McKay claimed self-defense. He likened the prisoner violence in Flossenbürg to an environment ruled by a kind of social Darwinism, insisting that the accused prisoner-functionaries, all of whom were veterans of the KL system, had merely survived through wit and cunning.[13] Sometimes their actions may have been to the detriment of others, but under no circumstances was it ever in willful collaboration with the SS. Thus, any perceived adherence to a common design was at best coercive. Referring to American legal scripture, he invoked US Supreme Court Justice Louis Dembitz Brandeis' "famous rule" as to when it is acceptable for one man to take the life of another.[14] According to McKay's interpretation of the Justice's writings on the topic, it was conceived that the abusive behavior of the accused capos and eldests was carried out against their fellow inmates in order to save themselves. Thus, the unfortunate victims were merely casualties of the capos' own self-preservation. Once McKay had concluded, assistant defense counsel Albert Hall delineated the apparent double-standard that existed between the accused functionaries and their former colleagues who had testified as victims for the prosecution. He explicitly referenced witnesses Emil Kaminac, who was confirmed to have been a capo; Carl Schrade, who had replaced Karl Mathoi (defendant 25) as hospital eldest; and Heinrich Bodet, who admitted to being drafted into the *Lagerpolizei*.[15]

In his rebuttal, Denson agreed with McKay's description of a crime—requiring elements of an "intent" and the "over act"—and added that his opponent had even made his case for him. As it states in the particulars, Denson recalled, "...the accused, *acting in pursuance* of a common design… to killings, beatings…" etc. is hardly coded language for intent. Furthermore, the prosecution had just spent approximately two months providing evidence of the "overt acts."[16] Denson dismissed the deliberate conflation of conspiracy, except to say that the sheer magnitude of criminal activity at Flossenbürg completely rejected any notion that the crimes were performed by a single individual or even a group of elites. Furthermore, the successful implementation of the alleged atrocities was a product of immense coordination between the offices of labor allocation and administration, the security and transport services, the medical department, the political

[13] Ibid, 2407-2408.
[14] Ibid, p. 2407.
[15] Defense Counsel Hall, M1204, *Becker Trial*, Roll 4, p. 2420-2422.
[16] Italics added. Denson, M1204, *Becker Trial*, Roll 4, p. 2411.

department, and so-on. Without such organization, Denson contended, the entire system could not have achieved its objectives in the manner that it did.

With respect to McKay's interpretations of self-defense and volunteerism. Denson conceded to the esteemed reputation of Brandeis but added that the Justice's professional opinions of self-defense were superseded by decades of legal consideration "long before [he] was even born."[17] More importantly, however, self-defense (in the legal sense) pertains exclusively to the scenario in which an individual injures or kills another under the explicit pretext of an immediate threat of the very same fate by the opposing individual(s). The 'exchange', Denson clarified, is always only between two parties. McKay's interpretation, on the other hand, incorporated a third; the SS in this case. In Denson's own words,

> counsel [McKay] has stated that a capo was punished severely if he refused to carry out the orders of his superiors… if he did not himself beat another prisoner, or we will say in an extreme case, to kill another prisoner. In other words, may it please the Court, that capo did not kill the man who attacked him. That capo killed an innocent man and the law is very plain… that one man does not have the right to take the life of an innocent man in order to save his own when it is threatened by a third person [...]
>
> The fear of punishment that the capo entertained was fear of punishment from the SS and from the camp administration -- not from the unfortunate victim.
>
> Let me say this, may it please the Court, all capos were not killers. All capos were not beaters. There were many capos that were more vicious and more terrible than the SS themselves and that viciousness was established by the manner in which they performed their duties -- and I say duties because the capos usually were the wearers of the green triangle and they were placed in charge of prisoners, in charge of political prisoners -- and to have intelligentsia ruled by criminals --[18]

Denson was suddenly interrupted, mid-sentence, by McKay who objected to the prosecutor's use of the label "criminals," to which Denson retracted the expression and continued,

> To have these men, many of whom were extremely intelligent, because the evidence has shown that the intelligentsia were put in Flossenbürg and other camps -- to have them ruled by wearers of the green triangle, may it please the court, was one of the most awful indignities that that prisoner could be subjected to.[19]

Fear of reprisal among the capos, according to Denson, was in no way a justification for violence towards others and didn't even approach a legitimate case of self-defense or the preservation of one's life. While his dismantling of McKay's arguments was as clear as it was concise, it is

[17] Ibid, p. 2413.
[18] Ibid, pp. 2413-2414.
[19] Ibid, pp. 2414.

Denson's subsequent comments on the antagonism of the "criminal" class toward the so-called "intelligentsia" that demands further contemplation.

First, Denson's use of the term "criminal" was intentional and very much in tune with Shaw's earlier characterizations. To identify the defendants with a label that explicitly implies guilt, prior to judgement, subjectively denies them a fair due process. With the legal mind Denson possessed, it is cynical to imagine that he was not acutely aware of the power of this term. In an interview decades later, Denson confirmed that his team consciously and repeatedly defined accused prisoner-functionaries as capos because the label alone conjured negative sentiments.[20] For Denson to employ "criminal" in his rebuttal of McKay's erroneous self-defense argument gave a not-so-subtle endorsement for the courtroom to differentiate between legitimate and illegitimate victims of Flossenbürg.

Furthermore, Denson's remarks looked to present the prisoner dynamic in the camp as a struggle between the deplorable brutishness of the "criminal" category and the victimized nobility of the educated political prisoner category. This was not the first time the prosecutor had run this line. Tomaz Jardim identifies Denson applying this very "skewed" strategy in the Mauthausen case.[21] In his (brief) opening statement there, Denson had proclaimed, "We expect the evidence to … show that these victims constituted in the main the intelligentsia of Continental Europe, those persons who had the intestinal fortitude … to stand up to the Nazi yoke of oppression."[22] Jardim notes that Denson's depictions of camp victims being widely well educated is, at best, a result of the types of prisoners that the prosecution found most useful as eye-witnesses. In reality, however, they were a relatively small minority within the general population. It is equally apparent to Jardim that, in Denson's characterization of the Mauthausen prisoner community, the prosecutor made no mention of Jewish victims (nor that of any other group persecuted for reasons of race),[23] which is consistent with his application of Jewish witnesses in the Flossenbürg case.

Jardim rightfully concludes that this approach directly subverted the historical record. However, the consequences of this strategy go beyond that. Positively singling out the political prisoner category constituted a reciprocal effect on the collective victim community to demonizing

[20] Denson interview by Joan Ringelheim, 25 August 1994.
[21] Jardim, *Mauthausen Trial*, pp. 121–123.
[22] It will be noted that as Denson had not given an opening statement in the Flossenbürg trial, it is revealing to see how strategies from the Mauthausen case are incorporated. Ibid, p. 121.
[23] Ibid, p. 123.

the "criminal" category. Not only does this practice reduce the groups to a monolithic characterization, but it establishes a hierarchical classification of 'legitimate' victims. The portrayal of Europe's intellectuals as *the* victims of the concentration camps reinforced the perception that only individuals who held value to the ideals of Continental (i.e. "Western") civilization were the true victims of National Socialism. In the courtroom, the testimony of some was given more credibility than others, based purely on an individual's arbitrary prisoner identity assigned to them by the camp-SS. While this may have been strategically expedient for the prosecution's case, it ultimately contributed to a segmenting of the collective victim community. As will be demonstrated below, this practice fueled further social stigmatization in the trial.

As expected, the motion to dismiss the sixteen prisoner-functionaries was ultimately overruled by the court. However, the defense would only lean further into making such false equivalencies. The defense proceeded to call its first witnesses with fifty-one accused still in the dock.

4.1.2 The Smudge Campaign

The defense may have failed to secure an immediate dismissal of the prisoner-functionaries, but counsel introduced an element of doubt as to the level of criminal agency among the accused. McKay continued to push the narrative that it was unfair to hold some prisoners responsible for their participation in the camp system while others had been paraded by the prosecution as victims to testify against their very colleagues. One instance in particular serves as an acute case-study, under which the defense employed the very same logic toward social stigmatization that was introduced to the court months earlier.

At the time former hospital eldest Carl Schrade testified for the prosecution, the court overruled the defense from forcing him to divulge his own prisoner category, determining such information irrelevant to the case.[24] However, he did insist his incarceration in the KL system was politically motivated. Since then, the defense had uncovered evidence of what they presumed to be a deliberate alteration to Schrade's prisoner category in the Flossenbürg registry book. Defense counsel McKay was convinced that Schrade had been a member of the green "criminal" category and hypothesized he had changed his designation. Counsel called the court's attention to

[24] Defense counsel Wacker attempted to ask Schrade his triangle color in Flossenbürg, but was denied the answer following a sustained objection on behalf of the prosecution. Wacker, M1204, *Becker Trial*, Roll 3, p. 997.

Prosecution Exhibit P-12,[25] and pointed to what appears to have been an erasure blemish in the "nationality" column,[26] next to Schrade's entry. When compared to the rest of the page, the smudge is rather conspicuous, enough so at least that McKay felt sufficiently confident to suggest that Schrade (or someone else) had amended the original entry. But just what did the 'new' label indicate, and why would anyone attempt to alter it?

Upon the court's request, the appointed interpreter determined the label to be an abbreviation, indicating "dch"—short for *Deutsch* (German), and presumably Schrade's nationality.[27] Such a banal 'revelation' only confused McKay's peculiar accusations, and the court struggled to understand the premise. Nevertheless, counsel continued to argue that it was imperative to learn the prisoner category of Schrade. Superficially, McKay was essentially accusing Schrade of lying under oath. However, the deeper intent was that if he could prove Schrade had been a green, not only would his testimony lose credibility on that fact alone, but it would sow further doubt over the criminal responsibilities of the sixteen accused prisoner-functionaries. Either Schrade belonged on the dock as a suspected war criminal for participating in the alleged common design, or his clients were victims of that very system, just like Schrade.

After a direct objection from the prosecution and a brief recess to privately discuss the matter amongst themselves, the court ultimately denied McKay's request. President Elliot ruled,

> The objection of the Prosecution is sustained. Based upon the fact that the Court believes that the question [of Schrade's triangle color] was irrelevant and immaterial. It is the decision of the court that the reference to the fact that an indicated individual wore a red

[25] Prosecution Exhibit P-12 was first introduced into evidence during the prosecution testimony of Milos Kučera, who co-authored the 8-volumed "camp books" (prosecution exhibits: P-12 thru P-19), and which contain the names of all inmates at Flossenbürg (and subcamps) between March 1944 and 15 April 1945. Entry number 1748 indicates Karl [*sic*] Schrade; Born in Zurich, Switzerland, dob: 17 April 1896, arrival to KL: 19 October 1934. Under nationality/category, "Sch" is written over what appears to be erasure smudging. The smudge is made apparent when viewed in comparison to the rest of the column. Exhibits P-12 to P-19 are "missing" from the court exhibits file. M1204, *Becker Trial*, Roll 11. This is probably due to the sheer size of each exhibit.
For a comprehensive quantitative analysis of the content found in the "Camp Books", as well as how the data can be used qualitatively, see Johannes Ibel, "Die Häftlingsdatenbank der KZ-Gedenkstätte Flossenbürg," *Gedenkstätten-Rundbrief* (2003): 3–13. For trial minutes of the "Camp Books'" (including Prosecution exhibit P-12) entry into the court record, see Milos Kučera testimony, M1204, *Becker Trial*, Roll 3, pp. 1247-1254. For the original eight volumes of the "Camp Books", see NARA, RG 549, Boxes 534-536–*Flossenberg* [sic] *registry*, vols. 120-128. For Schrade's entry, see ITS, 1.1.8.1, File: 10794218.

[26] The books were analyzed by the United States USFET Document Control Center, who provided a brief reading guide. The second column was (inaccurately) determined by US officials to represent a prisoner's nationality. See Untitled, 24 October 1945, ITS, 1.1.8.1, File: 10794154.

[27] Court Interpreter, M1204, *Becker Trial*, Roll 4, p. 2691.

> triangle indicating, as the court understands, that that individual was a political prisoner is not necessarily an attack upon the character of that particular individual.[28]

Despite the court siding with the prosecution, thus denying the defense their pursuit of Schrade's prisoner category, the concluding explanation above was painfully misguided. In fact, the entire episode missed the point completely. As the "dch" label provided absolutely no applicable relevance, the court reverted back to Schrade's claim of having been a political prisoner. More generally, the court concluded that such a discovery was insignificant to the credibility of a witness and therefore maintained its position against allowing such interrogations.

Incredibly, McKay actually had it all (almost) correct! First, the interpreter mistranslated the abbreviation. The three letters written over the erasure smudge were not "dch", but "Sch"—short for *Schutzhaft* (protective custody)—which is generally associated with political prisoners who would have worn a red triangle. A closer analysis of the registry further reveals that the second column did not record nationality, but prisoner category.[29] Foreign inmates were commonly listed in the books by their nationality. This is exemplified by the prevalent "Russ" (Russian), "Pole" (Polish), and "Tsech" (Czech) labels throughout and hence, the nationality translation confusion in the courtroom. Foreigners who were sent for a specific violation were given a compound listing of category plus nationality (ex. "Sch, Pole"). Prisoners of war (*Kriegsgefangene*) were entered with a "Kgf", while released POWs were labeled, "Entl Kgf" (*Entlassung Kriegsgefangene*). Germans, or more broadly "citizens of the Reich", were represented with an "R.D." (*Reichsdeutsch*) plus their corresponding offense: *Schutzhaft*, *Vorbeugungshaft* (VH, Preventive custody), *Berufsverbrecher* (BV, Professional Criminal), etc. (ex. "R.D. VH").[30]

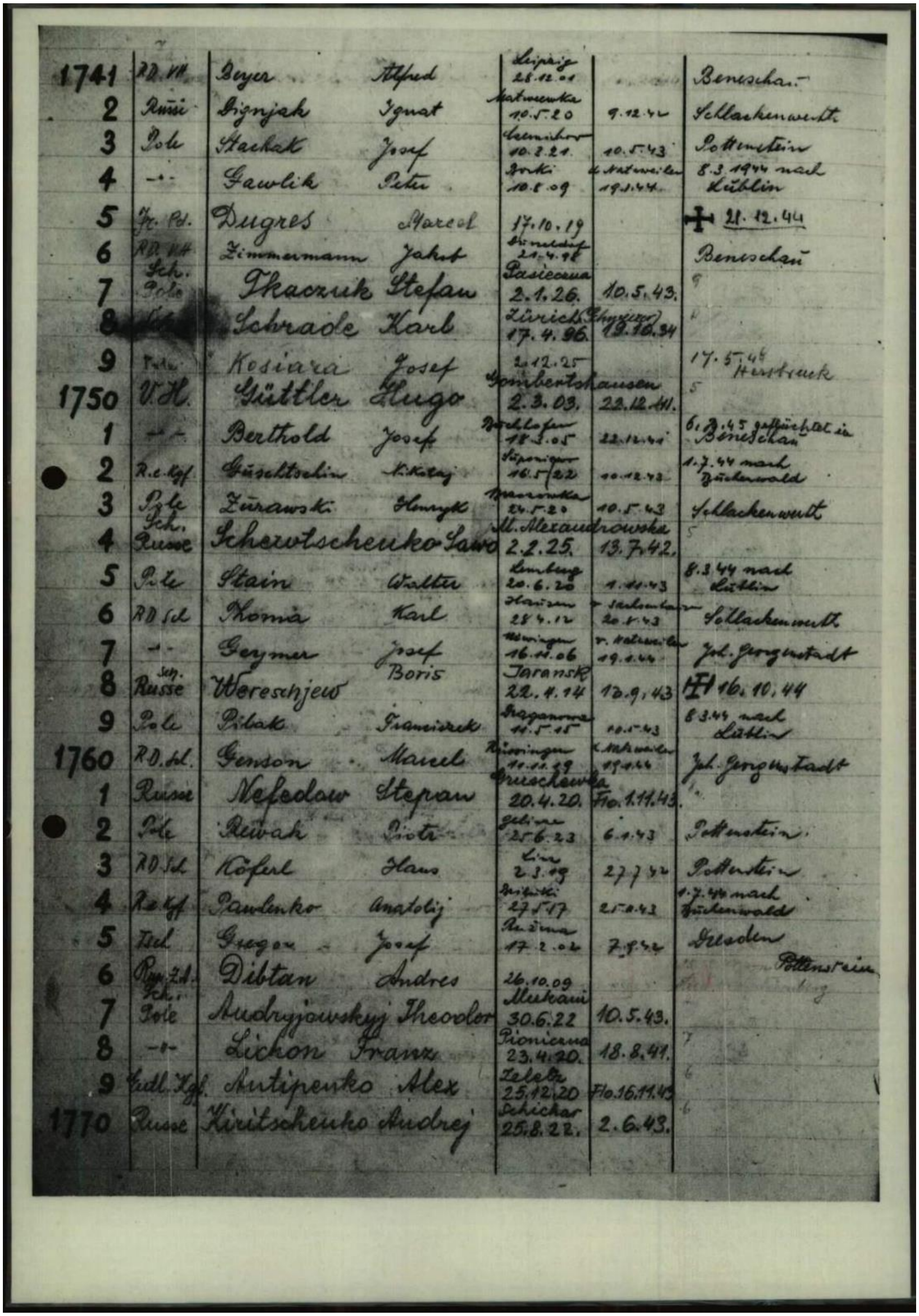
Whether or not his label was intentionally altered at some point, Schrade was listed as *Schutzhaft* at the time the US Army took possession of the prisoner registry books. The designation would have theoretically made him a "red." This is entirely verifiable since, first of all, "dch" was never used as an abbreviation for anything. Furthermore, Schrade was not German. In the fourth and fifth columns, just above his date of birth and his date of entry into the camp, "*Zürich (Schweizer)*" is clearly inscribed.[31] It could be logically conceivable then, that Schrade's "Sch"

[28] President Elliot, M1204, *Becker Trial*, Roll 4, p. 2694.
[29] Milos Kučera testified to this very point on 10 July 1946, stating that column 2 of the Cam Books identified "the nationality and kind of imprisonment." Milos Kučera testimony, M1204, *Becker Trial*, Roll 3, p. 1250.
[30] See image # (prisoner registry page)
[31] Flossenbürg Prisoner registry book, 1741-1770, ITS, 1.1.8.1—List Material Flossenbürg; 1 – 3.000, File: 10794218. See Illustration 10.

was not actually short for *Schutzhaft*, but rather the German spelling for Swiss. Yet, not only would that confuse the systematic application of "Sch" indicating *Schutzhaft* in every other instance, but there would have been no need to transcribe "Schweizer" in column five. In fact, a quick review of the page will show that Schrade is the only prisoner whose nationality is written in parenthesis outside of the designated column two. However, this only substantiates Schrade's prisoner category (as it was observed in the courtroom) but does not at all consider the erasure smudge. According to McKay's suspicions, someone changed the listing to "Sch" from something else.

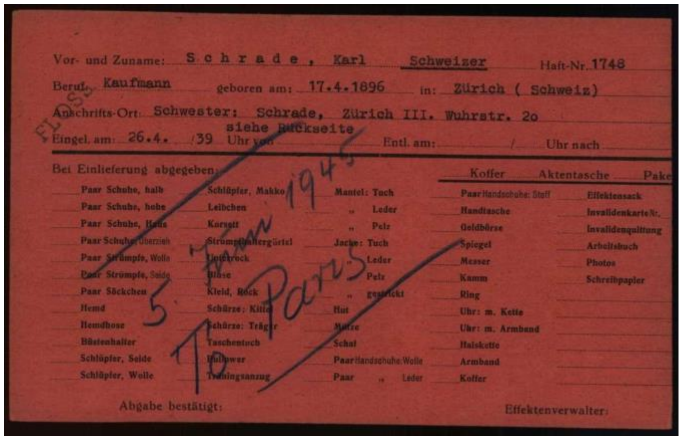
The answer to this, admittedly, relies on a number of circumstantial, yet highly convincing, pieces of evidence. Starting with the existing material documents, there are indeed significant discrepancies between the registry book and the rest of Schrade's surviving prisoner files. The two types of index cards that were preserved were prisoners' "effects cards" (a listing of all the material possessions, including clothing, that accompanied a prisoner on a transfer) and WVHA "prisoner cards" (*Häflingskarte*). Schrade's own effects card indicates that he arrived to Flossenbürg on 26 April 1939, but not before spending time in camps: Lichtenburg, Esterwegen, Sachsenhausen and Buchenwald, respectively. Significant to our investigation is the year at which Schrade first entered the system at Lichtenburg; 1934. Approximately twenty months after the establishment of the earliest concentration camps, the system was still in its infancy and not yet consolidated under the SS Concentration Camp Inspectorate. The November 1933 "Law against Dangerous Habitual Criminals" had been in effect for almost a year by that time, meaning that perceived "criminals" were actively targeted by the time of Schrade's initial incarceration.[32] What's more, Schrade's WVHA prisoner card identifies him as a *Reichsdeutsch*.[33]

[32] Wachsmann, "Indefinite Confinement," p. 166.
[33] "*Häftlingskarte*—Carl Schrade," WVHA_019482_barch_07a_fl_de.jp, KZGF, Accessed April 2021. See Illustration 13.

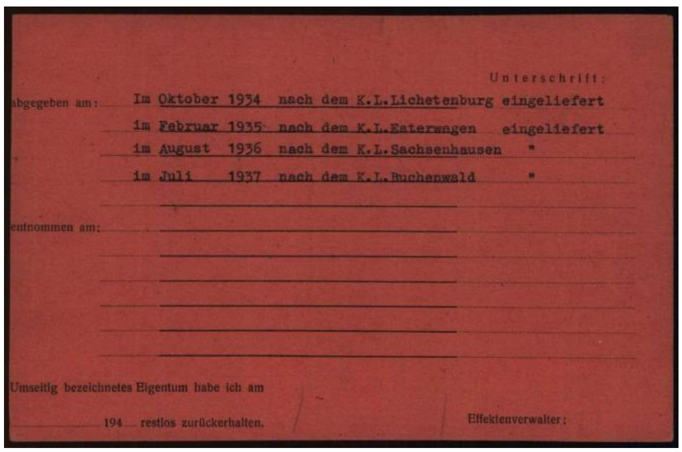


1741	RD.VH.	Geyer	Alfred	Leipzig 28.12.01		Beneschau
2	Russe	Dignjak	Ignat	Matweewka 10.5.20	9.12.42	Schlackenwerth
3	Pole	Stachak	Josef	[illegible] 10.2.21	10.5.43	Pottenstein
4	-"-	Gawlik	Peter	Borki 10.8.09	v. Natzweiler 19.1.44	8.3.1944 nach Lublin
5	Fr. Pol.	Dugres	Marcel	17.10.19		✝ 21.12.44
6	RD.VH.	Zimmermann	Jakob	[illegible] 21.4.98		Beneschau
7	Sch. Pole	Tkaczuk	Stefan	Pasieczna 2.1.26	10.5.43	
8	[illegible]	Schrade	Karl	Zürich (Schweiz) 17.4.96	19.10.34	
9	Pole	Kosiara	Josef	2.12.25		17.5.45 Hersbruck
1750	V.H.	Güttler	Hugo	Gombertshausen 2.3.03	22.12.41	
1	-"-	Berthold	Josef	[illegible] 18.3.05	22.12.41	6.3.45 geflüchtet in Beneschau
2	R.e.Kgf	[illegible]	[illegible]	[illegible] 10.5.22	10.12.43	1.7.44 nach Buchenwald
3	Pole	Zurawski	Henryk	[illegible] 24.5.20	10.5.43	Schlackenwerth
4	Sch. Russe	Scherotschenko	Sawo	Al. Alexandrowska 2.2.25	13.7.42	
5	Pole	Stain	Walter	Lemberg 20.6.20	1.11.43	8.3.44 nach Lublin
6	RD Sch	Thoma	Karl	[illegible] 28.4.12	v. Sachsenhausen 20.1.43	Schlackenwerth
7	-"-	Geymer	Josef	[illegible] 16.11.06	v. Natzweiler 19.1.44	Joh. Georgenstadt
8	Sch. Russe	Wereschjew	Boris	Jaransk 22.4.14	13.9.43	✝ 16.10.44
9	Pole	Pilak	Franciszek	[illegible] 14.5.15	10.5.43	8.3.44 nach Lublin
1760	RD.Sch.	Genson	Marcel	[illegible]	v. Natzweiler 19.1.44	Joh. Georgenstadt
1	Russe	Nefedow	Stepan	Gruschewka 20.4.20	Flo. 1.11.43	
2	Pole	Rewak	Piotr	[illegible] 25.6.23	6.1.43	Pottenstein
3	RD Sch	Koferl	Hans	Linz 2.3.09	27.7.42	Pottenstein
4	R.e.Kgf	Pawlenko	Anatolij	[illegible] 27.5.17	25.8.43	1.7.44 nach Buchenwald
5	Tsch.	Gregor	Josef	[illegible] 17.2.02	7.8.42	Dresden
6	[illegible]	Dibtan	Andres	26.10.09		Pottenstein
7	Sch. Pole	Andryjowskyj	Theodor	[illegible] 30.6.22	10.5.43	
8	-"-	Lichon	Franz	[illegible] 23.4.20	18.8.41	
9	Sdl.Kgf.	Antipenko	Alex	[illegible] 25.12.20	Flo.16.11.43	
1770	Russe	Kiritschenko	Andrej	Schichar 25.8.22	2.6.43	

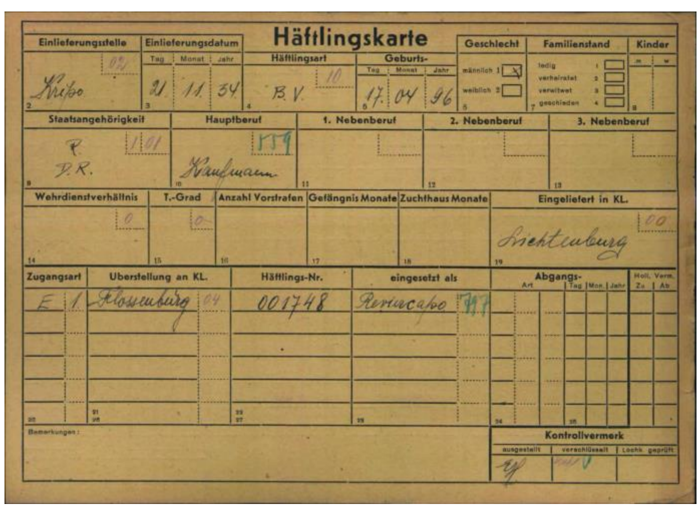
10. Number 1748 is Karl Schrade. A 'smudge' is visible over the prisoner category column. Flossenbürg Prisoner registry book, 1741-1770, ITS, 1.1.8.1—*List Material Flossenbürg*; 1 – 3.000, File: 10794218.


Vor- und Zuname: Schrade, Karl Schweizer Haft-Nr. 1748
Beruf: Kaufmann geboren am: 17.4.1896 in: Zürich (Schweiz)
Anschrifts-Ort: Schwester: Schrade, Zürich III. Wuhrstr. 2o
siehe Rückseite
Eingel. am: 26.4. /39 Uhr von Entl. am: / Uhr nach
Bei Einlieferung abgegeben:
Koffer Aktentasche Paket
Paar Schuhe, halb; Paar Schuhe, hohe; Paar Schuhe, Haus; Paar Schuhe, Überzieh; Paar Strümpfe, Wolle; Paar Strümpfe, Seide; Paar Söckchen; Hemd; Hemdhose; Büstenhalter; Schlüpfer, Seide; Schlüpfer, Wolle
Schlüpfer, Makko; Leibchen; Korsett; Strumpfhaltergürtel; Unterrock; Bluse; Kleid, Rock; Schürze: Kittel; Schürze: Träger; Taschentuch; Pullover; Trainingsanzug
Mantel: Tuch; „ Leder; „ Pelz; Jacke: Tuch; Leder; Pelz; „ gestrickt; Hut; Mütze; Schal; Paar Handschuhe: Wolle; Paar „ Leder
Paar Handschuhe: Stoff; Handtasche; Geldbörse; Spiegel; Messer; Kamm; Ring; Uhr: m. Kette; Uhr: m. Armband; Halskette; Armband; Koffer
Effektensack; Invalidenkarte Nr.; Invalidenquittung; Arbeitsbuch; Photos; Schreibpapier
Abgabe bestätigt: Effektenverwalter:

11. Prisoner Effects Card for Karl Schrade. 10997313 (front), 1.1.8.3 Individual Prisoner Records. ITS Digital Archives.


Unterschrift:
abgegeben am: Im Oktober 1934 nach dem K.L.Lichetenburg eingeliefert
im Februar 1935 nach dem K.L.Esterwegen eingeliefert
im August 1936 nach dem K.L.Sachsenhausen "
im Juli 1937 nach dem K.L.Buchenwald "
entnommen am:
Umseitig bezeichnetes Eigentum habe ich am
194 restlos zurückerhalten. Effektenverwalter:

12. Prisoner Effects Card for Karl Schrade. 10997313 (back), 1.1.8.3 Individual Prisoner Records. ITS Digital Archives.


Häftlingskarte
Einlieferungsstelle: Kripo 02
Einlieferungsdatum (Tag Monat Jahr): 21. 11. 34
Häftlingsart: B.V. 10
Geburts- (Tag Monat Jahr): 17. 04 96
Geschlecht: männlich 1 [x] weiblich 2
Familienstand: ledig 1, verheiratet 2, verwitwet 3, geschieden 4
Kinder: m w
Staatsangehörigkeit: R. D.R. 1/01
Hauptberuf: Kaufmann 159
1. Nebenberuf 2. Nebenberuf 3. Nebenberuf
Wehrdienstverhältnis: 0 T.-Grad: 0 Anzahl Vorstrafen Gefängnis Monate Zuchthaus Monate
Eingeliefert in KL.: Lichtenburg 00
Zugangsart: E 1 Überstellung an KL.: Flossenbürg 04 Häftlings-Nr.: 001748 eingesetzt als: Reviercapo 717
Abgangs- Art Tag Mon. Jahr Holl. Verm. Zu Ab
Bemerkungen:
Kontrollvermerk: ausgestellt verschlüsselt Lochk. geprüft

13. Carl Schrade prisoner card, Flossenbürg Memorial Digital Archive, BArch NS 3/1577, File: 19482.

Careful analysis of his *Häftlingskarte* reveals that "Karl" Schrade (prisoner no. 1748, born 17 April 1896) had been admitted (*Einlieferungsdatum*) into the KL system as a German citizen on 21 November 1934 by the Criminal Police (*Kripo*). According to this document, Schrade was registered as a professional criminal (BV),[34] for which he would have undoubtedly worn a green triangle (when the labeling scheme was introduced, that is[35]). In addition to his BV classification, multiple prisoners who knew Schrade in Flossenbürg recall him as being one of the few virtuous "greens" there. Former Czech prisoner Ferdinand Knobloch remembered Schrade, during an interview in 1999, as a "peculiarly personable (*eigenartige Persönlichkeit*) *Berufsverbrecher*," "very humanitarian" (*sehr humanistisch*) and "never hit anyone" (*niemand geschlagen*). Schrade was the only green whom Knobloch ever spoke positively of, adding that he helped many prisoners as a hospital capo.[36] Another prisoner, Jack Terry, claimed that,

> German prisoners were transported from Dachau, Sachsenhausen, and Buchenwald to build the [Flossenbürg] camp. These 'criminals'—their status identified by green triangles sewn onto their jackets—included not only first-degree murderers, embezzlers, thieves, and so-called anti-socials, but also anti-Nazis. Among them was Carl Schrade… the hospital's inmate administrator, its Kapo [*sic*], and, unusual among the Kapos, a decent man.[37]

These are just two of the many positive depictions of Schrade from Flossenbürg survivors and they are particularly significant because each one emphasizes his humanity and decency *in spite of* his "criminal" classification. Based on the above material and particularly credible eye-witness evidence, it is irrefutable that Carl Schrade was a BV and member of the greens in Flossenbürg concentration camp. But if he had so much support among the prisoner community, why would Schrade look to alter his prisoner category from "BV" to "Sch"?

Returning attention to the trial, if defense counsel McKay had proven Schrade's true prisoner classification (as it appears to have been the original intention), his testimony would have been significantly damaged—possibly thrown out altogether—due primarily to the prosecution's

[34] "Häftlingskarte—Carl Schrade."
[35] Nikolaus Wachsmann references the standardized implementation of color-coded triangle badges in the concentration camps from around 1937, at the earliest. Wachsmann, *Kl*, p. 119.
[36] Ferdinand Knobloch interview, 25 June 1999, KZGF, AGFl_0113. Accessed June 2020. See also Thomas Muggenthaler, *"Ich Lege Mich Hin Und Sterbe!" Ehemalige Häftlinge des KZ-Flossenbürg Berichten* (Munich: Vögel, 2005) pp. 33-34.
[37] Alicia Nitecki and Jack Terry, *Jakub's World: A Boy's Story of Loss and Survival in the Holocaust* (Albany: State University of New York Press, 2005), p. 54.

effective stigmatization of the green/"criminal" prisoner category as having all been collaborators of the SS in Flossenbürg. But this simple deduction critically neglects the timing of Schrade's access to the record books, as well as the context of his motivations.

Schrade had already testified, which was corroborated by others, that he was one of the few prisoner-functionaries who stayed back and cared for those who were too weak to leave with the final evacuation transports. In fact, he remained in Flossenbürg, caring for the sick and assisting the US war crimes investigation team, for several weeks after liberation.[38] As the eldest in the infirmary, Schrade had access to the camp records, prior to them becoming evidence material of the US Army. While it is indeed impossible to definitively confirm that Schrade altered his own entry, his colleague and camp clerk Miloš Kučera directly transcribed and managed the very prisoner registry books in question.[39] As Kučera also had a reputation of protecting his comrades whenever and however he could, he too certainly could have been the culprit.[40] In fact, it was Schrade and Kučera who personally presented war crimes investigator Benjamin Ferencz with the strength reports and the eight camp register books in late April 1945.[41]

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[38] Schrade was still in Flossenbürg on 27 May 1945, when the last of the French hospital inmates finally left. Nitecki, *Jakub's World*, p. 93.
On 4 June 1945, Schrade received a memo to assist him on his return to Switzerland, signed by the commanding US authority during the Flossenbürg investigation, Major Samuel Gray. The memo certified that Schrade "was of great assistance to the Allied Military Government inmates and he is deserving of any consideration or aid which may be given to him." Samuel S. Gray, Memo, 4 June 1945. ITS, 3.2.1— *International Red Cross (IRO) "Care and Maintenance" Program*, File: 81171265.

[39] See section 3.4.1, n.158.

[40] Jewish Flossenbürg survivor, Jack Terry, (who was fifteen years old in April 1945) recalled Carl Schrade and Milos Kučera saving his life by hiding him in various places in the camp during the evacuation round ups. He characterized Schrade as a member of the "criminal" category of greens and, "unusual among the Kapos, a decent man." Nitecki, *Jakub's World*, p. 54; Muggenthaler, *Ich Lege Mich Hin*, pp. 143-152. Of Kučera, Terry said, he "was a friend of Schrade, and, like him, used his position [as clerk] to help others when he could." see Alicia Nitecki and Jack Terry, Jakub's World: A Boy's Story of Loss and Survival in the Holocaust (Albany: State University of New York Press, 2005), p. 70. For details on how Schrade and Kučera hid Terry, certainly saving his life, see Alicia Nitecki and Jack Terry, Jakub's World: A Boy's Story of Loss and Survival in the Holocaust (Albany: State University of New York Press, 2005), pp. 79-82. See also, "In the Flossenbürg concentration camp - dissolution and liberation", Interview Jack Terry, 1998. https://memorial-archives.international/media_collections/show/53ea1574759c02dc8d8b4567. And "Evacuation of the camp and hiding place", Interview Jack Terry, 2007. https://memorial-archives.international/media_collections/show/533ad1ca759c02a726614bea.

[41] Schrade testified that in the final days leading up to the evacuation, he had conspired with the prisoner hospital clerk, Kurt Goltz, to hide prisoner records (strength reports) and prevent their destruction. He notes that they were originally prepared by Milos Kučera in the main prisoner clerk's office and that he turned over the documents to American investigators. Carl Schrade testimony, M1204, *Becker Trial*, Roll 3, pp. 920-923. Milos Kučera later corroborated this, at which time the corresponding documents were entered into the court record as prosecution exhibits P-2 and P-3. He further testified that he had drafted a third strength report (which was entered into the court record as prosecution exhibit P-11) and co-authored the eight volumes of "Camp Books" (prosecution exhibits P-12

Having untangled the morass of the 'smudge campaign' and providing evidence on who could have altered Schrade's prisoner records. The last remaining issue is determining why, prior to having any concrete foresight that such war crimes trials would be taking place (and even less knowledge of how), anyone would want to alter their prisoner identity.

One plausible explanation has to do with the formation of the *Lagerpolizei.* According to several accounts, the greens were forcibly drafted into the prisoner-police guard soon before the camp's evacuation.[42] It is known that Schrade actively forged the names of hospital patients in an attempt to save prisoners from the death marches. It is therefore entirely possible that his own prisoner category was changed from "criminal" to "political prisoner" in order to avoid being forced into the *Lagerpolizei*. Another possible reason was to avoid automatic arrest by investigators in the days following liberation. Accounts charge that even when the prisoner population reached an overwhelming majority of Polish and Russian inmates, the German greens continued to dominate the camp hierarchy in Flossenbürg. According to one survivor, very few were "decent."[43] To be a member of the greens in Flossenbürg, in other words, was implied to have collaborated with the SS. It is entirely conceivable that Schrade was aware of this and changed his status accordingly.[44]

While the precise details behind the smudge itself will likely never be fully revealed, the courtroom debate exposes many significant aspects about Flossenbürg and the subsequent war crimes trial. Above all, it illustrates the extent to which the defense turned its attention on challenging the witnesses over disputing the content of their testimony. In the case of Schrade, it had the added potential of bringing into question of how to determine which functionaries were a part of the common design and which were not, being that neither had been in the camps voluntarily. In spite of the prevalent abuse and murder committed by capos, the greens were not a

thru P-19), the first of which (P-12) contained Schrade's entry with the curious erasure smudge (see Illustration 10). Finally, Kučera confirmed that he personally handed over the Camp Books to investigators, following liberation. Prosecutor Berkowitz certified to the court that the books had been exclusively under US custody in Wiesbaden until their delivery to the courtroom that day. Milos Kučera Testimony, M1204, *Becker Trial*, Roll 3, pp. 238-254.

[42] See section 1.1.3.

[43] Jack Terry interview, October 1998, KZGF, AGFl_0112. Accessed May 2021.

[44] Anton Uhl, a green, was the last camp eldest of Flossenbürg and was selected by the commandant to supervise the remaining prisoners after the evacuations. Known for his brutality, he was attacked and murdered in the *Hauptlager* by fellow prisoners after liberation. Nitecki, *Jakub's World*, p. 93

monolith and Schrade is just one archetypal example of that.[45] Furthermore, prisoner categorization was a massively inconsistent practice. In addition to various subtle differences between camps, Dagmar Lieske has demonstrated that it was not at all uncommon for prisoners to be recategorized for a whole host of arbitrary reasons.[46] In other words, one's identity in the camps was neither definitive nor consistent, but always defined by the SS.

The culture of violence and hierarchical structuring, based on the arbitrary categorization of prisoners, was a deliberate phenomenon, established and enforced by the camp-SS. It was, as Wolfgang Sofsky claims, "more an instrument of power than a means of recognition."[47] Indeed, the greens were victims of National Socialism who suffered abuse, starvation, torture, and murder inside the camps. It is also true, particularly in the case of Flossenbürg, that this minority group was often disproportionately privileged compared to others and that many also took advantage of their positions at the direct expense of fellow prisoners. These behaviors should not be disregarded or understated. However, it cannot be overlooked that the sheer number of prisoner-functionaries standing trial in this case (most of whom were greens), coupled with a persistent social stigmatization of the "criminal" category by both the prosecution, greatly interfered with the court's perception of Flossenbürg's authority structure.

Because the premise of the trial was to convict those accused, the court was entirely disinterested in hearing the personal merits of Carl Schrade. They did not particularly care about his eleven-year odyssey through the entire domestic KL system;[48] how he saved the life of a fifteen-year-old Jewish boy from the death marches by hiding him in a heating duct;[49] or how he remained in Flossenbürg for several weeks after liberation to continue caring for the sick. None of these anecdotes—amounting in Schrade's case to a uniquely righteous life in the camps—were at all pertinent to convicting the fifty-one individuals on trial.

[45] For more on the "criminal" prisoner category, see Herbert Diercks, ed., *Ausgegrenzt: "Asoziale" und Kriminelle" im nationalsozialistischen Lagersystem*, (Bremen: Edition Temmen, 2009); Julia Hörath, *"Asoziale" Und "Berufsverbrecher" in Den Nationalsozialistischen Konzentrationslagern 1933 Bis 1938* (Göttingen: Vandenhoeck & Ruprecht, 2017); Dagmar Lieske, *Unbequeme Opfer? „Berufsverbrecher" als Häftlinge im KZ Sachsenhausen*, (Berlin: Metropol-Verlag, 2016); Wachsmann, "Indefinite Confinement"; Wachsmann, *Hitler's Prisons*. pp. 112-164.

[46] See Lieske, *Unbequeme Opfer?* pp. 30–32.

[47] Sofksy, *Order of Terror*, p. 118.

[48] See Schrade, *Elf Jahre.*

[49] Jack Terry, formerly Jakub Szabmacher, was the youngest prisoner in Flossenbürg at the time of liberation. He was supposed to be transferred with the evacuation of Jewish prisoners in the final days of the camp, but was saved by Carl Schrade and Milos Kučera. Nitecki, *Jakub's World*, pp. 75-85.

4.1.3 Expanding the Character Attacks

The smudge campaign against Carl Schrade is but one example of how the defense co-opted the prosecution's deliberate social stigmatization tactics against the "criminal" prisoner category. The impulse to attack the character of a particular witness, as a way to discredit their testimony, was soon adopted by the defendants themselves. In response to their accusers' testimony, several defendants focused their attention on baseless allegations of predatory homosexuality and pedophilia.

During his self-defense testimony, Karl Mathoi (defendant 25) explained that as hospital eldest he had observed prisoners Kurt Goltz and Paul Toermer, two of his accusers, engage in homosexual blackmail against young men and boys, in exchange for comfortable working conditions in the hospital. Of Goltz, Mathoi stated that he was a "homosexual as I have seldom seen one,"[50] and claimed that he had apparently amassed a significant amount of power in the prisoner hospital. He further accused both Goltz and Toermer of holding drug and alcohol filled orgies, with supplies designated to treat patients.[51] On one occasion, Mathoi recalled Goltz firing a young French orderly after refusing his sexual advances.[52]

Block eldest Karl Gieselman (defendant 14) echoed Mathoi's allegations towards Goltz and claimed to have respected the "terrific power" that Goltz held in the camp, explaining,

> On an average, I would have forty to fifty of the men under my supervision in the hospital or in the convalescent ward and twenty of these were juveniles which the master of the hospital, Goltz, kept for himself… I was not dumb enough to openly attack a man like Goltz who had such terrific power in the camp.[53]

Gieselman also voluntarily commented on the Schrade controversy,

> I would like to challenge the authenticity of the testimony of this witness Schrader [*sic*] by pointing out, among other things, that he was not in the concentration camp as a political prisoner but that he wore a green triangle. The green triangle was later changed into a protective preventive prisoner classification. Who did that and where it was begun of course is more than I know.[54]

Peaking the court's interest, Gieselman was asked to elaborate on the prisoner categories of Schrade and Goltz. He responded that up until he left the Flossenbürg *Hauptlager* on the 20 April

[50] Karl Mathoi testimony, M1204, *Becker Trial*, Roll 6, p. 4137–4138.
[51] Mathoi, M1204, *Becker Trial*, Roll 6, p. 4224–4225.
[52] Ibid, 4197–4198.
[53] Karl Gieselman testimony, M1204, *Becker Trial*, Roll 6, p. 4336.
[54] Gieselman, M1204, *Becker Trial*, Roll 6, p. 4435

evacuation march, he had never seen Schrade wear anything other than a green triangle and that Goltz had always wore a red triangle. When asked if Goltz was a "homosexual", Gieselman replied, "according to my opinion, yes, because the hospital was well known in the camp as being the main place of homosexuality and with it, Goltz."[55]

Given the collective value of testimony provided by Carl Schrade and Kurt Goltz, it should not be surprising that the court found itself so concerned with these two men. However, it is apparent that after the barrage of character attacks from the defense counsel and the defendants, the court's trust in the credibility of Schrade and Goltz increasingly hinged on their alleged prisoner category and immoral behavior, respectively. It must be noted that none of the accusations were ever definitively confirmed, either through material evidence or by re-questioning Schrade and Goltz themselves. As it relates to the trial, such a concerted interest in the character of these two men is exemplary of how the defense was able to use the prosecution's social stigmatization tactics against their own (key) witnesses and how the court bought into the strategy.

As the trial drew on, the court continued at every opportunity to question witnesses on this issue. At a later point, for example, the court asked defense witness and former political prisoner Clemens Diedrich to describe the standing of Goltz and Schrade in Flossenbürg. Of Schrade, Diedrich claimed that he "did not have a bad reputation." Seeing the court's dissatisfaction with his answer, he added that Schrade was always willing to help and often supplied him with whatever he needed.[56] When Diedrich recalled that Goltz was "considered a quiet, peaceful man," the court pressed on the question of his alleged immorality. Diedrich insisted that he had not known Goltz to be a "homosexual."[57]

While this kind of skeptical mistrust from the court severely threatened the prosecution's case, it neither proved nor disproved the accuracy of the testimony given by Schrade or Goltz. Nevertheless, through social stigmatization and unrelenting character attacks, the defense had significantly undermined the credibility of key prosecution witnesses, all while shifting attention away from the defendants and continuing to drag the trial on. The consequences of this kind of strategy were not isolated to, nor contained within the courtroom, however. Rather, the social stigmatization of "criminal" and "homosexual" groups, as well as others, was commonplace

[55] Ibid, pp. 4469–4470.
[56] Clemens Diedrich, M1204, *Becker Trial*, Roll 7, p. 5960.
[57] Diedrich, M1204, *Becker Trial*, Roll 7, p. 5967.

throughout post-war Germany decades after the war.[58] These two prisoner categories are often regarded as so-called "forgotten" or "marginalized victim" groups of Nazi persecution. Dagmar Lieske, however, has rightfully noted that this is a misleading term, as their exclusion from public recognition and material compensation was not an oversight, but deliberate and systematic.[59]

Despite US occupational policy that immediately abolished all laws explicitly informed by Nazi ideology, the (pre-1933) existing statutes against homosexuality and the prevailing judicial perceptions toward "criminals" remained.[60] In addition, efforts to overturn Nazi-era persecution were overwhelmingly fixated on cases of "anti-Nazi" behavior (i.e. political resistance), leaving "moral" offences relatively untouched.[61] Responsibility for compensation and restitution programs was later undertaken by the Federal Republic of Germany (FRG), which paid out victims for decades. Successful appeals, however, were often contingent upon the applicant's level of "moral recognition"[62] which was predicated directly upon the arbitrary identity-labels enforced inside the concentration camps. In 1953, for example, the West German Compensation Act went so far as to legally define the limitations of victimization:

> Victims of Nazi persecution are those who have been persecuted for reasons of political opposition to National Socialism or for reasons of race, religion or world-view through National Socialist violence and thus damage to life, body, health, freedom, property, assets, in his pursued professionally or in his economic advancement (persecuted).[63]

This definitively excluded such victim groups as "professional criminals," "asocials," "protective custody prisoners," "homosexuals," and "Gypsies" (Romani and Sinti). Not until 1994, did the reunified German state officially remove the Paragraph 175 statute (which criminalized male

[58] For a study on the historical contextualization of the "criminal" and "homosexual" prisoner categories, through the memoirs of two Flossenbürg inmates, see Nick Warmuth, "Recognising Victimisation: The Memoirs of Josef Kohout and Carl Schrade in the Context of Historical Persecution," in Janine Fubel et al. (eds.) *Practices of Memory and Knowledge Production: Papers from the 22nd Workshop on the History and Memory of National Socialist Camps and Extermination Sites*. (Berlin: Metropol-Verlag, 2022). pp. 187–221.
[59] Lieske, *Unbequeme Opfer?* p. 9-10.
[60] Thomas Vormbaum, *A Modern History of German Criminal Law*, ed. Michael Bohlander (Berlin Heidelberg: Springer-Verlag, 2014). P. 211
[61] Vormbaum. *A Modern History*, p. 212.
[62] Lieske. *Unbequeme Opfer?* p. 316.
[63] "Opfer der nationalsozialistischen Verfolgung ist, wer aus Gründen politischer Gegnerschaft gegen den Nationalsozialismus oder aus Gründen der Rasse, des Glaubens oder der Weltanschauung durch nationalsozialistische Gewaltmaßnahmen verfolgt worden ist und hierdurch Schaden an Leben, Körper, Gesundheit, Freiheit, Eigentum, Vermögen, in seinem beruflichen oder in seinem wirtschaftlichen Fortkommen erlitten hat (Verfolgter)." Quoted in Ibid, p. 319.

homosexuality) from the criminal code.[64] The struggle for recognition has taken even longer for the "criminal" category. Beginning in 2018, a grass-roots initiative was launched online to officially acknowledge "asocials" and "professional criminals" as victims of National Socialism.[65] While it is likely too late for financial compensation to most victims, material concessions would establish a path towards state-sanctioned memorialization and commemoration, as well as a space in the collective "culture of remembrance." Furthermore, previously denied funding opportunities for qualitative and quantitative research would be available, and open access to formerly restricted documents will help to rehabilitate the individual histories of the victims for relatives and descendants.[66] In February 2020, the initiative was brought to the floor of the German *Bundestag* where it received enough votes to pass. While the recent progress is a welcome change, the Flossenbürg parent trial illustrates how the MGC passively participated in reinforcing the social stigmatization and persecution against the so-called "criminals" and alleged "homosexuals," that endured for an entire generation.

4.2 Judgement

4.2.1 Nolle Prosequi

On the morning of 17 December, a Tuesday, the court came to order in the same manner it had been doing since June. Immediately following the obligatory roll call, however, Denson caught the entire courtroom completely off guard when he suddenly proceeded to call out the names of six defendants—Friedrich Becker (defendant 1), Georg Degner (defendant 9), Josef Oswalt (defendant 32), Heinrich Schmitz (defendant 40), Ludwig Winkler (defendant 49), and Wenzel Wodak (defendant 50)—whose cases were to be dismissed as *Nolle Prosequi* ("not to wish to prosecute"[67]). All but Schmitz, who was a technically a civilian physician, were low to mid-level SS-men.[68] The motion to simply drop the cases had been an eleventh-hour decision, made between the prosecution and the office of the Judge Advocate General. When President Elliot requested

[64] W. Jake Newsome, "'Liberation Was Only for Others': Breaking the Silence in Germany Surrounding the Nazi Persecution of Homosexuals," *The Holocaust in History and Memory* 7 (2014): 53–71. p. 65.
[65] The campaign was led by Frank Nonnenmacher, whose uncle had been imprisoned in Flossenbürg as a "professional criminal." The online petition, uploaded through change.org, was publicly supported by dozens of academics in field of Nazi persecution and the concentration camps and ultimately received almost 22,000 signatures. Warmuth, "Recognising Victimisation," pp. 220-221.
[66] Ibid.
[67] "*Nolle prosequi,*" Cornell Law School, LII, Wex, https://www.law.cornell.edu/wex/nolle_prosequi. Accessed June 2021.
[68] See Appendix: Flossenbürg Trial Defendant List

confirmation from the appointing authority, Denson could only verify that the order had been issued through a phone call.[69] Elliot offered to hold the motion in abeyance until Denson could produce a written directive. Despite protests that orders from the JAG office superseded the authority of the court, the President held fast in his demand of a written confirmation for the case record. Having been granted a recess, the prosecution returned that very afternoon with a brief half-page notarized directive, signed by Deputy Theater Judge Advocate for War Crimes Colonel Cleo Straight and Commanding officer of the Dachau Detachment Colonel Howard Bresee.[70] With documentation in hand, the court submitted the order into the trial record as Prosecution Exhibit P-93 and proceeded to remove the six defendants from the dock.[71] Reduced to forty-five defendants, the court promptly carried on.

So, what actually happened? While it is tempting to conclude that the prosecution simply realized it did not have enough evidence to convict the six defendants in the parent case, it would nevertheless be a gross simplification of the situation. One really only need to revisit the testimony against Heinrich Schmitz (given in the first weeks of trial) to realize that this was certainly not the case.[72] What hadn't yet occurred, however, was Schmitz' opportunity to call witnesses in rebuttal. This was also true for the other five dismissals. The trial had basically run out of time.

By mid-December, the Flossenbürg trial had been running for six months, already more than twice the length of the Dachau and Mauthausen trials combined, and there was still no clear end in sight. The decision was therefore made to conclude the trial as soon as possible. As the program to hold subsequent trials (based on the corresponding parent camp-atrocities cases) was already up and running by this time, the WCB intended to reindict the six defendants and try them at a later date.[73] This decision, however, did bring unintended consequences to the parent trial. In particular, the sudden removal of the defendants provoked the defense to demand all corresponding testimony be thrown out, as it was theoretically now irrelevant to the present case.[74] This sparked another debate over common design, by which the prosecution argued that testimony concerning any one individual was testimony concerning the operation of Flossenbürg as a whole.[75] In other

[69] M1204, *Becker Trial,* Roll 10, pp. 8253-8254.
[70] M1204, *Becker Trial,* Roll 10, pp. 8253-8259.
[71] Ibid, pp. 8258-8259. For Prosecution Exhibit P-93, see same, Roll 11.
[72] See section 3.2.1
[73] See Peters, "Trial of War Crimes Cases," p. 122.
[74] Ibid, pp. 8260-8262.
[75] Prosecutor Berkowitz, Ibid, p. 8262.

words, the remaining forty-five accused were still answerable to the alleged criminal offences by those who were no longer on trial.

The removal of the defendants also generated wider reverberations throughout the war crimes trial program, to the point that the military government leadership felt obliged to address the controversy. According to a memo by Colonel Bresee,

> The nolle prosequi entered as aforesaid in the [Flossenbürg] parent case was a procedure adopted solely for the reasons of expediting the conclusion of the mass atrocity trial. The selection of the defendants who were nolle prossed had no relation to any question of the sufficiency of any evidence against them, and was based upon the fact that little or no evidence for the defense had yet been entered by their respective counsel at the time it was directed that the number of defendants be reduced for the expeditious conclusion of the case.[76]

While Bresee's memo does provide a rational explanation, it equally provokes more questions, like to whom this clarification was directed, particularly if he and Colonel Straight were the primary authority in the matter? Concerns also arise as to the fates of the six individuals, being that they had just sat through half a year on trial, only to be sent back to the arrest bunker.

The Bresee memo was drafted on 9 June 1947 and was (vaguely) addressed to "All Tribunals Concerned." That very day, it was submitted by the prosecution as an exhibit in the Flossenbürg subsequent trial of Georg Degner (one of the six nolle prossed defendants).[77] Its function, in other words, was to act as a clarifying document in the subsequent trials where accusations of double jeopardy were raised.[78] It was also submitted to the court in the subsequent cases against Wenzel Wodak,[79] Friedrich Becker, and Heinrich Schmitz.[80] That Bresee needed to explicitly dismiss suspicions of lack of evidence speaks to the cynicism that the original *nolle prosequi* orders generated. Of the remaining two defendants, there is little information. Josef Oswalt, a Yugoslav national and guard in the *Waffen*-SS, was extradited to Poland. Ludwig

[76] Howard F. Bresee, "Nolle Prosequi Friedrich Becker, Case No. 000-50-46B," 9 June 1947, quoted by Prosecution, *United States v. Ewald Heerde et al.*—Case No. 000-50-46-3 (Hereafter *Heerde Trial*), 10 November—12 December 1947, NARA, RG 549, A1 2238, Box 526, pp.8-9

[77] For more on the Degner trial, see ch 5 *United States v. Georg Degner*—Case No. 000-Flossenburg-1 (Hereafter *Degner Trial*), NARA, RG 549, Box 271. p. 105.

[78] See section 5.2.1

[79] *United States v. Wenzel Wodak*—Case No. 000-Flossenbürg-2 (Hereafter *Wodak Trial*), 2—13 June 1947, NARA, RG 549, A1 2238, Box 272, pp. 163.

[80] Becker and Schmitz were tried together. *Heerde Trial*.

Winkler, an SS Sergeant was later reported to have escaped custody and "killed while being captured."[81]

4.2.2 Closing Statements

The Prosecution

On 13 January 1947, both the prosecution and defense teams were ready to present their concluding remarks. Denson explained that he would begin the prosecution's closing statement before passing the floor to his colleague Harry Berkowitz. Despite this new shared approach, Denson would recite nearly the same arguments he had presented at the Mauthausen trial, sometimes quoting entire passages word-for-word.[82] He briefly recalled that in the last seven months, more than 300 witnesses had testified and over 9,000 pages of transcript had been recorded. Denson began his roughly thirty-minute monologue by acknowledging the various conflicts and discrepancies that transpired over the course of the trial, but explicitly rejected the notion that any concessions were owed on account of the prosecution's witnesses. Instead, he implored the court to disregard minor inconsistencies to any one narrative and to focus attention on the glaring evidence that Flossenbürg facilitated systematic murder. He challenged the court to contextualize the dire circumstances that prisoners endured, to consider the motivations behind any dubious self-interests of the witnesses, and to resist the temptation to equate them with the "greater and more vital interests" of the defendants.[83]

Denson then turned his attention to vigorously reiterate the legal premise and material importance of the common design charge. He reminded the court that despite the defense's deliberate misinterpretations, common design was not, nor had it ever been, *the* crime in question. Rather, it merely represented the existence of a "mutual intent" among the accused to aid, abet, and participate in war crimes by way of beatings, tortures, starvations, and killings. And no matter how many times the defense tried to conflate the charge with conspiracy, Denson insisted that common design does not require a conscious agreement among the defendants.[84]

He reiterated that the prosecution was not looking to convict the accused on "isolated cases of misconduct" but was pursuing justice against the entire system that engendered a pervasive

[81] Unsigned, "Background of Accused in Flossenberg Case."
[82] For Denson's closing statement at the Mauthausen Trial, see Jardim, *Mauthausen Trial*, pp. 168-175.
[83] Denson, M1204, *Becker Trial*, pp. 9215-9216
[84] Ibid, pp. 9218-9220.

practice of violent misconduct. Pointing out that 15,000 prisoners died between March 1944 and April 1945, Denson proclaimed that *only* through a common design could the camp facilitate human destruction on such a massive scale. He mused over how the defense counsel planned to explain away the omnipresent "pattern of mistreatment," as well as how it could operate so efficiently without some common plan, before handing the floor over to his colleague, Harry Berkowitz.

While Denson provided an overview of the general principles of common design, Berkowitz carefully walked the court through the corresponding evidence and attempted to predict how the defense would respond. He began by illustrating the administrative apparatus of the camp, detailing the relationships that the defendants had to the alleged scheme, as well as to each other, proclaiming "the conditions that existed cannot be ascribed to any one department or any one individual but to all."[85] After a brief depiction of what new arrivals could expect upon entering Flossenbürg, Berkowitz proceeded to categorize the forty-five remaining defendants into three representative groups, beginning with the prisoner-functionaries.

Conceding to the fact that not all capos were inherently corrupt, Berkowitz nevertheless repeated the claim that most were "hardened German criminals… who loved the taste of authority [and] who would sell the lives of their fellow prisoners for petty benefits."[86] The same was said for the block eldests.[87] According to the prosecution, the prisoner-functionaries played an integral role in the common design scheme that, without them, the scope of destruction would have never reached the proportions that it did. Berkowitz spent a considerable amount of time describing them as a mindless appendage of the SS, used to violently foment animosity between prisoners. For example, he likened the capo class to human hands; being the most effective part of the body in performing manual functions.[88] The terror attributed to these men was not purely physical, however. Echoing earlier references by Denson on the psychological destruction of prisoners, Berkowitz insisted that the most egregious element of this unnatural power dynamic was the dominance of "criminals" over European intellectualism (vis a vis the political prisoners). He stated that "breaking a man's spirit is a tremendous stride towards his destruction… the crowning

[85] Berkowitz, M1204, *Becker Trial*, p. 9282.
[86] Ibid, p. 9230.
[87] Ibid, p. 9231-9231.
[88] Ibid, p. 9230.

blow in the cycle of extermination."[89] Again, in its narrow characterization of the victims, the prosecution completely refrained from explicitly referencing Jewish prisoners.

The brutality attributed to many prisoner-functionaries should not be neglected, nor should it have gone unpunished, but the prosecution deliberately presented an exceptionally simplified caricature of the "criminal" prisoner category as to establish the group as equal participants to the SS in the common design. Never was it acknowledged, however, that they too were victims of National Socialism or the extralegal circumstances of their incarceration at Flossenbürg and its subcamps.

The second group comprised mid-level SS personnel and administration; the block leaders, labor-detail leaders, and report leaders. Relatively little was said about these individuals (compared to the prisoner-functionaries), other than having had daily contact with prisoners and their apparent indifference to the lives over whom they presided. Their participation in the common design was largely presupposed.[90]

The third group of rank-and-file SS guards received a particularly interesting indictment:

> The guards and their officers are the men who stood in readiness to prevent any prisoner from extricating himself from this place where the beatings by Mathoi, Retzlaff, Hauser, Jakubith and others were daily occurrences ... It was the guards who kept the prisoner confined and in readiness to be sent to the murderous punishment detail administered by Jakubith and Hauser. To say that such conduct does not constitute participation in this common design is tantamount to ignoring the facts as disclosed by the record and being ignorant to the law applicable thereto.[91]

Berkowitz expressed a discernable indifference to allegations of physical abuse committed by the guards themselves. Instead, he indicated their explicit role in the common design was one of confinement, rather than wanton violence. Citing *Wharton's Criminal Law*, Berkowitz reminded the court that assistance to a criminal offence resulted in principle liability equal to that of those who committed the offense.[92] The crime of mistreatment itself, however, was again reiterated as being the role of the abovementioned capos. The overarching strategy, therefore, was to identify the various divisions of labor at their most rudimentary levels in order establish the exigencies of each role to the overall objective: the SS leadership and administration managed the operation, the

[89] Ibid. pp. 9230-9231.
[90] Ibid, p. 9232.
[91] Ibid, p. 9233.
[92] Berkowitz, quoting *Wharton's Criminal Law 12th edition*, page 341, paragraph 256, column 1. M1204, *Becker Trial*, pp. 9233, 9235.

guards ensured a near hermetically sealed environment, and the capos were employed as the tools of destruction inside. Collectively, they comprised the common design apparatus.

Satisfied with these characterizations, Berkowitz turned to preemptively address what he presumed would be contentions advanced by the defense. On the issue of superior orders, he expressed the absurdity of attempting to hang responsibility for the concentration camps solely around the necks of Hitler and his cabinet. He also reiterated that it was entirely immaterial whether or not a defendant had been drafted into the SS or assigned to Flossenbürg against their will. Nor was it a legitimate excuse for one to proclaim that they were compelled, under fear of reprisals, to carry out illegal orders.[93] This pertained to the prisoner-functionaries as well. Berkowitz insisted that such excuses of self-defense were completely disingenuous, recalling that at no point in the trial did anyone testify to receiving anything more than a slap to the ear or being removed from their position after refusing an order to abuse another prisoner.

Another common response from capos was fear of reprisals; that they used mild force to "discipline" prisoners in order to save them from more severe punishment by the SS. To that, Berkowitz exclaimed that such an excuse was incomprehensible and quoted Justin Miller's Handbook on *Criminal Law*, "threats, in any case, to be an excuse, must be threats of immediate, not future, injury or death. However, not even threat of immediate death, will excuse the taking of the life of an innocent person."[94]

On the topic of death rates, Berkowitz recalled attempts by the defense to argue that the spike in mortality in Flossenbürg in 1944 and 1945 was due to extreme overcrowding, following the arrival of thousands of severely sick prisoners. While true, Berkowitz pointed out that nothing was done at any level to mitigate the crisis. Rather, prisoners remained undernourished, overworked, and medically neglected.[95] Berkowitz also addressed the so-called "smudge campaign" against Carl Schrade and other deliberate character attacks on various key prosecution witnesses,

> Just call the absent witness, who is no longer in the courtroom to defend himself, a thief, or a homosexual, then maybe the court will believe the mistreatment was justified, or try to show that the now absent prosecution witness had trouble with

[93] Berkowitz referred specifically to mass executions of apparent offenders, without any prior judicial due-process. Berkowitz, M1204, *Becker Trial*, p. 9236-9237.
[94] Ibid, p. 9240.
[95] Ibid, p. 9241-9242.

> the defendant against whom he testified, maybe the court will believe that his testimony is rooted in revenge.[96]

While this remark does illustrate the malevolent tactics used by the defense to discredit witnesses, Berkowitz failed to acknowledge the prosecution's own role in laying the foundations for such attacks to be taken seriously by the court. It was chief prosecutor Shaw who first attempted to conflate one's guilt with the green, "criminal" prisoner-category. As a result, prosecution witnesses who had shared that label were then suspected of harboring the very same stereotypical traits attributed to the defendants. And it wasn't long before this device was appropriated by the defense and expanded to include accusations of homosexuality and pedophilia.

In summary, Berkowitz reiterated the prosecution's intentions to hold accountable those who broke international laws of war. He implored the court to ignore inclinations to judge the defendants individually upon the number of victims attributed to them, but rather to perceive them collectively as integrated cogs in the machine that was Flossenbürg concentration camp. Taking a que from Denson's closing arguments in the Mauthausen trial, Berkowitz posed two questions that the court should ask itself: First, did a common design to subject prisoners to abuse, starvation, torture, and killings exist at Flossenbürg and its relevant subcamps? If yes, what did each defendant do or fail to do regarding aiding, abetting, or participating in the scheme? If the answer is "something", proclaimed Berkowitz, then a judgment of guilt is certain. Following up, the extent of that "something" should only be considered during sentencing.[97] Lastly, Berkowitz acknowledged that the prosecution was seeking the death penalty for each of the accused. While it was entirely within the hands of the court to decide, he indicated that the hundreds of witnesses who testified for the prosecution were relatively few, compared to number of victims who are forever unable to speak. If these lives were not physically taken by the hands of those in the dock, Berkowitz insisted that every one of them nevertheless maintained the environment that made it possible.[98]

The Defense

At the close of the Mauthausen trial, lead defense counsel Robert Wilson was sick in the hospital. Because he had elected not to make an opening statement in that case, the only opportunity to

[96] Ibid, p. 9242.
[97] Ibid, p. 9249.
[98] Ibid.

present a comprehensive synopsis of the defense's arguments had been left to his assistants who apparently delivered a clumsy and disjointed series of challenges to the prosecution's charges. Each counsel took a turn addressing the court, opting in general to speak of the defendants collectively, according to Jardim, as having been agentless victims of the Nazi state and, currently, as "prisoners of an unjust occupying power."[99]

Eight months later, Wilson stood before the court in the Flossenbürg trial and professed that he saw no value in taking more of the court's time. On the other hand, he would oblige their explicit request to hear a summary of the defense's case.[100] Despite expressing another apparent concern for expediency, the defense team continued to show no hurry to conclude. In an exercise that almost poetically mirrored the prosecution's opening statement, Wilson and the rest of the defense team forwent a brief summary of their case. Instead, each counsel painstakingly presented individual closing arguments for all forty-five of their respective defendants, according to one counsel, "as though there were no allegation of common design in the charge sheet."[101]

Wilson kicked off what would become a three-day succession of monologues. His own introduction appealed to the overarching policy issues that the defense saw as delegitimizing the trial as a whole. First, he noted that while certain procedural changes were indeed necessary, the MGC program was nevertheless structured around Anglo-American principles of law. "Mass punishment", according to Wilson, was not a feature of this justice system. Only in cases of conspiracy, he added, did US law hold an individual criminally liable for acts they did not commit themselves.

Second, Wilson referred all the way back to the 1943 Moscow Declaration, which stated that German officers and members of the Nazi party who took a consenting part in the atrocities would be held criminally responsible. Upon strict reading of this passage, Wilson inferred that *only* consenting officers and party members were to be held liable, at the very least ruling out the sixteen prisoner-functionary defendants.[102] This strategy of semantic interpretation and fallacious reasoning was a recurring practice among many of the defense counselors. Third, Wilson once again referred back to American legal norms to disparage the use of hearsay evidence. He reminded the court that it was entirely within their discretion to admit *or refuse* any such testimony, but it

[99] Jardim, *Mauthausen Trial*, p. 175.
[100] Wilson, M1204, *Becker Trial*, p. 9251.
[101] Hall, M1204, *Becker Trial*, p. 9326.
[102] Wilson, M1204, *Becker Trial*, p. 9251.

was their obligation to hold a fair trial.[103] Finally, Wilson contemplated the perceived levels of agency among the accused, thereby dismissing the concept of common design as lacking common sense. Simply put, he contended, the sixteen prisoner-functionaries would not be on trial, had they not been sent to the camps in the first place. As for the SS, many claimed to have been involuntarily drafted and assigned to camp duty against their will. Wilson concluded his remarks, and the court was closed. His colleagues would start fresh the next day.

The following morning, Russel McKay, defense counsel to the sixteen accused prisoner-functionaries, delivered a lengthy three-hour statement. He first criticized the prosecution's attempts to demonize whom he characterized as "early victims of the Nazi system," before dedicating several minutes to each of his clients individually. McKay aggressively denounced the prosecution's incessant use of the label "habitual criminal" and correctly noted that it was the National Socialist system that first identified them as such. Conceding that mild disciplinary slaps did occur, McKay reasoned that, "it is not human nature for men who, themselves having been so long the victims of such a system, to join with their oppressors in perpetrating the type of crimes which they have experienced, upon others." [104] While it is not inevitable (as McKay implied) that at a certain point some prisoners will adopt the behaviors of those in power, survivor and psychoanalyst Bruno Bettelheim claimed to have personally observed the phenomenon in Dachau and Buchenwald.[105]

The primary issue McKay took with the prosecution's common design charge, as it related to prisoner-functionaries, was the implication of voluntary participation. He reminded the court that defendants Mathoi and Gieselman were hand-picked to their positions and that even prosecution witness Carl Schrade had testified that from 1943, capos were often selected based on their technical skills and language proficiency.[106] McKay also pointed to testimony that contradicted assumptions that capos and block eldests lived considerably better than the general population. Instead, contending that prisoner-functionaries were often scapegoats of the SS; anytime something went wrong, either in the blocks or on the work details, it was the responsibility

[103] Ibid.
[104] McKay, M1204, *Becker Trial*, p. 9256.
[105] The concept of prisoners imitating the SS in the camps was one of the primary themes in the social-psychological study by Bruno Bettelheim, who himself was a camp survivor of Dachau and Buchenwald. Bruno Bettelheim, *The Informed Heart: The Human Condition in Modern Mass Society* (New York: Avon Books, 1971). See also, Bruno Bettelheim, "Individual and Mass Behavior in Extreme Situations," *The Journal of Abnormal and Social Psychology* 38, no. 4 (1943) 417–452.
[106] McKay, M1204, *Becker Trial*, p. 9256.

of the block eldests and the capos.[107] Lastly, all but one of the accused prisoner-functionaries were drafted into the *Lagerpolizei* and forced to march as guards in the evacuation marches.[108] For these reasons, McKay insisted that the charge of common design did not apply to his clients.

At this point McKay turned his attention to the individual cases against the accused sixteen prisoner-functionaries. Despite the long-winded address, much of the substantive issues raised by McKay tended to overlap each other. The first notable example was the ever-recurring theme that all capos and block eldests were constantly under immense pressure to keep up with productivity quotas, maintain order among the prisoners, and prevent theft and sabotage. This of course was always accompanied by inferences that prisoners were lazy and selfish; not once, however, did counsel publicly consider why that may have been. Nevertheless, the defendants were apparently compelled to use force to keep prisoners in line. Of capo Willy Olschewski (defendant 31), for example, McKay insisted "that in order to protect the welfare of the prisoners as a whole, Olschewski had to slap prisoners."[109] A similar explanation was expressed about block orderly Walter Neye (defendant 30), whose duties were "carried out under over-crowded conditions, and it was necessary for him to slap prisoners who by misconduct would jeopardize the welfare of the prisoners who lived in the block."[110] And it was the same in the work-details. McKay recalled that Josef Hauser (defendant 18),

> …was under constant pressure from the civilian masters and the detail leaders to keep up the quota of wings required to be produced daily... During the working hours, there were always prisoners who would loaf. There were others who were careless in handling the machines. As capo of this detail, it was necessary for Hauser to take disciplinary action against those prisoners who stepped out of line. Hauser has admitted that on such occasions, he would slap prisoners and in some cases, made use of the rubber hose… Hauser always had to kept the welfare of these men in mind.[111]

From these three excerpts alone, a clear pattern emerges, with McKay suggesting that the physical abuse carried out by the prisoner-functionaries was not only necessary, but was done for the prisoners' own safety. Such a mischaracterization of the daily violence that existed throughout all corners of the camp was largely premised on the pretext that formal disciplinary reports were significantly worse. McKay proclaimed that as veteran prisoners, all of these defendants were well

[107] Ibid, pp. 9256-9257.
[108] Ibid, p. 9257.
[109] McKay, M1204, *Becker Trial*, p. 9299
[110] Ibid, p. 9310.
[111] Ibid, p. 9276-9277.

aware of the consequences that accompanied such a report; a typical punishment fell somewhere between twenty-five lashes and death.[112] On the other hand, resolved McKay, doing nothing would result in an unmet quota for the detail and the entire group would be severely disciplined.

Another issue that McKay persistently referred to, as he made his way down his list of defendants, was the types of prosecution witnesses selected and the pernicious motives that supposedly led them to testify. In his defense of chief capo Georg Weilbach (defendant 48), McKay attempted to segment (former prisoner) prosecution witnesses into two categories: Germans and "foreigners." Of the foreign witnesses, he proclaimed that the testimony plainly exposed their singular purpose of enacting revenge.[113] Defending capo Hans Lipinski (defendant 23), McKay referred back to the prosecution witness Ernst Nebel, a self-identifying Polish Jew,[114] who had arrived to Flossenbürg in November 1944 on a transport from Plaszow.[115] Nebel had testified that he witnessed Lipinski beat Hungarian- and Polish-Jewish prisoners (as well as other "nationalities") on a near daily occurrence.[116] He also recalled that as the evacuations were getting underway, he overheard Lipinski shout "we lose, but we kill Jews before that."[117] For McKay, this testimony was a nothing more than a shameless pander by a vindictive witness. McKay's interpretation of Nebel reads,

> It is a well-known fact that probably the greatest number of victims of the Nazi concentration camp setup were Jews, and Nebel, realizing this, seeks to color his testimony before this court by making the alleged victims of Lipinski's atrocities Jewish people… His whole testimony indicates that Nebel wants this court to consider Lipinski as a "Jew Beater", and he is willing to distort the facts to accomplish this end… Lipinski is an easy victim for prejudiced witnesses to select as the person against whom they will give distorted testimony.[118]

As shocking and problematic as this conclusion is, it wasn't the only time McKay hurled overt antisemitic attacks at prosecution witnesses. McKay accused a second Jewish prisoner's testimony of not only being untrue, but another case of blind revenge.

[112] Ibid, p. 9323.
[113] Ibid, p. 9270.
[114] When asked by assistant prosecutor Pinter to give his nationality, Silverberg relied "Polish Jew". Ernst Nebel testimony, M1204, *Becker Trial*, Roll 4, p. 2133.
[115] Ernst Nebel Prisoner card, ITS, 1.1.8.3—Individual Prisoner Records, File: 10958436
[116] Nebel, M1204, *Becker Trial*, Roll 4, pp. 2134-2136.
[117] Ibid, p. 2135.
[118] McKay, M1204, *Becker Trial*, Roll 11, pp. 9305-9307.

Like Nebel, Adam Silverberg was also a self-identifying Polish Jew. In February 1945, he was one of seventy prisoners transferred by freight car from Flossenbürg to Ganacker subcamp. The supervising capo in the car was Christian Eisbusch (defendant 10). According to Silverberg, while en route, Eisbusch beat a Polish Jew for attempting to get a second helping of bread. The following morning, Eisbusch beat the same prisoner again, this time killing him. When they arrived to their destination, Silverberg helped to remove the body from the train and burry it.[119] Apparently based on his own personal three-day experience in a 40-and-8 freight car, McKay cynically refuted that there was even enough room to kill a man in such a crowded space. Besides, another apparent inconsistency in Silverberg's narrative was that the prisoner number he attributed to the victim did not correspond to a Polish Jew in the registry book. Dwelling on such insignificant details was also a predicted tactic by the prosecution. Nevertheless, McKay was therefore convinced that Silverberg had falsely labeled the victim as a Jew in an attempt to "make his story more convincing" and concluded that "his entire testimony and appearance as a witness indicate that he is out to get even with every German prisoner in Ganacker."[120]

McKay's troubling antisemitic strategy is perplexing, given that the prosecution had not deliberately invoked the explicit abuse of Jewish prisoners in the camp for their own purposes.[121] In fact, it may have been a missed opportunity not to do so. Due to the overwhelming influx of Jewish prisoners to Flossenbürg in the last year of the war, as well as the Jewish evacuation transport which turned into a death march, there was ample material for the prosecution to have emphasized the particular plight of Jews vis a vis Flossenbürg. Yet, this was not done with any coordination and, as in the cases of Nebel and Silverberg, it was always the witnesses themselves who chose to identify themselves to the court as Jewish.

On the other hand, McKay declared that the German witnesses "are obviously trying to protect themselves from possible denouncements against them personally because of their position in Flossenbürg, and are willing to testify for the prosecution."[122] Just as Berkowitz had predicted, two such witnesses to receive the brunt of these accusations were Carl Schrade and Kurt Goltz. McKay dismissed Schrade's testimony against capo Raimund Maurer (defendant 27)—that he beat

[119] Adam Silverberg testimony, M1204, *Becker Trial*, Roll 4, p. 1989-1990.
[120] McKay, M1204, *Becker Trial* Roll 11, pp. 9313-14.
[121] Tomaz Jardim notes that Denson not only neglected to highlight persecution of Jewish victims (or any other prisoners by race or ethnicity) in Mauthausen, but completely failed to acknowledge Nazi racial ideology as a central feature of its principles. Jardim, *Mauthausen Trial*, p. 123.
[122] McKay, M1204, *Becker Trial*, Roll 11, p. 9270.

a prisoner to the point of hospitalization—not only as mere hearsay, but a personal attack. In response, counsel proceeded to invoke the smudge campaign and expose Schrade's "true picture" as a green triangle wearer, who deliberately presented himself as a political prisoner by forging his category in the register books.[123] Of Goltz, McKay recited the baseless accusations made by former hospital eldest Karl Mathoi (defendant 25); that he was a homosexual pedophile who used his powers in the hospital to prey on boys. Again, McKay declared to the court that Goltz' testimony against Mathoi was the result of a personal vendetta for interfering with his sexual debauchery.[124] Particularly disturbing, McKay further attempted to challenge Goltz' credibility as a witness based on the claim that he didn't physically appear to be starving at the time Flossenbürg was liberated.[125] These two anecdotes demonstrate the level of sheer investment made by the defense in the strategy of relentlessly hurling egregious personal attacks at prosecution witnesses throughout the trial.

McKay's arbitrary segmenting of the German and "foreign" witnesses offers a crucial juxtaposition from which to analyze the behaviors and potential motives behind why one testified for the prosecution. Tomaz Jardim has critically argued that the Mauthausen trial offered victims the empowering opportunity to actively participate in enacting justice against Nazi atrocities.[126] The instances in which witnesses voluntarily identified themselves Jewish prisoners, during the Flossenbürg trial, is a distinct example of how they interpreted the trials to be a space for reclaiming one's agency. Furthermore, it reflects their contribution to include Jewish victims in the historical narrative of Flossenbürg concentration camp, despite the prosecution's ambivalence on the issue. For many 'German' prisoners, on the other hand, the privileged functionary positions increasingly became a liability in the courtroom. Both the prosecution and defense had so relentlessly characterized German prisoners (particularly the greens) as willing collaborators, that some, like Schrade and Goltz for example, endured further stigmatization. For decades, countless victims like them would not be seen as victims of Nazi persecution.

The remaining four defense counsels each spent considerably less time presenting their closing arguments to the court. Assistant counsel Albert Hall quickly listed off a number of legal grievances that had been growing in him throughout the trial, most of which centered around

[123] Ibid, p. 9283. See section 4.1.2
[124] Ibid, p. 9260.
[125] McKay referred to a photograph taken by a member of the US signal corps in Flossenbürg, where Goltz supposedly appears not to be suffering from starvation. Ibid, p. 9260.
[126] Jardim, *Mauthausen Trial*, p.8.

evidence and conjecture. Hall complained, for example, that the prosecution made no attempts to confirm the death of an individual that had been referenced in the testimony provided by their own witnesses.[127] This dovetailed into his second issue that the prosecution never questioned the veracity of a witness' observations.[128] If the court is not concerned with substantiating claims beyond a reasonable doubt, Hall asked, how is one not to have suspicions over a witness' personal interests in the outcome of the trial? In the same breath that he proclaimed his sympathies for the victims of Nazism, Hall added,

> it cannot be denied of course that each accused has a personal interest in the outcome of this case. But as you will recall the parade of witnesses before this court, isn't it possible that the witnesses also have a desire for revenge, some in greater or lesser degress [*sic*, (degrees)] than others.[129]

Hall attempted to apply these critiques to the cases of his ten SS defendants with various levels of rationality, but one defendant in particular stuck out. Hall pointed out that the Romanian-born *Waffen*-SS guard Peter Herz (defendant 19) was mentioned exactly one time throughout the entire course of the trial, and that was during the prosecution's mass submission of sworn statements by more than a dozen accused.[130] Not one witness ever identified Herz and the only evidence against him was his own sworn statement. Hall read from the statement to further emphasize the sheer lack of incriminating details. For example, while Herz admitted to having been a guard at Flossenbürg, he was also at Gross Rosen and one of its subcamps, Fünfteichen (near Wroclaw). However, no specific dates as the when he was at any of them are provided.[131] Denson and his team often neglected the SS defendants, and such was apparent in Berkowitz' closing arguments. It cannot be said for certain, whether the prosecution had become preoccupied with their case against the prisoner-functionaries or that they simply took the guilt of the SS-men for granted, or both. Nevertheless, Hall had demonstrated one important oversight in the prosecution's case.

Counsel Wolfgang Engelhorn and Richard Wacker were both German attorneys who signed on to the defense team shortly after the trial began. The main premise of their closing arguments both centered around the functional role of Flossenbürg concentration camp as distinctly different from other allegedly far deadlier sites outside of Germany. Between the two of

[127] Hall, M1204, *Becker Trial*, Roll 11, pp. 9327-9328.
[128] Ibid, p.9329-9330.
[129] Ibid, p. 93301.
[130] See M1204, *Becker Trial*, Roll 4, pp. 2208-2218.
[131] See "Statement of Peter Herz," Prosecution Exhibit P-50 and P-50a, M1204, *Becker Trial*, Roll 11.

them, they represented eleven SS men, ranging from deputy commandant Major Franz Berger (defendant 3), to *Volksdeutsche Waffen*-SS draftee Josef Wurst (defendant 52). Engelhorn's statement, read through an interpreter, began by critiquing the various press reports and publications that, as he claimed, conflated the Flossenbürg "labor" camp with extermination camps.[132] The qualifying feature, according to Engelhorn, of an extermination camp was the gas chambers, which of course, Flossenbürg did not have. Rather, it was merely a work camp that supported the armament industry, which had been suffering from a manpower shortage and was continuously raided by Allied aggression. The report then proceeded to illustrate a pristine depiction of life at Flossenbürg: all prisoners were examined by a physician and deemed physically capable for work; they kept the same (or less) work hours as German citizens and received the same food rations as the civilian population. The report continued, the decline in conditions only came about late in the war, as foodstuffs became sparse, territory was lost, and transport routes were destroyed. This created a situation of overcrowding and starvation that consequently bred disease.[133] Before long, these chaotic circumstances—particularly the with respect to the dozens of various nationalities and foreign languages—required forceful discipline to maintain order.

Dr. Wacker closely followed his colleague's stance on the 'imprecise' portrayals of Flossenbürg and accused the prosecution of attempting to equate Flossenbürg to Mauthausen. Despite the allegation being patently false,[134] it can be assumed that Wacker implied Flossenbürg was being portrayed as an extermination camp. Indeed, Mauthausen did have a working gas chamber and, despite grossly overblown estimates from early investigators, it did have a total mortality rate more than three times that of Flossenbürg.[135] However, the two camps did actually share quite a lot in common. Both were established around the same time and purposefully chosen for their nearby stone quarries to be sites for extremely hard labor. While Mauthausen is the only officially recognized "level three" camp, even Buchenwald Commandant Hermann Pister (incorrectly) testified that Flossenbürg was also a level three camp, due to the severity of its forced

[132] Assistant defense counsel Wolfgang Engelhorn, M1204, *Becker Trial*, pp. 9365-9367.
[133] Engelhorn, M1204, *Becker Trial*, p. 9367.
[134] The subject of Mauthausen rarely came up in the trial at all, and when it did, it was either in the context of court procedure/precedent or as a being considerably more brutal. On testimony, for example characterized Flossenbürg as a "convalescent home" compared to Mauthausen. See Rudolf Schmidt testimony, M1204, *Becker Trial*, Roll 6, p. 3876. For court discussion on legal precedent set in the Dachau and Mauthausen trials, see M1204, *Becker Trial*, Roll 4, pp. 2190-2208.
[135] After experimenting with gas vans, a gas chamber was installed at Mauthausen in spring 1942. While the death books report more than 71,000 deaths, the accepted overall mortality rate for Mauthausen (including the murders at Castle Hartheim) is over 100,000. Jardim, *Mauthausen Trial*, p. 55, 60, n. 35.

labor program.[136] Nevertheless, Wacker's underlying point was that despite poor working conditions, Flossenbürg did not *intentionally* kill its prisoners, nor did it employ a system of abuse.

The final defense counsel to speak was American civilian attorney Charles E. O'Connor, who made no general comments to the case, but rather expressed his confidence in the expertise of the court to process the evidence that had been presented. With that, he directed his attention to the eight defendants he represented. In similar fashion to his colleagues, O'Connor disregarded any implications brought on by the collective guilt of common design and instead, stayed true to refuting each case on an individual basis. From sixty-one-year-old SS guard Eduard Losch (defendant 24) to thirty-four-year-old SS Lieutenant Alois Schubert (defendant 44), O'Connor's defense continued to push an excuse of superior orders and insisted upon a general inability by the defendants to influence the environment in which they found themselves. Only in closing did O'Connor directly address common design, proclaiming,

> Expediency, in my opinion, has dictated this unheard of [common design] charge, and expediency has no place in a court of justice that has the power and authority to snuff out the lives of every man in this dock.[137]

Admittedly not his intended point with this passage, it is nevertheless rather ironic that after seven months, by-far the longest running case in the entire war crimes trial program, that one of the last critiques would be the unfair speed and efficiency with which the prosecution attempted to charge its case.

Lead counsel Wilson reclaimed the floor to pronounce the closure of the defense's arguments. He thanked his colleagues, the court, the interpreters, and reporters for their work. The court was officially closed with no indication of when to expect judgement. Over the course of the next two days, the entire transcript of both closing arguments were translated and read to the defendants.

4.2.3 Judgement and Sentencing

The following Monday, 20 January 1947, the court was called back to order. With no introductory address, President Elliot directed the guard to bring the first defendant before the court,

[136] Hermann Pister testimony, M1204, *Becker Trial*, Roll 4, p. 2481-2482. For Mauthausen as a level three camp, see Jardim, *Mauthausen Trial*, p. 54.
[137] Assistant defense counsel Charles E. O'Connor, M1204, *Becker Trial*, p. 9422.

> Number 2, Joseph Becker, the court in closed session, at least two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you: Of the Particular and the Charge: guilty.[138]

Elliot offered to hear evidence of previous convictions and any extenuating circumstances, to which Denson replied that he possessed no such documents. Becker then declined the court's offer to make his own statement. Next, Law Member Major Clyde Lanham asked a series of questions as to Becker's personal status, to be considered during the sentencing process:

> Are you married?
> Do you have a mother or anyone else dependent upon you?
> Are both of your parents living?
> Are they both in good health?[139]

Becker was then excused and the next defendant was called in. This exchanged was replicated for each of the accused, save for a few adjustments to the personal status questions. Some of the defendants did take the offer to submit one final verbal statement, to which the court made no noticeable response, and the defense counsel occasionally asked the court to consider the defendant's age or health conditions when relevant. For those who had been prisoners in the camp, counsel requested the court to consider their time incarcerated.

The court then summoned defendant Number 8, former block eldest and "habitual criminal" Karl Buttner. "The court in closed session, finds you: Not Guilty. The court acquits you of the Particular and the Charge."[140] Buttner thanked the court and was excused. Four more defendants received not guilty verdicts. Karl Gieselman, Georg Hoinisch, and Theodor Retzlaff were each prisoner-functionaries. Peter Herz, whose defense counsel had called the court's attention to the fact that not one witness had testified against him, was the only SS man to be acquitted.

Two days later, the court came to order one last time for sentencing. Again, President Elliot wasted no time in calling the first convicted war criminal to receive their fate,

> Number 2, Josef Becker, the court in closed session, at least two-thirds of the members present at the time the vote was taken concurring, sentences you to be imprisoned for a

[138] President Elliot, M1204, *Becker Trial*, Roll 11, p. 9426.
[139] Law Member Clyde Lanham, M1204, *Becker Trial*, Roll 11, p. 9427
[140] M1204, *Becker Trial*, Roll 11, p. 9432.

> term of one. (1) year, commencing; 3 May 1945, at such place as may be designated by competent military authority. That will be all.[141]

Elliot made his way through the remaining thirty-nine names, delivering the same sober phrase, until he reached the last one, "Number 52, Joseph Wurst, the court in closed session, … sentences you to death by hanging, at such time and place as higher authority may direct. That will be all Wurst."[142] After a final confirmation from the prosecution and the defense that neither had anything further to add, the court was adjourned for the last time. When President Elliot finished reading out all forty sentences, it became clear that the court spent a considerable amount of time deliberating over these defendants.

The Dachau courts never furnished any documentation that helps to explain their deliberation practices and as a result, the only insight available to researchers is the timing it took between the conclusion of the trial, the verdicts, and the sentencing. For example, the court took only one hour to deliberate over the sixty-one accused in the Mauthausen trial before it delivered its verdicts; that amounts to no more than one minute per defendant. This led Tomaz Jardim to conclude with certainty that the court spent little to no time reviewing the case evidence, referencing judicial precedent, or seriously considering the defense's legal challenges such as the common design charge.[143] Being that the verdicts were read on a Saturday afternoon, it is also unlikely that the judges convened for any considerable amount of time before doling out sentences on the following Monday morning.[144] This was not the case for the defendants of the Flossenbürg trial.

Closing arguments concluded before noon on 15 January and the findings were not read until 1:30 pm on the 20th. While it cannot be confirmed exactly how much time was spent deliberating over the verdicts, the judges did have four working days to contemplate the case and still could not collectively bring themselves to convict five. The court then took another two days to deliver the sentences. Again, all conclusions are circumstantial without the relevant notes to reference, but unlike both the Dachau and Mauthausen trials,[145] punishments in the Flossenbürg

[141] Elliot, M1204, *Becker Trial,* Roll 11, p. 9473.
[142] Ibid, p. 9489.
[143] Jardim, *Mauthausen Trial*, pp. 180-181.
[144] Ibid, p. 181.
[145] The court-appointed sentences for the forty Dachau trial defendants were: 36 death by hanging, 1 life in prison, and 3 prison terms of ten years. Mauthausen resulted in 58 death by hanging, and 3 life in prison. For the Dachau trial verdicts and sentencings, see Sonnenfeld, "Review and Recommendations," *Weiss Trial*.
For the Mauthausen trial verdicts and sentencings, see Mueller, "Review and Recommendations," *Altfuldisch Trial*.

case varied greatly which suggests that the judges did utilize the considerable amount of time they had to issue sentences applicable to the severity of the crimes. A total of fifteen defendants received death sentences, eleven were sentenced to life in prison, one was sentenced to thirty years in prison, four received twenty years, four more received fifteen years, three were given ten years. The highest-ranking SS officer of the group, Franz Berger, received three and a half years, and Josef Becker was given just one year, which, as it was to commence on 3 May 1945, he had already served his time.[146]

Four months after the conclusion of the Flossenbürg parent trial, Dachau Detachment servicemen Captain Herbert Mueller and Paul Goode reviewed the case, prior to the Deputy Judge Advocate signing off on the results.[147] While it explicitly referenced the court's rulings as having been determined on the basis of the common design charge, the results of the trial seem to suggest otherwise. With five acquittals—a first in the camp-atrocities cases—the court was ultimately swayed by the defense's appeals to consider each defendant as an individual criminal case, at least for some. As four prisoner-functionaries walked free, it is apparent that the prosecution was unable to prove that they had voluntarily participated in the murderous system of the camps in the same manner as the SS. And given that the only SS-man to escape conviction was all but completely absent from the seven-month long trial testimony demonstrates just how much the prosecution had taken his guilt for granted.

Despite opening its case in the same method as had been done in the two previous camp-atrocities trials (invoking the superior orders excuse), it did not take very long for the defense to shift its attention almost exclusively toward undermining the criminal agency of the prisoner-functionary class. According to the defense, either all functionaries were equally victims of the concentration camps (including the sixteen on trial) or such privileged prisoners like Carl Schrade had insidiously escaped justice and deserved to be in the defendants' dock with his capo colleagues. McKay had to know his audacious motion to immediately drop the cases for all sixteen of his defendants was futile. However, such false-equivalencies did challenge the efficacy of charging prisoners with participating in the common design and ultimately ended up forcing Denson to double-down on the prosecution's negative characterizations of the "criminal" prisoner category. As a result, the prosecution disproportionately elevated the political prisoner category as

[146] See Appendix: Flossenbürg Trial Defendant List
[147] Mueller, "Review and Recommendations," 21 May 1947, M1204, *Becker Trial*, Roll 12.

culturally relevant ‘intelligentsia,’ thereby demeaning all other categories. Despite Denson’s best efforts to emphasize the common design narrative, there were simply too many holes in the prosecution’s argument and the defense aggressively exploited the weaknesses.

The relentless character attacks by the defense on individual prosecution witnesses demonstrates the potentially humiliating experiences that came with testifying against one’s persecutors. While the eyewitness testimony of victims was absolutely essential to the success of the Dachau Trials, their participation in the program was not devoid from exposure to potential collateral damage. It is precisely here, that the limitations of victim agency to enact justice are revealed. While the survivors often attempted to tell their experience in a comprehensive manner, to (re)assert themselves as human beings with dignity (as in the case of identifying as Jewish), they were nearly always restricted to answering deliberately strategic questions posed by both the prosecution and defense. Yet, without the opportunity to provide crucial context, various stereotypes and prejudices sometimes corrupted one’s credibility. What’s more, the strategy effectively perpetuated discrimination against survivors whose prisoner categories were socially and legally perceived as immoral, long after the end of the war. The Flossenbürg parent trial demonstrates how the US Military Government overlooked the post-war well-being of camp victims in its pursuit to punish the perpetrators.

Chapter 5. The Subsequent Trials

Beginning in October 1946, the Military Government expanded its camp-atrocities trial program to include a multitude of smaller auxiliary trials, as a way to expedite the process of prosecuting the hundreds of remaining suspects connected to the concentration camps. In total, 812 individuals were charged in 219 of these so-called "subsequent trials"—each directly attached to a corresponding "parent case." Upon completion of the primary (or parent) trial, the court would present its findings and designate the relevant concentration camp as a criminal enterprise. This designation, as well as the supporting evidence, would then form the foundation from which any number of subsequent cases were initiated. Prosecutors were thus spared the burden of needing to reintroduce or relitigate the same evidence twice. This approach substantially reduced the time it took to complete a case, allowing some to conclude within one day.

The comprehensive studies on the Dachau Trials do reference the premise of the parent trial structure, but typically do not engage with specific subsequent cases or evaluate them as a collective series. Elizabeth Yavnai,[1] Wesley Hilton,[2] Frank Buscher,[3] and Greta Lawrence[4] are all examples of this. From June to December 1947, the MGC conducted eighteen such trials that were directly related to the Flossenbürg parent case. The source material for these cases is immense; collectively amounting to several thousands of pages of evidence, transcripts, exhibits, and post-trial documents. While it would be entirely impractical to present and analyze each of them individually, the premise of this chapter is to demonstrate the significance of the subsequent trial program by analyzing a selection of the Flossenbürg sub-trials and identifying topics of inquiry that have previously been overlooked in the historiography and demonstrate how future studies can approach the Dachau Trials.

The first theme deals with the indictment charges and particulars that accompanied the sub-trial cases. Of the eighteen cases, twelve abandoned the collective "common design" approach and instead, charged a single individual with war crimes for a specific offense. What may appear to be an inconsequential modification to the charges provides the necessary variables to challenge the application and limitations of the common design component.

[1] Yavnai, "Military Justice."
[2] Hilton, "Blackest Canvas."
[3] Buscher, *U.S. War Crimes*.
[4] Lawrence, "Trials at Dachau."

The second theme deals with the courts' deliberation over technical legal strategies and the consequences of their successes and failures. Two specific motions will be investigated here. The legal concept of double jeopardy was invoked on multiple occasions during the Flossenbürg sub-trial series. A minor clause in the Fifth Amendment of the US constitution, it essentially protects an individual from being convicted and sentenced for the same crime, twice. As a select number of defendants were essentially retried in the subsequent cases (most of whom were originally indicted in the parent trial), the possibility of infringing on these legal safeguards was seriously disputed. Another issue that was raised in the Flossenbürg sub-trials was the defense of insanity. The psychology of the concentration camps and its influence over the minds of those involved is indeed a field of its own, and it is not the intention of this study to engage with the scientific debates of insanity. However, the fate of two Flossenbürg sub-trial defendants hinged on the court's decision over whether or not their state of mind should prevent them from being found guilty of their alleged crimes. This section will explore how the courts dealt with the topic of insanity as a legal defense.

The final theme is certainly an essential one but its placement here, at "the end" of this dissertation, is regretfully representative of the broader inequalities that existed throughout the MGC. Gender roles and the participation of women at the Dachau Trials are topics not often considered in the historiography of war crimes trials, but which deserve critical attention. Given the sheer number of women involved in the operational history of Flossenbürg concentration camp, the complete absence of female defendants is a dishearteningly conspicuous detail. Yet, several women were arrested in the immediate aftermath of the war and interrogated by war crimes investigators. Despite having prepared an entire casefile, none of the women were ever brought before the court by American authorities. From the perspective of the Military Government's Dachau Detachment, dozens of professional women worked "behind-the-scenes" at the trials as translators, court reporters, and paralegals. Rarely did they ever actually participate as attorneys. The only known instance, in fact, was Women's Army Corps (WAC) Captain Irma von Nunes, who became the very first female chief prosecutor in a US war crimes trial, while leading one of the subsequent Flossenbürg cases. This section looks to analyze the roles played by women at the Flossenbürg war crimes trials and explore what makes Nunes' work special in this regard.

5.1 Common Design v. Specific Crime

The underlying principle that guided the entire MGC program was (according to the JCS 1023/10 directive) always efficiency,[5] which, in practice translated to speed and simplicity. The charge-particular of common design, which was applied in every camp-atrocities parent case, was developed for this very purpose. In spite of the charge's success, however, the prosecution teams were still limited as to how many suspects they could prosecute at one time. Limiting the number of defendants per case generally meant that there was a surplus of war crimes suspects under arrest at Dachau, waiting to be arraigned. The subsequent case structure was therefore developed to efficiently process remaining war criminals, after the primary parent trial had concluded. The first such sub-trials connected to Flossenbürg began in June 1947. The series continued sporadically, until ultimately concluding on 12 December 1947. One of the more conspicuous, and evidently most revealing, aspects of the Flossenbürg sub-trial series was the differentiation between "individual" and "joint" indictment cases.

Each of the eighteen sub-trial cases (as well as the parent case) were built around the very same "violation(s) of the laws and usages of war" charge. This phrase was effectively the judicial lynchpin that held together the US military government's entire legal jurisdiction in occupied Germany. For the camp-atrocities sub-trial program, the War Crimes Branch investigation office established two filing systems. The first references cases relating to a particular concentration camp. Each of these begins with a triple-0, followed by the number 50 (designating that it is a concentration camp case) and finished with a specific camp-identifying number. For example, the Dachau parent trial is case number 000-50-2, the Mauthausen parent case number is 000-50-5, and the Flossenbürg parent trial is case number 000-50-46. The numerical value of each designation is largely irrelevant; the only importance is recognizing that "-46" corresponds to Flossenbürg concentration camp.

The second filing system was centered around an individual suspect whose case was connected to a particular concentration camp. It too begins with 000, but is then followed by the camp name and a sequential number (ex. 000-Flossenbürg-1). Theoretically, the primary difference between the two systems is simply whether a case involves a solitary accused or

[5] See section 2.2.2

multiple defendants.[6] This distinction, however, was entirely inconsistent in practice, particularly in the early stages of the program. It is in the charge-particulars of common design that one will find a more consistent separation between the two filing groups.

5.1.1 "Individual" Cases

Of the eighteen Flossenbürg sub-trial cases, twelve "individual" cases were heard from early June 1947 and ran sporadically through November of that year—eight occurred in October alone. Each case was labeled with the prefix "000-Flossenburg-" before the corresponding case number (ex. 000-Flossenburg-1, 000-Flossenburg-2, and so on, to 000-Flossenburg-18)[7]. The cases do not, however, progress in perfect numeric succession, as six casefiles never went to trial.[8] The demographic breakdown for these twelve cases is eight SS-men and four former Flossenbürg prisoners.

In contrast to prosecuting several dozens of perpetrators at once, a case against a single defendant would appear to be fairly routine. The indictments for the latter, however, were actually rather varied. Instead of one charge, covering all potential misconduct connected to the criminal enterprise of the respective concentration camp, the accused often incurred multiple charges, each based on specific allegations of criminal acts. For example, Wenzel Wodak, an SS guard at the Flossenbürg *Hauptlager* from 1941 to 1944, was charged with five separate counts of "violation of the laws and usages of war." The five corresponding particulars each repeated that Wodak "...did, at or in the vicinity of Flossenbürg, Germany … wrongfully encourage, aid, abet and participate in the killing of..." several known and unknown non-German concentration camp prisoners, at various times between 1942 and 1943. In total, the approximate number of deaths attributed to Wodak amounted to forty-seven victims.[9] Despite the location of the crime scene

[6] "US Case Files — Concentration Camp Cases Not Tried," (hereafter *Cases Not Tried*) USHMM, RG-06.005.05M—*Records of United States Army Commands*. Reel 1.

[7] The twelve Flossenbürg sub-trial cases with the "000-Flossenburg-" prefix include -1, -2, -3, -4, -7, -8, -10, -11, -12, -15, -16 and -18. See NARA, RG 549, Boxes 271–277.

[8] Case numbers 000-Flossenburg-5, -6, -9, -13, -14 and -17 never went to trial due to "insufficient evidence." Each case-file involves a named suspect (no details on status) having allegedly killed between one and approximately five Flossenbürg prisoners. The crime-scenes include the *Hauptlager*, subcamps Happurg and Bayreuth, and Regensburg and Schwarzenfeld (as sites on the evacuation routes). *Cases Not Tried*.

[9] Wodak was charged with count one: the death of approximately 40 non-German nationals in March 1942; count two: the death of Stanliaus Singer in February 1942; count 3: the death of an unknown non-German national in December 1942; count 4: the death of four unknown non-German nationals in April 1943; count 5: the death of an unknown non-German national in May 1943. George A. McDonough, "Review and Recommendations," *United States v. Wenzel Wodak*—Case No. 000-Flossenbürg-2 (Hereafter *Wodak Trial*), 1 December 1947, 9 pages, ICWC https://www.online.uni-marburg.de/icwc/dachau/000-Flossenburg-02.pdf. Accessed April 2020.

remaining consistent, each incident was handled as an independent charge. Wodak was ultimately found guilty on all five counts and sentenced to death.[10]

Other suspects were charged with multiple crimes that occurred at separate locations. SS Lieutenant and subcamp commandant Walter Degner was alleged to have participated in the assault of an unknown non-German national at the Mülsen St. Michelin subcamp (Czechoslovakia) in December 1944. He was also charged with participating in the killing of approximately 120 non-German nationals at the Oberschlema subcamp (Czechoslovakia) in April 1945.[11] After a week of deliberation, Degner was acquitted of all charges. Wodak and Degner were not only the first two individuals tried in the Flossenbürg sub-trial series but were both former defendants at the Flossenbürg parent trial. Their cases were among the six dismissed as nolle prosequi.

Considering all twelve "individual" cases, five involved one charge and one location, while another six included multiple charges but were restricted to a single location. But that only amounts to eleven trials. The sole outlier, 000-Flossenburg-16 (*United States v. Friedrich Lutz*, 28-29 October 1947), was the only "individual" case to directly invoke the "common design" phrase in the particulars, thus allowing the prosecution to charge a single indictment that covered multiple locations within a loosely defined region.[12] Friedrich Lutz was an SS noncommissioned officer who was accused of shooting three Polish prisoners to death and ordering the killing of several others, while leading an evacuation march of 200 Flossenbürg inmates from Schwarzenfeld to Dachau, between 18 and 22 April 1945.[13] After just two witnesses—only one of whom claimed to have seen the murders—the prosecution rested. Unconvinced by the scant evidence, the defense motioned for a judgement of not guilty, arguing that the prosecution failed to reach a compelling *prima facie* argument.[14] The prosecution's response was telling,

[10] McDonough, "Review and Recommendations," *Wodak Trial*, p. 3.
[11] Claudio Delitala, "Review and Recommendations," *United States v. Georg Degner*—Case No. 000-Flossenburg-1 (Hereafter *Degner Trial*) 10 February 1948. 3 pages, NARA, RG 549, A1 2238, Box 271. p. 2.
[12] Defendant Friedrich Lutz was an SS non-commissioned officer. Between 18-22 April 1945, Lutz was alleged to have been in charge of an evacuation convoy of approximately 200 Flossenbürg prisoners traveling from Schwarzenfeld toward Dachau. A witness testified that Lutz shot three polish inmates and ordered the murder of several others somewhere between Schwarzenfeld and Stamsried (a distance of about 35 kilometers). Lutz denied having ever participated in the evacuation march described. At the end of the two-day trial, Lutz was acquitted by at least a two-thirds court majority. Claudio Delitala, "Reviews and Recommendations", *United States v. Friedrich Christian Lutz*—Case No. 000-Flossenburg-16 (Hereafter *Lutz Trial*), 10 February 1948, 2 pages, NARA, RG 549, A1 2238, Box 277.
[13] Delitala, "Reviews and Recommendations," *Lutz Trial*, p. 1.
[14] *Lutz Trial*, pp. 37–38.

> we think we have proved a case of murder, aside from the common design features that are in this case. The first witness said point-blank that he saw him [Lutz] shoot three people on this march and there has been no evidence up to now to combat that testimony.[15]

This short passage reveals several missteps on account of the prosecution. First, despite the considerable latitude generally given to witness testimony by the MGC, one eyewitness was rarely convincing enough to yield a conviction. The testimony was then undercut when the second witness could not corroborate. According to chief prosecutor of the parent trial William Denson, he and his team typically looked to bring at least three witnesses to validate an allegation against a defendant. Second, the prosecution accentuated the weak murder allegation over Lutz' participation in the common design, thus undermining the charge itself. After two half-days of deliberation, Lutz was acquitted.[16] In all likelihood, it was an insufficiency of credible evidence that ultimately crippled the prosecution's case. The ambiguous location of the "crime scene" (the general region of east-central Bavaria), during the evacuation marches, likely prompted the inclusion of the all-encompassing common design element for this particular case. Nevertheless, it is inexplicable as to why in every other case, in which there was only one defendant, the prosecution opted to pursue a more straight-forward indictment that substantiated a particular criminal act. By the time the Lutz case went to trial, eight of the twelve "individual" cases had already concluded; producing seven convictions (six of which were death sentences)[17] and one acquittal. The remaining three cases that had yet to go to trial did not include the common design phrase in the charge-particulars.

From the perspective of the US military government, the "individual" Flossenbürg sub-trials were generally a success—producing nine convictions (seven death sentences) and three acquittals[18]—but it was not foolproof. Why did they omit the common design component? If the parent trial effected justice via sledgehammer, these individual cases used scalpels: the prosecution was able to isolate specific incidents of criminal activity and focus exclusively on the event. With

[15] *Lutz Trial*, p. 38
[16] The first day of the trial lasted from 1:15 pm to 4:30 pm on 28 October 1947, the second day lasted from 8:50 am to 1:45 pm on 29 October. See *Lutz Trial*, pp. 1–29, 30–75.
[17] Johan Vican pleaded guilty and received a twenty-year prison sentence George A. McDonough, "Reviews and Recommendations," *United States v. Johann Vican*—Case No. 000-Flossenbürg-3 (Hereafter *Vican Trial*), 1 December 1947, 3 pages, NARA, RG 549, A1 2238, Box 272.
[18] Degner (SS), acquitted; Wodak (SS), guilty—death; Vican (prisoner), pleaded guilty—20 years; Fritzsche (SS): guilty—15 years; Schulmeister (prisoner), guilty—death; Brauner (SS), guilty—death; Auerswald (SS), guilty—death; Goldmann (SS), guilty —death; Gottzmann (SS), acquitted; Straub (prisoner), guilty—death; Lutz (SS), acquitted; Ziehmer (prisoner), guilty —death).

clear-cut evidence, there was no need nor interest, by the prosecution, to attach the defendant to the abstract conception of participating in a collective criminal enterprise. The common design charge was only convenient when there were several defendants. In fall of 1947, the war crimes trials program was nearing its end. The MGC authorized a series of last minute "joint" cases that returned to the mass prosecution of multiple defendants at once.

5.1.2 "Joint" Cases

The six "joint" cases in the Flossenbürg sub-trial series ran from early November (overlapping just one of the individual cases) to mid-December 1947. These trials closely resembled the structure of the parent trial in that a single comprehensive indictment, which included the "common design" charge, was applied to multiple defendants, simultaneously. The language was identical to the Flossenbürg parent case and standardized in every case. The collective demographics of these cases also show similarities with the parent trial. In total, thirty defendants were prosecuted,[19] including seventeen SS, twelve prisoners, and one civilian doctor. The trials resulted in twenty-six convictions (ranging from several months, to death by hanging) and four acquittals. Considering that all of these trials occurred in the final two months of the MGC program, it would appear that there was an apparent rush to prosecute whatever outstanding cases the Dachau Detachment had been building. At one point, five of the six trials were running simultaneously.[20]

5.1.3 Comparisons

So why were there two prosecutorial approaches? There really is no conclusive explanation provided by the contemporaneous reports.[21] Given the timing and sequence of the eighteen Flossenbürg sub-trials, it appears that the MGC had shifted its program entirely to prosecute only individuals. There were no intentions to hold joint indictment cases until the window to prosecute

[19] In addition to the thirty defendants, eight more suspects were included in the original indictments, but were either not brought to trial or recharged in a different case. Ottokar Tuma, for example, was indicted in the 000-50-46-3 (*US v. Heerde et al.*) case, but was never tried. His indictment was moved to another case, 000-50-46-6 (*US v. Tuma et al.*), which was heard approximately two and a half weeks later. Tuma was ultimately acquitted of all charges. For the first case, see Maj. Louis F. Benson, "Review and Recommendations", *Heerde Trial*, 27 February 1948, 37 pages, p. 9. For the second case, see Claudio Delitala, "Review and Recommendations," *US v Ottokar Tuma et al.*— Case No. 000-50-46-6, 23 January 1948, 9 pages, NARA, RG 549, A1 2238, Box 533, p. 2.

[20] On 12 November 1947, 000-50-46-1 (*US v. Loh et. al*), 000-50-46-1 (*US v. Wilhelm et. al*), 000-50-46-3 (*US v Heerde et. al*), 000-50-46-4 (*US v Fischer et. al*), and 000-50-46-5 (*US v Mayer et. al*) were all in session. See NARA, RG 549, A1 2238, Boxes 520–522, 524–532.

[21] In general, the Review and Recommendations do not provide any details or explanation as to why the prosecution charged the defendant(s) the way it did.

began to close. Looking to the other camp-atrocities sub-trial programs, one will detect a developmental trajectory that supports this hypothesis.

The original Dachau parent case (000-50-2; *US v. Gottfried Weiss et. al*, 15 November 1945 to 13 December 1945) spawned 118 sub-trials—prosecuting a total of 492 defendants—between 14 October 1946 and 18 September 1947.[22] It really was a learn-on-the-fly enterprise. All but two of these early sub-trial cases were identified under the "joint" indictment filing name ("000-50-2-"). The remaining two were labeled "000-Dachau-1" and "000-Dachau-2"[23]; both took place at the end of the series.

According to the MGC "Cases not Tried" finding aid,[24] the two filing systems separated cases by single or multiple defendants, respectively. This was, however, not the case in practice for the Dachau sub-trial series, as more than thirty cases numbered under the "000-50-2-" filing system prosecuted one individual at a time. Most of these singular cases occurred later, suggesting that the MGC was actively shifting its approach. The only apparent method in the "000-50-2-" system is the application of the common design charge-particulars. Yet even this was not a hard rule. Case number 000-Dachau-1 included the common design particulars (and two charges). 000-Dachau-2 does not. Given this inconsistent and confused labelling scheme, it is apparent that the overall sub-trial program was developed in a rather ad hoc manner with little preparation. Such criticism is further substantiated when one actually explores the case reviews. Cases 000-50-2-44 (*US v August Broese et. al*, 10 January 1947) and 000-50-2-55 (*US v. Stefan Koch et. al*, 20-21 January 1947), both indicted ten suspects each but failed to convict any of them.[25] In three other cases, the only evidence presented by the prosecution was the findings from the Dachau parent case; no additional material was submitted. And in forty-five of the Dachau sub-trial cases,

[22] Hilton, *Blackest Canvas*, p. 297.
[23] Two Dachau sub-trial cases were filed under the "000-Dacahu-" label: 000-Dachau-1, *US vs Anton Stinglwagner et al.* (12-14 August 1947) and 000-Dachau-2, *US vs Sebastian Schmid* (15-18 September 1947). The Stinglwagner case indicted two defendants with two charges, neither of which were attached to a common design. The Schmidt case charged one individual with two charges; both particulars include the common design condition. See NARA, RG 549, A1 2238, Boxes 271-271.
[24] *Cases Not Tried*, USHMM, RG-06.005.05M.
[25] Of ten indictments in the Broese case, five defendants were acquitted, three defendants were nolle prossed before the trial ended, and two individuals were not tried. See Louie T. Tischer, "Review and Recommendations," *United States v. August Broese et al.*—CaseNo. 000-50-2-44, 10 January 1947, 3 pages, NARA, RG 549, A1 2238, Box 303. In the Koch case, six defendants were acquitted and four were not tried. Louie T. Tischer, "Review and Recommendations," *United States v. Stefan Koch et al.*—Case No. 000-50-2-55, 29 July 1947, 3 pages, NARA, RG 549, A1 2238, Box 304.

convictions resulted in sentences of time already served by the defendant, essentially releasing convicted war criminals immediately after their trial concluded.[26]

The program appears to have made improvements for the Mauthausen sub-trials, not least because the parent case indictment itself was revised.[27] Between 12 March and 26 November 1947, forty-seven joint cases and fourteen individual cases prosecuted a total of 238 defendants. Conviction rates increased and sentences became more severe.[28] As well, a clear distinction between the two case filings is evident. The fourteen "individual" cases all omitted the common design component in the particulars, instead charging each defendant with varying counts of violations of the laws and usages of war, reflecting specific criminal acts—to be evidenced and corroborated by witness testimony. All of the (Mauthausen) 000-50-5- "joint" cases charged multiple defendants with participating in a common design.

The order in which the cases were brought to trial shifted as well. The entire 14 "individual" case sub-series finished by 28 May 1947, before the first "joint" case started on 9 June of the same year. The Mauthausen sub-trial series still had complications, however. 000-50-5-19 (*US v Eduard Klerner et. al*, 26 November 1947), for example, indicted eleven individuals in the final weeks of the MGC program, but ultimately only prosecuted two. Both convicted earned five years in prison.[29]

This brings us to the Flossenbürg sub-trial series. Of course, most noticeably is the significantly reduced number of casefiles, compared to Dachau and Mauthausen. It is important to keep in mind that the Dachau and Mauthausen parent trials both finished before any sub-trial cases were brought before the court. The Flossenbürg parent case is therefore the first camp-atrocities parent trial to conclude *after* the sub-trial program was initiated.[30]

The justification for the common design charge was always efficiency, in terms of both timing and practicality. The approach appears to have worked relatively well for the parent trials. Indicting several individuals in one case obviously helped to mitigate the spatial and organizational limitations at Dachau. More importantly, however, is the assumption that the common design

[26] Hilton, *Blackest Canvas*, p. 297.
[27] For the Mauthausen parent trial, chief prosecutor William Denson combined the two charges (against civilian nationals and military POWs) into one and expanded relevant "crimes scene" to include a larger area of subcamps, as well as the Castle Hartheim killing center.
[28] Hilton, *Blackest Canvas*, pp. 323-324.
[29] John J. Ryan, "Review and Recommendations," *United States v. Eduard Klerner et. al*—Case No. 000-50-5-19, 30 January 1948, 11 pages, NARA, RG 549, A1 2238, Box 388.
[30] Hilton, *Blackest Canvas*, p. 298.

charge would generally make it easier to produce convictions at the subsequent trials. This was essentially the premise for the parent trial structure. By establishing that Flossenbürg, for example, was a criminal enterprise (in the parent trial), all subsequent defendants were theoretically guilty by association. It therefore became a matter of the defense to argue that their client was not at said location, at said time, and/or that it was a case of mistaken identity. In practice, however, the prosecution was rarely granted the benefit of the doubt, which is why witness testimony was such an essential aspect of the MGC program. The common design charge therefore became an unnecessary obstacle when the prosecution had direct evidence implicating an individual in a war crime. Removing this article from the particulars actually lowered the prosecution's burden of proof, in such instances. That with each parent trial, the corresponding sub-trial series steadily increased the number of "individual" cases while simultaneously decreasing the number of "joint" cases, it is clear that charging individuals on a case-by-case basis, and dropping the common design article, was the preferred approach going forward.

5.2 Technical Legal Defenses

In his 1948 review of the MGC in Germany, Eli E. Nobleman proclaimed that there were three procedural issues of immediate concern at the program's inception. First, the "fundamental safeguards" (including pleas, privileges, and immunities) so commonplace in the Anglo-American judicial system were completely foreign to Continental law. Second, trained attorneys of the US government were generally ignorant to the practices and procedures of their German counterparts. And third, a majority of the American officers who would be serving as judges on the MGC were not lawyers at all.[31] For these reasons, the Judge Advocate concluded that the MGC,

> had to be capable of comprehension by Germans appearing before the courts, either as defendants, witnesses or attorneys; and it had to be something which the MG [Military Government] officers would be able to handle—simple enough and sufficiently free from legal technicality to enable the comprehension and administration of it by the officers who were not legally trained.[32]

The emphasis on quick and uncomplicated trials produced a judicial structure that closely resembled US military courts-martial, but it was not a direct facsimile. The result was a hybrid system that allowed legal dispute, but was not beholden to established American legal precedent.

[31] Eli E. Nobleman, "Military Government Courts: Law and Justice in the American Zone of Germany," *American Bar Association Journal*, vol. 33, no. 8 (1947), 777–852. Here p. 780.
[32] Nobleman, "Military Government Courts," p. 780.

The courts were therefore authorized to essentially rule however they saw fit. In certain instances, defense counsel introduced various legal arguments that, while indeed a part of American law, directly challenged intentions to hold fast and simple trials. Two such examples include the concept of double jeopardy and innocence by reason of insanity.

5.2.1 Double Jeopardy

The legal concept of double jeopardy (derived from the Latin phrase *ne bis in idem*, "not twice for the same") essentially states that one cannot be prosecuted for the same crime twice.[33] Importantly, a prohibition clause on the concept is inscribed in the Fifth Amendment of the United States Constitution, "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[34] How is this relevant to the Flossenbürg trials? Five defendants in four sub-trials submitted pleas to bar their cases on account that they had been placed in double jeopardy.

On 17 December 1946, just one month shy of the Flossenbürg parent trial's conclusion, six of the original defendants' cases were deemed *nolle prosequi* and the accused were promptly removed from the trial.[35] Four of the six defendants were later re-tried in three cases,[36] at which time each invoked pleas of double jeopardy. A fifth defendant (not a part of the original parent case) also submitted a double jeopardy plea which concerned him being prosecuted in a German municipal court before standing trial at Dachau for the same allegations.[37] None of them were successful.

Despite what appears to have been a frivolous, if not desperate, maneuver on account of the defense teams, the motions did, however, reveal critical procedural issues relating to the arbitrary powers of the MGC as well as identify certain contradictions within the hybrid legal structure of the MGC program at Dachau. This subchapter will first briefly identify the origins and significance of double jeopardy as a legal concept. It will then present and analyze the relevant

[33] Carl-Friedrich Stuckenberg, "Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions," in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser, *The Oxford Handbook of Criminal Process* (New York: Oxford University Press, 2019) pp. 457–475, here, p. 458.
[34] Stuckenberg, "Double Jeopardy," p. 458.
[35] See section 4.2.1
[36] Friedrich Becker, Georg Degner, Heinrich Schmitz and Wenzel Wodak were each reindicted for war crimes concerning Flossenbürg Concentration Camp. Josef Oswalt and Ludwig Winkler were not charged again by the MGC.
[37] *United States v Ottokar Tuma et. al.*—Case No. 000-50-46-6 (Hereafter *Tuma Trial*), 28 November—12 December 1947, NARA, RG 549, A1 2238, Boxes 533, 538.

cases within the context of the Flossenbürg sub-trials before considering the larger consequences pertaining to the MGC.

Double Jeopardy - History and Significance

The legal theory of double jeopardy is rooted in Roman civil law, pertaining to *res judicata* ("a matter judged"[38]), from which the court derives its power of 'finality' when formulating a ruling.[39] The fundamental doctrine of final judgement was adopted in some form throughout continental Europe, as canon law, during the middle-ages. Though, the principles of fundamental rights protecting individual liberty against the state, to which the theory is currently attached, was not an explicit concern at the time.[40] The modern conceptions of double jeopardy were a product of the Enlightenment and incorporated into the national constitutions of the United States and France.[41] In 1948, the Universal Declaration of Human Rights did not include a double jeopardy clause. However, it is broadly prohibited in international law today,[42] including the statutes of most international criminal tribunals. As well, more than fifty national constitutions have set constraints against double jeopardy cases. Two of the most uncompromising constitutional guarantees against it today are Germany and the United States.[43]

Given its historical legal pedigree and the modern application of double jeopardy, it is worth considering the various theoretical rationales that justify its application in order to better approach the debate—as it relates to the Flossenbürg trials—from an objective position. Above all, the significance of double jeopardy is derived from its proximity to the concept of "finality"; the acknowledgement that all trials must ultimately come to a decision. Ensuring this fundamental ideal necessarily requires a prohibition on arbitrary re-litigation,[44] and it is essential to maintaining public confidence in the law. Yet, in addition to preserving a stable and predictable legal system,

[38] "*Res judicata* is the principle that a cause of action may not be relitigated once it has been judged on the merits. 'Finality' is the term which refers to when a court renders a final judgment on the merits." Cornell Law School, LII, Wex, https://www.law.cornell.edu/wex/res_judicata. Accessed July 2021.
[39] Stuckenberg, "Double Jeopardy," p. 460.
[40] Ibid, p. 463.
[41] The principles of individual liberty, guaranteed under law, can be found in the American Bill of Rights (1791), the revolutionary French Constitution (1791) and Napoleon's Code *d'instruction criminelle* of 1808. Ibid, p. 464.
[42] Ratified by 172 states, the principle is contained in Article 14(7) of the International Covenant on Civil and Political Rights. It is also guaranteed in the American Convention on Human Rights (art. 8(4)), the Arab Charter on Human Rights (art. 19(1)), and in Article 50 of the Charter of Fundamental Rights of the European Union. The African Charter on Human and People's Rights does not include a prohibition on *Ne Bis in Idem.* Ibid, p. 464–465.
[43] Ibid, p. 466.
[44] Ibid, p. 460.

a more practical argument of why trials must end is because each case is itself finite.[45] Not only will all legal arguments and relevant evidence eventually be exhausted, but documents will deteriorate, and memories will fade. It is therefore imperative that a case be brought to trial in a timely manner[46] and deliberated over patiently, but comprehensively.

On the contrary, the concept of "truth"—another theoretical pillar of western jurisprudence—as an ideal-type, is fundamentally at odds with finality. The intention of a court trial is to reveal the truth of an event in order to determine responsibility. This principle, of course, had a particular resonance within the context of prosecuting National Socialist war crimes. However, provided that no one can ever objectively know the "whole" truth of anything, no trial can ever fully be finished. As noted by Carl-Friedrich Stuckenberg, "this conflict cannot be resolved without curtailing one principle or the other: If truth is paramount, then there is no room for finality."[47] In practice, finality receives a majority of the capital.

On a psychological level, all parties involved are subjected to multiple forms of stress when participating in a criminal trial. This is an inherent feature of the courtroom, however, prohibiting retrials without a justifiable reason is a mitigating factor.[48] The confidence that a case will ultimately conclude is an essential part of the process itself. It not only allows for both the plaintiff and defendant to move on, but it is also the start of the rehabilitation phase. By denying that promise, the victim(s) and witnesses may naturally be subjected to reliving the trauma of their experience. As well, members of the court (prosecution, defense, jury, etc.) are not immune to acquiring their own ancillary anxieties.[49] On the other hand, defendant(s) are not below the dignity of continued arbitrary embarrassment; there is even a Latin phrase for this phenomenon: *nemo debet bis vexari* ("no man ought to be twice vexed").[50] Finally, each of these sensitivities are occasionally passed on to family members.

From a political perspective, the double jeopardy rule secures the legal agency of an individual against the state. Essentially, the state gets one opportunity to hold an individual to

[45] Ibid.
[46] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." *Sixth Amendment to the United States Constitution*, Cornell Law School, LII, Wex, https://www.law.cornell.edu/constitution/sixth_amendment. Accessed July 2021.
[47] Stuckenberg, "Double Jeopardy," p. 462.
[48] It is generally accepted that upon conviction, if a defendant appeals, they naturally waive their protection from repeat trials. Ibid, p. 472.
[49] Denson admitted to having lost a significant amount of weight and having recurring nightmares during the Flossenbürg trial.
[50] Stuckenberg, "Double Jeopardy," p. 460.

account for an alleged crime. If it fails to do so, it cannot get a second attempt without proper justification. In the 1970 US Supreme Court case, Ashe v Swenson, Justice William Brennen proclaimed, "Some flexibility in the structuring of criminal litigation is ... desirable and consistent with our traditions. But the Double Jeopardy Clause stands as a constitutional barrier against possible tyranny by the overzealous prosecutor."[51]

The Twin Cases of Walter Degner and Wenzel Wodak

The first case in the subsequent Flossenbürg trial series to appear before the court was 000-Flossenbürg-2 (*US v. Wenzel Wodak*, 2-13 June 1947). Three days later, 000-Flossenbürg-1 (*US v. Walter Degner*, 5-10 June 1947) commenced. In both of these trials, the defense pleaded to bar the trial on the basis that the accused were being subjected to double jeopardy, claiming that each had already been tried in the parent case. The similarities continued. Not only did Wodak and Degner have the very same defense team, but both cases were prosecuted by the very same prosecution team. What's more, the trials actually overlapped each other. The Wodak case ran from 2 to 4 June and paused, at the request of the defense, only to reconvene for one final day on 13 June. During the recess period, the entire Degner case was processed. Because the same defense team pleaded to bar both cases on account of double jeopardy, it comes as no surprise, then, that the textual transcripts are nearly indistinguishable from each other for almost twenty-five pages.[52] What makes these two trials so apt for comparison, however, is that they differed considerably in judgement. Wodak was convicted and sentenced to death, while Degner was acquitted on all charges.

On the opening days of the Wodak and Degner trials (2 June and 5 June 1947, respectively), the courts first ran through the obligatory introductions which, among other things, included informing the defendants of their rights and reading through the criminal charges. Before the prosecution could begin its opening statement, the defense team, led by Major John W. Brooks, submitted a "special plea" to bar the trial on account that the defendant had already been prosecuted

[51] US Supreme Court case: "Ashe v. Swenson," 397 US 436, 90 S. Ct. 1189, 13 November 1969—6 April 1970, p. 456. Cornell Law School, LII, Wex, https://www.law.cornell.edu/supremecourt/text/397/436. Accessed May 2021. See also Stuckenberg, "Double Jeopardy," p. 461.

[52] The similarities in transcripts extend far past using the same legal motions and referencing the same publications. The exact same phrases and vocabulary are employed by both the prosecution and defense teams to the point that the textual transcripts on the issue of double jeopardy fall within one page of each other. See *Degner Trial*, pp. 8–32; *Wodak Trial*, pp. 5–28.

for the same crimes, in the same court, and with the same evidence during the Flossenbürg parent trial.[53]

Brooks referred to a dossier, submitted by the prosecution (at both trials), explaining the impetus for the retrials,[54]

> The accused is one of six defendants originally indicted in the parent Flossenbürg case, who were withdrawn from that trial by the entry of a nolle-prosequi at the direction of higher headquarters in view of the urgent military necessity for terminating that lengthy proceedings on a date specified by superior authority. This group of six defendants was selected for this purpose, due to the fact that little or no defense material had, at that time, been introduced on their behalf, and their withdrawal from the suit, for trial at a later date could therefore be accomplished with the least sacrifice of time and money to the government. The order directing the nolle-prosequi specified that it was "without prejudice" to the subsequent trial of these accused.[55]

The defense felt that much of their argument was in this very passage. According to Brooks' interpretation, the decision by the governing authorities of the MGC to postpone the trial of six defendants, in order to conclude a case that had gone on far longer than expected, was an entirely arbitrary action that unfairly changed the rules on the defendants mid-trial.[56]

Above all, the defense argued that Wodak and Degner had each already endured six months of prosecution for their alleged crimes in the parent case before higher headquarters intervened with the express intent of retrying them under the "same charges, or charges which are an essential part of those formerly dropped against this accused,"[57] at a later date. Brooks proclaimed word-for-word at both trials, that "[n]othing is now sought nor charged to be proven against the accused which was not brought up and considered in detail at the trial of the parent Flossenbürg case."[58] In other words, both Wodak and Degner had already endured prosecution of the same indictment(s)

[53] Defense counsel Brooks, *Degner Trial*, p. 8.; *Wodak Trial*, pp. 5-6.
[54] Prosecution exhibit P-1 of the Degner trial is "missing" from the archived casefiles. According to the trial minutes, however, the document is entitled, "War Crimes Group, Form No. 38". No further information on the document is available. *Degner Trial*, p. 6.
[55] *Wodak Trial**, p. 10, This quote, and many that follow, appeared almost word-for-word in the Degner trial. It is significant to note because the debate between the prosecution and defense on the topic of double jeopardy presents elements of a choreographed exchange. At no point in the transcript does the defense or prosecution hint that the very same arguments, based on the very same references, had been presented to the court just days prior. Because the passages do have very subtle differences, however, the * icon will be applied to the citation from where the quote presented in the text was taken.
[56] The *nolle prosequi* was submitted simultaneously for all six individuals on 17 December 1946, approximately one month before a judgment was made (20 January 1947). The trial was, therefore, over 85 percent completed by the time the defendants were excused.
[57] Brooks, *Degner Trial*, pp. 9; 12.
[58] Brooks, *Degner Trial**, p. 12.; *Wodak Trial*, p. 12.

and material evidence, thus placing them in legal jeopardy for a second time. To support his claims, the defense offered several supporting arguments.

First, Brooks questioned the legal jurisdiction of higher headquarters, when Denson was ordered to submit the *nolle prosequi* request at the parent trial, with the deliberate intent of retrying each under altered conditions.[59] Second, Brooks framed the operational application of double jeopardy within a loose interpretation of what it means to be 'tried'.[60] Citing *Wharton's Criminal Law*, Brooks argued that nowhere in the text was it mandated that a case conclude in conviction or acquittal for a defendant to have endured legal jeopardy, quoting "…was the matter set out in the second indictment admissible as evidence under the first indictment, and could a conviction have been properly maintained upon such evidence? If the answer is yes, the plea is sufficient; otherwise, it is not."[61] Brooks characterized the defendants' experiences as having endured prolonged stress under criminal prosecution which came with the very real possibility of being sentenced to death. Then, just prior to judgement, both men were suddenly dropped from the case and returned to their jail cells. This, according to the defense, met the minimum criteria to have been in legal jeopardy.

Third, the defense accused higher headquarters of changing the rules, suggesting that, had Wodak and Degner faced judgement at the parent trial, the charge of common design would have failed to convict them. Brooks proclaimed that the only distinction between the parent trial and the subsequent trials of Wodak and Degner was the number of defendants, which of course, determined the joint nature of the charges.[62] The incriminating evidence, however, was all the same. The defense therefore contended that in spite of the evidence presented at the parent trial, which demonstrated alleged *individual* criminal offenses by the accused, it was not convincing enough to convict *on the grounds of common design*. As a result, higher headquarters intervened when they ordered the prosecution to abandon the common design charge and retry the defendants

[59] Brooks, *Wodak Trial**, p. 10; *Degner Trial*, p. 9

[60] According to *Military Law and Precedents*, a publication referenced by the prosecution in both the Wodak and Degner cases during the debates on double jeopardy, the lexemes "jeopardy" and "trial" are interchangeable legal terms which both indicate "the prosecution of a case to a verdict; that unless the case has proceeded at least to an acquittal or a conviction, there has been no trial and therefore no jeopardy." William Winthrop et al., *Military Law and Precedents* (Washington, DC: Government Printing Office, 1920) p. 260.

[61] Brooks, quoting *Wharton's Criminal Law,* Twelfth Edition, Section 394, (1932) in *Wodak Trial**, p. 12, *Degner Trial*, p. 13.

[62] "The prosecution had nothing in the parent case against this defendant to prove that he acted in common design with others, except the proof which they offered to show that he did the specific acts which they charged against him." Defense counsel John Brooks, *Wodak Trial*, p. 13

in individual trials, and on the merits of the very same evidence. Provided such evidence was enough to have yielded convictions, the decision to drop the common design charge was thus made intentionally as to avoid an acquittal. The argument was entirely procedural. From their perspective, the defense was wholly indifferent to whether or not Wodak or Degner were guilty of the specific atrocities attributed to them. Rather, Brooks insisted that the prosecution had made a critical strategic error by indicting the accused with an impotent charge the first time around. Once the powers-that-be recognized this, they simply changed the rules on the defendants.

Leaning heavily on the political-nationalist emotions of the MGC, Brooks declared (at both trials), "The crux of the matter is jeopardy—merely placing the accused, in the words of the [United States] Constitution, 'in jeopardy of life or limb.'"[63] From the beginning of the plea, Brooks referenced the prohibition of double jeopardy as an American legal safeguard against the threat of oppressive state power. He cited various American cases from the late nineteenth and early twentieth centuries in which the courts determined that *nolle prosequi* essentially operates as an acquittal, if indeed the trial had already begun.[64] The references insisted that the United States practiced a tradition of protecting its citizens from arbitrary and indefinite legal jeopardy. The operative word, however, is "citizens." Do the rights and protections of American citizens extend to war crimes trial defendants? Despite conceding that the legal protections provided to all Americans were not extended to war criminals, the defense noted that the issue of double jeopardy was completely absent in the military law manuals and proceeded to remind the court of its authority to set its own rules, "Where no procedure has been directed in any matter, a Military Government Court may adopt such procedure as it thinks fit, provided no injustice is thereby done to the accused."[65] With this phrase, Brooks essentially challenged the court to exercise its jurisdiction. Brooks concluded his argument in the Wodak case with moral predilection,

> If we have started out on this program of war crimes trials and punishment in good faith, in an honest effort, and with honest intention of administering even-handed justice, dispassionately, cooly, and impersonally, without any thought, when we formulated the rules, of obtaining a conviction in any particular case, then in equity and justice and good conscience we cannot change the rules of trial under which a man is to be tried for his life after the trial has once commenced; and it cannot be denied that the trial of this accused did commence on the 12th of June in the case of the United States against Becker, on the

[63] This quote was used word-for-word in both cases. *Wodak Trial**, p. 13; *Degner Trial**, p. 14.
[64] Referencing cases, *Stewart v State* (1864); *People v Disperati* (1909); and US v Aurandt (1910). *Wodak Trial*, pp. 13-14; *Degner Trial*, pp. 14-15.
[65] *Military Government Regulations*, Title 5, paragraph 339, see *Wodak Trial*, p. 16; *Degner Trial*, p. 17.

> identical charges which are pending now. Only the charge in common design—which was present there—is missing here […]
>
> We concede that it is competent for the War Crimes Organization, the Deputy Theater Judge Advocate and the Military Government authorities to make the rules, but we do not contend that the rules should not be changed. That is the way the Germans did it. The Germans changed the Rules of War after they had embarked upon the World War.[66]

In the Degner case, Brooks was slightly more direct,

> ...I hope we are not taking the position that jurisdiction and policy are dependent solely upon power. That was the German attitude which we are attempting to correct. We are trying to administer American Justice here. If the Military Government and War Crimes Authorities want to take from the accused the right to protection against double jeopardy, let them say so.[67]

As previously mentioned, not only did Brooks lead the defense for both Wodak and Degner, but Major Bigelow Boysen also appeared in both cases as chief prosecutor. On the issue of double jeopardy, the repetition of arguments, legal references, and phrases (down to the vocabulary) expressed by the defense and prosecution was so consistent between the two cases that the exchanges read as if they were scripted.

Contrary to the defense's extrapolations, the prosecution's rebuttal was brief and pointed. Boysen refuted the idea that war crimes suspects should by default be awarded any of the rights provided to American citizens—as set in the Constitution—regardless of whether or not an explicit mention of said rights appears in the war crimes trial manuals.[68] The court was further reminded that the current MGC structure was adapted from the Anglo-American systems of jurisprudence precisely because the US Military Government was unsatisfied with the poor level of fairness provided to defendants in the (German) continental system; in particular the opportunity for defendants to cross-examine witnesses.[69] With respect to the alleged overreach of the higher headquarters' power, the *Military Government Regulations*, Title 5, section 337 provides unequivocal authorization to retry a defendant, even after a conviction.[70] Boysen also cited the

[66] *Wodak Trial*, pp. 18, 25–26.
[67] *Degner Trial*, p. 28.
[68] Boysen notes that if such were the case, based on the fact that there are no explicit rulings in the relevant texts, the defendants at Dachau would theoretically have the right to demand a trial by a jury (as opposed to a military courts-martial). *Wodak Trial*, p. 19.
[69] *Ibid*, p. 19–20.
[70] Boysen referenced *US v. Michael Kaiser* (16 September 1946), in which the defendant was convicted of denying American POWs medical attention. His sentence of one year was ultimately denied by the reviewing authority who ordered a retrial. "It is a well established and ancient principle of law, guaranteed by constitutional provisions, that

1920 publication of *Military Law and Precedents* which states under the subheading, "Former Trial and 'Jeopardy' Identical", that under military law, one is not considered to have been tried before the trial is concluded.[71] Finally, Boysen addressed the defense's core procedural argument—which claimed that the basis for the retrials was due to the prosecution being unable to adequately conflate the individual crimes attributed to Wodak and Degner with the common design charge—by quoting the *Military Government Regulations* manual:

> Proceedings will be conducted with a view to the attainment of this purpose [the prosecution of war criminals] to the fullest possible extent. Technical and legalistic view points will not be allowed to interfere with such a result.[72]

The Joint Defense of Friedrich Becker and Heinrich Schmitz

The third attempt in which the defense pleaded double jeopardy was at yet another Flossenbürg subsequent trial. Case number 000-50-46-3 (*US v Heerde et. al)* was opened on 10 November and concluded on 12 December 1947, less than three weeks before the MGC would effectively terminate the war crimes trials program. As in the parent case, the Heerde trial indicted multiple individuals[73] for the same charge of "violation of the laws and usages of war". In similar fashion to the Wodak and Degner trials, the defense team, led this time by Major William Oates, motioned the court in the opening session to bar the case against defendants Heinrich Schmitz and Friedrich Becker on account that they had previously stood trial for the same crimes in the Flossenbürg parent case. SS Sergeant Becker had worked in several administrative departments at Flossenbürg from 1941 to 1945 and oversaw the entire prisoner-labor allocation program.[74] Dr. Schmitz was

man may not be twice put in jeopardy for the same offense." *Degner Trial*, p. 21, *Wodak Trial*, p. 21. For the Kaiser trial, see David P Hervey, "Review and Recommendations," *United States v Michael Kaiser*—Case No. 12-2616, 21 February 1947, 6 pages, NARA, RG 549, A1 2238, Box 245.

[71] Boysen, quoting Winthrop, "So, at military law, neither a mere arraignment, nor an arrest, followed by a discharge without trial, nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of the charges after arraignment or pending the trial nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding, nor a permanent interruption of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution—will amount to an acquittal or a 'trial' of the accused." William Winthrop, *Military Law and Precedents*, p. 263. *Wodak Trial*, p. 22, *Degner Trial*, p. 22.

[72] *Military Government Regulations*, Title 5, section 350. *Wodak Trial*, p. 25; *Degner Trial* 24.

[73] The original indictment included eight accused. Reinhold Teichman and Ottokar Tuma were both dropped from the case at its beginning. *Heerde Trial*, p. 1

[74] Between 1941 and 1944, Becker worked as a clerk in the Political Department and later, the work commitment office. In 1944, Becker became the chief of labor allocation. Benson, "Review and Recommendations," *Heerde Trial*, p. 26.

the prisoner physician in the Flossenbürg hospital from May 1944 to March 1945. He was accused of committing incredibly heinous abuse toward prisoners.[75] Oates stipulated that the charges were "substantially the same" in both cases, that evidence was introduced against Schmitz and Becker after they had both been properly arraigned, and that they were later *nolle prossed* by the prosecution without their consent. For these reasons, the defense claimed, Schmitz and Becker were now facing double jeopardy.[76]

The prosecution must have been expecting the motion because as soon as Oates finished, chief prosecutor Sherry Myers presented the court with a letter from the Commanding Officer of the Dachau Detachment, Col. Howard Bresee. Dated 9 June 1947, and addressed to "All Tribunals Concerned", the memo explained that one: the order of nolle prosequi was submitted on behalf of the Deputy Theater Judge Advocate (Col. Straight); and two: the action was taken purely to expedite the conclusion of the parent trial and that selecting the six defendants "had no relation to any question of the sufficiency of evidence against them..."[77]

Despite its brevity, the letter offers considerable insight into the degree of arbitrary authority possessed by the office of the Judge Advocate. One will first notice that it was drafted just days after the defense failed to plead double jeopardy in the Degner and Wodak cases. As the letter's content was essentially the same explanation presented at the two trials, the Military Government authorities certainly felt it necessary to justify the action and establish actionable precedent for the MGC before any future case incurred similar challenges.

One may argue that the letter was intended as an indication of transparency to quell any perceptions of arbitrary decision making and avoid such debate moving forward (i.e. that the prosecution essentially dropped its cases against likely acquittals, with the intention to retry the defendants later… as was alleged by the defense at the Wodak and Degner trials). While that is a convincing assessment, it had the opposite effect in practice. The letter is completely absent of any references to military judicial theory or precedent, thus requiring the prosecution and defense teams to present their own legal justifications to a court of Army officers with little to no training

[75] Ibid, pp. 9–14.
[76] Oates also referenced legal publications and relevant American court cases, including *Black's Law Dictionary* (the same source used by chief prosecutor Denson in the parent trial,) and *Criminal Law from American Jurisprudence,* which conveyed how a nolle prosequi can yield an acquittal. *Heerde Trial*, p. 7.
[77] Bresee, "Nolle Prosequi Friedrich Becker," *Heerde Trial*, p. 9. See section 4.2.1.

in US or international criminal law… which is exactly what proceeded to take place in the Heerde trial.

Chief prosecutor Myers cited several publications to support his assertion that the plea of double jeopardy is not extended to war criminals.[78] He quoted the *Manual for Courts Martial*, which states that "a nolle prosequi is not in itself equivalent to an acquittal or to a grant of pardon and is not a ground of objection or of defense on a subsequent trial."[79] In other words, without a judgement in the first trial, a defendant cannot claim double jeopardy in the second. According to *Winthrop's Military Law and Precedents*, Myers conceded that under normal criminal procedure, once an arraignment and plea have been entered, a subsequent nolle prosequi motion requires the defendant's consent. In a military government court procedure, however, the order of nolle prosequi is carried out by the prosecutor under the auspices of the "official superior who created the court and directed the trial." The defendant therefore has no claim to double jeopardy because they had no agency in the nolle prosequi accord. And the *Manual for the Trial of War Crimes* asserts that "the Theater Judge Advocate has the authority to designate what individuals will be tried for war crimes and will prepare the charges therefor."[80] Because the Theater Judge Advocate is the governing body for the entire court system, their authority to interject into a case is essentially absolute. Thus, concluded Myers, the decision to recharge Becker and Schmitz for the same crimes, after being excused as nolle prosequi, was not only acknowledged by the Military Government leadership, it was deliberately mandated.

His argument relied solely on the self-established authority of the Theater Judge Advocate. Citing the 1945 *US v Yamashita* trial, Myers then proclaimed with confidence that, irrespective of these regulations, "war criminals are not entitled to due process of law."[81] What Myers was referring to was the US Supreme Court ruling that determined war criminals—prosecuted under military commission—have no automatic claim to the same legal protections, particularly the Fifth Amendment, as US citizens.[82] While the Yamashita case did set precedent for much of the MGC

[78] Sherry Myers, *Heerde Trial*, p. 11
[79] United States War Department, *A Manual for Courts-Martial, U.S. Army 1928. (Corrected to April 20, 1943),* (Washington: U.S. Govt. print. 1943) pp. 56-57. Ibid, p. 10.
[80] Ibid, p. 9.
[81] Ibid, p. 11
[82] Upon his conviction, Yamashita's lawyers argued that he was denied due process, as established under the US Constitution. The Supreme Court took up the appeal and ruled that Military Commissions are essentially an internal affair, with sole autonomy over development and review of its own trials. Despite the Court's ruling, Justices Wiley

trials at Dachau, Myers' statement appears to be a case of "saying the quiet part out loud"; the MGC was governed by the office of the Theater Deputy Judge Advocate and as it was he who ordered the nolle prosequi[83] and the subsequent reindictment of Schmitz and Becker (as well as Degner and Wacker), there was no higher authority to whom one could appeal. The "fine print" was indeed technical, but clear.

Defense counsel Oates, like that of his colleague Brooks, had no other option than to appeal to the national pride of American jurisprudence,

> We must look to America, the law which our forefathers even before they came to America adopted… for very substantial reasons. It did not grow up as War Crimes courts have grown up, overnight or in six months or a year or two, but our law has grown up through the centuries. It was brought to us from England...two centuries ago the precedent and the law of double jeopardy was very well founded even at that time… when we look home we will find that the law of double jeopardy is one of the fundamental rights we have always adhered to...[84]

Once again, the emotional strategy fell on deaf ears, as the court ruled in favor of the prosecution shortly thereafter. After a month of deliberation, Friedrich Becker and Heinrich Schmitz were both convicted of war crimes, receiving a life sentence and death by hanging, respectively.

Alfons Roesch, Twice Convicted

Not all double jeopardy cases involved discrepancies over the retrial of defendants from the Flossenbürg parent trial. In 000-50-46-6 (*US v Ottokar Tuma et. al*; 28 November -12 December 1947), one of the five accused was charged with crimes for which he had already been tried *and convicted*. Alfons Roesch, had been a capo in the kitchen at the Obertraubling subcamp, near Regensburg. In September 1947, he was convicted in a Regensburg district court of beating prisoners and exploiting them through the promise of extra food in exchange for their gold fillings.

Rutledge and Frank Murphy strongly dissented, the later proclaiming, "The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is… The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case." Quoted in Walter Wyatt, *United States Reports, Volume 327, Cases Adjudged in the Supreme Court of the United States at October Term, 1945*, (Washington DC: United States Government Printing Office, 1947) pp. 26–27.

[83] Bresee's indication that the original 17 December 1946 order of nolle prosequi that he "prepared and signed" had come from Lt. Col. Straight. See Bresee, "Nolle Prosequi Friedrich Becker," *Heerde Trial*, p. 9

[84] Oates, *Heerde Trial*, p. 12.

Approximately three months later, three of the prosecution witnesses who testified against Roesch in the district court, spoke to the very same allegations in the Tuma trial at Dachau.

Just before the court moved to judgment, the defense submitted trial records from the district court case against Roesch and motioned to strike from the record all overlapping witness testimony (it was not a request to bar the case entirely or drop any of the charges).[85] The defense justified its motion by indicating that the district court had been explicitly approved by the US Military Government and authorized as competent to hold trials,[86]

> We [the defense] contend that since the various representatives of the American Government have transferred this case to the jurisdiction of the German court, and the case has been tried … the matter is Res adjudicada [*sic*], and this man should not be placed in double jeopardy and tried on those charges again.[87]

Despite Chief prosecutor Captain Richard Frank conceding to the fact that the crimes in question were indeed the same acts, he nevertheless maintained that the two court systems operated in completely different jurisdictions, allowing him to fundamentally refute the grounds upon which the defense had presented its motion.

Indeed, according to US military occupation law in Germany, all domestic German courts were subject to the compliance and authorization of the Military Government. German courts were responsible for prosecuting crimes by Germans against Germans (and/or stateless persons).[88] Such were not "war crimes" in the sense that, given the victim(s) were German citizens, they did not breach the international laws of warfare. All crimes against Allied nationals, on the other hand, were subject to the jurisdiction of the Allied military courts. According to this structure, the prosecution argued, it was perfectly appropriate for Roesch to be prosecuted for crimes that were in breach of the German Penal Code. That such crimes also fell under the category of war crimes, in this particular instance, was merely coincidence and completely within the Military Government's discretion to prosecute as well. The court overruled the motion to bar Roesch's case

[85] Defense Exhibits D-6 and D-7/D-7A. *Tuma Trial*.
[86] Ibid, pp. 560–562.
[87] Ibid, p. 563.
[88] See Control Council Law No. 10, Article 3, section 1-D, "Each occupying authority, within its Zone of Occupation, … 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." James Larry Taulbee, *War Crimes and Trials: A Primary Source Guide* (Santa Barbara, California: ABC-CLIO, 2018) loc. 3618 of 11796, Kindle.

and the trial quickly moved to judgement. On 12 December, Roesch was found guilty and sentenced to four months hard labor at Landsberg Prison, commencing 4 September 1947.[89] Given time already served, Roesch spent no more than three weeks at Landsberg Prison.[90] The Tuma case was officially reviewed, and all decisions were approved on 18 March 1948, almost two and half months after Roesch's release.[91]

The double jeopardy debate was, at its core, a procedural argument over how the Military Government courts interpreted fundamental rights of individuals and how it applied to war criminals. The paradox, which catapulted this ancillary issue to the forefront of American justice in Germany, was that the entire war crimes program was meant to be an exercise in applying a democratically sound process of judgement and punishment. The prosecution, however, argued that the defendants were simply not entitled to a fair trial, as it is stipulated in the Constitution. The Supreme Court's ruling over the Yamashita verdict, however, cemented this position for all future challenges.

The Flossenbürg parent trial was the first camp-atrocities case for which a request of nolle prosequi was submitted; Becker, Degner, Schmitz and Wodak were all recipients. The prosecution later argued that, based on military law, the removal of a defendant under the condition of nolle prosequi did not facilitate the plea of double jeopardy in future trials. And furthermore, being that it was the leadership of the Military Government itself who ordered the motion, the respective subsequent trials were deemed legitimate. After six months of deliberation, the Office of the Judge Advocate had become frustrated with the Flossenbürg trial's prolonged duration. In order to expedite its conclusion, six defendants for whom the defense had not yet presented testimony were removed from the case, to be retried later. When such actions were identified and challenged in court, the prosecution was forced to rely on some of the most arbitrary protections codified in the war crimes trial manuals. To their credit, the appointed court members did oblige the defense, providing an exchange of uninterrupted deliberation between the two opposing counsels. The defense emphasized the perceived moral superiority of America, *over its German adversary*, to argue against what it claimed was a procedural injustice. But the prosecution ultimately had the

[89] *Tuma Trial*, p. 576.
[90] According to an "Execution of Sentence" memo, Roesch was admitted to Landsberg Prison on 16 December 1947 and released on 3 January 1948. Ibid.
[91] The "Order on Review," essentially the last document to approve the case, was signed and authorized by Judge Advocate, Colonel J. L. Harbaugh Jr., on 18 March 1948. Ibid.

legal documentation on their side. They confirmed the Military Government's authority, regardless of how arbitrary it may have been, and acknowledged that the legal rights and protections awarded to all Americans were not an extended privilege to war crimes suspects.

5.2.2 The Insanity Defense

In his comprehensive 1948 report on the MGC program, Colonel Straight referenced the *Manual for the Trial of War Crimes and Related Cases*, in which he addressed "Action in Case of Insanity of Accused,"

> Whenever a court is satisfied that the accused is unable by reason of insanity to understand the nature of the charges against him or the proceedings of the court, or that the accused committed the offense for which he is being tried but was insane when he committed it, the court shall record a finding of either such fact and may make an order providing for temporary custody pending direction by the reviewing authority for permanent custody or other disposition.[92]

According to this passage, there are two contexts under which an accused could claim insanity as a "not guilty" plea or to avoid prosecution altogether: if the individual is deemed to have been insane at the time of said crime, and/or that the individual is mentally incapable of participating in the present criminal trial. That the legal guidelines for the plea were included in the war crimes trial manual confirms that the action was a relevant strategy for which established protocol was necessary. Straight, however, did not include any explicit examples in his report.

Two defendants from the Flossenbürg sub-trial proceedings pleaded to have their cases dropped for reason of insanity. Both Alphons Roesch and Heinrich Schmitz (the same Roesch and Schmitz that unsuccessfully pleaded double jeopardy) had been clinically diagnosed by a physician, prior to their arraignments, for mental instabilities that at the time were connected to the contemporaneous psychiatric concepts of "insanity". Neither plea was accepted by the courts and both were ultimately found guilty. But how seriously did the courts actually consider the mental stability of the defendants and, in the event of a conviction, to what extent did it inform sentencing? This section will explore how the Flossenbürg sub-trial cases dealt with the topic of insanity as a legal defense.

Alfons Roesch - The "Schizophrenic"

[92] Straight, *Report of the Deputy Judge Advocate,* p. 187.

Alfons Roesch was one of eight individuals indicted in 000-50-46-4 (*US v Fischer et. al,* 6-19 November 1947).[93] He was, however, withdrawn from the case in the opening minutes of the trial "by virtue of an examination with respect to his insanity, wherein the psychiatrist said he should be confined to a mental institution."[94] Three weeks later, Roesch was reindicted in 000-50-46-6 (*US v Tuma et. al*, 28 November–12 December 1947). Having punted in the first case, the court was now forced to deliberate over whether Roesch was even psychologically capable to stand trial. According to documents presented by the defense, Roesch was undergoing preliminary interrogations in October 1947 by his then counsel who began to question the mental state of his client.[95] A background inquiry revealed that, in addition to having a family history of "insanity," Roesch had undergone sporadic treatment at various mental institutes since 1928 and was currently undergoing psychiatric observation by the US military in the former SS hospital at Dachau. Roesch apparently conveyed that he had been released from an asylum in 1941 and was subsequently arrested and sent to a concentration camp shortly thereafter.[96] At the request of counsel, a psychiatric exam was performed on 30 October 1947 by the Army Neuropsychiatric Section chief, Captain I. F. Bennett. Dr. Bennett, who spoke to Roesch through an interpreter, determined that he suffered from chronic paranoid schizophrenia and mental deterioration. Bennett concluded that Roesch "is not responsible for his acts," and recommended that he be hospitalized indefinitely for his own "self-protection and care."[97]

Back at the trial, Chief prosecutor Captain Richard Frank objected to the report on the basis that not only was the examination a month old (thus, irrelevant to Roesch's *current* state of mind), but nowhere in the report did it reference the defendant's mental state *at the time of the alleged crimes*.[98] Considering the established guidelines above, it appears that the prosecution's grievances

[93] Accused Johann Wimmer and Josef Kokott were also dropped from the case, Roach, "Review and Recommendations," *The United States v. Fischer et al.,* (Case No. 000-50-46-4), (hereafter *Fischer Trial*) 6 Nov. 1947, 18 pages, NARA, Entry Number A1 2238, Box 527. p. 17.
[94] *Fischer Trial*, p. 1.
[95] Following an interview with Roesch, Defense Counsel Captain W. A. Gordon stated in a memo addressed to the Chief Counsel office, that "this accused is undoubtedly suffering from a serious mental affliction that would make it inadvisable to place him on trial on the date scheduled." "Mental Examination, Alfons Roesch" 22 October 1947, Defense exhibition, D-1. *Fischer Trial.*
[96] "Mental Examination, Alfons Roesch" Defense Counsel Captain W. A. Gordon, 22 October 1947. Defense exhibition, D-1. *Tuma Trial.*
[97] Captain I.F. Bennett, "Psychiatric Examination of: Roesch, Alfons" 30 October 1947. Defense Exhibit, D-2, *Tuma Trial.*
[98] Richard Frank testimony, *Tuma Trial*, p. 14.

were carefully presented as to deliberately avoid the necessary prerequisites needed to sustain a plea of insanity.

Three expert witnesses were called to testify to the mental faculties of Roesch. Former SS medical doctor and Dachau prisoner Karl Kahr testified first, for the defense. Kahr disclosed that he had engaged extensively with Roesch, over the course of two weeks, while the two were temporary cellmates. In that time, Kahr came to the professional conclusion that Roesch suffered from paranoid schizophrenia and, among other things, pointed to his dramatic emotional mood swings as confirming behavior.[99] Max Kaess and Albert Gyorgy—both US contracted doctors of "nervous disorders" (classified as psychiatry)[100]—each independently interviewed the defendant for multiple hours over several days. The two psychiatrists testified as prosecution witnesses that Roesch was not only of sound mind and therefore possessed the ability to stand trial, but that he expressed psychopathic behavior. Both concluded that Roesch was "fiending" mental illness.[101] Further strengthening their argument, the prosecution submitted a psychiatric evaluation of Roesch from 1939, which paralleled the skepticism of Kaess and Gyorgy.[102]

Despite the court ultimately ruling in favor of the prosecution, requiring Roesch to stand trial, the Court President made a curious conciliatory statement,

> The Court does not sustain the Plea of Insanity. The court directs that a Plea of Not Guilty be entered in the case of the accused, Alfons Roesch, and the case will be tried as if a Plea of Guilty had been made by the accused.[103]

Because Roesch had been unable (or unwilling) to acknowledge that he understood the charges and enter a plea on his own accord, the court defaulted to entering "not guilty" for him. What is perplexing, however, is determining exactly what the president's intentions were by proclaiming to try Roesch as if he had pleaded guilty. In a later appraisal of the case, the War Crimes Review Board noted that the court was "very apparently in error" when making this statement. However, the board determined that the case against Roesch appeared to proceed in an acceptable manner thereafter and that the sentence was considerably lenient. As there were no post-trial petitions raised, it was concluded that the rights of the accused were protected and no further action was

[99] Karl Kahr testimony, *Tuma Trial*, pp.16–22.
[100] Max Kaess testimony, *Tuma trial*, p. 24.
[101] Kaess, *Tuma Trial*, pp. 24–35; Albert Gyogy testimony, *Tuma Trial*, pp. 33–43.
[102] Prosecution Exhibit P-11, *Tuma Trial*.
[103] President, *Tuma Trial*, pp. 56–57.

necessary.[104] Based on the limited annotation provided, the only logical explanation is that the court intended to provide Roesch with a fair and comprehensive trial, but reserved for itself the license to administer leniency when it came time to establish a suitable punishment. This unorthodox resolution, however, suggests that the court was undecided on Roesch's mental state. With respect to the lack of a petition, it is unlikely the request would have been taken up before Roesch's release date, just three weeks later.

Heinrich Schmitz - The "Manic Depressive"

The other Flossenbürg trial-series defendant to make a legitimate plea of insanity before the court was Heinrich Schmitz. Schmitz was also one of the six nolle prossed cases from the Flossenbürg parent trial. He was later retried, convicted, and sentenced to death in the Heerde trial.[105] Neither an SS-man nor prisoner, Schmitz was the only "civilian" (and the only medical physician) accused in the Flossenbürg trials.

Schmitz had been clinically diagnosed with manic depressive insanity in 1939 and underwent multiple psychiatric examinations throughout the early 1940s. He attempted suicide and was also forcibly sterilized by the state. From Spring 1944, however, Schmitz spent approximately eleven months at Flossenbürg as the prisoner physician—a time which prisoners have characterized as "the most frightening and dangerous period, with the exception of the death marches."[106] In light of being accused of some of the most heinous prisoner abuses, how was the trial affected by his apparent mental issues?

In contrast to most of the war crimes defendants at Dachau, the personal history of Heinrich Schmitz has been fairly well documented; a result of his professional medical career and the multiple intensive psychiatric examinations he was forced to undergo.[107] He was born in 1896 in Braunschweig and had a rather troubled upbringing, having suffered the early loss of his younger brother and a physically abusive mother. In 1914, Schmitz enlisted in the German Army and fought on both fronts in the First World War. His older brother was killed in battle and Schmitz was severely wounded. He subsequently spent a total of three years in the hospital to undergo multiple operations.[108] In 1919 Schmitz, for reasons that are still unclear, decided to enter medical school.

[104] "War Crimes Board of Review No. 3," 15 March 1948, *Tuma Trial*.
[105] Benson, "Review and Recommendations," *Heerde Trial*, pp. 9–19
[106] Tannenbaum, *Medizingeschichte im Kontext*, 2016. p. 149.
[107] Ibid, pp. 132–161.
[108] Ibid, 135.

He studied at various universities, including Freiburg, Göttingen, and Berlin before passing his state-exams in Jena in 1924. Schmitz then stayed on in Jena as an assistant in the Tuberculosis ward. Schmitz continued to work in several hospitals throughout Germany, specializing in surgery and gynecology. His professional and financial success allowed him to open his own clinic in Gera in 1936.[109]

Between 1938 and 1944, Schmitz underwent several stints of psychiatric observation[110] which resulted in a variety of diagnoses, including "hypomania"[111] and "manic depression" (both manifestations of what is today referred to as "bipolar disorder"), as well as psychopathy. After surrendering his practice, Schmitz attempted to rebuild his profession by taking out a substantial loan to establish a new clinic, but later defaulted on the payments. In 1940, he attempted suicide and was once again committed to a psychiatric institution. Throughout this time, Schmitz had also been the subject of proceedings by the Jena Court of Eugenics. In 1942, after a failed appeal, the court revoked Schmitz' medical license and ordered that he be sterilized.[112] The leading psychologist on Schmitz' case, Dr. Gottfried Ewald,[113] pointed to Schmitz' erratic spending, fraudulent criminal activity, "restlessness", and moral transgressions (multiple failed marriages and affairs) as evidence of manic depression.[114] Still, the Court's ruling was questionable. The final paragraph stated,

> The concerned [Schmitz] may not show a classic picture of maniacal-depressive insanity; that his disease does pertain to this circle of forms, the senate does not doubt. The whole value of the person of the concerned as he is also manifested by his failure in phases in life and his serious lack of character puts him in the meaning of laws at one level with maniacal-depressive ones. Considering eugenic reasons it must be prevented that he should procreate

[109] Ibid, 135–136.
[110] According to Schmitz, he was apparently suspected by an unknown individual to have "manic depressive insanity", which was a retaliatory response to his recent distancing from the Nazi Party. However, medical records from Göttingen suggest that Schmitz was admitted on the request of his divorced wife. Ibid, 136–137; n. 599.
[111] Hypomania: "Symptoms and severity do not reach the severity of a manic episode. Typical is a persistently elevated mood with reduced need for sleep and increased libido." Ibid, p. 218.
[112] Ibid, p. 144. For more on sterilization theory under National Socialism, see: Richard F. Wetzell, *Inventing the Criminal: A History of German Criminology, 1880–1945* (Chapel Hill: University of North Carolina Press, 2000). p. 233–294.
[113] Gottfried Ewald (1907-1963) was professor of neurology and psychiatry at the University of Greifswald from 1933 and from 1934, he was the head of both the Göttingen University Psychiatric clinic and Göttingen-Rosdorf State Hospital. Despite Ewalds opposition to the T-4 program, he did advocate for the practice of forced sterilization. Tannenbaum, *Medizingeschichte im Kontex*, p. 134, n. 582.
[114] "Eugenics Court of Appeal at Jena—Decision," 11 February 1942, 3 pages, Defense Exhibit D-4/4a, *Heerde Trial*.

> more descendants: The law would lose its signification if personas [*sic*] of this kind would be admitted to propagation."[115]

Despite all attempts to overturn the decision, Schmitz was forcibly sterilized in Freiburg in 1943 and subsequently admitted to a psychiatric institute. Not a year later, however, Schmitz was reinstated as a practicing physician in the prisoner hospital at Flossenbürg concentration camp. He was apparently given the choice of indefinite institutionalization or treating concentration camp prisoners.[116]

Although Flossenbürg did not carry out the perverse pseudo-scientific experiment programs most commonly associated with the likes of Auschwitz or Dachau,[117] it did, however, actively participate in systematic prisoner executions and unnecessary medical procedures.[118] The prevailing method for on-site euthanasia was by phenol injection. A hospital orderly testified at the Flossenbürg parent trial that Schmitz personally administered up to twenty such injections per day.[119] About the 'euthanasia' program at Flossenbürg, Henry Friedlander writes that,

> ...Schmitz administered deadly injections himself---into the vein and not the heart, which took just a little longer. One time he was unable to hit the vein in the arm of a non-German inmate physician, who thereupon told him: '[P]oorly injected, dear colleague, but what you are doing is murder, while as a physician you are supposed to help humanity.'[120]

Interestingly, Friedlander's study "Physicians as Killers in Nazi Germany: Hadamar, Treblinka and Auschwitz" (2002) specifically focuses on three distinct killing centers within the Nazi genocidal program.[121] Flossenbürg was not, nor was it ever officially considered to be, an

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[115] Underlined text from original. "Eugenics Court of Appeals," Jena, 11 February 1942. Translation (from German), Defense Exhibit D-4A. *Heerde Trial*, Box 525, File 2. p. 2. p. 3.
[116] I. F. Bennett, "Psychiatric Examination of Dr. Heinrich Schmitz," 3 December 1947, 6 pages, Prosecution Exhibit, P-23. *Heerde Trial*, pp. 3–4.
[117] Among the cruel and unusual medical "studies" attributed to the concentration camps, Auschwitz is best known for Mengele's experiments on twins and pregnant women. See Ernst Klee, *Auschwitz, die NS-Medizin und ihre Opfer* (Frankfurt am Main: Fischer, 2015)
[118] Kurt Goltz testimony, *Heerde Trial*, pp. 29, 68.
[119] Goltz testimony, *Heerde Trial*, pp. 69, 72, 91-92.
[120] The procedure of injecting phenol is credited to Auschwitz physician, SS 1st Lt. Dr. Friedrich Entress, and was capable of killing up to one hundred individuals per day. See, Friedlander, Henry. "Physicians as Killers in Nazi Germany: Hadamar, Treblinka, and Auschwitz" in Nicosia, Francis R., and Jonathan Huener, eds. *Medicine and Medical Ethics in Nazi Germany: Origins, Practices, Legacies*. New York: Berghahn Books, 2002. p. 68.
[121] The Hadamar Euthanasia site (*Tötungsanstalt Hadamar*), located in the German district of Hessen, was the last of six fully institutionalized killing centers used in the T4 operation to euthanize disabled citizens on the Reich. Treblinka, located inside the Generalgouvernement region of occupied Poland, was the largest of three Operation Reinhard sites and established specifically to exterminate Jews and so-called Gypsies. Auschwitz, the largest killing center of all in terms of sheer numbers of deaths, was actually a hybrid site, consisting of both forced labor and extermination operations. Friedlander. "Physicians as Killers," 2002.

"extermination camp" (particularly on the level of Hadamar, Treblinka, or Auschwitz). Friedlander nevertheless singles out Schmitz and his actions at Flossenbürg, as an example of the exceptional barbarism applied to what was passed off in court as a necessary medical procedure.[122]

Schmitz did not only kill prisoners via injection, however. According to multiple witness testimonies, he also often utilized his position as an opportunity to explore his own medical limitations at the expense of his patients.[123] Belgian prisoner and Flossenbürg hospital clerk Jozef Ernest Troffaes wrote in a sworn statement,

> Dr. Schmitz, has killed more people than ten pilots could with airplanes. Two or three times a week Dr. Schmitz would operate all day. During the last five months that I was there he on these days would do between ten and fifteen operations. The first prisoners who were operated on had the best chance to live but at the end of the day when the doctor was fatigued the patients had practically no chance of living through the operations. The largest part of the operations were the amputation of arms or legs.[124]

Another witness reported that Schmitz would often hold what can only be considered as public exhibitions of his medical procedures, inviting several members of the camp's SS elites to observe the surgeries. The men would huddle around the operating table, smoking cigarettes and cracking jokes, and Schmitz rarely used gloves or even sanitized his instruments.[125] Various stomach operations, amputations, and castrations (without any anesthesia) were most common, though the majority of procedures were entirely unnecessary and often ended in agonizing death.[126]

It was these anecdotes, corroborated by multiple witnesses, that have helped to characterize Schmitz within the stereotypical "psychotic Nazi doctor" trope.[127] Yet the majority of deaths attributed to Schmitz are a direct result of his *inaction* during the height of a typhus epidemic in late 1944 and early 1945. One witness testified at the parent trial that Schmitz made no sincere attempt at establishing a quarantine for infected prisoners, as patients were never kept long enough

[122] Schmitz testified about his professional opinion on the justifications of euthanasia. See *Heerde Trial*, pp. 903–905; 926

[123] As many as six individual prosecution witnesses testified that Schmitz practiced dangerous and unnecessary operations on patients. Benson, "Review and Recommendations," *Heerde Trial*, p. 12.

[124] Troffaes statement, 30 April 1945, M1204, Roll 2. p. 4.

[125] Legeais testimony, M1204, *Becker trial*, pp. 495–496.

[126] Goltz testimony, *Heerde Trial*, pp. 35

[127] Jessica Tannenbaum notes that post-war characterizations of "the Nazi perpetrator", and camp doctors in particular, have often emphasized the concept of "split-personality"; that they lived dual lives as sadistic tormentors and psychopaths, but assumingly were good-natured family men when at home. In the case of Flossenbürg, Tannenbaum maintains that this characterization can only be held true to one particular individual (Heinrich Schmitz), and that one must keep in mind that most doctors were in fact highly trained and accomplished physicians prior to their deployment in the KL-system. Tannenbaum, *Medizingeschichte im Kontext*, p. 16.

to stop the spread.[128] Another witness testified at the Heerde trial that in spite of having a sufficient number of vaccines available, Schmitz refused to administer them to anyone but the hospital staff.[129] Out of an estimated 3,000 cases, fifty prisoners survived.[130] The bodies became so numerous that the crematory simply couldn't keep up. Mass pyres were erected to cope with the processing.[131] The typhus epidemic continued unabated until February 1945, when SS *Hauptsturmführer* Dr. Otto Adam[132] was instated as the new chief physician of the prisoner hospital. Adam immediately quarantined those suffering from typhus and introduced systematic care for them. The majority of the outbreak was under control within a month. In somewhat poetic fashion, Schmitz' time at Flossenbürg came to an end in March, after contracting typhus.
He was arrested by American authorities in a Weiden hospital on 28 April 1945.[133]

The striking juxtaposition between Schmitz' adverse personal history and the heinous crimes alleged against him underscores the complex dimensionality behind each individual defendant. On one hand, Schmitz indeed appears to epitomize the very caricature of the homicidal Nazi psychopath. On the other hand, there were legitimate concerns, diagnosed early on by medical professionals, that Schmitz was psychologically unstable, if not clinically psychotic. It was this very debate that consumed the court's attention for a significant portion of the Heerde trial. Multiple expert witnesses were brought in by the defense to provide a diagnosis of Schmitz' mental state—both during his time at Flossenbürg and as he sat in the courtroom. This was, however, an impossible and ultimately futile exercise.

Manic depression, according to the expert witnesses, is neither clearly exhibited through behavior, nor always present in the individual; it is therefore difficult for even a specialist to recognize the condition.[134] As defense witness Dr. Johannes Fischer[135] explained,

[128] Polak testimony, M1204, *Becker Trial,* p. 611–612.
[129] Legeais testimony, *Heerde trial,* p. 144.
[130] Ibid, p. 145.
[131] Schrade. *Elf Jahre*. p. 277.
[132] Dr. Otto Adam (1903-1967) was arrested by US authorities in May 1945 and subsequently extradited to the French zone in August 1947. Adam testified on behalf of Heinrich Schmitz and Friedrich Becker in the Heerde trial, but as a defense witness, questions about his own actions at Flossenbürg were minimal. In January 1948, he was released and returned to work as a private medical doctor in Germany. For a comprehensive biography and analysis of his time at Flossenbürg, see Tannenbaum, *Medizingeschichte im Kontext,* pp. 36–46.
[133] Schmitz, *Tuma Trial,* p. 903.
[134] Johannes Fischer testimony, *Heerde trial,* p. 693.
[135] Dr. Johannes Fischer (not to be confused with SS Dr. Hermann Fischer at Flossenbürg) was a German civilian internee physician, contracted to the US Army neurological psychiatric department at Dachau. Although admitting

> Generally speaking, the expression of manic-depressive disease is a mistake because it is not an actual disease, it is just a change in moods. In a more advanced stage of the disease one could rank it with a mental disorder [...]
>
> The manic depressive disease is not a sickness whereby the brain and the character is suffering, but a sickness of the will and of the feeling, and through this sickness of the will the whole action of the person is suffering on account of the disease. The feeling of a person breaks through to such an extent that it cannot be stopped and that it could be led to the most foolish acts.[136]

Given his lucid state and consistent stable demeanor, none of the physicians who testified could confidently proclaim that Schmitz was suffering from manic depression at the time of the trial.

According to the legal application, Schmitz must have then been "insane" while at Flossenbürg. Though each of the witness physicians maintained a positive reverence for Dr. Ewald, and expressed confidence in his diagnosis in the Eugenics Court Report, none were prepared to make a determination on the mental state of Schmitz at the time of the alleged crimes. What some were prepared to state, however, is that detectable episodes can periodically manifest and are often triggered by an antagonistic environment. Defense witness and psychiatric physician, Dr. Karl Knab, for example, testified that it is entirely conceivable that the unmitigated power over others, as provided to Schmitz at Flossenbürg, "released in him a certain maniacal action" which materialized in his treatment of prisoners.[137] Knab, a victim of German anti-Jewish law himself,[138] further added that the "body obedience in the Third Reich and the totalitarian principle" of the state facilitated the mental destruction of people suffering from psychological depressive tendencies.[139] In this sense, Schmitz can be considered a victim of Nazism in two distinct manners. His sterilization was objectively a consequence of the eugenic approach to medicine in the Third Reich and a direct result of building the Nazi racial state. Not only did the operation dismantle the perceived threat that Schmitz posed to the *Volksgemeinschaft*, but in his appointment to Flossenbürg, his supposed insanity was indeed weaponized against the state's designated enemies. His worst inclinations were not just enabled but empowered by an authority that acutely recognized his apparent mental deficiencies. The conditions of Schmitz' appointment to Flossenbürg was

to having been a former member of the Waffen SS, Fischer was not under investigation for war crimes. He was never stationed at Flossenbürg concentration camp. Ibid, pp. 689-690.

[136] Ibid, p. 694, 699.

[137] Karl Knab testimony, *Heerde trial*, p. 573.

[138] Knab testified to the court that his wife was Jewish and, by Nazi law, so was his son. As a "race-mixer" he was expelled from his practice as a physician.

[139] Knab, *Heerde trial*, p. 573.

explicitly restricted to the prisoner population and under strict oversight of the administration. The SS did not trust Schmitz with their own. But was Schmitz ever actually "crazy"?

Even the early examinations were inconclusive in determining whether or not Schmitz was insane; at best, he expressed distinguishing tendencies.[140] Yet, another mental condition that was floated by physicians early on was psychopathy. In 1939, as part of the investigation by the Eugenics Court, Schmitz was examined by a Dr. Berger from the University of Jena. After interviewing forty-eight close acquaintances of Schmitz (the only physician to explore his personal relationships), Berger could find no signs of manic depression, but concluded that Schmitz was a psychopath.[141] According to Merriam-Webster, a psychopath is defined as,

> a mentally unstable person; a person having an egocentric and antisocial personality marked by a lack of remorse for one's actions, an absence of empathy for others, and often criminal tendencies.[142]

Of course, this explanation is a simplistic baseline definition, but anything further is fairly irrelevant to the current analysis. Psychopathy has been, and continues to be, perceived as a corrupted, exploitational human quality. The stereotypical psychopath is intelligent and charming, but simultaneously manipulative who lacks the ability to vicariously consider the feelings or attitudes of anyone else. What the psychopath is not, according to popular perception, is a victim. If Schmitz were a psychopath, he was still culpable for his crimes.

Schmitz' fate, then, hinged on whether or not his crimes at Flossenbürg were the manifestations of an inferior-minded, emotionally tortured manic depressive… or a hyper-intelligent, deceitful, and amoral psychopath. Captain Bennett concurred with Dr. Berger's original conclusion.[143] The court ultimately determined with at least a two-thirds majority that Schmitz was sane at the time of his alleged crimes at Flossenbürg and as he sat in the courtroom.[144] Convicted of his heinous crimes, he was sentenced to death.

[140] As many as seven psychiatrists observed Schmitz between 1938 and 1941, which produced varied conclusions. I.F. Bennett testimony, *Heerde Trial*, p. 782. A second psychiatrist, included in the Eugenics Court of Appeals report, was unable to diagnose Schmitz with manic depression, or any other hereditary mental illness, but nevertheless approved of the decision for sterilization. "Eugenics Court of Appeals," *Heerde Trial*.
[141] I. F. Bennett, "Psychiatric Examination of Dr. Heinrich Schmitz, 3 December 1947," Prosecution Exhibit, P-23. *Heerde Trial*, p. 3.
[142] "psychopath" definition, https://www.merriam-webster.com/dictionary/psychopath, Accessed November 2019.
[143] I.F. Bennett testimony, *Heerde trial*, p. 782.
[144] *Heerde trial*, p. 928.

The cases of Alfons Roesch and Heinrich Schmitz provide an entry point into critically analyzing the uses and abuses of the "insanity" plea, as it relates to the war crimes trials at Dachau. Keeping in mind that there were two independent thresholds under which a defendant could justifiably claim insanity, the objective legal analysis is relatively straightforward. As demonstrated by both cases in question, the respective courts maintained a strict adherence to these guidelines. And according to the courts' decisions, the defense failed to present convincing evidence that either Roesch or Schmitz were clinically insane at any point in the relevant periods. The culpability for said crimes remained with the defendants and thus, the judgements were deemed justified. These cases demonstrate, however, that there is more nuance to explore when it comes to pleading insanity at the Dachau Trials. Identifying some of the parallels between how Roesch and Schmitz were characterized may help to demonstrate this.

Superficially, the psychiatric characterizations of Roesch and Schmitz can be contrasted as direct oppositions to one another. In the courtroom, Roesch apparently carried himself as if he had the mental capacity of a child and as a result, all attention was paid to whether he understood his immediate situation—if not, he could not justifiably be tried. Schmitz, by comparison, consistently presented himself in court with a rational composure and an abnormally precise memory. In spite of these dramatically contrasting personas, both Roesch and Schmitz were also diagnosed, by physicians at Dachau, as potential psychopaths.[145] The doctors pointed to the defendants' erratic personal and professional lives, as well as their criminal records, as evidence.[146] How is it that both manic depression and chronic schizophrenia each have the potential to be confused for psychopathy? In the context of the war crimes trials, and based on the expert witness responses from the Dachau detachment physicians, it is a matter of culpability. Particularly in the case of Roesch, he was either severely stunted mentally or he was faking it entirely. According to Dr. Kaess, the condition of pathological psychopathy can be described as "people who virtually exist

[145] Roesch was diagnosed as being psychopathic by Dr. Albert Goyrgy. *Tuma trial,* p. 41. Schmitz was believed to be psychopathic by Dr. I.F. Bennett. *Heerde trial,* p. 782.

[146] Gyorgy noted that Roesch was not a good student as a child, he could not keep a job as an adult, and he was a former convict. Gyorgy, *Tuma Trial,* p. 43. Bennett, on the other hand, systematically rationalized each of Schmitz' behavioral transgressions (including his attempted suicide), as they were listed in the Eugenics Court report, and concluded that they were not the actions of a manic depressive, but rather "characteristic of psychopathy". Bennet, *Heerde Trial,* pp. 782–785.

by lying."[147] Roesch's "childishly naive" performance as an "imbecile" was apparently unconvincing to multiple physicians.[148]

The belief that Schmitz was feigning insanity was less straightforward. No one denied the intelligent aptitude of Schmitz and all agreed that he was perfectly sane, sitting in the courtroom. The question, rather, was whether he had been in the middle of a manic episode while at Flossenbürg. No professional was willing to make that determination, definitively. However, Dr. Bennett was convinced that Schmitz showed signs of psychopathy. Again, a psychopath is not absolved from responsibility, when and if they commit a crime. The possibility that both Roesch and Schmitz were indeed psychopaths simultaneously allowed the physicians to acknowledge the presence of mental "abnormality," while conveniently preserving a sense of criminal culpability, on account of the alleged perpetrator. The courts were able to adopt the conclusions and try both men.

Does this mean that the MGC potentially convicted innocent people? Considering the evidence presented at both trials, there is no justifiable reason to conclude that either Schmitz or Roesch were wrongly convicted. In fact, when one considers the arbitrary authority the courts possessed when ruling over the issue of double jeopardy—as both Roesch and Schmitz were involved in that debate as well—it becomes relatively clear that, when it came to insanity, these same courts provided ample time to contemplate whether these defendants were indeed legally and mentally capable of standing trial. Regardless of what psychological conditions Roesch and Schmitz may or may not have had, the ruling ultimately came down to the procedural thresholds.

5.3 Women and the Military Government Courts at Dachau

In her 2010 article, "Portraits of Women at Nuremberg", Diane Marie Amman highlights several women from the US and beyond who participated in the Nuremberg War Crimes Tribunals in a multitude of capacities: Katherine Fite provided essential contributions to the drafting of the London Charter; Janet Flanner reported on the trials for the *New Yorker*; Captain Virginia Gill worked as executive to the prosecution; Elsie L. Douglas was Justice Robert Jackson's personal secretary; twenty-three year-old Edith Simon served as translator at pre-trial interviews with Hermann Göring. In the twelve subsequent military tribunals, Sadie Belle Arbuthnot served on the prosecution team during the third NMT "Justice" case; Belle Mayer Zeck and Mary M. Kaufman

[147] Kaess testimony, *Tuma Trial*, p. 25.
[148] See Kaess, *Tuma trial*, pp. 24. and Gyorgy, *Tuma Trial*, p. 34.

both worked on the sixth NMT "I.G. Farben" case; Elisabeth Gombel was lead defense counsel for Ernst Wilhelm Bohle in the eleventh NMT "Ministries" case; and Cecelia Goetz served as one of three major associate counsel in the tenth NMT "Krupp Industrialists'" case, gaining notoriety as the only woman to give an opening statement at Nuremberg.[149] Among these incredibly accomplished women, Amann also acknowledged Irma von Nunes, stating,

> News accounts placed another woman lawyer, besides Fite, at Nuremberg early on. Irma von Nunes had been admitted to the Georgia bar in the 1920s while still a teenager, and during World War II became a captain in the U.S. Women's Army Corps. Reports describe her, <u>without further elaboration</u>, as the first woman involved in the war crimes trials.[150]

Unfortunately, however, Amann's acknowledgement is only partly accurate. Nunes did pass the Georgia state bar at eighteen years-old and did earn the rank of captain in the WAC in 1944,[151] but she was not the first woman involved in the war crimes trials and she did not work with Katherine Fite at Nuremberg.[152] Captain Nunes, rather, was celebrated in numerous press reports as the first female lead prosecutor in a war crimes trial… at Dachau. The case was 000-50-46-4 (*US v Max Fischer et. al*, 6-19 November 1947); part of the Flossenbürg sub-trial series.

Despite this being little more than a simple clerical mistake, it is nevertheless exemplary of the extra labor often involved in uncovering women in history.[153] Contrary to the fact that countless women were working in both international law and the US military in the 1940s, the *public* spheres of these environments were still heavily male dominated and continued to prevent most female professionals from participating in spaces that actually awarded them recognition.[154]

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[149] Amann, "Portraits of Women at Nuremberg," pp. 2–6.
[150] Underline added. Amann, "Portraits of Women," p. 3.
[151] *The Atlanta Constitution* (Georgia), Friday, 15 December 1944, p. 14.
[152] Katherine B Fite was the only woman on Justice Robert Jackson's staff in Summer 1945, during the developmental stages of what would become the IMT; thus earning her the 'title' of "first involved in the war crimes trials." During the IMT, Harriett Zetterberg (Margolies) and Catherine Falvey, worked as junior attorneys on Jacksons prosecutorial staff. John Q. Barrett, "Katherine B. Fite: The Leading Female Lawyer at London & Nuremberg, 1945," *Studies in Transnational Legal Policy* 42 (2010), p. 9–30. Here, p. 14.
None of the three women ever addressed the IMT. See Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Penguin Books, 1995) p. 212.
[153] Amann's reference to Nunes was attributed to Karen Morello, who in 1986 wrote, "The first woman prosecutor to participate in the German war crimes trials was WAC captain Irma Von Nunes, a skilled attorney from Atlanta." Morello makes no mention of Fite or Nuremberg in relation to Nunes. Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America, 1638 to the Present* (Boston: Beacon Press, 1988) p. 184, n.*
[154] In a contemporaneous radio broadcast, Howard Smith noted that approximately half of the six hundred American staffers at the IMT were women. Not only were they employed as secretaries, but many functioned as researchers, interpreters, and translators. Persico, *Infamy on Trial*, p. 212

Only the very exceptional, as referenced above, have earned individual acknowledgement. In comparison to the growing scholarship on the women of Nuremberg, the women of the Dachau Trials continue to remain nameless. In extraordinary fashion, Nunes' story, via the Flossenbürg trials, bridges the notions of exceptionalism and invisibility.

Of course, the concept of the exceptional woman also existed for perpetrators. Only three women were prosecuted by the MGC in the so-called mass-atrocities cases.[155] Irmgard Huber was the head nurse at the Hadamar 'euthanasia' center, where patients were systematically murdered under the auspices of the T-4 program. As chief physician for multiple subcamps in Mühldorf (itself, a subcamp of Dachau), Erika Flocken sent hundreds of prisoners to their deaths on so-called "invalid transports." And Ilse Koch, the wife of a former Buchenwald commandant, allegedly utilized her sexuality and played on morbid fascinations to torture prisoners, many of whom apparently died because of her antics. Each of these three women were prosecuted for mass murder unspeakable offences, but in contrast to their supposed exceptionalism, thousands of "ordinary" female perpetrators avoided punishment by the MGC.[156] In relation to Flossenbürg, an entire case—involving a women's subcamp and the arrest of no less than a dozen female guards and supervisors—was investigated and prepared for prosecution. The case, however, was never brought to trial, thus preventing justice for the 550 women who were forced into slave labor.

Despite the apparent lack of accountability for ordinary female perpetrators, the Flossenbürg trials did bring women victims in to testify against their persecutors; itself, a rarity.[157] Case 000-50-46-1 (*US v Wilhelm Loh et. al*, 5-12 November 1947) convicted Wilhelm Loh,

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At its peak, during the Second World War, the WAC reached 100,000 members. By the end of the war, 8,316 WACs were still deployed to the European Theater. Mattie E Treadwell, *The Women's Army Corps* (Washington, DC: Office of the Chief of Military History, US Government Printing Office, 1954) pp. xi, 380.

[155] That number is compared to 1,027 males accused in mass-atrocities cases. Yavnai, "Military Justice," p. 201. The total number of female defendants at the Dachau Trials was extremely low. Of the 1,672 individuals prosecuted by the MGC in Germany between 1945 and 1947 (including Dachau, Ahrweiler, Augsburg, Darmstadt, Duren, Freising, Heidelberg, Ludwigsburg, Munich, Wiesbaden, and Salzburg, Austria) only 18 (or about 1%) were women. These 18 women were prosecuted in ten separate trials. The remaining fifteen female defendants were prosecuted for crimes committed against American POWs. Female defendants also appeared before courts in Darmstadt, Munich, Wiesbaden, and Salzburg. Nick Warmuth, "A Social-Statistical Approach to the Dachau Trials." (unpublished research paper) 2018, 20 pages, Central European University, p. 11.

[156] The term 'ordinary women,' in the context of genocide and persecution, can be attributed to Wendy Lower, whose study on rank-and-file German women in the eastern German occupied territories reveals instances of broad support and often zealous participation in the Nazi extermination program. Wendy Lower, *Hitler's Furies: German Women in the Nazi Killing Fields*, (Boston, MA: Houghton Mifflin Harcourt, 2013)

[157] In his study on the Mauthausen Trial, Tomaz Jardim critically notes that chief prosecutor William Denson had neither charged a female perpetrator nor called on a single female witness to testify in the parent trial, thus, preventing the more than 4,000 female prisoners and dozens of female guards from their respective due justice. Jardim, *Mauthausen Trial*, p. 104.

commandant of the Hainichen women's subcamp, for allegedly beating a female prisoner to death. The trial is one of the very few such instances in the American war crimes trial program where female victims were given the opportunity to not only participate in the justice system, but establish a legal record of an all-women's camp. Wilhelm Loh, a man, was the only individual to be held accountable by the MGC for the crimes committed at Hainichen subcamp, plainly demonstrating the lost opportunities to prosecute and document war crimes committed against women, by women.

5.3.1 Legal-Professional Women

"A Woman's Army as Well as a Man's"

In the February 1948 edition of *Look* magazine, WAC Captain Irma von Nunes was celebrated as the first female prosecutor at the Dachau Trials. The immensely popular bi-weekly periodical promoted Nunes as bucking the gender norms of 1940's America,

> In a role ordinarily associated only with men, she [Nunes] has been pointing the legal finger at suspected Nazi war criminals and other unsavory characters. And her argument of cases has little room for improvement, if any, by her male colleagues.
>
> A legal career of unusual distinction serves Capt. Nunes as background. In her native Atlanta, Ga., she was admitted to the bar when she was only 19 and became the youngest woman attorney in America. She won her first case and continued practicing until her father died. Then she took over the post he held in the Atlanta Law School. She joined the WAC in 1942. Ever since then, she has been showing it's a woman's Army and well as a man's.[158]

In spite of such a storied life, Nunes has since become little more than a footnote in the field of women's history; an obligatory acknowledgment in the biographies of her more famous female contemporaries.

Irma von Nunes can be seen as the stereotypical model for women's emancipation in early twentieth century America. Raised in an upper middle-class family,[159] Nunes shunned even the progressive choice of going to college, choosing instead to shadow her father before taking the bar exam without ever having stepped in a university classroom. Her first case was a divorce suit—which she won—and not long after, earned the title of youngest lawyer to plead a case before the Georgia State Supreme Court. Not only did she win that case too, but it was the first time a woman

[158] *Look Magazine*, 3 February 1948, p. 17, Library of Congress (hereafter, LOC), 3454—Look, Vol 12, Jan—Dec 1948, Reel 11.

[159] Her father owned his own law firm. "Young Portia Plays a Lone Hand in Life," *Canton Daily News* (OH), Sunday, 17 February 1929, p. 20.

had ever appeared before the institution.[160] Nepotism aside, she later filled the position of law professor formerly held by an older, white male. Between 1928 and 1930, Nunes' story was reported in local newspapers from New York to Hawaii. One column-long article wrote that Nunes was only fifteen years old when she made three very important decisions in her life: she would become a lawyer, she would not "keep house", and she was not going to have a husband.[161] Another paper reported that "Miss Von Nunes finds divorce cases most interesting. She believes that people are too hasty in marrying and that they regret it soon afterward."[162] And a third quoted Nunes proclaiming, "I shall never marry… though I have no complaint against men. In fact, they are easier to work with than women."[163] Despite what appears to have been positively championing female empowerment, Nunes was paraded about the broadsheets as impersonating a man, or at least striving to live as one.

When the US entered World War II, Nunes continued to follow the 'boys'. At 33 years old, she was apparently among the very first enlistments to the newly established Women's Army Corps.[164] The newspapers would acknowledge her 'grit' once again. The *Atlanta Constitution* reported in 1942 that, as all five of her brothers were already in the Army, Irma's enlistment had "upheld a family saying, 'A Nunes can't be drafted.'"[165] Her qualifications were clearly met with strong approval and she was fast-tracked through the officer training program.[166] In 1944, Nunes was promoted to Lieutenant and assigned to Fort Oglethorpe, Georgia to train new WAC officers. By the end of the year, Nunes was a Captain and the assistant director of the entire WAC Training Center.[167]

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[160] "Decatur Boasts Youngest Woman Attorney in US," *The Atlanta Constitution* (GA), Thursday 3 January 1929, p. 11.
[161] "Girl Youngest Lawyer," *Dixon Evening Telegraph* (IL), Wednesday, 12 September 1928, p. 5. See also, "Young Portia Plays a Lone Hand in Life," *Canton Daily News*, p. 20.
[162] "Decatur Boasts Youngest Woman Attorney in US," *The Atlanta Constitution*, p. 11.
[163] "Nation's Youngest Portia Never Attended Law School, Won't Marry," *Salt Lake Telegram*, Wednesday, 13 February 1929, p. 9.
[164] As early as the turn of the twentieth century, the US military had seriously considered an all-women's corp. Their essential role as battlefield nurses increased with every new war, the Army recognized that it was time they were supported and protected as part of the US armed forces. Debates over how, and to what degree, to implement a women's corps continued throughout the first half of the 20th century, but with the Japanese bombing of Pearl Harbor on 7 December 1941, the Women's Army Auxiliary Corp (WAAC) was fast-tracked into existence. By Christmas, the bill was sent to Congress who passed it on New Year's Eve. The WAAC bill was officially written into law in May 1942. Treadwell, *The Women's Army Corps*, p. 24.
[165] "Atlanta Law Teacher is WAAC Auxiliary," *The Atlanta Constitution*, Sunday, 6 December 1942, p. 21.
[166] "WAAC Auxiliaries to Attend OCS," *The Atlanta Constitution*, Wednesday, 20 January 1943, p. 18. See also "Three Atlanta WAACs Training in Iowa," *The Atlanta Constitution*, Tuesday 16 February 1943, p. 12.
[167] "Promoted," *The Atlanta Constitution*, Friday, 15 December 1944, p. 14.

With the end of the war, the Army's transition from combat to courtroom was swift.[168] Nunes left for Germany in November 1946 to assist in preparing cases for military government courts at Dachau.[169] On 26 August 1947, the *New York Times*, one of several periodicals that covered the story, reported that Nunes was "the first woman prosecutor to participate in a Dachau trial under the auspices of the War Crimes Commission [and that she] conducted her first examination of a witness today."[170] Astoundingly, the trial was none other than case number 6-100, *US v Otto Skorzeny et al.* (18 August to 9 September 1947). One of the few high-profile cases to come out of Dachau, it was a pivotal point in Nunes' prosecutorial future in Germany.

The prosecution for the Skorzeny case was led by Lt. Colonel Abraham Rosenfeld. Rosenfeld had already played a prominent role throughout the Dachau Trial series. As Law Member (the only justice required to possess a law degree), Rosenfeld was a part of the presiding court in the Mauthausen Trial (29 March — 13 May 1946) and the so-called Malmédy Massacre Trial (16 May — 16 July 1946). Rosenfeld consequently found himself at the center of the contention for allegedly practicing partiality for the prosecution. The allegations were tinged with antisemitism, as the defense counsel often complained in private about Rosenfeld's Jewish bias.[171] A year later, Rosenfeld appointed Captain Nunes to assist him in the Skorzeny case. Otto Skorzeny, so-called by Rosenfeld the "most dangerous man in Europe," was perceived to be destined for justice. The charges brought against him and his associates, however, were bafflingly weak; all ten defendants were ultimately acquitted on all charges. Failing to convict Skorzeny was an embarrassing defeat for the MGC.[172]

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[168] The first US military commission war crimes trial took place on 7 April 1945. See E. M. Brannon, "Review of proceedings of Military Commission in the case of United States v. Haupmann (Captain) Curt Bruns" (hereafter, *Bruns Trial*), 20 April 1945,7 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-006-0056.pdf. Accessed March 2020.

[169] "US Woman Lawyer Enters Nazi's Trial," *New York Times*, Tuesday, 26 August 1947, p. 5.

[170] "US Woman Lawyer," *New York Times*, p. 5.
The date of the Skorzeny trial occurred three months before Cecelia Goetz would give her opening statement at Nuremberg, earning Nunes the title of "first woman to prosecute a war crimes case in Germany."

[171] James J. Weingartner, *A Peculiar Crusade: Willis M. Everett and the Malmédy Massacre* (New York: NYU Press, 2000) pp. 53–54, 88, 193.

[172] For more on the trial of Otto Skorzeny, see United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, Volume. IX* (London: HMSO, 1949) pp. 90-93; John Mendelsohn, "Records of United States Army War Crimes Trials, United States of America v. Otto Skorzeny et. al, July 13, 1945–December 13, 1948," in *Registers of the Records of the Proceedings of the U.S. Army General Courts-Martial 1809-1890*, Washington DC: National Archives and Records Service, 1982); James J. Weingartner, "Otto Skorzeny and the Laws of War," *The Journal of Military History*, vol. 55, no. 2 (1991), pp. 207–224; Maximilian Koessler, "International Law on Use of Enemy Uniforms As a Stratagem and the Acquittal in the Skorzeny Case," Missouri Law Review, vol. 24, no. 1 (1959), pp. 1–28.

In November of 1947, Rosenfeld was assigned to case 000-50-46-4, *US v Fischer et al*.; the thirteenth case in the Flossenbürg sub-trial series. Two *Waffen*-SS guards and three prisoner-functionaries were jointly charged with the now-standardized 'pursuance of a common design to commit war crimes' at the Flossenbürg *Hauptlager*.[173] Despite the humiliating loss at the Skorzeny trial, Nunes must have made an impression on Rosenfeld because she was brought back to assist him in the Fischer trial. From the very first witness, however, Nunes led the case as chief prosecutor.[174] After a week and a half of deliberation, all five defendants were found guilty and received sentences ranging from two years to life in prison.[175] The Dachau Trials came to an abrupt end on 30 December 1947,[176] making the Fischer case one of the very last of the Dachau Trial series. Captain Nunes would not have another opportunity to participate in trial deliberation.

It is unknown why Rosenfeld ceded control of the case to his assistant. He must have had confidence in her professional capabilities, which did not interfere with the fact that she was a woman. It did gain the attention of the media, however. The only known image of Nunes at Dachau is a snapshot—taken by a Signal Corps photographer—of her questioning a witness during the Fischer trial. The accompanying caption reads,

> WAC Capt. Irma Nunes … is shown here as she strikes a pose while acting as chief prosecutor of five war criminal suspects at Dachau Military court. It is the first time a woman has ever been assigned to such a position, although she aided in the recent prosecution of the famous Skorzeny case. The defendants are all charged with violation of the laws and usages of war and mistreatment of political inmates under their jurisdiction at

[173] Roach, "Review and Recommendations," *Fischer Trial*.

[174] In his first address to the court, Rosenfeld forwent an opening statement and jumped directly into witness testimony, adding, "If the court please, the examination will be conducted by Captain Nunes, who is the assistant prosecutor." He is not directly heard from in the transcript again until the final day of sentencing. Abraham Rosenfeld, *Fischer Trial*, p. 13.

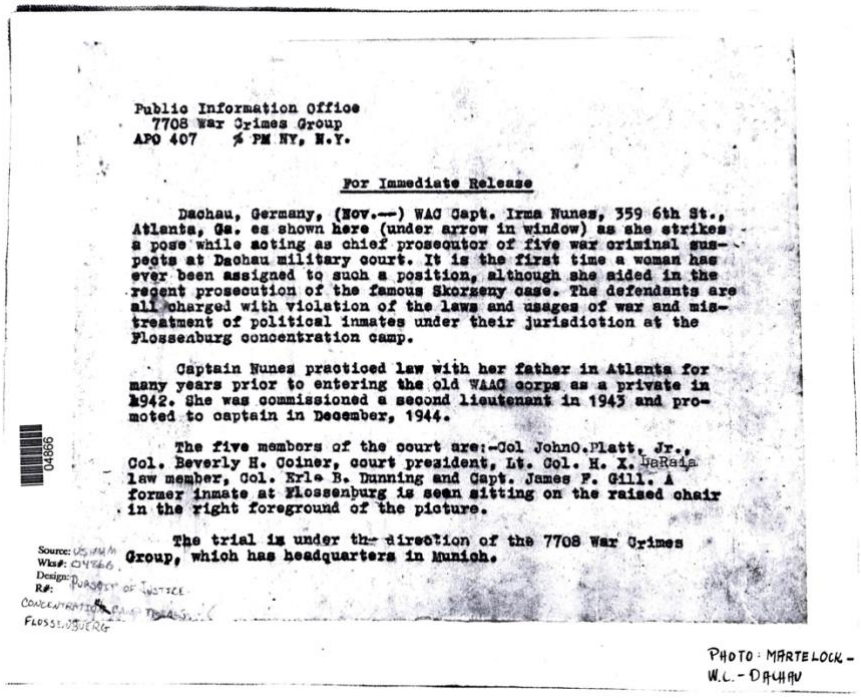
[175] Max Fischer was a *Waffen*-SS Tech Sergeant and served as guard, assistant block leader, and detail leader in the quarry at Flossenbürg *Hauptlager* from 20 Apr 1940 to 1943. He was sentenced to life in prison. Philip Mueller was a "criminal" inmate at Flossenbürg and served as a capo in the stone quarry and was block eldest from 3 May 1938 to 20 July 1944. He was sentenced to 2 years in prison. Adolf Seubert was a sergeant in the *Waffen*-SS and served as a guard as well as a stonemason master in Hall 3 of the Kommando 2004 labor detail from 1942 to 1945. He was sentenced to 17 years in prison. Johann Fuchs was an Austrian "criminal" inmate. He served as a capo and room orderly at Flossenbürg from 1942 to the evacuation. He was sentenced to life in prison. Paul Toermer was a political prisoner and held multiple positions as a room orderly, a male nurse and an oberkapo in the civilian hall of Kommando 2004 at Flossenbürg. He was sentenced to 15 years in prison. Roach, "Review and Recommendations," *Fischer Trial*.

[176] See, Harold E Kuhn and Joseph L Haefele, "Review and Recommendations," *United States v Kurt Andrae et al*.—Case No. 000-50-37 (hereafter *Andrae Trial*), 15, April 1948, 86 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-050-0037.pdf. Accessed May 2021.

the Flossenbürg concentration camp."[177]

14. "Chief Prosecutor Captain Irma Nunes (standing on the right) questions a survivor during one of the Flossenbuerg [*sic*] trials held in front of an American Military Tribunal in Dachau." Martelock, "Chief Prosecutor Captain Irma Nunes," 1947, USHMM—courtesy of Janet Haskins, Photograph Number: 04866.

[177] Martelock, "Chief Prosecutor Captain Irma Nunes," (text on reverse) 1947, USHMM—courtesy of Janet Haskins, Photograph Number: 04866. See Illustrations 14 and 15.



Public Information Office
7708 War Crimes Group
APO 407 % PM NY, N.Y.

For Immediate Release

Dachau, Germany, (Nov.--) WAC Capt. Irma Nunes, 359 6th St., Atlanta, Ga. es shown here (under arrow in window) as she strikes a pose while acting as chief prosecutor of five war criminal suspects at Dachau military court. It is the first time a woman has ever been assigned to such a position, although she aided in the recent prosecution of the famous Skorzeny case. The defendants are all charged with violation of the laws and usages of war and mistreatment of political inmates under their jurisdiction at the Flossenburg concentration camp.

Captain Nunes practiced law with her father in Atlanta for many years prior to entering the old WAAC corps as a private in 1942. She was commissioned a second lieutenant in 1943 and promoted to captain in December, 1944.

The five members of the court are:-Col John O. Platt, Jr., Col. Beverly H. Coiner, court president, Lt. Col. H. K. LaRaia law member, Col. Erle B. Dunning and Capt. James F. Gill. A former inmate at Flossenburg is seen sitting on the raised chair in the right foreground of the picture.

The trial is under the direction of the 7708 War Crimes Group, which has headquarters in Munich.

04866

PHOTO: MARTELOCK - W.C. - DACHAU

15. Martelock, "Chief Prosecutor Captain Irma Nunes" (Caption on Verso), 1947, USHMM—courtesy of Janet Haskins, Photograph Number: 04866.

Yet again, the rhetorical implications diametrically contradict the progress for which Nunes is being acknowledged. She is "act[ing]"… or *playing* the role of chief prosecutor. At its core, the article presents Nunes as an exception to the contemporary gender norms; impersonating a lawyer and an Army officer, or the gendered expectations of what these professional identities *ought* to be. With thousands of men returning to the domestic workforce, the post-war years in America are defined as a point of significant resurgence in hostility toward female emancipation, vis a vis, unmarried professional women.[178]

Moving past the sexism in the caption, it was this very event that was reproduced and reported on in the press, only to be condensed and diluted to the point of historical misrepresentation in the secondary literature, decades later. The December 2, 1947 issue of *The Stars and Stripes* (the Army's own internal newspaper) printed a cropped version of the same photo, which was accompanied by the headline, "WAC 'Portia' Accuses Nazis."[179] The report

[178] Lillian Faderman, *To Believe in Women: What Lesbians Have Done for America—A History* (Boston: Houghton Mifflin, 2000) p. 313–315.
[179] "WAC 'Portia' Accuses Nazis," *The Stars and Stripes* (Europe, Mediterranean, and North Africa Editions), Tuesday, 2 December 1947, p. 4.

introduces Nunes as "the first woman ever to act as chief prosecutor on a war crimes case."[180] Despite the brief three-inch column referencing Flossenbürg, only the accolade of "first woman to-" has since endured. Nunes was indeed exceptional and as such, she was gradually transitioned out of the obscure subcamp cases of the Dachau trials and superficially placed among the company of the women of Nuremberg.

The Fading Legacy of Irma von Nunes

In 1986, Nunes was referenced as a footnote in Karen Morello's *The Invisible Bar: The Woman Lawyer in America, 1638 to the Present*.[181] The corresponding text is actually a brief profile of Cecelia Goetz. Goetz was a graduate from NYU Law and in 1947, was working as a federal bankruptcy judge when she applied for a position as a war crimes prosecutor for the upcoming Subsequent Nuremberg Trials. Her application was apparently not taken seriously and was told she was "much too attractive" for the position.[182] Goetz was only brought on personally by chief prosecutor Telford Taylor, after a direct appeal to him. In a corresponding footnote, Morello notes,

> The first woman prosecutor to participate in the German war crimes trials was WAC captain Irma von Nunes, a skilled attorney from Atlanta. In 1931 von Nunes was interviewed by an Atlanta newspaper which reported, "Little Miss von Nunes wears her hair cut like a boy's, affects an almost masculine garb and declares that marriage, like jail, is a good thing, but that she prefers to see other people in both."[183]

This presents a couple of issues to unpack. First, the text to which Nunes is footnoted is in reference to Goetz' time at Nuremberg. With no mention of the Dachau Trials, it is only logical that the reader would place Nunes at Nuremberg as well. The second part of the footnote is even more problematic. The passage is premised, once again, on Nunes' comprehensive refusal to physically conform to the popular expectations of women in 1940s America. And, whether intentional or not, Morello presents this in stark juxtaposition against the "much too attractive" Cecelia Goetz.

These aspects directly engage the issue of power and gender in an environment compounded by themes of (hyper)masculinity (i.e. International and Military criminal law, where the primary elements of deliberation are centered around warfare and extreme violence). Goetz is characterized as a competent and relevant legal mind, but is temporarily impeded by her femininity, only to be rescued by a male superior (Taylor literally had to sign a "waiver of

[180] Ibid.
[181] Morello, *The Invisible Bar*, p. 184.
[182] Ibid.
[183] Ibid.

disability" on account of Goetz' gender) who, according to Goetz herself, "did not share such antifeminist views."[184] Nunes, on the other hand, is passively acknowledged merely for her "first place" role, which is then implied as being dependent on her masculinity, possibly even suggestive of homosexual tendencies. Providing no more context whatsoever, Morello therefore leans into the trope that a masculine gender identification was Nunes' professional contribution to female emancipation. This conclusion may seem unwarranted, but for the fact that Nunes—via Morello's footnote—was later anecdotally exemplified in the history of queer women in America.

In her 1999 publication, *To Believe in Women*: *What Lesbians Have Done for America—A History,*[185] Lillian Faderman argues that, for certain women, it was precisely their lesbian lifestyles (not purely sexual in nature) that provided them with the opportunities needed to progress women's issues in society.[186] In an overt effort to present her as a lesbian, the same newspaper characterization of Nunes is applied here to demonstrate how the press published "mild innuendos" regarding "inversion" (lesbianism) among professional women. In what increasingly appears to be an ambivalent recognition, Faderman also notes that Nunes was "the first female prosecutor to participate in the German war crimes trials in the 1940s."[187] The context of the Dachau Trials had been lost.

In 2010, Diane Marie Amman published her "Portraits of Women at Nuremberg" article. This time, Nunes is directly attributed to the wrong war crimes tribunal. Amann writes, "News accounts placed another woman lawyer … at Nuremberg early on … Reports describe [Nunes], without further elaboration, as the first woman involved in the war crimes trials."[188] And as recently as 2016, Marlene Trestman cites Amann when categorically placing Nunes at Nuremberg in her biography of Bessie Margolin, thus completely removing Nunes from her contributions at the Dachau Trials.[189]

In an almost systematic compulsion to identify Nunes in the history of women at the American war crimes trials in Germany, no one appears to have had any more substantive interest

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[184] Ibid.
[185] Faderman, *To Believe in Women*, p. 313.
[186] Ibid, p. 1.
[187] Ibid, p. 404, n. "wears her hair."
[188] Amann, "Portraits of Women at Nuremberg," p. 3.
[189] Among the extensive list of noteworthy accomplishments in a legal career spanning 40 years, Bessie Margolin led the development of US military policy for the Subsequent War Crimes Trials at Nuremberg. Citing Amann, Trestman lists four women attorneys that assisted Justice Jackson at the IMT: Katherine Fite, Harriet Zetterberg, Catherine Falvey and Irma von Nunes. Marlene Trestman, *Fair Labor Lawyer: The Remarkable Life of New Deal Attorney and Supreme Court Advocate Bessie Margolin* (Baton Rouge: LSU Press, 2016) pp. 204–205, n. 4.

in her historical or professional agency. As a consequence, the professional women at the Dachau Trials continue to remain invisible, under the shadow of Nuremberg. Nunes' story is significant because it is precisely her celebrated, *highly* documented past that even allows us to know her name. The statistical information on women in the War Crimes Department in Germany is practically non-existent. This is a result of several factors. First, the archival methodology at the National Archives and Records Administration (NARA) has not documented military staff in Germany in any systematized manner, nor are any auxiliary documents that may indirectly provide such data currently digitized to enable a macro-level search for individuals.[190] Furthermore, the entire MGC program archive was classified to the public until 1987,[191] severely delaying any research into the Dachau Trials. Finding out who worked where has most commonly been uncovered through references in personal memoirs or diaries.[192] Second, approximately eighty percent of all Army records of servicemen and women, active between 1912 and 1959, were lost in a massive fire that burned through NARA's National Personnel records in St. Louis in 1973.[193] Nunes' file was among the casualties.[194] And third, gender was not an identifying feature in any of the contemporaneous trial materials, making it impossible to document the presence of women (in any capacity) at any given trial without meticulously reading through *each* transcript.[195] The 'paper trail' leading from the popular press releases back to the Fischer trial is a disparate route of fragmented documentation—not an impossible feat (as demonstrated here), but immensely inconvenient when the objective is to simply give Nunes her due recognition.

Reading through the Fisher case transcripts reveals that Nunes actually worked among a team of women (both military and civilian). Augusta Lapins, Marjorie Shumway, Dixie Foster, Yolanda Keller and Lilli Metzig were among the twelve court appointed interpreters and reporters

[190] Only 14 of the total 489 individual cases (~2.8 percent) have been microfilmed. The rest are still textual photocopies. To date, nothing has been digitized.
[191] "Reviews of US Army War Crimes Trials in Europe, 1945-1948," 1987, Microfilm, 5 Rolls, NARA, RG-549, M1217.
[192] Cecelia Goetz acknowledged that, unlike many of her male colleagues, she never wrote a memoir of her time in Germany. Diane Marie Amann, "Cecelia Goetz, Woman at Nuremberg," *International Criminal Law Review*, vol. 11, no. 3 (2011) pp. 607–620.
[193] For information on the 1973 fire, see Walter Stender and Evans Walker, "The National Personnel Records Center Fire: A Study in Disaster," *The American Archivist* 37, no. 4 (October 1, 1974): 521–49.
[194] I placed a formal request to the National Personnel Records Center (hereafter NPRC) for the military file of Nunes. All that remains is her honorable discharge papers, dated 6 July 1948 and a corresponding pay slip of 346 US dollars.
[195] For example, the 18 female defendants (of more than 1,600) that were prosecuted by the MGC are not listed by gender in any statistical documents. I manually went through each name, in order to obtain the 18 women.

assigned to the Fischer trial.[196] In dealing with thousands of textual pages per case,[197] the painstaking and meticulous reading required to uncover these details cannot be overstated. Because finding such information is so labor intensive, the current descriptions of Nunes in the secondary sources have been passively inherited and reproduced without critical concern for the larger historiographical consequences. Notwithstanding the perpetuation of historical inaccuracies, the most apparent result is that the Dachau Trials still present a general picture of not just a male-dominated program, but one that was almost entirely devoid of women altogether.

5.3.2 Prosecuting Female Perpetrators of the Concentration Camps

In the immediate aftermath of the war, the War Crimes Investigation Teams did not spare female suspects and actively pursued their capture. Despite their efforts resulting in several arrets, a total of just three women—Irmgard Huber, Erika Flocken, and Ilse Koch—were ultimately prosecuted for their participation in mass-atrocities involving the concentration camps and killing centers. Indeed, their offences depicted some of the worst treatment of prisoners. Yet, they were exceptional cases. Thousands more 'ordinary' women participated in the enslavement and genocidal programs of the Third Reich. While not the only camp to do so, Flossenbürg played a significant role in female perpetration. Incredibly, an entire auxiliary investigation case was compiled alongside the preliminary Flossenbürg (parent) case file.[198] 000-50-46B, as it was labeled, dealt exclusively with the Siemens-Schuckert Werke (SSW) subcamp in Nuremberg. This section will consider the case of 000-50-46B that never was, juxtaposing it against the three cases in which women were prosecuted. With little opportunity to uncover why the case was jettisoned, it is possible to explore the consequences for doing so.

In 1945, Irmgard Huber was one of seven individuals prosecuted and convicted for participating in the killing of Russian and Polish nationals at the Hadamar 'euthanasia' center.[199] The 47-year-old Huber was the head nurse at Hadamar, where she supervised a subordinate team

[196] *Fischer Trial*, NARA, RG-549, A1-2238, Box 527, files 1, 2 and 3.
[197] Even the relatively short trials (circa 200-300 pages of trial transcript) are accompanied by hundreds of pages of investigation evidence (witness statements, prisoner records, transfer lists, case-reports etc.), exhibits, and post-trial materials (appeal cases, clemency requests).
[198] The "file" is a collection of documents (including interrogations, sworn statements, captured transport lists, suspect lists, and compiled reports) amounting to over 250 pages. NARA, M1204, Roll 2.1.
[199] Hadamar was one of the sites that participated in the systematic murder of German citizens deemed genetically unfit for the future of Germany. However, US military courts did not prosecute Nazi crimes committed against its own citizens. Therefore, the Hadamar case exclusively prosecuted the murder of foreigners, primarily Russian and Polish laborers. See, Patricia L Heberer, "'Exitus Heute in Hadamar': The Hadamar Facility and 'Euthanasia' in Nazi Germany" 2002. See section 2.3.2

of female personnel who killed patients and blamed their deaths on tuberculosis. It was also claimed that she sat in on the daily conferences where the forged death certificates were signed.[200] She ultimately received twenty-five years imprisonment for her participation; the lightest sentence in a case of seven.[201]

In 1947, Erika Flocken[202] was convicted in the trial of Mühldorf concentration camp for her work as the chief physician for the Mühldorf Ring, a collection of forced-labor camps operating under authority of the KL-Dachau administrative body. Over a dozen witnesses claimed that she had selection power over prisoners and sent hundreds to Auschwitz on so-called "invalid transports" with full knowledge of their fate. For this, she was sentenced to death by hanging.[203] Despite approval from the trial reviewer, however, the Judge Advocate (who had final say in confirming all capital punishments) commuted Flocken's sentence to life in prison, disclosing that, "in arriving at this conclusion I concede that I have been influenced to a certain degree by the fact that the accused is a woman."[204]

Nicknamed the "Bitch of Buchenwald," Ilse Koch was the wife of former camp Commandant Karl-Otto Koch. Mrs. Koch gained widespread notoriety from press reports as the only female defendant in the Buchenwald parent trial.[205] Witnesses alleged that she would casually expose herself to camp inmates and then report them (or beat them herself with a riding crop) when she caught them looking. She was also famously accused of collecting the tattooed skin of prisoners, which she had made into various items like lamp shades, book-covers and gloves.[206] Prosecuted by William Denson, Koch was found guilty and sentenced to life in prison. Much to

[200] "Review and Recommendations of the Deputy Judge Advocate, Case No. 12-449, The United States v. Alfons Klein", *Hadamar Trial.*
[201] Patricia Heberer, "Early Postwar Justice in the American Zone: The 'Hadamar Murder Factory' Trial," in Heberer, Patricia, and Jürgen Matthäus, eds. *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*. (Lincoln, NE: University of Nebraska Press; published in association with the United States Holocaust Museum, 2008). pp. 25–47. Here, p. 37.
[202] For a biography on Erika Flocken, see Fern Overbey Hilton, *The Dachau Defendants: Life Stories from Testimony and Documents of the War Crimes Prosecutions* (Jefferson, NC: McFarland, 2004).
[203] Oliver C Hardy and Abraham S Bernstein, "Review and Recommendations," *United States v Franz Auer et al.*—Case No. 000-50-136 (hereafter *Mühldorf Trial*), 1 February 1948, 56 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-050-0136.pdf. Accessed May 2021.
[204] Fern Overbey Hilton, *Dachau Defendants*, pp. 154-155. Quoted in Yavnai, "Military Justice", p. 202.
[205] Kathleen McLaughlin, "31 of Buchenwald convicted by U.S." in *The New York Times*, 13 August 1947. p. 14.
[206] Harold E Kuhn and Richard A Schneider, "Review and Recommendations," *United States v Josias Prince zu Waldeck et al.*—Case No. 000-50-9 (hereafter *Buchenwald Trial*) 15 November 1947, 97 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-050-0009.pdf. Accessed May 2021, pp. 62-65.

the chagrin of Denson, however, the case reviewer recommended a reduced sentence of just four years.[207]

Huber, Flocken and Koch were all exceptional cases. Each held positions of considerable authority near the top of their respective hierarchies (a rarity for women in the Third Reich) and were accused of particularly appalling cruelty, directly facilitating the deaths of many. Their 'exceptionalism' has since overshadowed the reality that women were far more omnipresent throughout the concentration camp system. Yet, without the prosecution of 'ordinary women', the misrepresentation of female perpetrators is perpetuated, thus distorting the perceived gendered dynamics of the entire KL system. According to Jessica Trisko Darden and Izablela Steflja, "Lower-ranking female perpetrators are often spared from facing justice for their crimes because they are perceived as victims of patriarchal political ideologies and practices."[208] They further argue that this phenomenon not only existed in the post-Second World War context, but was a recurring feature of later war crimes trials of the twentieth century, including the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). As a result, the lack of accountability for the thousands of low- and mid-level female perpetrators unfairly places the responsibility of investigation and prosecution on the domestic courts, "often with far fewer resources and in a highly politicized and highly gendered postwar-environment."[209]

Three individuals, among more than one and a half thousand indictments, is hardly an adequate sample with which to make any broad inferences. Nevertheless, there are still many critical aspects that are worth pointing out. Denson championed his so-called cross-section approach as one of the principle strategic aspects that led to his success in the Dachau, Mauthausen, and Buchenwald trials. Being that the Flossenbürg trial was the only case he did not prepare, this notion is not without merit.[210] Yet, Denson never so much as indicted one female guard in any of his cases.[211] In total, an estimated 3,500 *Aufseherinnen* (female overseers) worked in various

[207] Kuhn, "Review and Recommendations", *Buchenwald Trial*. pp. 62-65.
[208] Jessica Trisko Darden and Izabela Steflja, "When Women Commit War Crimes," War on the Rocks, October 28, 2020, https://warontherocks.com/2020/10/when-women-commit-war-crimes/. Accessed April 2020. See also, Izabela Steflja and Jessica Trisko Darden, *Women as War Criminals: Gender, Agency, and Justice* (Stanford, CA: Stanford University Press, 2020).
[209] Trisko, "When Women Commit War Crimes."
[210] See section 2.3.3.
[211] Ilse Koch was the only female that Denson ever prosecuted personally. Despite her significant power and authority over prisoners at Buchenwald, she was never officially a part of the *Aufseherinnen* apparatus.

capacities throughout the entire concentration camp system; indeed a minority (less than seven percent) among their 51,000 male camp-SS counterparts.[212] Such figures would never have demanded a large female presence in the defendant's dock, but particularly in the case of Flossenbürg, women did inhabit a multitude of positions up and down the camp organizational structure making them an integral feature to the system as a whole.

A superficial argument could be made that, in the cases where women had obtained a significant amount of power and proclivity for violence, they *were* held accountable. While this may be the case, it is nevertheless evidence of the very problem that the threshold for prosecuting war crimes committed by women was significantly higher than for men.[213] And for those whose behavior was deemed severe enough for judgement, justice was stymied. In spite of being found guilty, Huber, Flocken and Koch each received reduced sentences. The Military Government's leniency on punishment towards female war criminals therefore further exemplifies the gendered double-standards of the American war crimes justice system in Germany.

As far as the mass-atrocities cases are concerned, the MGC were not terribly interested in "making an example" of female perpetrators. Candidly, in certain cases, women simply did not demand a large enough part of the camp cross-section to realistically warrant broad prosecution. Such actions were not inconsequential to the historical narrative of the concentration camps. In general, excluding women from criminal prosecution has distorted the memory production of female participation in the concentration camps (and through this, the systematic persecution and extermination of countless victims). Huber, Flocken, and Koch have become characterizations, perpetuating the trope of the hyper-brutalized and hyper-sexualized female Nazi, when in reality, most were far more "ordinary" perpetrators.

000-50-46B: The 'Missing' Flossenbürg Sub-trial

Despite Flossenbürg's incredible expansion throughout its seven-year existence, the camp's population remained exclusively male for the first five years. Some 16,000 women would nevertheless be processed through its register in the span of two years before ultimately

[212] Shelly Marie Cline, "Women at Work: SS Aufseherinnen and the Gendered Perpetration of the Holocaust". PhD Dissertation. 2014. p. 3.
[213] This same phenomenon has been identified in later international war crimes trials such as the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Trisko, "When Women Commit War Crimes."

capitulating.[214] By comparison, a mere 4,065 female prisoners experienced Mauthausen.[215] In July 1943, Flossenbürg received its first female prisoners; ten women were transferred from Ravensbrück to work as "prostitutes" in the newly established camp "brothel."[216] Between ten and twenty women were consistently kept in the so-called *Kommando Sonderbau* (special building detail), located inside the *Hauptlager*, as sex slaves for privileged inmates.[217] While there were never more than a couple dozen women in the main camp, thousands more eventually contributed to Flossenbürg's exploding subcamp population.

1944 witnessed a swift and dramatic shift in female labor assignments, as the ever-demanding war effort continuously increased its armaments manufacturing needs.[218] On 1 September 1944, five of Ravensbrück's subcamps were officially transferred to the Flossenbürg administration, automatically increasing the latter's female population by some 10,000.[219] In total, female prisoners could be found in at least twenty-five of Flossenbürg's ninety-two subcamps.[220] Practically all of them had entered into contracts with local private industry to manufacture military-use materials. Holleischen (Holýšov, Czech Republic), a munitions factory owned by Metallwerke Holleischen GbmH and one of the five former Ravensbrück satellites, was among the

[214] Karl Prohaska testimony, M1204, *Becker Trial*, pp. 1169–1170.
[215] Jardim, *Mauthausen Trial*, p. 104. For more on the female prisoners of Mauthausen, see Andreas Baumgartner, *Die vergessenen Frauen von Mauthausen: Die weiblichen Häftlinge des Konzentrationslagers Mauthausen und ihre Geschichte* (Wien: Mauthausen, 2006).
[216] The use of the words "prostitute" and "brothel" are, as noted by Elizabeth Anthony, contextually "inapplicable and thus problematic." Inside the concentration camps, the concept of sex-as-a-service-in-exchange-for-payment, as well as the name for where such transactions occur, was entirely euphemistic. In reality, the program facilitated state administered sexual slavery of women. Both labels, however, are often applied by both perpetrators and victims in contemporaneous documentation as well as in postwar accounts. Elizabeth Anthony, "Sexual Violence as Represented in the ITS Digital Archive Concentration Camp Brothels," in Rebecca L Boehling, ed., *Freilegungen Spiegelungen der NS-Verfolgung und ihrer Konsequenzen* (Göttingen: Wallstein, 2015) pp. 49–60. Here, pp. 49–50.
[217] In order to increase productivity among the prisoners, the SS leadership introduced a KL system-wide reward program. So-called "Premium coupons" (*Prämienschein*) functioned as authorized camp money and were distributed to inmates who demonstrated outstanding work. The coupons could be exchanged for food, tobacco or visits to the brothel. Jews were excluded from the program. Fritz, *Flossenbürg Concentration Camp*, p. 104. See also, Jörg Skriebeleit, "Flossenbürg–Hauptlager," p. 37–38.
[218] Neurohlau (Nová Role), for example, was a medium sized subcamp of Ravensbrück in late 1943, with approximately 400 female prisoners who worked in a porcelain factory and sewing shop. By the second half of 1944, one third of the women had been reassigned to produce airplane parts for Messerschmitt. In September of that year, Neurohlau was acquired by Flossenbürg, who continued with armaments production. By April 1945, the camp held over 1,000 female prisoners. Petr Kanak, "Neurohlau (Nova Role)," in *Flossenbürg: Das Konzentrationslager Flossenbürg und seine Außenlager*. Pp. 201–204. here, p. 201.
[219] Graslitz, Hainichen, Holleischen, Neurohlau, and Zwodau were transferred to Flossenbürg. Jörg Skriebeleit, "Flossenbürg–Hauptlager," p. 41.
[220] Between 1942 and 1945, a total of 92 subcamps operated under the administrative auspices of Flossenbürg, throughout the regions of Bavaria, Saxony and Bohemia. Ibid, p. 44.
For a brief biography of each subcamp, see Benz, *Flossenbürg und seine Außenlager*.

largest of the Flossenbürg subcamps with an average of around 600 female prisoners, reaching 1,100 by the end of the war.[221] Unique, however, to this subcamp, was its *Aufseherinnen* (female overseers) training program.[222] Another consequence of the increasingly desperate total-war efforts by the Third Reich was that more and more young, able-bodied SS-men were sent to the front. As a result, the concentration camps were increasingly staffed with older men, foreign nationals, and women.[223] From 1943, women between the ages of seventeen and forty-five were recruited to join the *SS-Erfolge* (entourage). Each candidate had to file an application (which included a full medical physical, personal history questionnaire, and "common-knowledge" aptitude test) before being accepted into the three-week training program.[224] By 1945, nearly five hundred *Aufseherinnen* were trained and subsequently deployed throughout the Flossenbürg subcamp system.[225] The women were also able to move up the hierarchical ladder. Ida Guhl, Margarete de Hueber, and Charlotte Hanakam, for example, supervised three of Flossenbürg's women's subcamp details in Dresden and were reportedly known for their violent brutality.[226] Despite many accounts of physical and mental cruelty, not all *Aufseherinnen* were abusive. According to postwar statements by prisoners, the inmates at Rochlitz subcamp (north of Chemnitz) were treated relatively well, with new barracks, decent food, and no daily roll call.[227]

In addition to what was taking place inside the camps, the neighboring villages surrounding Flossenbürg were home to several local and SS deployed families, many of whom had a direct relationship with the concentration camp. The use of camp prisoners for domestic labor became a source of contention between the two resident groups. In 1943, a number of farmer's wives—collectively addressing themselves as "women from Flossenbürg [village]"—complained to the mayor that all of their maids (concentration camp prisoners) had been taken away, while the wives of SS-men were able to keep theirs.[228] Needless to say, women played an integral role in all aspects

[221] Holleischen was a co-ed subcamp, located approximately 30 kilometers southwest of Pilsen and operated from 15 April 1944 to 3 May 1945. The primary employer of prisoner labor was Metallwerke Holleischen GmbH. Alfons Adam, "Holleischen (Holysov)," in Benz, *Flossenbürg und seine Außenlager*, 145–148.
[222] The corps of SS *Aufseherinnen*, modelled on the Finnish women's organization *Lottas-Svard*, was established by Himmler in 1938 to be assistants to their male counterparts. Despite the title, women were not officially recognized as members of the SS. Cline, "Women at Work," p. 2.
[223] Fritz, *Flossenbürg Concentration Camp*, p. 139.
[224] Cline, "Women at Work," pp. 17–24.
[225] Fritz, *Flossenbürg Concentration Camp*, p. 139.
[226] Benz, *Flossenbürg und seine Außenlager*. pp. 80; 84; 94.
[227] Ulrich Fritz, "Rochlitz," in Benz, *Flossenbürg und seine Außenlager*, pp. 241–243. Here, p. 242.
[228] Letter from "Women of Flossenbürg," 15 May 1943, M1204, Roll 1.

of Flossenbürg concentration camp. What is surprising, then, is the relative lack of representation at the MGC war crimes trials. Concerning the Flossenbürg parent trial and its eighteen subsequent cases, not a single woman was indicted.

The Siemens-Schuckertwerke (SSW) company, in cooperation with the Flossenbürg camp administration, established a women's forced labor camp on 18 October 1944. 550 primarily Jewish-Hungarian women, between the ages of fourteen and forty, were transferred in cattle wagons from Auschwitz-Birkenau. Most of the women were tasked with various menial jobs, such as carrying heavy iron parts or removing rust from metal, while a small number worked in the transformer and meter production (*Trafo- und Zählwerk*) factory. More than 200, however, were simply too weak to work and remained in the barracks. The women suffered insufficient clothing and food, as well as humiliating abuse.[229] In February 1945, the site was destroyed in an Allied air raid. The prisoners were temporarily moved to a nearby schoolhouse before ultimately being transported by open coal wagon to the Holleischen subcamp in March. At least three women are reported to have died at SSW.[230]

Interrogation files show that a handful of former *Aufseherinnen* (female overseers) had been arrested no later than August 1945. Through their cooperation with US intelligence, the War Crimes Department compiled a list of thirty-one names in connection to SSW; over a dozen were women of various authority levels.[231] The War Crimes Investigation Teams continued to pursue outstanding suspects. By January 1947, thirteen the former *Aufseherinnen* were in custody in Ludwigsburg.[232] The file contains interrogation transcripts and sworn statements from each of the suspects, all of which were used to draft a comprehensive report. A portion of the eight-page document is reproduced below,

> The victims lived under appalling conditions. Rations were so meager that the girls were forced to steal potatoes. For this 'offense' they were beaten, had their hair shorn and sometimes were shot. Few of the prisoners had more than one garment; most were without adequate foot-gear. Even in midwinter they were allowed only 1 blanket and slept on straw sacks sometimes 3 or 4 to one bunk.

[229] Prisoners reported women having their heads shorn and being forced to kneel for hours on end. Alexander Schmidt, "Nürnberg (Siemens-Schuckertwerke)," in Benz, *Flossenbürg und seine Außenlager*, 207–210.
[230] Schmidt, "Nürnberg (Siemens-Schuckertwerke)," p. 209.
[231] The suspect list consisted of 31 names. 16 were women and 15 were men. M1204, Roll 2.
[232] Major Joseph L. Haefele, "Interrogation of Perpetrators," 15 January 1947, 2 pages, M1204, Roll 2.

> Whippings by female SS guards were common. The rations set aside for use by the prisoners were stolen by their guards. There was no medical care whatever for the inmates. One prisoner was a doctor but was not permitted to practice. Dr. Georg Grieshammer, Siemens Schuckert Werke representative, was in charge of the slave-laborers. In his affidavit dated 28 July 1945 he claims to have been subordinate to the SS men. The guard Emeran HOFFMAN is named as the one who shot four girls for stealing potatoes … The fate of these four victims is not known. The camp was guarded by about 15 SS guards and 18 SS females. The female guards were the most sadistic ...
>
> Maria BILLMEIER was the chief of the female guards and along with Anna ECKERT, Elizabeth DRITTLER and Martha EBERHARD was considered the most brutal of the lot.[233]

The report declares that there is enough evidence to prosecute those already in custody, but that all material pertaining to the Flossenbürg parent trial should be removed and preserved in anticipation of the subsequent trials. None of the suspects from the 000-50-46B case appeared at any of the Flossenbürg trials, nor is the Siemens-Schuckert subcamp referenced in any of the sub-trial court transcripts. It appears that, in spite of significant efforts to do so–the above investigation notwithstanding—relatively little was done by the MGC to hold those responsible to account. In the 1960s, the Jewish Claims Conference secured financial compensation for the victims of several German businesses, including some of the women that had worked for Siemens.[234] But such restitutions can hardly be resolved as justice.

There were at least six other cases directly connected to Flossenbürg that never went to trial; most were dropped due to lack of evidence.[235] It is therefore perplexing as to why *this* case was never prosecuted. Considering the three primary objectives of the US Military Government's war crimes program—punishment to the perpetrators; a demonstration of democratic justice; and an objective account of the crimes committed—the MGC completely failed the victims of SSW. Indeed, several female perpetrators were prosecuted by Allied courts for their participation in the concentration camps, most of which occurred under the auspices of the British courts via the Ravensbrück trials. The British held Bergen-Belsen case also deserves recognition for pursuing justice against female perpetrators.[236] But Flossenbürg, and its dozens of women's subcamps, offered a significant opportunity for the US courts to identify and hold accountable war crimes

[233] Major P.B. Klein, "File 000-50-46B Siemens_Schuckertwerke (P)." 1 October 1946, 7 pages, M1204, Roll 2.
[234] Schmidt, "Nürnberg (Siemens-Schuckertwerke)," p. 209. For a history of Siemens use of concentration camp labor, see, Wilfried Feldenkirchen, *Siemens, 1918–1945,* (Columbus, OH: Ohio State University Press, 1999).
[235] "Cases Not Tried", USHMM, RG 06.0005.05M.
[236] For the British-led Bergen-Belsen trial, see section 2.3.2.

committed by women, against women. Not one case in the MGC mass-atrocities trials considered this commonplace phenomenon.

The Loh Trial - Women as Victim

Case number 000-50-46-1 (*US v Wilhelm Loh et al.*, 5–12 November 1947)[237] was the first of the six "joint" trials within the Flossenbürg sub-trial series.[238] *Waffen*-SS Technical Sergeant Wilhelm Loh was among the three defendants[239] charged under the common design indictment. Loh had been commandant of the Hainichen women's subcamp from August 1944 until the camp's evacuation on 24 April 1945.

Hainichen subcamp, approximately twenty kilometers northeast of Chemnitz, was established in August 1944 to provide slave labor to the Framo-Werke GmbH. Throughout its eight-month existence, approximately 500 mainly Jewish women were transferred from Auschwitz to work on an assembly line, manufacturing armaments materials. The women were guarded by a total of twelve SS-men (mainly Hungarian) and supervised by as many as twenty-five trained *Aufseherinnen*. As commandant, Loh oversaw all operational aspects of the camp. It was reported that the food and medical care were wholly insufficient and that the plant suffered from frequent air raids. In the barracks, a two-story former needle factory, the women were supervised by *Oberaufseherin* (chief overseer) Gertrude Becker. Becker was apparently notorious for her cruelty and was often referred to as "Black Owl" (*Fekete Bagoly*), "Devil", and "Death" by prisoners.[240] According to survivors, the camp was hastily evacuated, following another air raid. The women embarked on a chaotic week-long odyssey, both on foot and by train, ultimately arriving at Theresienstadt where, on 8 May 1945, they were liberated by Soviet troops.[241]

[237] *The United States v Wilhelm Loh et al.,* (Case No. 000-50-46-1), (hereafter *Loh Trial*) 5-12 November 1946, NARA, RG 549, A1 2238, Boxes 520-552.
[238] 11 "individual" cases connected to the Flossenbürg parent trial had already concluded by the time the Loh case was heard.
[239] Five men were originally indicted in the Loh trial (two were not tried). Edmund Wissmann was a criminal inmate and camp clerk/secretary of a work detail at Altenheimer subcamp from 27 Dec 1944 to evacuation on 16 Apr 1945. He was also accused of being a member of the *Lagerpolizei* and guard on evac march from Flossenbürg. Wissmann was found guilty and sentenced to death, which was later commuted to life in prison. Martin Humm was also a criminal inmate, capo and block leader in several barracks at Flossenbürg Hauptlager from 1943 to Summer 1944. He was then transferred to Hersbruck as camp eldest until the camp's evacuation on 16 Apr 1945. Humm was found guilty and sentenced to death, which was reduced to life in prison. Captain Emanuel Lewis, "Review and Recommendations," 22 January 1948, 19 pages, ICWC, https://www.online.uni-marburg.de/icwc/dachau/000-050-0046-001.pdf. Accessed March 2020.
[240] Ulrich Fritz, "Hainichen," in Benz, *Flossenbürg und seine Außenlager*, pp. 126–130. Here, 128.
[241] Fritz, "Hainichen," p. 129.

At the trial, three former prisoners of Hainichen were brought in as witnesses. Loh was accused by Rivka and Helina Hochmann (Polish sisters) of beating an already severely ailing female inmate over the course of two days—just weeks before the evacuation—ultimately killing her.[242] Another prisoner, Jadza Pasalski, testified that she never saw Loh act abusive towards the women, although she did hear of the incident.[243] Taking the witness stand himself, Loh admitted to physically 'disciplining' the victim in question, but denied that he was responsible for the woman's death. Loh was nevertheless found guilty by the court and sentenced to death by hanging.[244] In the review of this case, however, it was determined that there was not enough credible evidence to definitively prove Loh had single-handedly killed the woman. His sentence was therefore reduced to life in prison.[245] Apart from this modification to the sentencing, the case appears to have been fairly straightforward. This brief trial, however, provides various identifiers that illuminate the gendered dynamics of MGC.

When the prosecution rested its case—indicating the half-way mark of the trial—the defense motioned for the court to find Loh not guilty, arguing that their colleagues had failed to prove he had participated in a common design with the Flossenbürg administration.[246] Despite the existing precedent on the issue, counsel's argument had matured since the parent case. The defense insisted that the five acquittals in the Flossenbürg parent trial proved that simply being present at a concentration camp did not indicate the automatic guilt of having been a part of a criminal enterprise. It was therefore incumbent upon the prosecution to present such evidence, which, according to the defense, did not occur. Despite (hypothetically) conceding to the testimony brought forward by the Hochmann sisters, the defense maintained that it did not bespeak the *specific* crime for which Loh was being tried. Following due consideration, the court overruled the motion.

The subsequent trials program was developed as yet another novel scheme to ensure the fastest and most efficient prosecution of as many suspected war criminals as possible. Numbering over 200 individual trials, it constitutes a significant portion of the Military Government courts at Dachau. However, they remain among the least studied cases by historians. It was, therefore, the

[242] The prisoner was said to have had only one kidney and was particularly vulnerable because of it. Helina Hochman testimony, *Loh Trial*, pp. 18–26; 186–189.
[243] Jadza Pasalski testimony, *Loh Trial*, pp. 199–201
[244] Loh trial, p. 270–273.
[245] Lewis, "Review and Recommendations," *Loh Trial*, p. 5.
[246] *Loh Trial*, 193–196.

intention of this chapter to identify a number of crucial aspects that are only uncovered after reading through the transcripts of these cases, but nevertheless greatly impact and even challenge what is currently understood about the Dachau Trials.

The confused dual filing system suggests that the Military Government was continuously figuring out the most efficient approaches to prosecute war criminals. Considering that it tried more than 800 individuals in just over one year, however, the program appears to have ultimately delivered on its objectives. On the other hand, the majority of the cases (at least those connected to Flossenbürg) discarded the common design charge in favor of "individual" indictments that addressed allegations of specific incidents. The common design charge was an exceptional tool when prosecuting many at one time but, as witnessed in the parent trials, it was always confused and invariably contested. Given that the majority of MGC court members were professionally ignorant to the technicalities of law and legal theory, the prosecution simply dropped common design in most of the sub-trials and proceeded to charge perpetrators one-by-one.

The issues of double jeopardy and insanity are indeed critical to understanding the procedural applications of the MGC, and their limitations. Under no circumstances does this study intend to make its own judgement over the innocence or guilt of the accused (either directly or indirectly). Instead, it has identified and explored the various legal strategies that were employed by both the prosecution and the defense, in order to affect a judgement in one way or the other. On one hand, the hybrid structure of the MGC was specifically engineered to curtail technical conflict. On the other hand, its ambivalence over the degree to which the courts must adhere to constitutional law directly facilitated the very technical controversies it looked to avoid. In analyzing the time afforded to debating the issues of double jeopardy and mental instability at the Flossenbürg sub-trials, it is apparent that the courts were genuine in their pursuit of fairness. Of course, their rulings were justifiably representative of the existing legal precedent. The primary discrepancy, then, is the conspicuous contradiction between the recondite legal-procedural treatment of alleged war criminals and the openly democratic image the US occupying forces looked to portray, via the war crimes trials.

Lastly, research dedicated explicitly to the women that participated in the Dachau Trials is long overdue. Irma von Nunes is a particularly stark example of how women played an integral role in the process of enacting justice for Nazi crimes. However, Nunes' contributions have not only been forgotten, but mistakenly attributed to the Nuremberg Tribunals. Of course, she was not

the only female professional at Dachau. Others succeeded in the background, filling the positions available to them within the context of their professional gendered expectations. It is still unknown if there were more female lawyers working for the Dachau Detachment. Such acknowledgements are important to the history of international law and pursuing such obscure trials, such as those in the Flossenbürg series, demonstrate that there is much more material to uncover.

As the authoritative power of Irmgard Huber, Erika Flocken and Ilse Koch transcended that which was typically available to the normalized gender roles of women, their respective spheres of influence extended into the spaces of their male colleagues. Their crimes were therefore disproportionately concentrated to male victims. By contrast, most mid-level female perpetrators—particularly those in the concentration camps—operated exclusively within their own gendered communities; women rarely guarded male prisoners. By foregoing prosecution of these 'ordinary' women, the courts consequently neglect entirely the crimes perpetrated by women, on women. Indeed, an SS-man invariably presided as commandant over all subcamp details. But it was typically the *Aufseherinnen* who had daily interaction with the female prisoners. Nevertheless, in the only trial dedicated exclusively to crimes committed inside a women's camp, it was the male commandant Wilhelm Loh, who was prosecuted.

Conclusions

The Dachau Trials represent the largest undertaking by the United States to punish perpetrators of Nazi atrocities. With nearly 1,700 indictments in almost 500 individual trials, the program dwarfed the tribunals held at Nuremberg. Still, the Dachau Trials are significantly underrepresented in the historiography. There are multiple reasons for this. First, the celebrity of the accused and the mass broadcasting of the Nuremberg Tribunals worked to all but completely overshadow what was taking place at Dachau. But timing played a significant part as well. While the IMT was working through start delays, the Military Government began own trials almost immediately after the end of the war. The early military commissions, however, not only dealt exclusively with cases of abuse to US servicemen, but the program had not yet become centralized at Dachau. Trials were being held all over the American occupied zone. The so-called atrocities cases didn't start until the Rüsselsheim case (held in Darmstadt) in July 1945. Following the British-led trial of Bergen-Belsen, momentum and attention picked up. The Hadamar trial commenced just days later, and the JAG offices ordered the Dachau case to prepare for trial. Interest in the Dachau parent trial was large, with some of the US Army's top brass attending the in the first days. It was at this time, however, that the IMT finally commenced and nearly all attention migrated to Nuremberg.

Eighty years later, Nuremberg has continued to overshadow the Dachau Trials. The second reason that the Military Government war crimes trial program is still heavily unresearched is due to a combination of the sheer physical size of its archival materials and public access to them. Only in the mid 1980s did the National Archives first begin to make the transcripts of the Dachau Trials available to researchers. Access to the sources therefore resulted in a substantial delay in the research itself. With so much time in between, interest in the topic as a whole waned. Related to the issue of access, is the sheer collective size and scope of the program. The Military Government in Germany completed 489 cases (462 at Dachau) and prosecuted 1,672 defendants between 1945 and 1948.[1] With each case comprising between several hundreds and several thousands of pages (as in the case of Flossenbürg) of material documents, researching this history is daunting. To make matters worse, most of the files are still only in textual form.[2]

[1] Straight, *Report of the Deputy Judge Advocate,* p. 50; Jardim, *Mauthausen Trial*, p. 13.
[2] The trials that have had a higher volume of research requests, including the camp-atrocities parent cases, are on microfilm.

This project benefited immensely from the dedicated (multi-year) program by the Flossenbürg Memorial Museum to copy and digitize the entire archive of the Flossenbürg trial casefiles (both the parent trial and all eighteen subsequent trials). The digitization of the entire program (not unlike the International Tracing Service has done in recent years) would not only provide a much-needed increase in access and interest, but it would provide the opportunity to input the morass of information in a systematic manner and build a keyword search engine that would finally allow for comprehensive, quantitative research projects. Providing the ability to locate the countless women who worked in the program is enough to legitimize the argument.

Among the handful of studies that have focused on the Dachau Trials, the prevailing consensus ranges from abject failure to 'success-within-context.' The principal criteria that are consistently referenced by historians in this determination is whether the trials adequately punished those responsible in a fair and just manner, and the extent to which the program facilitated its pedagogical objectives to educate the world to Nazi atrocities, thereby guiding a remorseful Germany in its re-entry back into the international democratic community. Finally, the trials would establish, as Frank Buscher explains, a "future code of conduct," by which the promise of stiff retribution would keep would-be governments with aggressive ambitions at bay.[3]

Among the earliest to study the Dachau Trials, Buscher gave one of the most damning assessments, writing in 1989 that none of the above goals were met by the US Military Government.[4] Using the Flossenbürg parent trial as a case-study in his comparison between American and German Federal Republic war crimes trials, Rudolf Schlaffer concludes that the manner in which the military government courts prosecuted war criminals amounted to an overstepping of their legal jurisdiction.[5]

Elisabeth Yavnai, on the other hand, is among those who have settled on a more balanced conclusion. She admits that the courts failed to establish a historical narrative, but insists that the timing at which the trials were held nevertheless provided a semblance of justice to the victims. Tomaz Jardim agrees, owing to the "lax rules of evidence and procedure," he concludes that, "as an exercise in expeditious justice, the Mauthausen Trial was a great success for its American

[3] While Buscher pointed to the Vietnam War as a case-in-point, the number of possible examples have since increased. Buscher, *U.S. War Crimes*, p. 2.
[4] Ibid, p. 159–161.
[5] The only work to accurately report the five acquittals in the Flossenbürg parent trial is Schlaffer's, *GeRechte Sühne?* Schlaffer, *GeRechte Sühne?* pp. 162–163.

Organizers" and a "staggeringly effective vehicle for punishment."[6] Presumably, this assessment would naturally include the trials of Dachau, Buchenwald, and Flossenbürg (under the 'perfect' verdict narrative). Jardim does, however, acknowledge that, with regard to the US Army's pragmatic objectives, the Dachau Trials were "a resounding failure."[7]

Greta Lawrence and Wesley Hilton encourage a broader contextualization. The Dachau trials, Lawrence argues, was a monumental undertaking whose work covered a wide array of atrocities and in various locations. The courts employed the existing legal precedent contemporary to 1945, and despite the relaxed rules and "controversial" common design charge, defendants were provided with "fair and vigorous legal representation."[8] Hilton confidently proclaims that calling the program a historical failure is "nothing further from the truth."[9] Pointing to the archived transcripts themselves, he insists that an historical record has been written. What Hilton seems to be overlooking, however, is that in spite of their existence and meticulous preservation, these documents are still practically inaccessible to most.

The above studies demonstrate that determining the failure (or success) of the Dachau Trials is rather subjective, depending on the precise context of the study. What is much less in dispute, however, is the perfect rate of conviction by Denson's four camp-atrocities cases. This conventional wisdom, however, is predicated upon the false understanding that the Flossenbürg parent trial contributed to the flawless success rate. But how exactly did this come about?

In multiple interviews and in a privately published booklet on his time at Dachau, Denson has claimed to have convicted a record number of 177 defendants as chief prosecutor for in the Dachau, Mauthausen, Flossenbürg and Buchenwald parent trials.[10] This number is broken down as: forty convictions from the Dachau case; sixty-one convictions from the Mauthausen case; forty-five convictions from the Flossenbürg case; and thirty-one convictions from the Buchenwald case. The figures are indeed correct for all but Flossenbürg. It will be recalled that, of the original fifty-two accused, forty-five defendants did make it to judgement, but five of them were acquitted.

[6] Jardim, *Mauthausen Trial*, p. 212.
[7] Ibid, p. 213.
[8] Lawrence, "Trials at Dachau," p. 222.
[9] Hilton, "Blackest Canvas," p. 395
[10] Because Denson only worked in four, fairly high-profile cases (in comparison to the majority of other cases), it is relatively easy to count the number of his 'wins and 'losses.' On the other hand, due to the inability to note who worked what case throughout the entirety of the US military government courts, it must be taken entirely on his word that he holds the record for most convictions at Dachau. It is undeniable, however, that Denson does hold the record for most convictions of perpetrators of the concentration camps.

Denson therefore only convicted forty defendants in the Flossenbürg case and, as impressive as his record still is, the number is 172. In the concluding chapter of Jardim's study of the Mauthausen trial, he writes, "building on his experiences with both the Mauthausen and Dachau cases, Denson had a preexisting, efficient trial strategy with which to approach the Flossenbürg case—a strategy that would again provide a 100 percent rate of conviction."[11] It is indisputably established that this was not the case. In the handful of relevant material, I have found only one time that Denson explicitly references the acquittals. Speaking about the prosecution's strategy, Denson said,

> we would get together after each session and discuss among ourselves to what extent we thought we had conditioned the court so that we could bring on testimony of these bizarre events that took place. And it seemed to work. The court in all cases except one found the accused guilty of committing war crimes.[12]

Another likely source in the perpetuation of the mistake can be found in Denson's 2003 biography, *Justice at Dachau*, by Joshua Greene.[13] Greene worked directly with Denson's widow to compile much of the materials that have since been added to the Manuscripts and Archives repository at the Yale University Library. Greene's biography of Denson provides readers with a heroic accounting of the chief prosecutor at Dachau. Within the hundreds of pages of narrative text, detailing the four camp-atrocities cases, Greene devotes barely one page to the Flossenbürg trial. Provided his (mis)understanding of the verdicts, the Flossenbürg trial was likely deemed to be just one more of the same victories, in between the juggernaut of the Mauthausen case and the controversy of the Buchenwald case.[14]

This revelation is not intended to discredit Denson, nor any of the researchers (Greene included) who have dedicated their time to the topic of the Dachau Trials. It is, however, meant to further underscore just how inaccessible the source material is; the Flossenbürg case in particular. The sheer size of the document has kept most from engaging with it, even for reference purposes. This has been the biggest contributor as to why the mistake has continued. Neither can it be neglected that the relatively overshadowed profile of the camp, next to Dachau and Buchenwald, has likely added to a sense of insignificance. Such an oversight has indeed distorted not only the

[11] Jardim, *Mauthausen Trial*, p. 201.
[12] Denson interview by Joan Ringelheim, 25 August 1994.
[13] Greene, *Justice at Dachau.*
[14] Ibid, pp. 226–227.

history of the Flossenbürg parent trial and those who participated in it, but more importantly, the legacy of the Dachau camp-atrocities trials as a whole.

Considering the veritable upset that the conclusion of the Flossenbürg trial brought to the prosecution (and Denson's otherwise 100 percent conviction rate), there is no more failure of a camp-atrocities case than this. The fact that it dragged on to become the longest single trial of the entire program only adds to that inference. Denson himself noted, "the hardest [case] to try was Flossenbürg…" He attributed the difficulties to the former chief prosecutor Robert Shaw, who had prepared the case "as though he had 45 separate murder cases."[15] After three trials in fourteen months, all dealing with the atrocities of the concentration camps, by the time the Flossenbürg case concluded, Denson weight 117 pounds (down from 155) and was complaining of headaches and nightmares. "I was reliving some of these experiences myself…" Denson admitted, "What would I be doing under those circumstances? How would I react to this? It took a toll."[16] Approximately three months later, Denson found himself back in the courtroom presenting his opening remarks in the case: *United States v. Josias Prince au Waldeck, et al*. Better known as the Buchenwald Trial. Despite whatever physical and emotional obstacles he continued to battle, Denson returned to form with another clean sweep of convictions. To prove the efficacy of his strategy, all four cases are required: Dachau was a tremendous success and Denson' strategy caught the defense completely off-guard, but was it a fluke? Mauthausen put any such concerns to rest, demonstrating the strategy's durability to scale up, even against a prepared defense. Yet, Flossenbürg showed its vulnerabilities when improperly employed. And Buchenwald was the masterclass for Denson. The controversy and press interest that arose over the prosecution of Ilse Koch, for example, was a considerable distraction not present in the previous cases (the upset in the last trial and Denson's health, notwithstanding). Nevertheless, the strategy held.

This project was premised on the need to correct the historical narrative of the Flossenbürg parent trial, and in so doing, analyze and explain the reasons it failed to live up to the success of its three counterparts. This exercise is important because, in addition to increasing the general historical notoriety of the Flossenbürg concentration camp and the Dachau Trials, it offered an opportunity to dissect the legal strategies of Denson's approach in prosecuting the perpetrators of the concentration camps. Furthermore, it reveals deeper nuances of the MGC judicial structures.

[15] Denson interview by Horace Hansen, *Denson Papers*, p. 36
[16] Denson, interview by Joan Ringelheim, 25 August 1994.

As well, it is in the comparative 'failures' of the Flossenbürg case that provide for a critical review of the qualified meaning of success, in the context of transitional justice.

To adequately explain the contributing factors that led to the 'failed' outcome of the Flossenbürg concentration camp, it is necessary to start before its liberation by US forces. Time and space in the final weeks of the camp's operational period were essential in determining how the prosecution's case, and its list of indictments, would be initially structured. By April 1945, German capitulation was inevitable, but that didn't stop the SS from keeping their slave labor programs in the concentration camps running at full capacity, albeit within an ever-shrinking German-controlled territory. Flossenbürg had become a major transit hub for tens of thousands of prisoners coming from camps recently discovered by the Allies. At this time, Himmler waffled over whether to surrender the camps and their contents, or to follow Hitler's orders and deny any living prisoner to fall into the hands of the enemy. In the meantime, Flossenbürg commandant Max Koegel deputized some four hundred German prisoners, mostly from the green "criminal" category, who would eventually become armed guards on the mass death marches from the *Hauptlager*. When the decision was finally made to evacuate, it was simply too late to avoid being intercepted by US forces. Thousands of prisoners, in columns scattered over hundreds of kilometers throughout the Bavarian countryside, were finally freed. Not only were many of the prisoners-turned-guards arrested as suspected war criminals, but the various evacuation routes themselves would further complicate the prosecution's case.

Liberation was quickly followed by criminal investigations, with the intent of future prosecution and punishment of the perpetrators. The war crimes investigators, like Benjamin Ferencz (who also happened to be an expert in international criminal law), employed several prisoner-functionaries, whose privileged positions helped them to access crucial and incriminating knowledge (as well as material evidence) against their oppressors. Not only did they assist in the investigations in the camp, but several would later travel to Dachau to testify in court. In addition to the valuable evidence he and his colleagues were able to collect, Ferencz was perceptive to the social and national divisions that existed among the prisoner community at Flossenbürg. In particular, he recognized that one's offensive behavior in the camp was often a reflection of the violent environment in which they had been forcibly living and empathized with them as victims of National Socialism. This insight is a curios juxtaposition to the social stigmatization that would become so prevalent in the courtroom.

The Flossenbürg parent trial was the result of years of preparation and painstaking development by the Allies to bring Germany to justice for its atrocities. At the forming of the United Nations and the signing of the Moscow Declaration, which promised punishment to offenders both large and small, the Allies had only received reports of the concentration and extermination camps. Motivated by incidents of gross breaches to the established laws of warfare, (such as the Malmédy massacre) it wasn't until the United States Army entered Ohrdruf for the first time, that the extent of the Nazi atrocities became apparent. Not only were they dealing with particularly vulgar offences, but the number of perpetrators was immense.

Some of the brightest legal minds in the country got to work on a comprehensive program to hold Germany accountable while simultaneously demonstrating to the world what a just and democratic society looks like. By the end of the war in Europe, it was agreed between the Allies that a joint tribunal would be established to prosecute the so-called major war criminals. As well, each nation would hold its own military trials against lesser offenders. As a way to prosecute dozens of defendants at a time, and let previous cases work to further simplify those that came afterward, Murray Bernays proposed the idea of charging the executive class of the Nazi state with conspiring to commit war crimes. By prosecuting the leadership of the SS, the SD, and the Gestapo—subsequently labeling the organizations as criminal enterprises—all corresponding members could automatically be found guilty simply through their association. This ingenious strategy was further developed over the course of multiple US military government courts, eventually being applied by William Denson in the camp-atrocities cases at Dachau. The charge of common design to aid, abet, and participate in the committing of war crimes not only side-stepped certain legal constraints of conspiracy, but when used in conjunction with the cross-section indictment, the strategy proved to be a near flawless formula.

After the incredible success of the Dachau and Mauthausen trials, Denson's request to retire from the Army and return home was granted. Whatever excitement the two previous cases had generated waned considerably for the Flossenbürg case, as it was given a new prosecution team and a moved to a smaller courtroom. Nevertheless, it would still be a test to see how Denson's methodology fared in someone else's control. From the first day, however, it was apparent that the new lead prosecutor, Robert Shaw, was not following the strategy. The overarching source of the fault was a disproportionate dwelling on the sixteen accused prisoner-functionaries that began from the very first moments of the trial and maintained throughout its seven-month-long duration.

Beginning with an apparent disregard for the cross-section indictment—which provided a comprehensive 'representation' of the camp's administrative departments—nearly one third of the accused had been prisoner-functionaries (most of whom became guards on the evacuations). While likely no less guilty of war crimes, the number of former prisoners on the dock created an imbalance in the operational hierarchy that worked to undermine the concept of a well-integrated common design. Nothing was more detrimental to the charge, however, than Shaw's early attempts to conflate guilt with prisoner identity (specifically the green "criminal" category). By employing crass social stigmatization, based explicitly on the arbitrary prisoner groups enforced by the SS, the prosecution undermined its own strategy and neglected to portray the prisoner-functionaries and the SS as working in collaboration with each other. With the sudden and unfortunate death of Shaw, William Denson was coaxed into returning, being that he was the only prosecutor with any prior experience in prosecuting camp-atrocities cases. Despite attempts to reframe the case back toward his proven methods, it was ultimately untenable.

The defense came to the trial with no new approach to speak of. It followed through with the same arguments that it had in the other trials, for which it had failed to gain a footing. However, the prosecution had unwittingly set itself up for a relentless defense counterstrategy of character attacks, directed toward prosecution witnesses who had also been in positions of power in the camp. Able to exploit the social stigmatization tactics, it brought the issue of agency (between the SS and the prisoner-functionaries) into question. As well, it expanded on the social stigmatization issues through unfounded allegations of homosexuality and pedophilia. While the majority of the responsibility lies with the prosecution, the defense nevertheless succeeded in denying five convictions. But at what cost? On one hand, it is precisely the Flossenbürg parent trial that best lends credibility to the perception of 'fair and just' prosecution; it is *because* of the awful performance by the prosecution that the court (with all of its arbitrary powers) ruled five times in favor of the defense. In fact, it is the perfect conviction rates of the other three trials that would have critics skeptical. On the other hand, however, the primary failure of the Flossenbürg trial is how the survivors of National Socialism were treated. Not only were they forced to relive potentially traumatic experiences, but were subsequently attacked by the defense through baseless accusations and social stigmatization (of which, was rooted in arbitrary categorization by the SS).

Long after the convicted had been released,[17] survivors of the "criminal", "asocial", and "homosexual" categories were still waiting for public recognition of their victimization.

The unique case of the Flossenbürg trial(s) would not be complete without an assessment of the eighteen subsequent trials that followed it its wake. Through the ways the courts dealt with the obscure defense of double jeopardy, as well as the subjective nature of diagnosing one's sanity in time and space, the protections of the accused (a pillar of American jurisprudence) were jettisoned when it conflicted with the protections of the court (i.e. the authority to adhere to or deny legal precedent from the US domestic justice system). The Flossenbürg sub-trials closely parallel the uniqueness of its parent case in that their study convincingly argues for more dedicated and comprehensive research of the Dachau Trials program. Not only do these sub-trials include the program's first and only known female lead prosecutor, but a close reading of the preliminary casefiles reveals the potential for an all-female trial that was never brought before the courts at Dachau.

[17] The last inmate convicted in the Dachau Trials was released from Landsberg prison in summer 1958. Buscher, *U.S. War Crimes*, p. 4.

Appendix 1: Flossenbürg Trial Charge Sheet

Dachau, Germany
14 May 1946

Names of the Accused:

Friedrich Becker	Raimund Maurer
Joseph Becker	Christian Mohr
Franz Berger	Erich Mussfeldt
Konrad Blomberg	Walter Paul Adolf Neye
Peter Bongartz	Willi Olschewski
Wilhelm Brusch	Josef Oswalt
Ludwig Buddensieg	Hermann Pachen
Karl Buttner	Otto Pawliczek
Georg Degner	Erich Penz
Christian Eisbusch	Josef Pinter
August Fahrnbauer	Theodor Retzlaff
Johann Geisberger	Walter Reupsch
Michael Gelhardt	Albert Roller
Karl Frederick Alois Gieselman	Heinrich Schmitz
August Ginschel	Kurt Erich Schreiber
Karl Graeber	Cornelius Schwanner
Gerhard Haubold	Ludwig Schwarz
Josef Hauser	Alois Schubert
Peter Herz	Stepan Sczetynskyi
Georg Hoinisch	Bruno Skierka
Alois Jakubith	Hermann Sommerfeld
Karl Keiling	Georg Weilbach
Hans Johann Lipinski	Ludwig Winkler
Eduard Losch	Wenzel Wodak
Karl Mathoi	Erhard Wolf
Gustav Matzke	Joseph Wurst

Are hereby charged with the following offences:

CHARGE: Violation of the Laws and Usages of War.

PARTICULAR: In that the above enumerated individuals previously mentioned German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses and indignities, did, at or near the vicinity of Flossenbürg Concentration Camp, near Flossenbürg, Germany, and at or near the vicinity of the Flossenbürg out-camps, particularly Hersbruck, Wolkenburg, Ganacker

and Leitmeritz, and with transports of prisoners evacuating said camps, all in Germany or German-controlled territory at various and sundry times, between the 1st of January 1942, and the 8th of May, 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of Poles, Frenchmen, Jugoslavs, citizens of the Soviet Union, Norwegians, Danes, Belgians, citizens of the Netherlands, citizens of the Grand Duchy of Luxembourg, British subjects, stateless persons, Czechs, citizens of the United States of America 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 then 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, starvation, abuses and indignities, the exact names and numbers of such persons being unknown, but aggregating many thousands.

Appendix 2: Flossenbürg Trial Defendant List

United States v. Friedrich Becker et al. (Flossenbürg Parent Trial) – Defendant List

Number	Last Name	First Name	Age	Nationality	Rank / Prisoner Category	Counsel	Sentence	Recommendation
1	Becker	Friedrich	39	German	Waffen-SS Oberscharführer	—	*Nolle Prosequi*	N/A
2	Becker	Joseph	26	Romanian	SS Wachmann	Hall	1 year	Approved
3	Berger	Franz	36	German	SS Sturmbahnführer	Wacker	3.5 years	Approved
4	Blomberg	Konrad	47	German	Police Officer (civilian)	O'Connor	Death	Approved
5	Bongartz	Peter	39	German	Asozial (Asocial)	McKay	15 years	Approved
6	Brusch	Wilhelm	54	German/Sudeten	Waffen-SS Oberscharführer	Wacker	Death	Approved
7	Buddensieg	Ludwig	61	German	Waffen-SS Hauptsturmführer	Wacker	Life	Approved
8	Buttner	Karl	55	German	Berufsverbrecher (professional criminal)	McKay	Not Guilty	N/A
9	Degner	Georg	36	German/Polish	Waffen-SS Untersturmführer	—	*Nolle Prosequi*	N/A
10	Eisbusch	Christian	28	German	Asozial (Asocial)	McKay	Death	Approved
11	Fahrnbauer	August	56	German	SS Oberscharführer	Hall	15 years	Approved
12	Geisberger	Johann	36	German	SS Hauptscharführer	Engelhorn	Life	Approved
13	Gelhardt	Michael	30	German	SS Rottenführer	Hall	Life	Approved
14	Gieselman	Karl Frederick Alois	52	German	Berufsverbrecher (professional criminal)	McKay	Not Guilty	N/A
15	Ginschel	August	24	German	Vorbeugungshaft (preventive custody)	McKay	Death	Approved
16	Graeber	Karl	54	German	SS Oberscharführer	Hall	10 years	Approved
17	Haubold	Gerhard	38	German	Waffen-SS Oberscharführer	O'Connor	20 years	Approved
18	Hauser	Josef	34	German	Vorbeugungshaft (preventive custody)	McKay	Death	Approved
19	Herz	Peter	38	Romanian	Waffen-SS Wachmann	Hall	Not Guilty	N/A
20	Hoinisch	Georg	42	German	Vorbeugungshaft (preventive custody)	McKay	Not Guilty	N/A
21	Jakubith	Alois	33	German	Vorbeugungshaft (preventive custody)	McKay	Life	Approved
22	Keiling	Karl	53	German	Waffen-SS Sturmscharführer	Hall	Death	Approved; commuted to Life
23	Lipinski	Hans Johann	25	German	Criminal*	McKay	10 years	Approved
24	Losch	Eduard	61	German	SS Wachmann	O'Connor	20 years	Approved
25	Mathoi	Karl	39	German	Schutzhaft (political protective custody)	McKay	Life	Approved
26	Matzke	Gustav	42	German	Vorbeugungshaft (preventive custody)	McKay	10 years	Approved
27	Maurer	Raimund	37	German	Vorbeugungshaft (preventive custody)	McKay	30 years	Approved
28	Mohr	Christian	55	German	Waffen-SS Unterscharführer	O'Connor	Death	Approved
29	Mussfeldt	Erich	33	German	SS Oberscharführer	Hall	Life	Approved
30	Neye	Walter Paul Adolf	37	German	Schutzhaft (political protective custody)	McKay	15 years	Approved
31	Olschewski	Willi	43	Dutch	Vorbeugungshaft (preventive custody)	McKay	Death	Approved
32	Oswalt	Josef	38	Yugoslav	Waffen-SS Wachmann	—	*Nolle Prosequi*	N/A
33	Pachen	Hermann	50	German	Waffen-SS Oberstrumführer	Engelhorn	Life	Approved
34	Pawliczek	Otto	32	German	Waffen-SS Oberscharführer	Wacker	Life	Approved
35	Penz	Erich	21	Yugoslav	SS Sturmmann	Hall	Life	Approved
36	Pinter	Josef	21	Yugoslav	Waffen-SS Rottenführer	Hall	Life	Approved
37	Retzlaff	Theodor	33	German	Schutzhaft (political protective custody)	McKay	Not Guilty	N/A
38	Reupsch	Walter	41	German	SS Unterscharführer	Wacker	20 years	Approved
39	Roller	Albert	37	German	SS Sturmscharführer	Hall	Death	Approved
40	Schmitz	Heinrich	50	German	Physician (civilian)	—	*Nolle Prosequi*	N/A
41	Schreiber	Kurt Erich	35	German	SS Hauptscharführer	O'Connor	20 years	Approved
42	Schwanner	Cornelius	62	Austrian	Waffen-SS Hauptscharführer	O'Connor	Death	Approved
43	Schwarz	Ludwig	47	German	Wehrmacht Hauptsturmführer	Wacker	Death	Approved
44	Schubert	Alois	34	German	SS Obersturmführer	O'Connor	Death	Approved; commuted to Life
45	Sczetynskyi	Stepan	22	Ukrainian	Waffen-SS Wachmann	—	Charges Withdra	N/A
46	Skierka	Bruno	49	German	Waffen-SS Untersturmführer	O'Connor	Death	Approved
47	Sommerfeld	Hermann	54	German	SS Obersturmführer	Wacker	15 years	Approved
48	Weilbach	Georg	47	German	Berufsverbrecher (professional criminal)	McKay	Life	Approved
49	Winkler	Ludwig	32	German	SS Oberscharführer	—	*Nolle Prosequi*	N/A
50	Wodak	Wenzel	36	German/Sudeten	Waffen-SS	—	*Nolle Prosequi*	N/A
51	Wolf	Erhard	47	German	Waffen-SS Sturmmann	Engelhorn	Death	Approved
52	Wurst	Joseph	26	German/Sudeten	Waffen-SS Rottenführer	Engelhorn	Death	Approved

The status of prisoners was determined through multiple documentary sources, including prisoner index cards and entries in the prisoner register books.
*There are no surviving documents for Hans Lipinski (defendant number 23). His prisoner status was provided under oath, during the trial

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