British War Crimes Trial Policy in Germany, 1945–1957: Implementation and Collapse

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The scholarship on the punishment programs of the Allies in Germany after the Second World War is unbalanced. It is heavily weighted toward the origins and course of the trial of the major war criminals at Nuremberg. Relatively, there is only a tiny amount dealing with the Allied prosecution of Nazi criminals beyond that well-known trial. Owing to this focus, detailed research has, for the most part, been on the creation of legal means for dealing with Nazism. While we know that the Allied trial programs were limited in many ways, and that most Nazi criminals escaped completely or received lenient treatment,[1] there has been no methodical inquiry into the relationship of those limitations to punishment policy as a whole. This article seeks to help redress the balance by illustrating how in the case of British prosecutions, punishment policy was for the longer period one of a gradual dismantling of the legal machinery. It does this by means of a more comprehensive and systematic history of British policy than has hitherto been written, examining as an interrelated whole the trial of the major war criminals, the trials of other categories of (''lesser'') criminals, the political and practical problems of prolonged accounting for mass criminality, and the processes of premature release of convicted criminals.

The article will address British war crimes trial policy in Germany up to 1957, spanning the period from the first trial to the exit of the last

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[1] See the somewhat sensational Tom Bower, *Blind Eye to Murder: Britain, America and the Purging of Nazi Germany—a Pledge Betrayed* (London, 1997); and on the general problems of occupation justice, see Lutz Niethammer, *Entnazifizierung in Bayern: Säuberung und Rehabilitierung unter amerikanische Besatzung* (Frankfurt am Main, 1972).

Journal of British Studies 42 (January 2003): 91–118
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https://doi.org/10.1086/342687 Published online by Cambridge University Press

prisoner from Werl jail in the erstwhile British zone of occupation. That time frame encompasses a series of quantum shifts in policy toward Germany. The transitions from wartime to peacetime status and thence to the cold war, and the accompanying debates about West German political and military integration into Western Europe, were vital in the process, but longer-standing cultural factors, legal criteria, and short-term logistical considerations also played important roles in ending the punishment program. To set these developments in their historical context, we begin in the first two sections by looking briefly at the well-charted early course of British and Allied trial policy, and the legal implications of the largest of all the trial ventures in which the British were involved, that of the major war criminals at Nuremberg. Those examinations show the early establishments of limitations on the potential development of the British program in particular and illustrate how the scene was set for a (protracted) winding down of punishment policy, even as the extent of Nazi criminality was becoming more apparent.

The Early Course of British Trial Policy

In October 1941, Churchill and Roosevelt proclaimed that ''the punishment of [Nazi] crimes should now be counted among the major goals of the war.''[2] The questions of whom precisely to hold responsible, and for what, and what form the punishment should take were not yet the main issue. Two years later, some answers were provisionally provided when, at the Moscow Conference of Foreign Ministers, Britain, the United States, and the USSR declared that

> at the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or who have taken part in [various aforementioned] atrocities, massacres and executions, will be 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 those liberated countries and of the Free Governments which will be erected therein. . . . [T]he above declaration is without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by a joint declaration of the Governments of the Allies.[3]

Many smaller nations thus undertook their own trial programs. Indeed, most of the member countries of the United Nations War Crimes

[2] John Tusa and Ann Tusa, *The Nuremberg Trial* (London, 1995), p. 21.
[3] Cited in ibid, pp. 23–24.

https://doi.org/10.1086/342687 Published online by Cambridge University Press

Commission (UNWCC)—the first body to consider in detail the issue of punishment and the only fully international one—had been actively using that organization as a forum for the investigative works of their own national commissions since its establishment late in 1943.[4] The British government had also decided by November 1944 to prosecute certain German crimes committed against Allied nationals. In anticipation of the majority of criminals being extradited to the nations directly concerned with their cases, this program was expected to revolve predominantly around crimes against British personnel.[5] Yet with the division of Germany by the victors, and indeed as one of the chief Allies, Britain also acquired the additional responsibility of prosecuting crimes committed previously in its zone of occupation.

The British zonal trials were conducted under a piece of legislation known as the Royal Warrant. Proceedings pursuant to that legislation were prosecuted by the Judge Advocate General's Department of the Army (JAG). Behind the legislation was a series of inter- and intraministerial debates about the legality of such proceedings, with particular emphasis on matters of jurisdiction over crimes committed in Axis territory or Axis-occupied regions outside the direct context of warfare, or against nationals of Axis states, because these did not fit within the definition of war crimes as traditionally circumscribed (war crimes *stricto sensu*). The first case to be heard began on 17 September 1945 and concerned the senior staff of the Belsen concentration camp, several of whom had also served at Auschwitz, and a number of inmate functionaries; there were forty-five defendants in all. The case lasted for two months. Eleven of the defendants were sentenced to death, nineteen to prison terms varying from one year to life, and fourteen were acquitted.[6]

Despite the ''Belsen trial,'' and preparatory developments among various UNWCC member countries, and despite the aforementioned Moscow declaration, well into 1945 inter-Allied policy on major war criminals remained uncoordinated. The institution of an International Military Tribunal (IMT) to try some of the leaders of the Third Reich derived from interdepartmental debate in the U.S. government. The concept of what emerged as the trial of Hermann Göring and twenty-one others had to be sold to the remaining Allies. It was not inevitable that

[4] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948); and Arieh Kochavi, *Prelude to Nuremberg* (Chapel Hill, N.C., 1998).

[5] Priscilla Dale Jones, ''British Policy towards German Crimes against German Jews, 1939–1945,'' *Leo Baeck Institute Yearbook* 36 (1991): 339–66.

[6] Raymond Phillips, ed., *The Trial of Josef Kramer and Forty-Four Others* (London, 1949).

https://doi.org/10.1086/342687 Published online by Cambridge University Press

these particular Germans, and the Nazi organizations deemed complicit in their wrongdoing, would reach a courtroom. In the precedent-bound legal world it was certainly no foregone conclusion that they would face the type of charges that they eventually did.

In early negotiations about the nature of the peace, Churchill and members of his cabinet favored summary execution of a large group of arbitrarily defined Nazi leaders, over and above those ''lesser'' perpetrators who would be given the benefit of trial. The guilt of the former was simply too obvious for trial, it was held, while the unprecedented nature of the proceedings in question rendered them legally problematic. (Prosecuting foot soldiers for easily definable acts such as the murder of POWs was grounded in legal practice whereas punishing a politician for his role in ''acts of state'' such as the subjugation of another country was not.) The courtroom might also provide a platform for revanchist Nazi propaganda, the British contended.[7] A more extreme position was taken by an American lobby centered on the Department of the Treasury and its secretary, Henry Morgenthau, Jr.

The Treasury Department was aware of some of the realities of the war in Europe as it had close contacts with the War Refugee Board. The latter body had been established in 1944 in a belated American recognition of the seriousness of the plight of the Jews, as an attempt to provide relief and facilitate rescue. It became a key conduit for information about the ongoing ''final solution of the Jewish question'' and for pressure on behalf of its victims. Morgenthau's anti-Germanism was manifested in demands for the emasculation of the country by the execution of its leaders, by deindustrialization and pastoralization.[8]

The representatives of the USSR favored a trial of some description of a group of leading Nazis, perhaps for propaganda purposes similar to those served by their previous ''purge'' trials. In any case, this idea was a close approximation to another American proposal forwarded as a counter to the ''Morgenthau plan.'' The rival Department of War under Henry Stimson wished to divert President Roosevelt from his enthusiasm for Treasury's idea, recognizing that not only was deindustrialization impractical (and immoral) but that it might sow the seeds of discontent for a third world war. Conversely, extending ''due process'' to prominent Nazis was morally unimpeachable and would have the benefit of

[7] Tusa and Tusa, *The Nuremberg Trial,* pp. 25–28, 61–64; Bradley F. Smith, *The Road to Nuremberg* (London, 1982), pp. 45–46.

[8] Tusa and Tusa, *The Nuremberg Trial,* pp. 50–51; Smith, *The Road to Nuremberg,* pp. 25–29. Such an approach also had British advocates.

https://doi.org/10.1086/342687 Published online by Cambridge University Press

exposing the evils of that regime for the instruction of the publics of the world and of posterity, thereby hopefully preventing their repetition.[9]

Self-evidently, the trial option won the day. It achieved predominance in the United States in the final quarter of 1944, aided by the propaganda value the Morgenthau plan yielded to Josef Goebbels in his attempts to make the Germans fight to the last, and also by the outrage provoked in December at the murder in Malmédy, Belgium, of American troops by a Waffen-SS division. By April 1945 some form of legal action against prominent war criminals was all but certain, particularly when the death of Roosevelt resulted in the succession to the presidency of Truman, a firm supporter of the trial idea.[10] In addition, the machinery had by that time been put substantially into place for a lower-key set of trials of lesser Nazis in the territory being overrun by U.S. forces.[11] The multinational flavor of the prosecution of the major war criminals was achieved by Soviet and then French acquiescence in the principle of trial of the ''major war criminals.'' The British government and officialdom was the last to concur, never really overcoming their fears about the propriety and wisdom of such a trial. They ultimately only surrendered to the united front of their allies.[12]

The Trial of Hermann Göring et al.

The trial resulting from these negotiations was held before the IMT, which was composed of judges from each of the four prosecuting nations. The tribunal sat in judgment over a group whose criminal activities, in the words of the Moscow declaration, had ''no specific geographical location'': in other words, the makers and higher administrators of broad policy rather than the direct executors. In recognition of the extreme and peculiar nature of Nazi criminality, the IMT had to adjudicate on actions that did not correspond to breaches of the ''laws of war'' as such. These included persecutions before the outbreak of war and against Axis nationals, crimes committed during wartime but outside of war situations (the so-called crimes against humanity that were beyond the remit of the

[9] For extensive details of these interdepartmental rivalries, see chap. 1 of Smith, *The Road to Nuremberg;* and Tusa and Tusa, *The Nuremberg Trial,* pp. 51–54.

[10] Tusa and Tusa, *The Nuremberg Trial,* pp. 61–67; and Smith, *The Road to Nuremberg,* pp. 54–55 and chap. 7.

[11] Institut für Zeitgeschichte, Munich, FG 16, Report of the Deputy Judge Advocate, fol. 3, for the dates of U.S. ''Dachau'' trial preparations. On the U.S. ''Dachau'' trial series, see Robert Sigel, *Im Interesse der Gerechtigkeit: Die Dachauer Kriegsverbrecherprozesse, 1945–48* (Frankfurt am Main, 1992).

[12] Tusa and Tusa, *The Nuremberg Trial,* pp. 66–67.

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Royal Warrant), and ultimately, and most controversially, the very act of aggressive war itself.

The implementation of the prosecution plan was orchestrated by the U.S. Office of Chief-of-Counsel for the Prosecution of Axis Criminality (OCCPAC) under the leadership of Supreme Court Justice Robert H. Jackson. The plan was the brainchild of a Col. Murray C. Bernays of the War Department. It posited the pursuit of continental and world domination as the central idea of Nazism, and aggressive warfare as the ultimate and all-inclusive crime. One necessary manifestation of the quest for conquest, it was held, was the repression and murder of real and conceptual opponents of the regime. The plan as it was implemented, rather contrary to Bernays's intentions,[13] distorted the essence of Nazism for it implied that warfare provided the stimulus to atrocity. That was only partially true, and downplayed the role of Nazi ideological hatred of the victim groups. Jackson described the intention of the planners as ''to try in two phases the question of war guilt. The first phase would be to establish the existence of a general conspiracy to which the Nazi party, the Gestapo and the other organizations were parties. The object of the conspiracy was to obtain by illegal means, by violation of treaties, and by wholesale brutality control of Europe and the world. When this plan should be proved, the second phase would be entered upon which would consist of the identification of individuals who were parties to this general conspiracy.''[14]

The Office of Chief-of-Counsel for the Prosecution of Axis Criminality was, therefore, deploying a theory that implicated most of the German state. The organizations to which Jackson referred were the leadership corps of the Nazi Party, the Reich government cabinet, the SS, the Gestapo and SD (the SS intelligence organization), the SA, and the ''General Staff and High Command of the Armed Forces.'' Most of the twenty-two defendants who reached trial were indicted both for their individual criminal responsibility and as representatives of one or other of these organizations. In OCCPAC's conceptualization, evidence against an individual could then also be held against organization, and vice versa. The logic of this idea was that given the obvious mass criminality of Nazi Germany, some method of expediting mass prosecution was necessary; a finding of organizational guilt would supposedly hold for every member of that organization.

[13] Shlomo Aronson, ''Preparations for the Nuremberg Trial: The OSS, Charles Dwork, and the Holocaust,'' *Holocaust and Genocide Studies* 12 (1998): 257–81, here 261–64.

[14] Papers of Robert H. Jackson, Library of Congress, Washington, D.C., container 191, ''Justice Jackson's story,'' fols. 1046–47.

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The reality of the trial did not correspond entirely with the American vision of it. The Office of Chief-of-Counsel for the Prosecution of Axis Criminality set the tone by opening the prosecution's case with the conspiracy count that it had helped to bring into existence. In the process OCCPAC presented much evidence of the ''subsidiary'' crimes against both the laws of war and—where they did not overlap—of humanity. This upset both the French and Soviet delegations who not only opposed the conspiracy charge (which in the way it was framed was alien to continental law, deriving from English common law) but also considered much of the thunder to have been stolen from their presentations, on war crimes and crimes against humanity in Western and Eastern Europe, respectively.[15] The British—who presented the evidence on ''crimes against peace,'' including the breaking of treaties and acts of aggressive warfare—similarly preferred to concentrate on substantive crimes.[16]

Each nation presented its case in its own distinct way, establishing the prosecution more as a quadripartite affair than the international proceeding it purported to be. The Office of Chief-of-Counsel for the Prosecution of Axis Criminality, in its determination to create an irrevocable historical record, generally avoided calling witnesses, believing them to be unreliable and open to refutation. It chose instead to deluge the tribunal with the ample Nazi correspondence that had survived the regime. Though a boon for historians, this documentary cornucopia detracted immensely from the contemporaneous attraction of the trial as a spectacle. Eyewitnesses to the most horrendous crimes of Nazism were brought only by the French and Soviets, but by this time—the beginning of 1946—public interest had long since waned.

Nevertheless, the IMT judgment, along with its extensive written opinion and the vast array of documentation adduced and subsequently published, afforded just the sort of historical record of Nazi criminality that Stimson and Jackson had in mind when they were pushing for trial. Though it undoubtedly and unsurprisingly failed to convince every German of the error of his or her ways,[17] the trial itself, if tortuously long and undoubtedly imperfect in some of its procedures and outcomes, was a competent exercise in being seen to be fair. For the most part its inner workings have also stood up to extensive historical scrutiny.[18]

[15] Ibid.; Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York, 1977), pp. 82–90.

[16] Tusa and Tusa, *The Nuremberg Trial,* p. 83.

[17] See, e.g., Norbert Frei, *Vergangenheitspolitik: Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Munich, 1996), on German reactions to the Nazi past and the occupation period.

[18] For example, Smith, *Reaching Judgment at Nuremberg.*

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On the legal level, three of the defendants—Franz von Papen, Hans Fritzsche, and Hjalmar Schacht—were acquitted, twelve were sentenced to death, and the remainder to varying terms of imprisonment. The SS, the Gestapo and SD, the Reich Cabinet, and the Nazi Party leadership corps were all declared to be criminal organizations. The death sentence on General Alfred Jodl, the sentences on Albert Speer and Grand Admiral Karl Dönitz, and the acquittals (particularly of Papen and Schacht) elicited, for varying reasons, surprise and condemnation, yet illustrate that the outcome of the trial was by no means a foregone conclusion. Of greater significance both for the development of international law and for the purge of Germany were the limitations imposed by the IMT on the ambitions of the conspiracy-criminal organization plan.

The tribunal was not prepared to accept the rather nebulous conspiracy concept as it was projected by OCCPAC. The IMT declared that the conspiracy could not be traced convincingly back to the early days of Nazi power and instead had to be judged only in close chronological proximity to the war. Equally, the conspiracy was limited in its application to the preparation for aggressive war and not to the planning of war crimes and crimes against humanity.[19] The idea of guilt by association was also strictly circumscribed. Members of the criminal organizations could only be declared criminal themselves if it could be shown that they had joined voluntarily with an awareness of the criminality—in terms of ''war crimes'' and ''crimes against humanity''—of the organization.[20] It is impossible to predict what would have happened had the blanket accusations against the organizations been upheld. Clearly though, the fact that the judgment imposed a burden of proof in each individual case on the prosecutor demanded an exponentially greater effort in further prosecutions than would otherwise have been necessary. As will become clear, neither the resources nor the political will were present to pursue this gargantuan task.

The organization and conspiracy judgments showed that the doubts of the continental jurists and of British officialdom about the American innovations were to an extent justified. Despite the British reservations, however, the British War Crimes Executive—the British approximation to OCCPAC—and the two British judges contributed fulsomely to proceedings, whether in Deputy Chief Prosecutor David Maxwell-Fyfe's rapier penetration of Göring's defense or in Sir Geoffrey Lawrence's temperate presidency of the tribunal. Nor was it simply a question of

[19] Tusa and Tusa, *The Nuremberg Trial,* chap. 17.

[20] Ibid.; Telford Taylor, *The Anatomy of the Nuremberg Trials* (London, 1993), chap. 20.

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individual participation. Once the decision had been made to embark on the trial venture, the relevant British agencies—the Foreign Office, the War Office, the JAG, the Lord Chancellor's Office, and the Attorney General's Office—were determined to make it a success, realizing that they had become embroiled in something of great significance for the postwar world.

The IMT trial then was as much a political phenomenon as it was legal. Political movement had brought it into being, defined some of its ends and ensured its relative success. Yet, when directed negatively, the potential that had been deployed for a constructive purpose was equally potent. Cold war politics, in combination with a series of structural and economic factors and with developments in the IMT case, determined when the trial idea was no longer of utility. In fact, well before the end of the trial of the major war criminals, it was a matter of consensus in diplomatic circles that those proceedings were to be sui generis. British machinations were at the very heart of the decision not to try further ''major'' war criminals before multinational courts, and they provided a very clear signal about the limited future of British war crimes trials of any sort.

The Aborted Second Trial of Major War Criminals[21]

A nonevent at the IMT trial leads into this subplot. It concerns one of the men who was originally slated for prosecution but who did not reach trial. As Justice Jackson saw it, the logic of the conspiracy plan demanded the indictment of private industry alongside the Nazi state economy. The final selection of defendants included one main representative of each, both selected for their involvement in German rearmament, which was in turn viewed as part of the master plan for pursuing aggressive war. Hjalmar Schacht, erstwhile Reichsbank president and a chief contributor to the Nazi economic miracle, was held to be an orchestrator of this conspiratorial policy, while the Krupp firm was seen as the willing foil, supplying the state with the material means of conquest and subjugation. The renowned Essen dynasty had supplied guns to the Nazis as the family firm had to Germany for generations, and the two most recent Krupp figureheads were at Nuremberg.

There was some disagreement as to which of the two should stand trial as representative of the firm. Gustav had been in charge until 1942,

[21] For an expansion of the subject matter in this section, see Donald Bloxham, '' 'The Trial That Never Was': Why There Was No Second International Trial of Major War Criminals at Nuremberg,'' *History* 87 (2002): 41–60.

https://doi.org/10.1086/342687 Published online by Cambridge University Press

when illness and old age compelled him to step down in favor of his son Alfried, who retained control until the occupation. Though less fit for trial, Jackson wanted Gustav indicted, since his role in the prewar period made him a more appropriate candidate for OCCPAC's favored charges of criminal conspiracy and crimes against peace.[22] Alfried was more responsible under the other two counts for the firm's exploitation of slave labor in the second half of the war.

The American wish once again prevailed, and Gustav was indicted.[23] The extent of his dementia, however, properly ruled him unfit for trial. Yet rather than fading away, the Krupp issue now gave immediacy to demands made by the French and the Soviets for a second trial of other ''major'' war criminals, such as had been suggested earlier in the preparations.[24] Though in a less conceptual, more pragmatic way, the economic part of the case was as important to the continental states as it was to Jackson, for both countries had experienced great exploitation and destruction of their resources under occupation.

The French, it was judged by a British prosecutor, wished to try industrialists not only for their own actions but in order to ''strengthen the hand'' of the French authorities in dealing with collaborationist French industrialists.[25] The Soviets harbored the simplistic determinist view that Hitler was an instrument of German bankers and big business.[26] Conversely, the British Foreign Office and sections of the American prosecution were worried about the prominence of the economic case in OCCPAC's scheme. The former, in particular, feared that the case against Schacht was weak enough to bring an acquittal (and indeed it was), to say nothing of the prospects of proving the participation in a state conspiracy of a private industrialist like Krupp.[27]

The outcome of French agitation over the issue, however, was that British chief prosecutor Hartley Shawcross, in an attempt to ensure the timely initiation of the trial, assured his French counterpart François de Menthon that the British would participate in a second international trial

[22] Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major War Criminals* (London, 1978), pp. 30–32, 212. As well as contributing to Germany's illegal rearmament after Versailles, Gustav was thought to have organized contributions from industry to the Nazi Party after 1933.

[23] Taylor, *Anatomy,* pp. 90–94; William Manchester, *The Arms of Krupp, 1587–1968* (New York, 1970), pp. 8–9; Neave, *Nuremberg,* pp. 29–32.

[24] At the London Conference of June–July 1945.

[25] Public Record Office, London (hereafter PRO), War Office (WO) 311/39, Maxwell-Fyfe to BWCE, 25 January 1946.

[26] Neave, *Nuremberg,* p. 209; David W. Ellwood, *Rebuilding Europe: Western Europe, America and Postwar Reconstruction* (London, 1992), pp. 52–53.

[27] Taylor, *Anatomy,* pp. 80–92.

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against a group of industrialists including Alfried.[28] A quadripartite committee of prosecutors was established during the IMT trial to discuss this proposal, and the chief prosecutors of each country also met periodically to the same end.

While Shawcross considered that his promise had bound Britain to the French in a future trial,[29] other interested British parties were not so resigned. Importantly, the Treasury Solicitor's Office feared the potential cost of a second international proceeding;[30] this was in the context of the damage done to the British economy during the war and the cost of sustaining the most populous zone of occupation in Germany. The Foreign Office was less happy still, wary of a second lengthy trial, which they feared would be anticlimactic and would detract from the achievements of the first. While not wishing to be seen to be letting off the industrialists, they felt that the IMT trial was a sufficient measure of their commitment to the cause of the trials, and they could point quite genuinely to the lack of public interest in another showpiece trial. Finally, an important strand of foreign-political thought suggested that a trial of industrialists could degenerate into ''a wrangle between the capitalist and communist ideologies.'' ''The Russians,'' contended Permanent Undersecretary Orme Sargeant, ''might exploit the proceedings to discuss irrelevancies such as . . . [the British] attitude to German rearmament.''[31]

The Shawcross–de Menthon pact did not actually guarantee that another trial would transpire. Though the London Agreement establishing the trial of the major war criminals made provision for a series of trials before the IMT, any power could terminate the agreement with one month's notice. The Office of Chief-of-Counsel for the Prosecution of Axis Criminality had not committed itself to a further international trial. By the end of 1945, a consensus emerged among Jackson, the U.S. War Department, and the Office of Military Government for Germany (OM-

[28] PRO, Premier (PREM) 8/391, Orme Sargeant to Clement Attlee, 31 July 1946; Tusa and Tusa, *The Nuremberg Trial,* concludes that ''for the British the desire for a prompt start always overcame any other consideration'' (p. 138).

[29] Jackson Papers, container 98, Office Files, U.S. chief-of-counsel, chief prosecutors' meeting of 5 April 1946; Shawcross to Jackson, 25 July 1946, cited in app. J in Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington, D.C., 1949), pp. 283–84. See also PRO, Foreign Office (FO) 371/57583, Shawcross to Basil Newton, 28 February 1946.

[30] Tusa and Tusa, *The Nuremberg Trial,* p. 373.

[31] Frederick Elwyn Jones, *In My Time: An Autobiography* (London, 1983) p. 126; PRO, PREM 8/391, Sargeant to Attlee, 31 July 1946; see also comments throughout this file. Anne Deighton, *The Impossible Peace* (Oxford, 1990), pp. 25–28, and p. 78 on the importance of Sargeant. In a low-profile case the British did try two industrialists of the Tesch and Stabenow firm who had supplied the poison gas Zyklon B to the SS. See United Nations War Crimes Commission, *Law Reports of Trials of War Criminals,* 15 vols. (London, 1947), 1:93–103.

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GUS) that this form of procedure was undesirable and that other major war criminals were best tried by the individual occupying powers.[32] This line of thought was roughly parallel to that in Whitehall and was founded in the ongoing and decisive changes that had colored the international political scene since the inception of the IMT idea. In combination with the events of the IMT trial itself, the rapidly emerging cold war ensured that the ''subsequent trial'' did not materialize.

Probably before its American counterpart, Whitehall saw that Germany would have to be resurrected in some form, as the mainstay of a central European power bloc designed to check the advance of communism. Alongside the economic factor—making Germany more self-sufficient and reducing the size and cost of the military government—by mid-1946 this impulse had grown to be stronger than any fear of a revival of German nationalism.[33] Hence trials of Germany's former leaders came to be seen as detrimental to Britain's interests, particularly if those trials were conducted in tandem with the Soviets.

In August 1946, by which time Capitol Hill had long since reached conclusions similar to those of the British Foreign Office, Ernest Bevin proceeded to raise the issues with his opposite number, James Byrnes, at a conference in Paris. Bevin observed that Shawcross's pledge prohibited open British opposition to a second trial but suggested that, were the Americans to take the lead against it, they would receive British support.[34] Byrnes concurred.[35] In the second half of September, Jackson asked the State Department to notify the other powers of the official United States opposition to the trial; and in the next month he submitted his final report to President Truman formalizing his own position. The United States issued notes in January 1947 to its erstwhile confederates to the effect that further proceedings before the IMT were ''not required.'' ''German war criminals,'' it was held, could be tried ''more expeditiously . . . in national or occupation courts.''[36] As regards the major war criminals not included in the IMT case, the American authorities were certainly more determined than their British counterparts that such

[32] National Archives and Record Administration, College Park, Md. (hereafter NARA), Record Group (RG) 260, OMGUS, Adjutant General's Decimal Files, 1945–48, box 2, W. B. Smith to Jackson, 5 December 1945; General McNarney to chief of staff, Washington, D.C., 5 December 1945.

[33] Deighton, *The Impossible Peace,* pp. 78, 115, 224.

[34] National Library of Wales, Papers of Lord Elwyn Jones, C14, Elwyn Jones to Warren, 9 August 1946; Scott-Fox to Maurice Reed, 15 August 1946. See also Taylor, *Final Report,* pp. 25–26.

[35] PRO, Lord Chancellor's Office (LCO) 2/2989, Scott-Fox to Reed, 18 August 1946; Elwyn Jones papers, C14, Elwyn Jones to Shawcross, 22 August 1946.

[36] Taylor, *Final Report,* app. K, p. 285, substance of note addressed to London, Moscow, and Paris Embassies, 22 January 1947.

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trials would transpire. Indeed, a ''subsequent proceedings division'' had been established within OCCPAC as early as January 1946 to plan for future trials at Nuremberg—in whatever form they took—of ''major war criminals of the second rank,'' including industrialists.[37]

In July 1946, the American Nuremberg staff had been informed by the British JAG that the latter intended to pursue a program of trials in the British zone that was to be ''roughly parallel'' to the American program. Prisoner exchange was to facilitate a ''division of business'' in this regard.[38] As had been previously observed within the Foreign Office, however, if Britain's allies chose to indict industrialists, the British were not bound to do likewise. The only obligation was to transfer on request suspects whom the occupation authorities did not intend to try themselves.[39] Thus the Foreign Office willingly transferred six industrialists, including Alfried Krupp, and three other suspects, for trial in the American ''subsequent Nuremberg proceedings,'' and this despite the fact that the nerve center of Krupp's operations—the Ruhr—lay within the British zone of occupation.[40] Many more British prisoners were to follow.

Under Brigadier General Telford Taylor, OCCPAC's successor organization, the Office of Chief-of Counsel for War Crimes (OCCWC), went on to prosecute 185 ''second rank'' major war criminals—including senior civil servants and Nazi Party members, soldiers, businessmen, and SS personnel—in twelve large-scale trials at Nuremberg. Many of these trials featured suspects surrendered by the British authorities, including Karl Brandt, Oswald Pohl, and Otto Ohlendorf,[41] the chief defendants in OCCWC's first, fourth, and ninth trials, and Erhard Milch, the only defendant in the second trial. In addition, the American military authorities continued to prosecute the direct implementers of Nazi atrocity at the former concentration camp at Dachau and elsewhere in the U.S. zone. In contrast, Britain only conducted an approximate parallel to

[37] University of Connecticut Archives, Papers of Thomas J. Dodd, box 319, file ''General memoranda 1945 Oct.–1946 Apr.,'' general memorandum no. 3, ''subsequent proceedings division,'' 12 January 1946.

[38] John F. Kennedy Library, Boston, Papers of Drexel Sprecher, box 57, file ''Administrative matters,'' memorandum for all section heads from Telford Taylor, 23 July 1946.

[39] PRO, FO 371/57583, Basil Newton to Hartley Shawcross, 26 March 1946; PRO, LCO 2/2989, Sargeant to the lord chancellor, 23 October 1946.

[40] PRO, FO 937/143, secret memo from permanent secretary of FO, 16 September 1946; PRO, LCO 2/2989, Garner to Shawcross, 2 October 1946; Control Commission for Germany (CCG), Berlin, to Control Office for Germany and Austria (COGA), 21 September 1946; PRO, FO 937/143, FO minute, 17 October 1946; PRO, LCO 2/2989, Sargeant to lord chancellor, 23 October 1946; PRO, FO 371/57583, minute by Beaumont, 13 April 1946.

[41] PRO, FO 371/57576, u436/436/73; PRO, WO 309/1455 contains a series of extradition requests, including one for Ohlendorf; Taylor, *Final Report,* pp. 77–78.

https://doi.org/10.1086/342687 Published online by Cambridge University Press

the latter series of trials, dissociating itself from the extended Nuremberg venture.[42] The emphasis was now on closure.

The Lesser War Criminals and the Closure of the Trial Program

Beyond the showpiece IMT trial and the delicate question of the further ''majors,'' the British continued to pursue lesser malefactors for trial under the Royal Warrant. Yet the vast number of suspects created in the criminal state that was Nazi Germany made a proper accounting with each of them all but impossible. This would have been the case even in an ideal world, and occupation politics was scarcely conducive to unfettered idealism.

The dictates of realpolitik were evident in a response by a Foreign Office official to the conspiracy-criminal organization plan in April 1945. J. C. Wardrop minuted to a member of the Lord Chancellor's Office that ''the proposal seems rather to suggest that a judgement of the . . . tribunal declaring [for example] the SS to be an organisation of 'criminal character' would enable us to proceed against any member on the basis of his membership alone and without the necessity to prove him guilty of an actual crime. If this assumption is correct, the proposal is a very good one, *so long as we can punish under it as many or as few members of the organisation in question as we think fit.*''[43]

The stress was on the lower parameter. The author's enthusiasm for the idea of guilt by association was not generally shared in the Foreign Office, whose officials remained staunchly legalistic in approach, but the concern to limit the potential number of trials of Nazi underlings most certainly was.[44]

Ultimately, as we have seen, the IMT judged that the burden of proving the individual member's knowledge of the criminality of the organization remained with the prosecutor. Had the will and resources existed to scour Germany in the way that Jackson wanted, this pronouncement would have implied innumerable protracted cases rather than the summary proceedings envisaged in the conspiracy-criminal organization plan. It is improbable in any case that courts constituted under British military law would have been prepared to enact what Wardrop termed

[42] Robert Woetzel, *The Nuremberg Trials in International Law* (London, 1960), pp. 219–26.

[43] PRO, LCO 2/2980, Wardrop to Coldstream (of LCO), 18 April 1945; emphasis added.

[44] PRO, LCO 2/2980, minutes (taken in early April) by attorney general of a meeting with American and FO representatives.

https://doi.org/10.1086/342687 Published online by Cambridge University Press

''wholesale punishment by way of quasi-judicial proceedings,'' and a pronounced legal conservatism meant that British officialdom never lost its reservations about courts and charges of a ''Nuremberg character.''[45] Thus in the Royal Warrant trials the ''mere fact'' that a defendant held a high rank in a criminal organization such as the SS made no real impact on the court.[46] Conversely, the British were certainly not prepared to embark on full-scale legal action in any court against each of the estimated 19,500 criminal organization members in their custody in the period immediately after the IMT trial.[47] It should be noted that this estimate was probably significantly less than the actual number of criminal Germans and collaborators in the British zone.

Like the American occupation authorities, the British adopted a realistic stance and put most of the members of the criminal organizations through the ordinary denazification courts, the *Spruchkammern,* which could impose maximum sentences of ten years and which were more about preventing Nazis from holding positions of influence in postwar Germany than about judicial investigation of the past.[48] Thousands who were judged ''comparatively innocuous'' were released without trial. Particularly ''hard core'' suspects were processed through courts constituted under British judges by the British element of the Allied Control Council for Germany.[49] Overall, however, denazification under the British was far less extensive than under the Americans.

The cases tried under the Royal Warrant were, like the American Dachau program, concerned solely with substantive crimes, though again membership of a criminal organization could also be charged against many of the defendants in either series. Other than the ''Belsen trials,'' the British conducted various proceedings against the staff of the Neuengamme concentration camp and its *Aussenlager* (subcamps), and against the personnel of the Ravensbrück women's camp. The Ravensbrück case was unusual in that the camp was situated beyond the British zone, in Soviet-occupied territory; several suspects were ultimately handed over to the Soviets for trial. The other cases that constituted the majority of

[45] PRO, LCO 2/2980, Wardrop to Coldstream, 18 April 1945. The expression ''Nuremberg character,'' used by the secretary of state for war, Frederick Bellenger, in 1947, reflected ongoing suspicion of the novel, American-led IMT trial. PRO, WO 311/648, Bellenger to Bevin, 3 October 1947.

[46] PRO, WO 309/1674, quarterly report of legal section WCG North West Europe (NWE) October to December 1947.

[47] PRO, FO 371/64712, suggested redraft of report, initialed by Patrick Dean, Brown et al., 5 June 1947.

[48] PRO, FO 371/64713, c8815/7675/180, FO brief for secretary of state, 2 June 1947.

[49] PRO, FO 371/64712, draft report of lord chancellor on war crimes trials, and comments on draft report by Dean et al., 5 June 1947.

https://doi.org/10.1086/342687 Published online by Cambridge University Press

the Royal Warrant trials were against the personnel of several Gestapo prisons and *Arbeitserziehungslager* in the British zone (the murderous ''work education camps'' to which forced foreign laborers—and particularly Russian or Polish workers—deemed to be ''slacking'' were sent) and against the murderers of British servicemen, primarily airmen.[50]

The limited trial program would court little diplomatic controversy and would be comparatively cheap, dealing more and more with localized offenses and lower-ranking defendants. With the passage of time the trials were increasingly limited to atrocities against British servicemen. Most of the little interest—apart from antipathy—regarding the trials shown by the British public was on matters relating directly to Britain, and, understandably, the government felt a particular duty to investigate these. Priscilla Dale Jones illustrates that the pursuit until the end of 1948 of the murderers of fifty British airmen at Stalag Luft III (a prisoner-of-war camp in Silesia) in March 1944 was vital in the prolongation of the British trial program. Immortalized in the Hollywood film *The Great Escape,* the Stalag Luft murders held the interest of the British public like no other case and consumed a great part of the time and budget of the war crimes investigation unit.[51]

The emphasis on such crimes was one manifestation of the consistent tightening of the parameters of the Royal Warrant program. At the beginning of that program responsibility was jettisoned by the War Office for cases pertaining to concentration camps outside the British zone, apart from parts of the Ravensbrück case. Further, in attempting to process more trials and to give the impression of greater activity—as in the matter of confusing numbers of cases and individuals tried—War Office officials considered trying easier, more trivial cases. Likewise, owing to criticism of the length of time the ''Belsen'' trial had taken, it was proposed to divide large cases into smaller ones that could be disposed of more speedily, though the whole would then in fact take longer.[52] Also,

[50] See, e.g., PRO, WO 309/1674, quarterly reports of legal section WCG (NWE), July to September 1947, October to December 1947. On the Arbeitserziehungslager, see Gabrielle Lofti, *KZ der Gestapo: Arbeitserziehungslager im dritten Reich* (Stuttgart, 2000). More generally on the Royal Warrant series, see A. P. V. Rogers, ''War Crimes Trials under the Royal Warrant: British Practice, 1945–1949,'' *International and Comparative Law Quarterly* 39 (1990): 780–800.

[51] PRO, FO 371/64723, c15911/7675/180, Barratt (of JAG) to O'Grady, 9 December 1947; Priscilla Dale Jones, ''Nazi Atrocities against Allied Airmen: Stalag Luft III and the End of British War Crimes Trials,'' *Historical Journal* 41, no. 2 (1998): 543–65.

[52] PRO, WO 309/1, cable, WO to Headquarters (HQ) 21 Army Group, British Army of Occupation of the Rhine (BAOR), 19 June 1945; WO 309/1, Chilton to WO, 16 December 1945; commander-in-chief of Rhine Army to undersecretary of state in the WO and JAG, 3 November 1945.

https://doi.org/10.1086/342687 Published online by Cambridge University Press

in most cases the time to be allowed between formal charging and the beginning of trial was limited to fourteen days.[53]

The idea of prioritizing trivial crimes was rejected, and it seems that, by the lights of the British prosecutors at least, emphasis remained on the more serious ones.[54] (Though in February 1946, e.g., months after these ideas had been discussed, the JAG was expending energy on the trial of one Otto Nickel. Nickel was finally sentenced to two months imprisonment for the ''ill-treatment'' of ''an unknown Allied airman.'')[55] The principle of division of cases was, however, applied, as, for instance, in the prosecution of the subsidiary Belsen trials and the Neuengamme case.[56] These deliberations were closely related to the issue of ending the trial program in toto, a question that was debated from almost as soon as trials began, in autumn 1945.[57] The investigators and prosecutors worked to impossible deadlines to expedite the conclusion of what was nevertheless becoming an increasingly controversial aspect of Allied occupation policy both in Germany and Britain.[58] By cabinet decision of November 1946, the British government was looking to wind down the whole process of war crimes trials.[59]

In October 1945, the attorney general decreed that as a minimum five hundred cases be tried in Germany by 30 April 1946. This would have entailed the completion of three cases per day between 1 November 1945 and the end of April.[60] A total of five hundred individuals (rather than cases; the target having been arbitrarily modified) was only reached in the early months of 1947.[61] The quarterly average of individuals tried from early 1947 until mid-1948 was approximately equal to the baseline target of fifty cases per month that had been established in May 1946, after the failure to meet the attorney general's initial target.[62]

Working through new cases and the backlog of old ones was a

[53] PRO, WO 309/1, minute, fols. 30, 31 October 1945.

[54] PRO, FO 371/64718, c13471/7675/180, note on policy by Shapcott, 15 October 1947.

[55] Liddell Hart Center for Military Archives, Wade Papers I, file 1, app. C, case 47.

[56] PRO, WO 309/1, commander in chief of BAOR to undersecretary of state (WO) and JAG, 3 November 1945.

[57] Dale Jones, ''Nazi Atrocities against Allied Airmen,'' p. 548.

[58] PRO, WO 309/1, fol. 28, minute of 30 October 1945; WO 309/1642, Deputy Military Governor's Office, CCG British Element, to regional commissioners, n.d., on British and German desire to end the whole process of trials generally.

[59] PRO, PREM 8/391, Command Paper (CM) (46) 94th Conclusions, 4 November 1946.

[60] PRO, WO 309/1, fol. 27, minute of 12 November 1945, signature illegible.

[61] See Dale Jones, ''Nazi Atrocities against Allied Airmen''; PRO, FO 371/66555, u515/2173, minute on number of war criminals tried, 25 February 1947.

[62] See the quarterly reports of the legal section WCG (NWE) in PRO, WO 309/1674 for figures of tried; WO 309/1, fol. 42, BAOR to WO, May 1946.

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lengthy process, and it was only in April 1948 that a time limit was set on the trial program. 1 September 1948 was the date by which all proceedings were to be completed and beyond which extradition requests would only be granted subject to the provision of prima facie evidence of murder as defined under German law.[63] The war crimes trial center in northwest Europe was set to disband in October 1948, and through that year the number of courts functioning simultaneously was increased from three to five to facilitate that goal.[64]

As with all the prosecuting nations, the total number of Germans tried was not even in the same league as the number of suspects who more than warranted punishment. Indeed, Foreign Office Undersecretary Basil Newton explicitly recognized the potential limitations of the British commitment when he inquired as early as November 1945 what total number of prosecutions would suffice as ''politically acceptable.''[65] A certain realism is necessary alongside understandable distaste when considering the ultimate failure of Britain (alongside the United States) in what Tom Bower has called ''the purging of Nazi Germany.''[66] Predictably, cold war pressures topped the agenda. In addition—and the two factors are certainly not unrelated—the resources at the disposal of the investigating and prosecuting units were meager; they were experiencing severe manpower and financial shortages. The general British austerity drive of the postwar years was particularly acute in the occupation budget. Staff shortages resulting from demobilization were experienced almost as soon as trial preparations began in 1945;[67] manpower limitations also resulted in difficulties in locating both the accused and relevant witnesses.[68] Finally, expedition was further hindered by technical problems relating to the unusual courtroom procedures of war crimes trials.[69]

Together, these factors explain why only just over a thousand Axis nationals and collaborators were tried by British military courts. However, that the trial program was finally terminated in 1949, three years after the cabinet decision for closure, bespeaks the pursuit of at least a limited justice, if primarily for British servicemen. Rather than simply

[63] Establishing such a prima facie case was by no means straightforward. For the peculiarities of German law in this connection, see, e.g., Martin Broszat, ''Siegerjustiz oder strafrechtliche Selbstreinigung: Aspekte der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit,'' *Vierteljahreshefte für Zeitgeschichte* 29 (1981): 477–544, here 480–81.

[64] PRO, WO 309/1646, fol. 146A, HQ Hamburg District to HQ BAOR, 20 March 1948; fol. 168, note by Dyas, 13 August 1948.

[65] Cited in Dale Jones, ''Nazi Atrocities against Allied Airmen,'' p. 549.

[66] Bower, *Blind Eye to Murder.*

[67] PRO, WO 309/1, cable, WO to HQ 21 Army Group, BAOR, 19 June 1945.

[68] PRO, WO 309/1, fol. 42, BAOR to WO, May 1946.

[69] PRO, WO 309/1, fol. 27, minute of 12 November 1945, signature illegible.

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abandoning investigations arbitrarily, moves toward closing the program—after incitements from the Attorney General's Office, the Lord Chancellor's Office, and Prime Minister Attlee himself—were conditional on securing sufficient personnel to deal with the cases in hand.[70]

Closure became a matter of practical exigency and political expediency for the British government in the face of growing German hostility to, and British apathy concerning, ''war crimes'' trials.[71] There was also, however, a genuine feeling that prolonging the trial process was somehow unfair, and certainly ''un-British.'' Even at this close proximity to the war, Churchill was echoing the thoughts of many when he suggested famously that justice delayed even a few years was not justice at all.[72] This response will be recognizable to anyone who kept abreast of the campaign in the last decades of the twentieth century to prosecute war criminals living in Britain.[73] It was partially founded in an Anglo-centric lack of appreciation of the extremity of Nazi criminality, as is illustrated by Churchill's announcement in the House of Commons in October 1948 (by which point he had become a convinced opponent of trials), that there were only a few exceptional cases ''such as the slaughter of the men of the Norfolk Regiment . . . [which] it was right to pursue, as one would pursue a common case of murder, even after fifteen years had passed before it came to light.''[74]

Ending the trials became a policy aim. As such it was pursued administratively according to the same principles as any other executive action. There are notable cases of dissent among the British legal personnel in Germany, but the structural-political emphasis was heavily on the side of closure. The populations of the civilian internment camps that contained suspected war criminals were radically reduced by extradition and also by the wholesale release of suspects who were not requested by any nation—810 in the last quarter of 1947, for instance.[75] Some cases

[70] PRO, WO 309/1, Chilton to WO, 16 December 1945; WO 311/9, lord chancellor's report Overseas Reconstruction Committee (47) 27; J. H. Hoffman, ''German Field Marshals as War Criminals? A British Embarrassment,'' *Journal of Contemporary History* 23, no. 1 (1988): 17–36, here 18–19.

[71] On the diminishing of interest and even the growth of opposition to trials in Britain after the trial of the major war criminals, see University of Sussex Archive, Mass-Observation Archive file report 2424A, 27 September 1946; directive replies, September 1946.

[72] Martin Gilbert, *Winston S. Churchill,* 8 vols. (London, 1988), 8:438–42.

[73] David Cesarani, *Justice Delayed: How Britain Became a Refuge for Nazi War Criminals* (London, 1992); see also the letters page of the *Daily Telegraph* (5 April 1999).

[74] Gilbert, *Churchill,* 8:441–42. See also Donald Bloxham, ''Punishing German Soldiers during the Second World War: The Case of Erich von Manstein,'' *Patterns of Prejudice* 33, no. 4 (1999): 25–45.

[75] PRO, WO 309/1674, quarterly report of legal section WCG (NWE), October to December 1947.

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were handed over by the war crimes investigation staff to the Control Commission tribunals, some ultimately to German courts. Many criminals would then run free or face lenient judgment, but at all times the British legal machinery in Germany could point to the fact that it was stretched to deal with those suspects under investigation.

We can see from the foregoing discussion that the trial of prominent Germans was not an issue for most of the duration of the British zonal trial program. With a few exceptions, such as the trial of Field Marshal Kesselring in Venice in 1947, the British had avoided the problem of trying ''majors,'' sometimes by putting them through the low-key ''denazification'' process or, preferably, by transferring them to the U.S. zone. This policy had only excited some criticism from the Americans and some from British prosecutors involved in the IMT trial.[76] Yet at the tail end of the program, one of the most controversial of all cases fell fortuitously into the hands of the British authorities. The trial of Erich von Manstein combined the specter of massive German opposition to the prosecution of a popular and vaunted German field marshal with that of open scrutiny of British trial policy by both the United States and the USSR. A special war crimes unit was formed to pursue this final, controversial proceeding, in what was dubbed ''Operation Marco.''[77] The prosecution brought abruptly to a head the thorny issue of ongoing legal redress against Nazism.

The Manstein Case

The initial context was the second half of 1947, when OCCWC was involved in preparations for what would turn out to be the twelfth and last of the subsequent proceedings against high-ranking officers from the High Command of the Wehrmacht and the various service branches thereof. Three such soldiers—all field marshals—were in British custody: Gerd von Rundstedt, Walther von Brauchitsch, and Manstein.[78] Each was implicated in the issuance and distribution of criminal orders on the eastern front. They had also helped to provide logistical support and assistance to the SS Einsatzgruppen, the itinerant killing squads de-

[76] PRO, LCO 2/2989, J. P. Henniker (of FO) to Addis (of 10 Downing St.), 6 February 1947.

[77] PRO, WO 309/1646, fol. 168, note by Dyas, 13 August 1948; and throughout WO 309/1670.

[78] In fact, Rundstedt was officially an American prisoner; he had been loaned to the British for interrogation after his capture in May 1945 and had thereafter caused confusion at Nuremberg by declaring himself to be a British prisoner.

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ployed in the rear of the invading German armies in 1941 to murder Jews and others.

The British army had known of OCCWC interest in the three since the beginning of 1947 but had not investigated their deeds.[79] When in August of that year Taylor forwarded some of the evidence gathered on them and on one Colonel-General Adolf Strauss to Hartley Shawcross—and the military governor of the U.S. zone, General Lucius Clay, did likewise to his temporary British opposite number, Air Marshall Sir Sholto Douglas—it was an obvious reminder of the British obligation to consider legal proceedings or allow extradition to other countries.[80]

The British could not just discreetly ''drop'' the issue after a time as desired, because it was returned to the fore in the first half of 1948 by extradition demands from Poland and the USSR, and a request from OCCWC for the field marshals' presence at Nuremberg as witnesses in the high command case.[81] The Polish government wished to try Brauchitsch and Manstein, and the Soviets likewise wished to try Rundstedt and Manstein, in connection with the crimes committed in the invasion and occupation of those two countries. The British government rejected both of these requests out of a legitimate distrust of Soviet legal procedure, and out of fear of the damage such a surrender would do to Anglo-German relations and to more debatable concerns about Polish justice.[82] (It certainly illustrated the different rules applying to ''major'' and ''minor'' war criminals, respectively, however; hundreds of the latter had been transferred eastward in the attempt to clear the British internment camps of suspects.) Yet it was implicit in the rejections that the British would try the soldiers themselves, and the cabinet had little choice but to proceed and preserve what good faith remained among the former allies.[83]

The political sensitivity of the case would even now bear greatly on its development, and arguments against trial were given added force by the advancing years of the suspects.[84] It was natural that Brauchitsch, Rundstedt, Manstein, and Strauss should experience some of the frailties of relative old age. Brauchitsch's health was clearly the most degenerate, and in the light of a series of examinations in the first quarter of 1948,

[79] PRO, WO 309/1456, memo to Parker, OCCWC liaison with BAOR, from Norma Ervin of OCCWC, 4 February 1947.

[80] Hoffman, ''German Field Marshals as War Criminals?'' pp. 17–18; NARA, RG 260, Records of the Chief-of-Staff, box 1, Clay to Douglas, 19 August 1947.

[81] PRO, LCO 2/2994, Reed to Shawcross, 14 November 1947. Feelings stimulated by direct experience of German disdain for the trials.

[82] PRO, PREM 8/1112, CM (48) 47th Conclusions, 5 July 1948.

[83] Ibid.

[84] In June 1948 they were respectively 67, 73, 61, and 69 years old.

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the cabinet decision to try the four had left his disposition subject to his prevailing medical state; he died of coronary thrombosis in October of that year.[85] The condition of the others was far from clear-cut, however, and in March 1948 a Home Office medical panel declared each one fit for trial.[86] Early in 1949 a combined Home Office and Army board of doctors examined the three again and found that only Manstein was now fit; and this despite the fact that a few days previously doctors at the soldiers' Münster Lager prison hospital had adjudged only Strauss unfit.[87] A trio consisting of the Lord Chancellor, Hartley Shawcross, and a medical expert was thus brought in to make the final decision as to whom would be tried.[88]

That Manstein alone reached trial in August 1949—two years after Taylor had forwarded the incriminating evidence—may be ascribed to the ultracaution of the triumvirate. Given the proportions that the case had assumed, it would have been disastrous for the Labour government had one of the accused collapsed in the dock. It should not be unduly surprising to learn that Rundstedt's lawyer did not consider his client's health to have deteriorated over the four and a half months since he had been officially charged, nor that Rundstedt lived for more than a decade after 1949.[89]

In Britain the trial of senior soldiers was probably more problematic than that of any other group of Germans. Few Britons could be found to stand up for SS members such as the Gestapo agents who had gunned down the Stalag Luft III airmen in 1944, or such as Joseph Kramer, the notorious commandant of Belsen. Even Lord (Maurice) Hankey, one of the foremost public critics of trials, was prepared to forgo releasing prisoners convicted of ''sheer sadism.''[90] However, soldiers were viewed as a different category by those convinced of the apoliticism and honorable tradition of the regular military.[91] Many of the staff of British Army War

[85] PRO, PREM 8/1112, CM (48) 47th Conclusions, 5 July 1948, memo to cabinet from Emmanuel Shinwell, 28 March 1949.

[86] PRO, PREM 8/1112, memo to cabinet from Shawcross, 22 June 1948; Bower, *Blind Eye to Murder,* p. 252.

[87] PRO, PREM 8/1112, memo to cabinet from Shinwell, 28 March 1949: Bower, *Blind Eye to Murder,* pp. 259–60.

[88] PRO, PREM 8/1112, CM (49), 24th Conclusions, 31 March 1949; CM (49), 32d Conclusions, 5 May 1949.

[89] LHCMA, LH 9/24/77, Walter Grimm to Liddell Hart, 18 May 1949.

[90] Lord Hankey, *Politics, Trials and Errors* (Oxford, 1950), p. 145.

[91] Classic statements of this often one-eyed support of German soldiery may be found in R. T. Paget, *Manstein: His Campaigns and His Trial,* (London, 1951). See also Hankey, *Politics, Trials and Errors;* Montgomery Belgion, *Epitaph on Nuremberg: A Letter Intended to Have Been Sent to a Friend Temporarily Abroad* (London, 1946); F. J. P. Veale, *Advance to Barbarism: How the Reversion to Barbarism in Warfare and War-Trials Menaces Our Future* (Appleton, Wis., 1948). Of the welter of current literature on the crimi-

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Crimes Group, northwest Europe, withdrew their services in protest against the planned prosecution.[92] In Parliament, two peers set up a public fund, to which Churchill—by this time a staunch critic of trials—was an early subscriber, to provide legal defense in this ''belated trial of an aged German general.'' In all, £2,000 were raised. The lower house contributed two defense counselors free of charge: Reginald Paget as the senior and Samuel Silkin as his junior.[93] Notably, Silkin was Jewish, a factor that opponents of trial seized on as an indication of the justness of their cause.[94]

With these forces arrayed in opposition alongside the German antipathy toward trials, it is apparent that only by perverse circumstance did Manstein become the last British prisoner to stand in the dock for war crimes in the postwar era. His case provided the clearest illustration of why the British government wished to close the book on the issue of war criminals. Indeed, by the time of his trial, the War Office had enacted a review of every other sentence passed by a Royal Warrant Court. This was the first phase in a process that would see the last war criminal released in the British zone in 1957 but was also a logical outcome of the political pressure to cease legal reckoning with the crimes of Nazism, for the continued existence of a class of German convicts would perpetuate the controversies that surrounded their trials in the first place.

Sentence Review, ''Clemency,'' and Premature Releases

The Number One War Crimes Review of Sentences Board was constituted in January 1949 to review all sentences passed in Royal Warrant trials in Europe and to ''ensure uniformity of punishment for similar offences.'' This meant ''similar offences,'' not only across Europe, but also those adjudicated on by the number two review board operating in the Far East. (The review did not affect Manstein's sentence, which was passed too late.) Underlying the principle of sentence, ''equalization'' was certainly a wish to be seen by the West Germans to be beyond reproach in terms of legal practice and egalitarianism. This desire was both pragmatic and idealistic, serving to minimize the growing German complaints about the trials and to further the lessons of the benefits of democratic legal process. The review meant fairly widespread reduction because it was illegal to increase shorter sentences in the interests of

nality of parts of the Wehrmacht, see esp. Hannes Heer and Klaus Naumann, eds., *Vernichtungskrieg: Verbrechen der Wehrmacht 1941 bis 1944* (Hamburg, 1995).

[92] PRO, PREM 8/1112, Shinwell to Lord Jowitt, 8 November 1948.

[93] Paget, *Manstein,* pp. 71–74.

[94] See ibid., generally; Veale, *Advance to Barbarism.*

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equalization. Of the 247 trial cases considered, involving 564 convicts, 107 individual sentences were either commuted or partially remitted. Importantly, it was also stated that the quantum of a life sentence was 21 years imprisonment. Equally importantly, the review was declared to be ''final,'' with no more to be considered ''except under exceptional circumstances.''[95]

''Finality'' was clearly not a constant, however, because a further review was instituted at the beginning of 1951. As Hartley Shawcross objected, this contrasted with the practice of the British Home Office to review sentences every four years, and there was certainly no reason to seek uniformity of sentencing more than once.[96] However, the proposed formation of a European Defence Community against the perceived Soviet threat spelt out ever more clearly the necessity for some sort of German military contribution.[97] This was altogether improbable while overtly nationalistic West German societal elites were vocally challenging the Allied occupation of Germany and the right of Britain, France, and the United States to pass moral judgment on the wartime past. The war criminals issue had become one of the most highly charged diplomatic issues, particularly the matter of the incarcerated military leaders, who were held up as symbolic of Germany's degradation at the hands of others.[98]

The following statement of Foreign Office policy to the cabinet in February 1951 speaks for itself as a classic example of the diplomatic adornment of political pragmatism.

> It is now our declared object, and that of the French and United States' Governments, to bring the Federal Republic into full political and economic cooperation with the West, and discussions are already in progress with a view to enabling Germany to contribute to western defence. When a factor of serious importance emerges which hinders the implementation of this new policy towards Germany, it is incumbent on . . . His Majesty's Government to take this factor into consideration and to give it due political weight. . . . It is with the above considerations in mind that the present review of [war crimes] sentences in the United Kingdom Zone is being undertaken.[99]

[95] Wade papers, Wade I, file 1.

[96] PRO, PREM 8/1570, CP (51) 45, memo by attorney general to cabinet, 8 February 1951.

[97] On the issue of rearmament, see David Clay Large, *Germans to the Front: West German Rearmament in the Adenauer Era* (Chapel Hill, N.C., 1996).

[98] Frei, *Vergangenheitspolitik,* pp. 202, 207, 249, 292.

[99] PRO, PREM 8/1570, CP (51) 38, 6 February 1951, secret memo by minister of state.

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A less euphemistic analysis had been provided by Patrick Dean of the Foreign Office and the British War Crimes Executive when he read the runes of the international situation as early as June 1946. Having berated the leniency of British sentencing compared to that of the American tribunals at Dachau, he averred, ''from the point of view of the Germans there is nothing to be gained in acquitting or imprisoning for short terms these terrible murderers. Those that are imprisoned will only be released just when the Allied control of Germany begins to relax.''[100]

Despite the possibility of a popular British backlash against the release of war criminals, by 1951 the political impetus for pro-German action was in the ascendant. Besides, the effects of British policy over war criminals could be substantially concealed from the domestic public. With the system of checks that was in place already—some of which were an inherent part of a more-or-less equitable legal system, and some of which, like the second review round, were the product of political expediency—light was clearly visible at the end of the tunnel for the convicts.

The following hypothetical instance may elucidate the extent to which the system favored the criminal. A man convicted in 1946 for a capital crime, murder, and consequently sentenced to death might well have had his death sentence commuted by the confirming officer to one of life imprisonment. With the quantum of ''life'' established as twenty-one years and the very widespread—indeed, often indiscriminate—use of a one-third reduction of sentences for ''good behavior,'' this murderer faced a maximum of fourteen years in prison and thus release in 1960. Had he benefited from sentence review or the gift of ''clemency'' (granted in individual cases for nonlegal reasons such as grounds of compassion), his sentence would have been shorter still.

The above case, it must be remembered, is an example of an ''average'' criminal—one of no remarkable rank or public repute. Extra effort went into securing the freedom of more esteemed individuals like Manstein. He was sentenced to eighteen years imprisonment in December 1949; on the occasion of confirmation of his sentence at the beginning of 1950, it was reduced to twelve years by the commander in chief of the BAOR, General Keightley, despite legal advice that there was no need for this.[101] And with the mounting of Western European defence pressures, and after the reaccession of the Conservatives in October 1951, the prospects for senior soldiers, in particular, looked progressively better.

[100] PRO, FO 371/57671, u5804/5488/73, minute by Dean, 18 June 1946.

[101] PRO, FO 371/85914, CG786/48/184, Shinwell to Bevin, 13 February 1950; emphasis added.

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Immediately on his return to Downing Street, Churchill moved to release all of the remaining officers in British custody.[102] The more cautious Anthony Eden, as foreign secretary, stressed that ''clemency'' could only be used where it was justified in terms of the specifics of the individual case.[103] However, he swiftly produced another legal device that unfairly aided many war criminals. In December 1951, Eden persuaded the cabinet to institute the policy of counting pretrial custody against sentences imposed. With the exploitation of a semantic loophole, this ostensibly equitable measure frequently doubled reductions already accounted for, as the Manstein case illustrates.

Anticipating the need for clarity, the Manstein court explicitly declared his sentence would date from the day of judgment, 19 December 1949, and that ''the period during which the accused has been in custody has been taken into account.'' In the face of this apparently unequivocal proclamation, Eden contended that the phrase ''taken into account'' did not mean that pretrial custody had been fully ''reckoned towards [the] sentence.'' (In fact, the principle was from henceforth established that pretrial custody could now be discounted from the sentence in every case where the court had not explicitly stated the formula that time previously served would be ''set off in its entirety.'')[104] Thus Manstein's original sentence, reduced on ''confirmation'' to twelve years, was reduced by a further period of approximately four and a half years. As did so many others, Manstein also acquired a further reduction of his twelve-year term by dint of the rule on ''good conduct.'' Having been sentenced in December 1949 to eighteen years imprisonment, he was scheduled for release on 7 May 1953. In any case, he was actually out of prison from August 1952, given medical parole for a minor operation and then an extended convalescence period at a health resort in Allmendigen (his hometown); all this coinciding conveniently with the period in which West Germany was set to ratify the European Defence Community Treaty.[105]

With the Conservative government pulling out all the stops in this way, on the back of the concessions made under the previous Labour administration, it is not hard to see why the last war criminal departed British custody within a dozen years of V-E Day. The only Germans still imprisoned as a result in part of British efforts were those ''major

[102] PRO, FO 800/846, Churchill to Eden, 29 November 1951; Churchill to Eden, 8 June 1952.

[103] PRO, FO 800/846, Eden to Churchill, 29 August 1952.

[104] PRO, FO 371/104159, CW1663/13, Kirkpatrick to Eden, 23 April 1953; PRO, Cabinet 129/48, C (51) 54, foreign secretary's note to cabinet, 18 December 1951.

[105] PRO, FO 371/104159, CW1663/13, Kirkpatrick to Eden, 23 April 1953.

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war criminals'' under quadripartite authority at Spandau, because the required Soviet acquiescence in their release was not obtained. Yet though the British punishment program was concluded in a very different political atmosphere to that in which it began, it must be stressed that the processes that culminated in that termination had been set in train more than a decade earlier.

Conclusions

To return then to the introduction: British war crimes trial policy has been justifiably criticized. Many leads were not followed up by British investigators, screening of suspects was inadequate, many of the criminals who fell into British hands were not tried, many who were tried were not punished severely enough, and many of the sentences that were handed out were compromised by the processes of ''clemency'' and sentence review from 1949 onward. The chief political reasons for these deficiencies are easy enough to ascertain: war-weariness and adjustment to the postwar international climate. The replacement in the eyes of the western Allies of Germany by the Soviet Union as the menace to world peace and occidental, ''Christian values,'' demanded the increasingly lenient treatment of the former to encourage solidarity against the latter.

Though the British trial program assuredly did concern many crimes against non-British nationals (a claim that few of the other European states could make), the limited legal accounting for crimes against Jews—not to mention that of Slavs, the ''disabled,'' and the Roma—was also founded on the very limited remit of the Royal Warrant. That remit was characteristic of a legal conservatism affecting the entire British punishment policy, embodied in the emphasis on ''war crimes'' as traditionally defined, which, in turn, reflected the cultural foundations of a society that had found itself incapable of responding to the enormity of the Nazi racial genocides.[106]

It would be crude and unfair to leave the analysis at this level, however. That many criminals went untried in the British zone (and everywhere else) should not blind us to the more than one thousand who were, nor to the considerable efforts that went into trying them, nor to the existence of a small but significant opposition to the ending of the trial program. Moreover, the occupation of Germany was not intended to be wholly punitive. The comparatively enlightened nature of the occupa-

[106] See Donald Bloxham, *Genocide on Trial: The War Crimes Trials in the Formation of Holocaust History and Memory* (Oxford, 2001); Tony Kushner, *The Holocaust and the Liberal Imagination* (Oxford, 1994); Dale Jones, ''British Policy towards German Crimes against German Jews.''

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tions of its western regions may be partially explained as regards the British and American authorities by their lack of experience of Nazi occupation, which both hindered full understanding of Nazi criminality and tempered the desire for vengeance. Yet ''democratization'' rather than ''denazification''—broadly defined—became the cardinal aim of the project not merely out of economic considerations or the utilitarian need for a strong anticommunist central European power but because of the very reasonable assumption that the former was both worthy and humanitarian.

Unlike the more structured American trial programs, the Royal Warrant trials were basically enacted ad hoc. Accordingly, their frequency and subject matter were to a greater degree at the mercy of the ebb and flow of public and political opinion. Within those general parameters, and given the personnel and budgetary limitations, it was consistent with a focus on British national interest that priority was increasingly given to the prosecution of crimes committed against British servicemen. It might be said that punishment in this category was an attempt at a literal interpretation of occupation justice, whereas in all other cases punishment was a more limited, metaphorical affair. Given the restrictive legalism of the British lawgivers, and the vast scope of Nazi criminality, acceptance that a symbolic reckoning was the most that could be expected was both encouraged and welcomed.

In the final analysis, every trial program fell victim to the relativizing force of political exigency. The American-led attempt to assert the rule of law over the capriciousness of international affairs may have left an important legacy for posterity, a seed that is perhaps now coming to fruition in the Hague, but in the peculiar circularity of postwar developments it was rebuffed. From shortly after its initiation, British punishment policy was predicated on recognition of the inexorability of that rejection.

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