Scholars of war crimes trials have often focused on the question of whether the trials were fair and just. More recently, the research has shifted to whether war crimes trials are an effective tool for educating civilians about the crimes of a previous regime. Mark J. Osiel in his book *Mass Atrocity* argues that war crimes trials should be designed as monumental spectacles to maximize their educational impact, affording the affected society a forum for exploring its past and reshaping its collective memory. Lawrence Douglas in *The Memory of Judgment* supports this argument by suggesting that war crimes trials may be an imperative “born of the scars left on an outraged collective consciousness,” and that such trials can contribute to the historical understanding of a traumatic past. But Martha Minow in *Between Vengeance and Forgiveness* warns that varying prosecution strategies and the self-serving interests of the defendants may distort the historical record presented at trial. Because of such inherent dangers, Michael Marrus argues that the historical narrative presented at trials should be viewed critically. Hannah Arendt goes further in *Eichmann in Jerusalem* to suggest that creating a historical record in war crimes trials could only distract from the law’s main purpose: to “render justice, and nothing else.”

This tension between the law and history, as it manifested in the U.S. Army war crimes trials in Germany, is the focus of this paper. Between 1945 and 1947 the U.S. Army prosecuted 1,676 lesser war criminals, defined as perpetrators “other than those who held high political, civil, or military positions,” in 462 trials conducted in the American zone of occupation in Germany. The accused included concentration camp personnel, Nazi military and state officials, as well as ordinary German civilians accused of violations of the laws of war. The Dachau trials – as they later became known for the location where most of them took place – were meant to serve both punitive and educational purposes. By punishing the perpetrators the army hoped to establish individual responsibility for violations of the laws of war. At the same time, by presenting evidence of Nazi criminality in open court, the army also sought to educate the Germans about the crimes of their past regime. Through an overview of the Dachau trials, this paper will demonstrate how the law shaped the historical record prosecutors could present and how it influenced the army’s ability to achieve the didactic goals it set for the trials.

In the aftermath of the Second World War, the United States prosecuted war criminals in Germany under three separate jurisdictions: the International Military Tribunal at Nuremberg (IMT), the successor Nuremberg Trials, and the U.S. Army trials at Dachau. First, the IMT, which convened under the London Charter by the United States, Great Britain, the Soviet Union, and France, indicted 24 of the highest ranking military and political leaders of the Third Reich captured by the allies. The indictment included three categories of crimes: crimes against peace – defined as “planning, preparation, initiation, or waging of a war of aggression”; war crimes – defined as “violations of the laws and customs of war;” and crimes against humanity – defined as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population... or persecutions on political, racial or
religious grounds...whether or not in violation of the domestic law of the country where perpetrated."

During the IMT proceedings, which began on 20 November 1945 and lasted for ten months, the court examined mostly documentary evidence about the crimes of the Nazi regime. Of the 22 defendants sentenced, twelve received death sentences, three received life imprisonment, four received lesser prison terms, and three acquitted.9

The second group of cases, closely linked to the IMT, was the successor Nuremberg trials. Established by the American Military Governor in Germany in accordance with Control Council Law No. 10, the twelve trials indicted 185 leaders of the Third Reich ministries, military, industrial concerns, SS, and legal and medical professions.10 The accused were charged with war crimes, crimes against peace, crimes against humanity, and membership in groups or organizations declared criminal by the IMT.11 The trials took place after the IMT proceedings concluded, beginning in December 1946 and ending in April 1949. Of the 177 defendants sentenced, the courts sentenced 24 to death, 20 to life imprisonment, 98 to lesser prison terms, and 35 acquitted.12

The third group of cases, constituting the largest and longest American effort to bring war criminals to justice, included the U.S. army trials of lesser war criminals. The fate of the lesser war criminals, in contrast to the major war criminals, was determined as early as 30 October 1943, when the United States, Great Britain, and Soviet Union signed the Moscow Declaration. The Declaration stated that perpetrators who committed crimes in known geographical locations would be brought back to the scene of their crimes after the war to be prosecuted by the countries in which their crimes took place, "according to the laws of those liberated countries."13 The U.S. Army, as occupier of Germany, had authority to prosecute war crimes within its zone of occupation, whether committed in concentration camps liberated by U.S. forces, or committed against American nationals.14

The U.S. Army became involved in the war crimes issue soon after the D-day invasion. On 25 September 1944, the army's Judge Advocate General established the National War Crimes Office in Washington, DC, to collect evidence on Nazi criminality in anticipation of possible war crimes trials in the future.15 Initially, army commanders in the field only collected evidence on Nazi perpetrated crimes against American servicemen.16 But with the liberation of Nazi concentration camps by American forces, the army created nineteen professional war crimes investigation teams that were able to expand the scope of the investigations to include mass atrocities against allied nationals.17

The American war crimes investigation teams attempted to gather evidence under extreme conditions and with little manpower. Often, investigators were unprepared for what they found and had to rely on their own creativity in order to accomplish their incredible task. Benjamin Ferencz, a war crimes investigator before he became a prosecutor at Nuremberg, wrote of his experience investigating crimes committed inside Flossenbürg concentration camp:

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9 Trial of the Major War Criminals before the International Military Tribunal Nuremberg, 14 November 1945 - 1 October 1946, 365 (Nuremberg, 1947).
11 Ibid. 64-65.
12 Subsequent to the indictment four accused committed suicide, and four others were severed from the proceedings because of illness. Ibid., 91.
13 Moscow Declaration signed 30 October 1945 by Roosevelt, Churchill and Stalin.
16 Ibid., 11.
“I took over two large offices [in the camp] for our headquarters... Some of the inmates had hidden the books with the names and statistics of the prisoners, and those were now brought out and I put a crew to work tabulating the data. I had two long-time French inmates, as well as one Polish journalist start writing a complete history of the camp. To another I assigned the job of compiling the names of all known SS men who were ever in the camp. A Dr. was gathering statements from persons in the hospital, and I went to work furiously gathering statements from others whom I started calling to the office.”

American war crimes investigators who entered Mauthausen, Dachau, Buchenwald, and Nordhausen concentration camps had similar experiences. Yet despite these difficulties investigators gathered over 12.5 tons of documentary evidence, and opened 3,887 war crimes cases, which formed the basis for the army’s trials of lesser war criminals.

The army relied on established international law to prosecute its war crimes cases at Dachau. The indictments focused exclusively on violations of the laws and usages of war in accordance with the Army’s own rules and regulations. The exclusive focus on war crimes was in contrast, however, with the broader charges of crimes against peace and crimes against humanity used in the IMT and subsequent Nuremberg proceedings. The army’s use of a narrow legal framework made it less susceptible to accusations of retroactivity of the law, but at the same time presented unique challenges for prosecuting crimes of an unprecedented scale and nature.

Between June 1945 and December 1947, the army prosecuted two types of cases at Dachau: cases dealing with crimes against American nationals and cases of mass atrocities. The first group involved 253 trials against 646 defendants who mistreated American aviators or ground troops in violation of the laws of war. The aviators were shot down from their planes over the German countryside. Upon their surrender as POWs on the ground, the flyers suffered mistreatment by the local population. Later, they were either lynched by mobs of civilians or executed by local police or party officials. The surrendered American ground troops, on the other hand, were either shot by German soldiers on the battlefield, or mistreated in Nazi POW camps. The prosecution presented evidence in court to show that the deaths of the American servicemen were the result of an official policy developed by Himmler and Bormann to encourage the killing of captured allied soldiers in violation of the laws of war. Introducing this evidence assisted the army in educating the German public about the criminal policies of the Nazi government. It also illustrated to the Germans that the execution of these policies was carried out not only by government officials but also by ordinary civilians.

The 646 accused, including fifteen women, were mostly German or Austrian nationals but also included six Hungarians, two Czechs, two Romanians, and one Dutch citizen. They were civilians, Nazi police and party officials, as well as German military personnel, and ranged in ages between 18 and 72 years old. Many did not belong to the Nazi Party. Some defendants maintained that their actions were the consequence of the relentless Nazi propaganda, which encouraged them to kill downed flyers. Others attributed their acts to the trauma they suffered either on the battlefield or after losing family members or property to allied bombings. Yet others claimed that they only followed orders and that disobeying their superiors would have resulted in their own deaths. In most cases the court did not

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18 Ferencz to Trudy, 29 April 1945. Benjamin Ferencz Papers, RG 12.001.03*01, United States Holocaust Memorial Museum, Washington, DC.
21 For example case 12 -1497 U.S. v. Hagen et al.; Order No. 003830/42 g.Kdos. OKW/West, 18 October 1942; Editorial by Göbbels on the subject which appeared on 29 May 1944 in the Volkscher Beobachter; Himmler, Order RF/48/16/43 g., 10 August 1943; Keitel to the Supreme Commander of the Air Force, 14 June 1944. NARA, RG 338, Cases Tried Box 260.
22 Yavnai, Military Justice, appendix, trials chart.
recognize these arguments as acceptable defense but did consider them as mitigating circumstances during sentencing. Of the 533 accused found guilty, the court sentenced 196 to death, 92 to life in prison, and 245 to prison terms ranging from two months to 30 years.\(^{24}\)

The second group of cases the army prosecuted at Dachau involved mass atrocities against allied nationals. The army prosecuted 232 mass atrocities trials against 1030 defendants. The accused committed war crimes in six main concentration camp rings including Dachau, Mauthausen, Buchenwald, Flossenburg, Nordhausen, and Müldorf, as well as at the Hadamar mental institution.\(^{26}\) These unprecedented crimes were particularly difficult to prosecute because, as opposed to the downed flyer cases, their scope went beyond the traditional violations of the laws of war which the military courts had authority to handle.

The 1030 accused, including only three women, either held official positions at the camps as members of the Nazi Party, Allgemeine SS, SA, Waffen SS, Wehrmacht, Navy or Luftwaffe; were civilian employees of the Third Reich; or privileged concentration camp inmates including kapos and block elders. They included German, Austrian, Yugoslav, Czech, Romanian, Polish, Spanish, Latvian, Hungarian, and Dutch nationals and ranged in ages between 21 and 74 years old. In their defense, the accused argued that they executed legal orders; followed superior orders; suffered duress; mistaken identity; were the target of revenge by witnesses; or that they simply did not commit the crimes charged. The Dachau courts found 885 defendants guilty of war crimes and sentenced 233 accused to death, 106 to life in prison, and 546 to prison terms ranging from one to 20 years.\(^{27}\)

Having to prosecute the mass atrocities cases within the narrow legal framework afforded by the laws of war affected the army's ability to present a coherent historical context for these crimes. For example, prosecutors could not introduce evidence on the Holocaust, as it was carried out in concentration camps, because genocide was not a recognized crime yet, and persecution based on religion was a crime against humanity, but not a violation of the laws of war.\(^{28}\) Instead, prosecutors focused on the criminality of daily life at the camps. In the Mauthausen case, prosecutors illustrated the various forms of mistreatment, malnutrition, hard labor, executions, poison injections to the heart, and gassing, which caused the deaths of many inmates there. While this evidence did not explain the reasons or policies of persecution of certain groups in the camp, it did help the court to find that the camp was a criminal enterprise; that it was impossible for anyone to be present there without knowledge of the criminal practices; and that personnel connected with the camp, regardless of their capacity, could be found guilty of violating the laws of usages of war.\(^{29}\)

In another example, the Hadamar case, prosecutors could not present evidence against the mental institution's staff for their role in killing thousands of Germans as part of Hitler's T4 euthanasia program, because this policy was a domestic matter outside the scope of international law.\(^{30}\) Instead, prosecutors had to focus on the deportation to Hadamar and subsequent murder by the institution's staff of a few hundred eastern workers who were not mentally or otherwise handicapped.\(^{31}\) As a result, the purpose of the Hadamar institution was never fully explained through the trial evidence, and staff involved in killing thousands of other victims could not be prosecuted.

\(^{24}\) According to the U.S. Army's *Rules of Land Warfare* paragraph 347.1 as amended on 15 November 1944, superior orders do not absolve military personnel from responsibility for committing war crimes. However, the fact that the accused had committed war crimes pursuant to an order of a superior or government sanction "may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving the orders may also be punished." "Report by the Deputy Judge Advocate for War Crimes", 16. NARA, RG 338, General Administration, Box 13.


\(^{26}\) Ibid.

\(^{27}\) Ibid.

\(^{28}\) The term genocide, coined by Raphael Lemkin in 1943, became officially recognize as a war crime in the 1948 by the United Nations in the *Convention on the Prevention and Punishment of the Crime of Genocide*.

\(^{29}\) Case number 000-50-5, U.S. vs. Hans Altfuldisch et al.


\(^{31}\) Case number 12- 449, U.S. vs. Alfons Klein et al.
Prosecutors were very careful not to introduce evidence that was outside the legal scope of the court. Partly for this reason they built their prosecution strategy on carefully controlled witness testimonies supported by documentary evidence.\textsuperscript{32} As was later the strategy of the Israeli prosecution in the Eichmann trial, and in marked contrast to the IMT where most of the evidence presented was documentary, at the Dachau mass atrocity cases prosecutors tried to link the evidence with the personal suffering of the victims. The witnesses were carefully selected based on the credibility they projected, namely, their ability to convey their experiences in an eloquent and convincing manner.\textsuperscript{33} The witnesses could only testify about the daily working of the camps, the lower-ranking defendants only about their personal acts and observations. This allowed prosecutors to better control the history narrative they were presenting to the court and the public, even if it was a limited one.

In conclusion, as Martha Minow argues, war crimes trials by themselves cannot create "an international moral and legal order, prevent genocides, or forge the political transformation of previously oppressive regimes."\textsuperscript{34} Whether war crimes trials are the correct forum for presenting historical narratives remains debatable. But as the U.S. Army trials at Dachau illustrate, when using war crimes trials to educate a nation about its criminal past, the choice of law is not less important than the development of evidence. At Dachau, legal limitations dictated the kind of evidence prosecutors could present, often limiting its scope. While the trials afforded the German public an opportunity to hear in open court directly from the perpetrators and their victims, the historical narrative presented was often incomplete or distorted. Nevertheless, the Dachau trials were able to provide accountability, closure for the victims, and offer a starting point in which the crimes of the Nazi regime could be discussed in the immediate aftermath of war.

\textsuperscript{34} Minow, \textit{Between Vengeance and Forgiveness}, 49.
Lisa Yavnai

*Militärjustiz: Kriegsverbrecherprozesse in der amerikanisch besetzten Zone in Deutschland, 1945-1947*
