

"Defending the Indefensible: Douglas Bates and the Dachau War Crime Trial"

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Abstract

In the quiet town of Dachau, just north of Munich, Hitler opened his first and model Concentration Camp on March 22, 1933. When it was liberated 15 years later (April 29, 1945), it was clear that a US military tribunal would be established quickly to try the camp's leaders. While all this is well documented in Holocaust literature, what is not is the approach taken by the chief defense council, Tennessee lawyer Douglas T. Bates, II. In fact, this first Dachau War Trial predated the more infamous Nuremberg War Trial, just 60 km away. Based upon the official war trial transcript and interviews, the approach taken, objections made, and summary conclusion by defense counsel Bates insured that this trial – the first of the World War II war crime trials – would establish the international legal precedence needed for what was to come in the rest of the bloody 20th century (and well into the 21st century).

Keywords: Dachau, Holocaust, Hitler, Bates, war trial, concentration camp, World War II

Public memory is contested terrain, the historian Herbert Marcuse observes, especially when the past event in memory is Hitler's unimaginably evil model of a concentration camp outside the town of Dachau, Germany.¹ Seventy years on, we are used to seeing modern revisionism as a tour de force in the redefinition of that memory. But as regards Dachau, that myth of "not me" culpability began almost immediately. Here is how the postwar mayor of Dachau, Josef Schwalber², succinctly summarized what had happened at that concentration camp in a speech given to high-ranking Allied officials on November 9, 1945 at Dachau Castle:

Ladies and Gentlemen! How peaceful life once was here! Dachau, once the epitome of rural stolidity and earthiness, closely bound to its artists and their noble cultural efforts for more than a century! That was once our Dachau! But then non-local sadists came and settled on the outskirts of our city, and with horror and fear we had to watch as they defiled the name Dachau in the eyes

I am greatly indebted to Douglas T. Bates, III, son of the Dachau War Trial chief defense counsel, for his cooperation and assistance in this project. It is an understatement to say that this paper could not have been written without his factual help and filial love. To Phyllis Garfield, I gratefully acknowledge her invaluable advice in reading the drafts of this paper. I am most grateful for the financial support in this research from The Wendt Center for Character and Ethics, University of Dubuque; the Faculty Development Fund, University of Dubuque; and the Jackaline Dunlap International Studies Fund, University of Dubuque.

¹ In a discussion of National Socialism during an unpublished speech in Seattle, WA, Marcuse differentiated and deconstructed the meanings of "remembering", "recollection", "commemoration", "memory groups" and "collective memories". See "Dachau and the Memory of National Socialism," at the conference "Geteilte Geschichte: A History Shared and Divided. The Two Germanies 1945-1990," sponsored by the German Academic Exchange Service, Seattle. Online at: <http://www.history.ucsb.edu/faculty/marcuse/present/seattle.htm>.

² Schwalber (a Weimar era style politician) was appointed and then elected as Dachau's first post WWII mayor. This speech, intended to soften the horrors that had occurred in Dachau, was given one week before the first Dachau War Trial (the focus of this paper) started.



of the entire civilized world. For twelve long years the concentration camp weighed like a nightmare upon us.³

If we examine this speech more closely, we see that Schwalber first evokes a positive image of Dachau before describing how Dachau citizens "had to watch" while immobilized by "horror and fear" as those alien, inhumane outsiders created a camp that was to defile their reputation. A similar sentiment, with incredulous overtones, was expressed by a liberation soldier at Dachau who is documented as stating that this fellow Hitler must have been quite some guy, since he seemed single handedly able to govern the entire country, control the military, and execute millions of people in those concentration camps.⁴

The terrible horrors that went on in Dachau is fact from its ceremonial opening on March 22, 1933 (see figure 1) to its liberation on April 29, 1945.⁵ In this paper, the facts are surprisingly simple: the Dachau Concentration Camp was liberated by the US Army's 42nd Infantry (the Rainbow Division) under Major General Harry Collins 13 years after its opening on April 29, 1945. The first-ever concentration camp trial – an 8 man military tribunal, the Dachau War Trial - started five and a half months later on November 15, 1945. And while final arguments and the tribunal's findings were delivered on December 12, 1945, actual sentencing occurred on December 13, 1945, one month after the beginning of the trial.

Figure 1. March 21, 1933 announcement of the opening of the Dachau Concentration Camp. *Münchener Neueste Nachrichten* (*The Munich Latest News*).

Military trials after the defeat of the Nazis occurred in fast succession, so much so that to the American media and public, the Dachau War Trials often blurred one into another.⁶ Many trials took place at Dachau, but the first one, the original, was the Dachau War Trial specifically

³ For the complete speech, see *Statio Orbis*. Kösel, Munich. Volume II. 1961. pp. 164-169. A partial translation can be found in Harold Marcuse. *Legacies of Dachau: the uses and abuses of a concentration camp, 1933-2001*. Cambridge University Press, Cambridge. 2001 pp 73-74.

⁴ For these and other opinions by the liberation soldiers, please see Sam Dann, editor. *The Rainbow Liberation Memoirs*. Texas Tech University Press. 1998.

⁵ The Dachau Concentration Camp, built on the ruins of an older munitions plant, opened 51 days after Hitler took power. Official notice appeared in *Münchener Neueste Nachrichten* (*The Munich Latest News*) on March 21, 1933.

"The Munich Chief of Police, Himmler, has issued the following press announcement: On Wednesday the first concentration camp is to be opened in Dachau with an accommodation for 5000 persons. 'All Communists and—where necessary—Reichsbanner and Social Democratic functionaries who endanger state security are to be concentrated here, as in the long run it is not possible to keep individual functionaries in the state prisons without overburdening these prisons, and on the other hand these people cannot be released because attempts have shown that they persist in their efforts to agitate and organise as soon as they are released.'"

⁶ While this paper focuses on the original Dachau War Trail, subsequent trials took place immediately afterwards at Dachau: Mauthausen in April 1946, Flossenbürg in January 1947, Buchenwald in August 1947, Mühldorf in May 1947, and Nordhausen in August 1947. For more information, see "Some Noteworthy War Criminals" from *History*

about the Dachau Concentration Camp. The others took place at Dachau, but their focus was on concentration camps outside of Dachau.

The Dachau War Trial has been documented in Holocaust literature. However, the arguments and direction of the defense in this, the first war crimes trial, has not. Therefore, I will focus on this one month trial by looking at the strategy of the chief defense counsel, Douglas T. Bates, II within the context of the Tribunal.⁷

Why Have War Crime Trials

Though the idea of war crime trials had been circulating as early as 1942, it was by no means a foregone conclusion that there would be trials. The details involving jurisprudence was an open question.⁸ When President Franklin Roosevelt stated in 1942 “that just and sure punishment shall be meted out to the ring leaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities”, he was no doubt remembering the failed war trials of World War I.⁹ Three years after the war ended in 1919, the Allied powers turned over a list of 896 persons charged with specific crimes (based upon the Geneva Convention) to the German command intended to be prosecuted by the new German Supreme Court. It was assumed that since Germany was defeated, it would soon become again a nation governed by laws. But post World War I Germany did not aggressively prosecute. Only 45 men were brought to trial (5% rate) with only 9 found guilty (1%). Furthermore, of those 9, the initial sentences were minimal (6 months to 4 years) and in the end, no one served a full term.

Clearly the Allied forces did not want a repeat of what they saw as that gap of formal justice that was experienced after the World War I. Reports had begun to filter back about concentration and labor camps, though most reliable news sources tended to minimize what they had seen or heard even from first hand witness reports. James Agee (in *The Nation* in May, 1945) and Milton Mayer (in *The*

of the United Nations War Crimes Commission and the Development of the Laws of War. United Nations War Crimes Commission. London: HMSO, 1948. Online at: <http://www.ess.uwe.ac.uk/WCC/warcrimcon.htm>.

⁷ All references to the Dachau War Crime Trial refer to the original typed transcript, now available online at: <http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d3.pdf>. An abridged version, often cited, is available online at: http://www.uni-marburg.de/icwc/forschung/2weltkrieg/usadachau?order=id_trial&order_type=asc&offset=0&count=25&id_trial=492. Among recent publications that examine the trials in Dachau and their continuing influence both within and outside of Germany: Harold Marcuse. *Legacies of Dachau: The Uses and Abuses of a Concentration Camp, 1933-2001*. Cambridge University Press, Cambridge. 2001. Joshua M. Greene. *Justice at Dachau: The Trials of an American Prosecutor*. Broadway Publishers, New York. 2003.

⁸ Indeed, history was being written at every juncture. And even though the Allied powers through the Moscow Declaration and the London Agreement indicated that they wanted a formal action which would clearly and officially hold the Nazis responsible for the atrocities, when the generals (Eisenhower, Bradley and Patton) descended upon Dachau their initial responsible was not so deliberative. General Omar Bradley in his diary recounted that Patton got on top of his jeep and shouted to his men, “See what these sons of bitches did? See what these bastards did? I don’t want you to take a prisoner!” Deborah Dash Moore. *GI Jews: How World War II Changed a Generation*. Harvard University Press, Cambridge. 2004. p. 229.

⁹ Charles Cheney Hyde and Edwin D. Dickinson. "Punishment of War Criminals". *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*. Vol. 37, (April 30-May 1, 1943), p. 39. Online at: <http://www.jstor.org/pss/25657076>.

Progressive also in May, 1945) either didn't believe the accuracy of the film footage they saw or thought it had been manipulated.¹⁰ After the war's end and the liberation of the first camp – Dachau – Joseph Pulitzer Jr. admitted in the New York Times that the earlier reports had been understated.¹¹

The Moscow Declaration (from October 30, 1943) clearly stated the intention by the Allies that the Nazis responsible for war crimes should be brought to justice. While the details were not there, the attitude was. Soon after, on August 8, 1945, came the London Agreement and Charter which more clearly laid out this notion of judicial action. The four major powers (US, Great Britain, Russia and France) would independently try those Germans captured in their respective zones of occupation. The Allies quickly launched their individual war crimes programs and the Dachau War Trial was the first.

Dachau Trial: Military or Civilian?

Since the Rainbow Division (US Army 42nd Infantry) troops liberated Dachau, the United States decided to initiate the first trial there, 65 miles south of Nuremberg where the International Military Tribunal (IMT) was preparing to prosecute top Nazi officials. It was decided that the Judge Advocates General of the US Army would organize all trials.¹² The Dachau court was made up of eight senior officers, all with the rank of full colonel who had active field service. They were Lester Abele, Wendell Blanchard, George Brunner, John Jeter, Laird Richards, George Scithers, Peter Ward and John Lentz, Brigadier General and president of the court. Colonel Mickey Straight, chief of the JAG War Crimes Branch, appointed the court.¹³

It was clear to all that there would be military war crime trials and that they would be rather quickly pulled together. It was also clearly the expectation that they would be finished quickly. But for a host of reasons, not the least of which was that the world was watching, the process of law needed to be followed and followed seriously. The prosecutor had to investigate and identify charges and appropriate personnel who would match those charges. The defense counsel had to do his best to dismiss the charges and defend those accused. And yet at Dachau, neither the head prosecutor – Lt. Colonel William Denson, Harvard Law School graduate and West Point instructor – nor the head defense

¹⁰ Paul Johnson. *A History of the Jews*. Harper & Row Publishers, New York. 1988. p. 504 and James Agee, "Films," *The Nation*, Vol. 60: May 19, 1945, p. 54. For further discussion of Agee's refusal to acknowledge WWII atrocities see Hugh Davis. *The Making of James Agee*. University of Tennessee Press, Nashville. 2008.

¹¹ "US Army and the Holocaust" Online at: http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0020_0_20242.html . Thompson Gale Reference Team, editors. *Contemporary Authors: Joseph Pulitzer, Jr. (1885-1955)*. 2007. Digital Edition only. Joshua M. Greene. *Justice at Dachau: The Trials of an American Prosecutor*. Broadway Publishers, New York. 2003. p. 14.

¹² Judge Advocates General (JAGs) have been the attorneys for the US Army's legal needs since 1775. While this paper focuses on the Dachau War Trial, in all of World War II (in Germany and Japan) the JAGs were responsible for 189 trials involving 1672 defendants. Jay M. Siegel. *Origins of the Navy Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775 to 1967*. US Government Printing Office, Washington. 1998.

¹³ It has been observed that the JAGs were simply over their heads since crimes, the likes of which they were to adjudicate, had never been part of their background before. Simply put, such crimes at such a scale had never been documented in law procedures before and it was clear to both chief prosecutor and chief defense counsel that they were forging new directions.

councilor Lt. Colonel Douglas T. Bates, II, graduate of Vanderbilt and Stamford Law School in Birmingham, Alabama had any experience with war crimes.¹⁴

Both had served the military in European operations and had been active in combat until the end of World War II. Now they were ordered, simply put, to prosecute and



Figure 2. November 15, 1945. View of the Dachau War Trial. Under the American flag is the military tribunal. On right, defense counsel in front; rows of prisoners in back. On the bottom of photo, prosecutors from the back. Courtesy National Archives and Records Administration, College Park, Photograph #11454.

defend. Since they did not yet have enough points to request state-side active duty, their roles were not voluntary.¹⁵

Opening Day, November 15, 1945

Two war crime trials had been scheduled to open in November in Germany. The more famous one, associated with Nuremberg, was to try twenty four prominent members of the political, military, and economic leadership of the defeated Nazis at the restored Palace of Justice. But reconstruction caused a delay. So the first World War II war crimes trial, which was intended to try forty concentration camp officials and guards, started at 10am, November 15, 1945, in a crowded 200 foot room, dominated by a 6 foot American flag (see Figure 2). Under the flag was a 15 foot table with eight chairs for the American military tribunal judges. In front of the judges' table sat the various court reporters (using shorthand and typewriters). In front of the reporters were rows of chairs for spectators, admitted only by ticket (see Figure 3). It is estimated that there were 400 spectators when the trial began. The prosecutors sat to the left of the judges' table; the defense sat to the right of the judges' table. In back of the defense area sat the 40 men accused, ranging in age from 18 to 74 (see Figure 4).^{16 17}



Figure 3. November 15, 1945. Visitor's Pass for Dachau War Trial. Courtesy of Yad Vashem Photo Archive, Jerusalem, Israel.

¹⁴ The prosecution's five member team was: Lt. Colonel William Denson (Tennessee), Lt. Paul Guth (New York), Captain Phillip Heller (New York), Captain William D. Lines (Florida), Captain Richard G. McCuskey (Ohio), and Captain Dalwin J. Niles (New York). The defense's five member team was: Lt. Colonel Douglas T. Bates, II (Tennessee), Captain John A. May (Texas), Major Maurice J. McKeown (New Jersey), Captain Dalwin J Niles (New York) and German lawyer (former prisoner in Dachau chosen by the accused themselves) Karl von Posern.

¹⁵ The military "point system", used to rotate US soldiers back to the United States, went into effect after the war ended (May 8, 1945 in Europe and August 15, 1945 in Japan). Those who volunteered or who had been drafted during the war were in the war until the end of hostilities plus one year. The point system was announced and put in effect only after armistice. There were a certain number of points for how many times you were wounded, for medals you received, for the length of service, for the number of combat days, etc. The cutoff number was 85. For further explanation, see: <http://users.skynet.be/jeeper/point.html>.

¹⁶ The Palace of Justice was chosen as the site of the two trials for a host of reasons. It was within the American zone of occupation and therefore could be organized according to American directions; it was virtually undamaged and in impressive condition; it was very large (anticipating crowds of journalists and politicians); its prison was intact; and symbolically the city was the location of Nazi party rallies, offering a sobering metaphor of justice. The trials took place in courtroom number 600. And though the main Nazi leaders had already committed suicide (Heinrich Himmler, Adolf Hitler and Joseph Goebbels), it was decided to try second tier Nazi-ideological leaders like Karl Dönitz, Hans Frank, Wilhelm Frick, Hans Fritzsche, Walther Funk, Hermann Göring, Rudolf Hess, Alfred Jodl, Ernst Kaltenbrunner, Wilhelm Keitel, Konstantin von Neurath, Franz von Papen, Erich Raeder, Joachim von



Figure 4. November 15, 1945. View of the Dachau War Trial. Defense counsel in the front with German prisoners in the back. Courtesy United States Holocaust Memorial Museum, Washington, D.C.

While the opening days were packed, soon the courtroom settled to just a handful of spectators (see Figure 5).¹⁸ The lack of press attention weighed on the prosecutor, William Denson. It was welcomed by Defense Counsel Douglas T. Bates, II.¹⁹

Figure 5. November 15, 1945. The room at the Dachau War Trial was packed during the first week. Courtesy Jewish Virtual Library. <http://www.jewishvirtuallibrary.org/jsource/ww2/malmedy2.html>.

Military Tribunal Rules



A military court operates with its own sets of rules, often different than the rules of the country where it occurs. These rules define the limits of the court, what it will hear, what it will rule on, and how it will approach the evidence. Of course, these rules are taken seriously by the prosecutor and the defense counsel since they indicate what will or will not be interpreted as germane in court. There were three explicit directions from the Dachau War Crime Tribunal.

One direction stated that probative statements (hearsay) would be allowed. Often in criminal law, probative statements are viewed as soft and unreliable. A jury is often instructed to ignore probative statements. But under the rules established by the Tribunal, probative statements were allowed if they seemed relevant to a reasonable man.²⁰ This concession was probably allowed since so many eyewitnesses had been killed.

Ribbentrop, Alfred Rosenberg, Fritz Sauckel, Hjalmar Schacht, Baldur von Schirach, Arthur Seyss-Inquart, Albert Speer and Julius Streicher. To put these trials in perspective, the Nuremberg trials saw the prosecution of 22 Nazis orchestrated by a team of 640 staff members. By contrast, the Dachau prosecutors had only 22 staff members to prosecute 1,672 defendants.

¹⁷ Trial details in English, Dutch and German are from Dick de Mildt, editor. *Tatkomplex: NS-Euthanasie. Die ost- und westdeutschen Strafurteile seit 1945*. Amsterdam University Press, Amsterdam. 2009. An abridged (but almost complete) version is available online: <http://www1.jur.uva.nl/junsv/index.htm>.

¹⁸ The lack of public interest in the trial was also noticed during the next week at Nuremberg as well, where higher ranked Nazi prisoners were being tried. Both trials were based upon facts and the tedium of translation, mis-translation, alternative translation of question, answer, follow-up, etc. took its toll. Popular journalists of the time, Margaret Higgins and Walter Lippmann, cut their stays in Dachau and Nuremberg drastically short.

¹⁹ Based upon the author's interview with Douglas T. Bates, III, the defense counsel's son and partner in law after the war, on April 1, 2009.

²⁰ According to Aron, the judges in the Tribunal believed that when probative evidence, regardless of its source, establishes the truth, then justice is achieved. Harold G Aron. *The probative law. A commentary on evidence, trial procedure and practice and judicial proof generally and in actions ex delicto, ... in judicial methods and the adjective law*. Georgic Press. 1932.

A second direction involved the scope of the Tribunal's jurisdiction. The Dachau War Tribunal would only prosecute crimes committed by Germans against non-Germans who were at war with Germany. The scope of the court, then, would not examine any claims made that German citizens might have brought against the Germans running Dachau.²¹

A third stipulation was that the Tribunal would only hear crimes which occurred between January 1, 1941 and April 29, 1945 (the liberation of Dachau).

Bates' Defense Strategy

While the counsels for the defense had no doubt of the guilt of each of the 40 prisoners, they saw it as their duty to create the best defense possible. While they knew this would produce friction in Dachau among the lawyers and their teams, from the start they tried to represent the defendants actively. This was simply the way it had to be as the world watched (see Figure 6).²²



Figure 6. November, 1945. Douglas T. Bates, II with Dr. Klaus Schilling. Courtesy Horace R. Hansen Photo Archives, University of Minnesota Law Library.

1. Ask for dismissal of charges based on vague accusations (common design).

After the two charges were read to the defendants, the Tribunal president asked, "How do you plead?" The defense immediately requested to have the charges dropped due to their vagueness.²³ The prosecution settled on the generic "common design" charge rather than "crimes against humanity" charge (which was the basis for the Nuremberg trials). Under the "common design" concept, organizations as well as individuals could be charged with war crimes. Membership in an organization was enough to convict an individual of a war crime, whether or not there was a witness to testify that the accused was seen committing any criminal acts (see Figure 7).²⁴ In fact, not one of the 40 accused at the Dachau War Trial was charged with committing a specific

²¹ Of course, this meant that any survivors who were German Jews could not bring action at this court. It was determined that in cases of Germans vs. Germans, who best to judge an internal matter but local courts at a later date. It never occurred.

²² Based upon the author's interview with Douglas T. Bates, III, the defense counsel's son and partner in law after the war, on April 1, 2009.

²³ According to the transcript, the two charges alleged that the accused "acted in pursuance of a common design to commit acts hereinafter alleged and as members of the staff of the Dachau Concentration Camp, and camps subsidiary thereto, did at or in the vicinity of Dachau and Landsberg, Germany, between about 1st January, 1942, and 29th April, 1945, wilfully (sic), deliberately and wrongfully aid, abet and participate in the subjection of civilian nations" (charge 1) and of "captured members of the armed forces" (charge 2) "of nations then at war with the German Reich, to cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities, the exact names and numbers of such victims being unknown but aggregating many thousands. . . ."

²⁴ For the Tribunal proceedings at Dachau, the "common design" or "common plan" theory meant that individuals were guilty of crimes committed by others on the staff of a concentration camp even if they didn't serve at the same time. It didn't matter whether or not the crimes allegedly committed by others in a particular concentration camp had ever been proved in a court of law or by a military tribunal; staff members of that camp were presumed to be guilty of these crimes, and there was no defense against the new law of "common design."

This new concept of collective guilt was formulated by the Allies in order to see that justice was done. The basis for the proceedings of the prosecutor was that the Germans had participated in a "common design" to commit war crimes. The

Figure 7. December 10, 1945. Dachau commandant Martin Weiss (facing the Tribunal) during his testimony. Courtesy of National Archives and Records Administration, College Park. Photograph #11454.



motion was denied.

crime, but rather with aiding and abetting the commission of crimes in the concentration camp system (which was designated by the Allies to be a criminal enterprise). The legal basis for the “common design” charge was Article II, paragraph 2 of Law Order No. 10, passed by the Allies.²⁵

From the outset, it was the defense’s strategy to discredit the charges against their clients. Defense counsel continued, “What is my client charged with? Murder? Torture? Beating?” The

2. Object on technicalities.

The prosecution’s first witness was Medical Corp Col. Lawrence Ball who brought an evacuation hospital to Dachau two days after the liberation. When the prosecutor asked what Ball found at Dachau, Bates immediately objected. “Liberation was April 29. That’s the date the court set. May 2 is another date entirely.” The motion was denied.

Upon Ball’s testimony of finding thousands of bodies in 38 railroad cars, Bates sought to discredit the medical corpsman. “Did you know whether than train was going to or from Dachau?” “Did you know of the nationality of any of the bodies you found?” “Some of those bodies could have been German, like the bodies in the crematorium.” The Tribunal only agreed to hear criminal charges committed against Allied citizens (American, Belgian, British and French). Motion was sustained and Ball’s testimony was not allowed.

3. Challenge simple, probative statements (even though the Tribunal allowed them).

In cross-examining a camp survivor, Bates asked, “When you first arrived here, things were not so bad considering it was a concentration camp, were they?” He got the survivor to admit that it got much worse later. By using this line of questioning, Bates shifted responsibility away from his German defendants on trial and onto other Nazi officials at other camps. As the war got worse for Germany at the end and there were fewer medicines and fewer food convoys, Bates observed, guards could not possibly give the prisoners enough medicines nor food. Since when is that the guard’s fault, he asked.

When a group of Russians were executed, there were no witnesses. A camp survivor testified that he saw the Russian bodies being brought to the crematorium. But what part did any camp official play in their deaths? Through hearsay, the survivor assumed it was certain camp guards. Bates asked, “What

prosecution had only to prove that the accused had participated in a common plan by virtue of his position on the staff of a concentration camp, whether or not he had personally committed any atrocities.

²⁵ Article II, paragraph 2 of Law Order No. 10 states:

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

See online: <http://avalon.law.yale.edu/imt/imt10.asp>.

part does revenge, retaliation or vengeance play in these witnesses testimonies?" The motion to strike was denied.

4. Remind the Tribunal that fairness and justice is the basis for law.

In his closing argument, Bates warned the court that, "The surest safeguard against totalitarianism is uncompromising adherence to the administration of justice." By challenging the court to remain fair, he suggested that the idea of common design was merely an expedient way of trying 40 defendants quickly and he asked the court not to fall for it. "If we want to shoot Germans as a matter of policy, let it be done as such. But don't hide the deed behind a court. The world yields no respect for courts that are organized merely to convict."

The Verdicts and a Postscript

It took the Dachau War Tribunal one hour and thirty minutes to deliberate and pronounce a guilty verdict for all 40 prisoners (this translates to about 3 minutes per prisoner). The next day, December 13, 1945, 38 defendants were sentenced to death by hanging while 2 received life in prison. How did the German prisoners react as they left the courtroom? They shook Bates' and the other defense counsels' hands saying they never expected anyone to work so hard in their defense. As a group, they walked over to prosecutor Denson and thanked him saying they never expected a fair trial.²⁶

While the prosecutor tasted victory and the defense counsel defeat on December 13th, they had no way of knowing that the political reality of postwar Germany had just started and would significantly influence the final outcomes for the defendants (see Figure 8). In spite of the death sentences, only 23 of the Dachau concentration camp prisoners were hung (May 28-29, 1945). One escaped custody and was never apprehended. The rest received commutations and, in any case, only one spent four years in prison. The Cold War had started and the political will of the US was focused on building a strong Germany to combat the new threat, Communism and the Soviet Union.



Figure 8. Douglas T. Bates, II. Defense counsel. Courtesy of National Archives and Records Administration, College Park.

Significance of a strong defense at Dachau

The legal and ethical legacy of the post-Dachau War Trial is testament to the thorough and intense proceedings that were directed by both prosecutor William Denson and defense counsel Douglas T. Bates, II. In particular, Bates mounted a vigorous defense when, it was assumed, one was not needed. Why he did this is not entirely clear. Rather than proceed with a standard pro forma strategy, discharging his defense duties quickly and without personal or professional risk, his defense strategy – riddled with objections and a profound philosophical view of the ethical nature of post victor's law – was

²⁶ This account is based upon personal notes of William Denson (died 1998) and was repeated by Douglas Bates, III, son of the defense counsel, in an interview with the author on April 1, 2009. It also appears in Joshua M. Greene. *Justice at Dachau: The Trials of an American Prosecutor*. Broadway Publishers, New York. 2003.

made at great personal cost (and this he must have realized at the time).²⁷ Through statements, objections and cross-examinations, we see questions of individual accountability, medical ethics, international criminal law, universal jurisdiction, human rights and the transcendence of law in Bates' defense. As a result, it is later reflected in the Universal Declaration of Human Rights, the Genocide Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the creation of the International Criminal Court.²⁸

Conclusion

Because of the first Dachau War Trial, and in particular Douglas T. Bates, II's active defense, certain basic principles emerged and entered into the modern lexicon of international law. These include the ban against aggressive war, violations of the laws and customs of war, inhuman acts committed on civilians, individual liability of heads of state for war crimes, rejection of the "superior orders" defense, and the right of accused war criminals to a fair trial.

Three of those principles became the philosophical grounding of Bates' defense at the Dachau trial: the notion of following orders, the importance of documenting war crimes, and the right to a fair trial.

First principle: In spite of the prosecutor's belief that a "following orders" defense is not required at trial, it was the defense's view that "following orders" needed to be proven (as it was 65 miles north in Nuremberg).

Bates pinned his defense strategy not on refuting the "common design" theory but that the defendants could not be punished for following orders. In response, the prosecutors proved that no staff member in

²⁷ The quiet intensity of Bates' determination to do the best job he could has never been documented. The author learned of Bates' determination in an interview with Douglas T. Bates, III, in an interview on April 1, 2009. William Denson's and Douglas Bates' backgrounds were surprisingly similar before the war. Both from Tennessee, their trajectories diverged during and after law school. Bates started at Vanderbilt University (Nashville, Tennessee) but finished law at the Cumberland School of Law, Stamford University, in Birmingham, Alabama. While Denson took the professional military track and proceeded to West Point, Bates married and returned to Centerville, Tennessee, to become the stereotype of a small-town lawyer. But this was in 1937, and the rural Tennessee economy could not adequately support his family. He enlisted in the National Guard but became an artillery officer in the Army, landing in Normandy 11 days after D-Day. He was involved in 240 straight days of combat duty until the end of the war. After his role as defense counsel during the Dachau War Trial, he returned home to Centerville, Tennessee where, predictably, he was branded a "Nazi lover". His desire for public service was not reciprocated (because of his role in the defense at Dachau) until years later. His son, Douglas T. Bates, III, followed his father (and grandfather) in the family law practice, working with him until the senior's death in September, 1981. For a published personal recollection of his father by Douglas T. Bates, III, see this guest column from 2005: <http://offenburger.com/guestpaper.asp?link=20050605>.

²⁸ The Universal Declaration of Human Rights was adopted by the UN General Assembly on December 10, 1948. Online at: <http://www.un.org/en/documents/udhr/>.

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted (Resolution 260) by the UN General Assembly on December 9, 1948. Online at: <http://www.preventgenocide.org/law/convention/text.htm>.

The Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by the UN General Assembly on November 4, 1950. As a working document, it has been amended a number of times, the latest version in May 2009. Online at: <http://conventions.coe.int/Treaty/en/Treaties/html/005.htm>.

The International Criminal Court is the first permanent, treaty based, international criminal court established to bring to justice those persons responsible for the most serious crimes of concern to the international community. As an independent international organization, not part of the United Nations, its seat is at The Hague, The Netherlands. The Rome Statute, its initial statement, was adopted by 120 nations on July 17, 1998. It came into legal force after 60 nations ratified it on July 1, 2002. Online at: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/>.

a concentration camp had ever been executed for refusing to follow an order. This helped convince the Tribunal that concentration camp workers could be held responsible for the crimes against concentration camp inmates. This principle, the notion that “following orders” needs to be examined, has played an important role in many subsequent war crime trials, the most recent being the conviction of former Yugoslav army chief Momčilo Perišić.²⁹

Second principle: It is extremely important to document war crimes and human rights violations, both for the legal sake of the trial and for posterity. The Dachau War Trial (and later the Nuremberg trial) was characterized in the international press by an excess of documentation. Courtroom chambers emptied within the first week of the trial because of the tedious detail that both lawyers wisely wanted on the record. In later years, both prosecutor Denson (in a series of law school speeches) and defense counsel Bates (though never written, clearly expressed to his family) insisted that by documenting the Nazi atrocities, there could be no ground for denial of these crimes in the future.³⁰

Third principle: Every war crime defendant has the right to a fair trial. Some Allied leaders (among others Winston Churchill stands out) suggested executing Nazis without a trial. But others felt strongly that the Allied forces should avoid “victor’s justice”. Thus at Dachau, the defendants had important procedural rights, including the right to the defense attorney of their choice and the right to refuse to testify. They could cross-examine government witnesses, make statements to the Tribunal, and have all proceedings translated into each prisoner’s native language. The German defendants expressed surprise at the rights accorded them.

In conclusion, the approach taken by defense counsel Douglas T. Bates, II insured that this trial – the first of the World War II war crime trials – would establish the international legal precedence needed for what was to come. This, the first Dachau War Trial, certainly because of the successful prosecution but also because of the serious defense, became the “concept” behind Nuremberg and what would later be adopted by the UN in 1950 as the Seven Principles of Nuremberg.³¹

Postscript

In the courtyard of the Cumberland Law School, Stamford University, Birmingham, Alabama, (Bates’ alma mater) stands this bronze sculpture by Glenn Acree entitled “Lady Justice Held Back by Lady Mercy”. In a way, this sculpture becomes a moving metaphor for the courageous and determined commitment to values expressed by Dachau Defense Counsel, Douglas T. Bates, II.

²⁹ The United States Army convicted Momčilo Perišić to 27 years in prison. <http://www.usdoj.gov/eo/press/080909perisic.htm>

³⁰ Admirable, the most flamboyant. He did the best job he could. He does not appear in his own trial. Douglas T. Bates, II

³¹ The “Principles of Nuremberg” were adopted by the United Nations in 1948. <http://untreaty.unhcr.org/refugees/refugees/1948.html>



Victims (1990s) of the Yugoslav

condition. Among them, David Milutinović. His conviction to do the same. The government does not interview him.

Principles) were