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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

British War Crimes Trials in Europe and Asia, 1945–1949: A Comparative Study

CHEAH W.L.* AND MORITZ VORMBAUM**

Abstract
Between 1945 and 1949, the British military conducted a large number of war crimes trials in Europe and Asia. Based on historical archival records, among other sources, this article evaluates and compares the British authorities' implementation of the 1945 Royal Warrant and war crimes trials in Europe and Asia, with a specific focus on trials organized in Germany and Singapore. By examining the British war crimes trial experience in those two jurisdictions, the article analyzes factors shaping the evolution of the Royal Warrant's legal framework and trial model in different contexts. It therefore contributes to the growing historical work on post-Second World War trials and current debates among scholars of transitional justice and international criminal law on the contextual factors that impact on war crimes trials.

Keywords
1945 Royal Warrant; Germany; Second World War; Singapore; war crimes trials

1. INTRODUCTION

Between 1945 and 1949, the British military conducted hundreds of war crimes trials in Europe and Asia. These trials have been ignored in the academic debate for a long time. Some authors even speak of 'forgotten trials'[1] or of trials that lead a 'shadow existence'.[2] One can only speculate about the reasons for this. Most probably, the public and academic attention given to the Nuremberg Trial of the Major War Criminals and the Tokyo Trial before the International Military Tribunal for the Far East marginalized, to various degrees, the other trials conducted by the Allied powers

* Assistant Professor, Faculty of Law, National University of Singapore [lawcwl@nus.edu.sg].
** Professor, Faculty of Law, University of Münster [vormbaum@uni-muenster.de]. The authors would like to express their gratitude to the two anonymous reviewers, Gerhard Werle, Wolfgang Form and Sergey Vasiliev for very helpful comments. They would also like to thank Gareth Richards and Helena Dodge-Wan for proofreading and the Research Fund of Humboldt-Universität zu Berlin and National University of Singapore for financial support.

1 L. Charlesworth, 'Forgotten Justice: Forgetting Law's History and Victim's Justice in British "Minor" War Crime Trials in Germany 1945–8', (2008) 74 *Amicus Curiae* 2–10. Although the author exclusively refers to the British trials in Germany, the same is true, without doubt, for the trials conducted in Asia.

2 U. Schmidt, '"The Scars of Ravensbrück": Medical Experiments and British War Crimes Policy, 1945–1950', (2005) 23 *German History* 20, at 21.

in the immediate post-war period.[3] In the case of the British trials, it is also significant that the records were not publicly accessible for decades.[4] Researchers have, over the past ten years, given more attention to Allied trials beyond Nuremberg and Tokyo.[5] However, there is as yet no comparative study of post-war trials in Europe and Asia.[6] This article, which is based on historical records from various archives among other sources,[7] evaluates and compares the British authorities' implementation of the 1945 Royal Warrant and war crimes trials in Europe and Asia, with a specific focus on the trials in Germany and Singapore. By analyzing the British war crimes trial experience in Germany and Singapore as comparative case studies, we aim to identify factors shaping the development of the Royal Warrant legal framework and trial model in different contexts. It therefore contributes to the growing historical work on post-war trials and more current debates among scholars of transitional justice and international criminal law on factors shaping war crimes trials.

After setting out the methodology (Section 2), the article provides an overview of the factual and historical background of the Royal Warrant trials in Germany and Singapore (Section 3) and the legal and institutional set-up of these trials (Section 4). It then identifies and assesses the shared and divergent characteristics of these trials (Sections 5 and 6). Finally, the findings are summarized and reference is made to the trials' achievements and deficiencies as well as possible lessons for today (Section 7).

2. Methodology

The analysis takes a comparative methodological approach.[8] While comparative law research typically juxtaposes laws or cases from different states or regions,[9]

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[3] The subsequent Nuremberg trials by the US certainly have received greater attention than the trials by the other three Allied Powers, see, for example, K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2012).

[4] Apart from laws limiting access to archival documents, Narayanan argues that there was less interest in individual Allied war crimes trials after the war as 'realism became a dominant political philosophy' and scholars focusing on matters of '*Realpolitik*' rather than 'justice'. A. Narayanan, 'Japanese Atrocities and British Minor War Crimes Trials after World War II in the East', (2006) 33 *Jebat: Malaysian Journal of History, Politics and Strategic Studies* 10.

[5] See, for example, M. Bergsmo, Cheah W.L. and Yi P. (eds.), *Historical Origins of International Criminal Law* (2014—2015), Vols. 1–4; J. Cramer, *Belsen Trial 1945* (2012); G. Fitzpatrick, T. McCormack and N. Morris (eds.), *Australia's War Crimes Trials 1945–51* (2016); K. Hassel, *Kriegsverbrechen vor Gericht* (2009); B. Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (2015); S. Linton (ed.), *Hong Kong's War Crimes Trials* (2013); P.R. Piccigallo, *The Japanese On Trial: Allied War Crimes Operations in the East, 1945–1951* (2011); K. Sellars (ed.), *Trials for International Crimes in Asia* (2015); Y. Totani, *Justice in Asia and the Pacific Region, 1945–1952: Allied War Crimes Prosecutions* (2015); S. Wilson, et al., *Japanese War Criminals: The Politics of Justice After the Second World War* (2017).

[6] See Hassel, *supra* note 5, at 239.

[7] The full and original transcripts and related records of the trials analyzed in this article are at the National Archives of the United Kingdom (hereinafter, TNA). TNA staff have entered sequential pagination on most records. When available, this pagination is used, placing 'SP' before the number. Otherwise, and if available, page and paragraph numbers are used. For the trials in Germany, the relevant records at the International Research and Documentation Centre for War Crimes Trials at Philips-Universität Marburg have also been evaluated.

[8] On comparative law methodology in general see, for example, M. Siems, *Comparative Law* (2014), 11; K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (1996), 33–47.

[9] On different macro and micro approaches of comparative law see, for example, G. Samuel, *An Introduction to Comparative Law Theory and Method* (2014), 50–3. On the particularities of comparative law and legal history

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the article deals with trials that in fact had the same legal basis – the 1945 Royal Warrant. We compare how this warrant was implemented in two locations with different socio-political and administrative conditions – Germany and Singapore. How did the warrant's implementation play out on the ground? Were the trials in these locations two different microcosms clearly separated from each other?[10] Or were these trials so closely related that they could be seen as 'twin trials' mirroring each other? Or is it better to understand them as 'two branches of the same tree', with commonalities as well as independent developments? Apart from addressing these questions, we draw on the comparative findings to put forward some conclusions relevant to today's efforts in the prosecution of war crimes or, in a broader sense, in dealing with mass atrocities.

Choosing Germany as a case study enables an analysis of a large trial sample size within a geographical unit that was relatively compact in terms of socio-political, cultural, and linguistic conditions.[11] In Asia, where conditions were more diverse across trial locations, it makes sense to focus on a particular trial location. Singapore, with its concentration of ethnic Chinese immigrants and specific socio-political and cultural characteristics, serves as an appropriate case study as it was a hub for British prosecutions in Asia.[12] As a trial location, Singapore thus hosted a sufficiently large number of trials to be able to draw some valid general conclusions. In restricting the study to the German and Singapore trials, it is not our intention to imply that they are completely representative of other trials taking place in Europe or Asia. Indeed, this is not possible given the numerous trial locations and varied on-the-ground conditions.

In terms of the materials analyzed, we examine a range of rules and policy statements. The article also provides an in-depth study of trial transcripts and internal military documents to understand how these rules and policy statements were implemented. It should be noted at this point that as these courts were modelled on the British courts martial system, they did not produce detailed reasoned judgments as is normally expected of ordinary courts, though some British courts did state brief reasons when handing down findings of guilt or innocence.

3. Factual and historical background

As the Allies received news of atrocities from Axis-occupied territories during the Second World War, they issued official condemnations and jointly discussed how

see J. Gordley, 'Comparative Law and Legal History', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook on Comparative Law* (2006), 754–73; on comparative law and international criminal law see S. Vasiliev, 'The Usages and Limitations of Comparative Law and the Methodology of International Criminal Procedure', (2014) 2 *Revista Eletrônica de Direito Penal AIDP-GB* 166–96.

[10] Although they had the same legal basis, the notion of two separate processes is possible because of the broad, open-ended, and fragmentary nature of the rules in the Royal Warrant.

[11] For trials statistics see Section 3, *infra*.

[12] Hong Kong was another location where the British held many trials. Singapore and Hong Kong, which were both former British Crown colonies, had 'relatively ample jails' and 'relatively abundant facilities for hearing cases'. They were therefore the locations for many trials of crimes committed elsewhere. See Wilson et al., *supra* note 5, at 110.

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they should approach these atrocities. Many of these Allied wartime positions would later shape British war crimes prosecutions. At the 1943 Moscow Conference, the United States, Britain, the Soviet Union and China adopted the Moscow Declaration proclaiming their intention to 'act together' on 'matters relating to the surrender and disarmament' of their 'common enemy'.[13] At the same conference, the US, Britain and the Soviet Union also adopted a Statement of Atrocities.[14] In this statement, the Allies agreed that:

> those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein.[15]

The statement was originally passed by the Allies only in response to German atrocities. Nevertheless, the principles set out in it were later expressly applied by the British to atrocities committed by Japan.[16] More importantly, the Moscow Declaration and Statement of Atrocities did not explicitly assert how the Allies would proceed to 'act together' and ensure that those responsible for atrocities would be 'judged and punished'. There was no mention of war crimes trials.

When the war came to an end, the Allies started organizing trials throughout Europe and Asia. Apart from jointly establishing the Nuremberg and Tokyo tribunals, which focused on high-ranking German and Japanese military and political leaders, each Allied power arranged separate trials across Europe and Asia in the immediate aftermath of the war. In Europe, the four Allied powers conducted trials in their respective zones of occupation in Germany. In addition, Allied trials took place in other European countries: British trials in Austria, Italy, the Netherlands, and Norway; French trials in France and French colonies in North Africa; and Soviet trials in Poland and Czechoslovakia.[17] In Asia, trial efforts were mainly (though not exclusively) organized by returning colonial powers. These included British, Dutch, Chinese, US, Australian, and French trials conducted by the Allied powers at an

[13] Declaration of the Four Nations on General Securities, Moscow Conference of Foreign Secretaries 1943, 30 October 1943 (hereinafter, Moscow Declaration).

[14] Statement of Atrocities, Declaration of the Four Nations on General Securities, Moscow Conference of Foreign Secretaries 1943, 30 October 1943 (hereinafter, Statement on Atrocities).

[15] Ibid.

[16] On 29 August 1945, the United Nations War Crimes Commission (UNWCC) expressly applied the principles adopted at the 1943 Moscow Conference to Japanese atrocities, recommending that those 'Japanese who have been responsible for … crimes and atrocities committed in or against the nationals of a United Nation' should be 'apprehended and sent back to the countries in which their abominable deeds were done or against whose nationals crimes or atrocities were perpetrated in order that they may be judged in the courts of these countries and punished'. Summary Recommendations Concerning Japanese War Crimes and Atrocities, Note by the Secretary General, United Nations War Crimes Commission, C.145(1), 29 August 1945, 2, III. British decision-makers would later cite this UNWCC decision when deciding on the framework of war crimes prosecutions in Asia. War Office, South East Asia Command, Military Headquarters Papers, DAG to HQ ALFSEA, Dutch Right to Claim War Crimes Suspects and Hold Them in N.E.I, 5 June 1946, para. 3: WO 203/6087, TNA.

[17] See, for example, M.C. Bassiouni, *Introduction to International Criminal Law* (2013), 1061–2; A. Rückerl, *NS-Verbrechen vor Gericht* (1984), 98–100.

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assortment of locations, such as Malaya, Burma, the Dutch East Indies, and French Indochina.[18]

The British trials in Germany took place in the British zone of occupation. Each of the Allied powers exercised 'supreme authority' within their respective zones, while the joint Allied Control Council decided 'in matters affecting Germany as a whole'.[19] While British military occupation of Germany was intended to be temporary, the British position in Singapore was very different. The British were engaged in the recolonization of many of their Asian territories that had been under Japanese occupation during the war. The British war crimes trials project in Asia was therefore undoubtedly shaped to a certain extent by the need to reassert British colonial prestige.[20]

Establishing the exact number of Royal Warrant trials held in Germany is challenging. Some trial statistics combine British trials conducted in Germany and other European countries.[21] Other figures do not differentiate between trials by Royal Warrant courts and trials before Control Commission courts based on Control Council Law No. 10.[22] Similar discrepancies exist with regard to the number of defendants. However, according to the latest research, based on a thorough evaluation of all trial records, the British held 329 Royal Warrant trials of 937 defendants in Germany, of which 190 took place in Hamburg.[23] The situation could be perceived as less complicated in Asia because the British conducted war crimes trials solely under the Royal Warrant, but researchers have also found it challenging to establish exact trial numbers. Based on British archival records, 306 cases of 920 defendants were tried by the British in Asia.[24] Of these 131 trials were organized in Singapore.[25]

4. Legal and institutional trial arrangements

Unlike the Nuremberg and Tokyo tribunals, which were organized on the basis of the Allied powers' joint authority, the British trials in Germany and Singapore were organized under the authority of national law. This section examines the legal framework governing the British war crimes trials and the court system put in place in Germany and Singapore.

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[18] For an overview of trial locations in Asia, see Wilson et al., *supra* note 5, at 74–8.

[19] Art. 1, Agreement on Control Machinery in Germany, Adopted by the European Advisory Commission, 14 November 1944.

[20] Recent studies exploring post-war trials' impact on decolonization and politics in Asia are K. von Lingen (ed.), *War Crimes Trials in the Wake of Decolonization* (2016); K. von Lingen (ed.), *Debating Collaboration and Complicity in War* (2016).

[21] According to an internal list of trials, there were 357 trials by the British military in Germany and other European countries. Judge Advocate General's Office, War Crimes in the Far East, Index: WO 235, TNA.

[22] In 1964, the German Minister of Justice reported to the Bundestag that British military courts carried out trials of 1,085 persons, apparently also taking into account the trials before the Control Commission courts. See Deutscher Bundestag, Drucksache IV/3124, 10.

[23] Twenty trials in 1945, 181 trials in 1946, 65 trials in 1947, 62 in 1948, and only one trial (the very comprehensive trial of Field Marshal Erich von Manstein) in 1949; see Hassel, *supra* note 5, at 147, 157. In addition, Hassel states there were 54 trials with 146 accused persons before the Control Commission courts.

[24] See Wilson et al., *supra* note 5, at 97.

[25] This figure is based on trial records at the TNA. One of the 131 trials is recorded by the TNA as 'missing at transfer', available at discovery.nationalarchives.gov.uk/results/r?_q=WO+235%2F1018 (accessed 11 March 2018).

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4.1. The 1945 Royal Warrant: Substantive law and trial procedure

Pursuant to its royal prerogative powers, a Royal Warrant was adopted on 18 June 1945 that authorized the British military to establish military courts 'for the trial of persons charged with having committed war crimes'.[26] The warrant defined war crimes as 'a violation of the laws and usages of war' committed in any war the British had been engaged in after 2 September 1939.[27]

Under the 'Regulations for the Trial of War Criminals' attached to the Royal Warrant, each military court was to be composed of at least three judges with proceedings based on adversarial common law procedure. Judges were authorized to pass sentences of death, imprisonment, confiscation, and fines, though death sentences could only be imposed with the agreement of all judges if the court was composed of not more than three judges.[28] If the court had more than three judges, death sentences required the agreement of at least two-thirds of judges including the president.[29]

Court acquittals were final, but trial findings of guilt and sentences had to be confirmed by a confirming officer from the British military.[30] This confirming officer reviewed trial proceedings and decided whether trial findings should be maintained or amended. A convicted person had 14 days from the end of trial to submit a petition for consideration of the confirming officer.[31] During this confirmation stage, the Department of the Judge Advocate General (DJAG) would also issue a review report on the trial for the confirming officer's study. These reports usually contained a summary of trial proceedings, the facts of the case, some analysis, and recommendations to the confirming officer.

The Royal Warrant and its regulations were very brief. The warrant specifically required courts to 'take judicial notice' of 'laws and usages of war', but did not set out detailed elements of crimes, principles of liability, or defences. However, in Europe the warrant was supplemented by British Army of the Rhine Administrative Instruction No. 104 (BAOR Instruction No. 104),[32] while in Asia it was supplemented by Allied Land Forces, South East Asia War Crimes Instruction No. 1 (ALFSEA Instruction No. 1).[33] These army instructions filled in some of the substantive gaps resulting from the brevity of the warrant and its regulations. In particular, they set out a list of offences that would qualify as war crimes. However, both instructions largely addressed procedural and administrative matters rather than substantive law.

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[26] War Office, Royal Warrant and Regulations, War Criminals: General (Code 94A): Regulations and Procedures for Trial of German and Japanese War Criminals, Army Order 81/1945, 18 June 1945, para. 1: WO 32/12210, TNA. See also A. Rogers, 'War Crimes Trials under the Royal Warrant: British Practice 1945–1949', (1990) 39 *International and Comparative Law Quarterly* 786.

[27] Royal Warrant and Regulations, *supra* note 26, para. 1.

[28] Ibid., Reg. 9.

[29] Ibid.

[30] Ibid., Reg. 11.

[31] Ibid., Reg. 10.

[32] British Army of the Rhine (BAOR) Administrative Instruction No. 104, Investigation of Atrocities and Trial of War Criminals, August–September 1945: WO 311/857, TNA. BAOR Instruction No. 104 was amended in 1947. However, the amendments did not affect the issues dealt with in this article.

[33] Allied Land Forces South East Asia (ALFSEA) War Crimes Instruction No. 1, Investigation of War Crimes and Trial of War Criminals, December 1945: WO 325/53, TNA. This instruction was amended several times. We state the exact amendment when referring to it.

The Royal Warrant required the military courts established under its authority to be considered 'Field General Courts-Martial' unless 'herein otherwise provided expressly or by implication'.[34] Under British military law, British field general courts-martial applied a mix of British military law and English criminal law. The warrant thus incorporated by reference laws that would otherwise apply in British field general courts-martial, a type of court martial used by the British military when operating overseas or in active service.[35]

4.2. Investigation units and courts

In order to investigate Nazi crimes, the British introduced in their German occupation zone a war crimes unit, established under the auspices of the 21st Army Group.[36] This unit formed war crimes investigation teams that inspected the crime scenes, interrogated witnesses and suspects, and collected evidence. After an investigation closed, materials were sent to the DJAG office in London where the indictment was drafted. The case files were then returned to the 21st Army Group that was in charge of carrying out the trial.[37] British military courts established under the Royal Warrant in Germany operated from 1945 to 1949, and sat in various cities in the north-west of the country. According to BAOR Instruction No. 104, an accused person should 'normally be tried as near as practicable to the scene of his crime having due regard to the location of witnesses etc.'; otherwise, the place of trial was 'at the discretion of the Convening Officer'.[38]

In Singapore, the British authorities' war crimes institutional set-up was slightly different and more decentralized. The British established a War Crimes Registry charged with the collection of information.[39] As of 1946, the British military had 17 investigation teams operating throughout Asia, though Singapore was the base of British war crimes investigations. War crimes investigation team number seven was assigned to Singapore.[40] Unlike in Europe, the British decided that it 'was not practicable or desirable' for final advice on Asia-related investigations and prosecutions to be given by personnel based in London.[41] This was because the accused 'were being interrogated on the other side of the world'. The role of the authorities in London was therefore limited to 'questions of policy', 'general supervision', and the collection of evidence from prisoners of war repatriated back to Britain.[42] By 4 May 1946, the British had established 12 courts in different locations across Asia,

[34] Royal Warrant and Regulations, *supra* note 26, Reg. 3.
[35] Ibid.
[36] After the end of the war, the Allied powers reduced the extent of German territory and divided the remaining parts into four zones of occupation, each of which was administered by one of the victorious powers.
[37] See Cramer, *supra* note 5, at 36. Cramer also describes the reluctance of the British to co-operate with the UNWCC.
[38] BAOR Instruction No. 104, *supra* note 32, Part II, para. 25.
[39] Judge Advocate General's Office, DALS/1/28Q, DALS/0185/416, Minute by Brig. Henry Shapcott, Director of Army Legal Services (DALS), 23 November 1948, para. 20: WO 311/646, TNA.
[40] ALFSEA Instruction No. 1, *supra* note 33, Part 1, para. 23.
[41] Minute by Shapcott, *supra* note 39, para. 21.
[42] Ibid.

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with eight of these courts in Singapore. Courts in Singapore heard cases from 1946 to 1948.[43]

While British war crimes prosecutions in Asia took place solely before Royal Warrant courts, in Germany the British also conducted war crimes trials before other courts. In December 1946, the British established so-called Control Commission courts that would prosecute not only war crimes but also crimes against humanity based on Control Council Law No. 10.[44] It is important to note that BAOR Instruction No. 104, which supplemented the Royal Warrant in Germany, stated that crimes 'against the laws of humanity' were also to be reported as 'war crimes', defining these as those 'crimes and atrocities committed … against civilians of whatever nationality'.[45] However, the Royal Warrant and its accompanying instructions did not authorize, as Control Council Law No. 10 did, the prosecution of war crimes, crimes against humanity, and crimes against peace as separate and distinctly defined crimes.[46]

Apart from these Control Commission courts, the British administration established the Supreme Court for the British Zone (*Oberster Gerichtshof für die Britische Zone*) in Germany on 18 November 1947. This was a German court, though falling under the auspices of the British administration that was tasked, among other things, 'to promote legal uniformity in the British Zone of Occupation'.[47] The court gained particular significance for its pioneering interpretation of Control Council Law No. 10, especially with regard to crimes against humanity.[48]

5. Common experiences and challenges

The British experienced numerous administrative, evidential, and legal obstacles when organizing the Royal Warrant trials. This section explores some common experiences and challenges encountered in Germany and Singapore.

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[43] ALFSEA Instruction No. 1 (2nd edition), *supra* note 33, Part 1, para. 27. The first trial, *Gozawa Sadaichi and Others*, began on 21 January 1946. Judge Advocate General's Office, War Crimes Case Files, *Gozawa Sadaichi and Others*, Case No. 1, 26 October 1945–28 April 1946: WO 235/813, TNA. The last trial, *Mizuno Keiji*, was concluded on 12 March 1948. Judge Advocate General's Office, War Crimes Case Files, *Mizuno Keiji*, Case No. 298, 8 March 1948–16 May 1948: WO 235/1110, TNA.

[44] The courts were established by UNWCC, Control Commission Courts in the British Zone of Germany, Ordinance No. 68, Control Commission Courts, Misc. No. 114, 9 December 1946. Before that, Allied Military Government courts were competent for trials on the basis of Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945. However, they prosecuted a total of only about ten persons. Cf. W. Form, 'Der Oberste Gerichtshof für die Britische Zone: Gründung, Besetzung und Rechtsprechung in Strafsachen wegen Verbrechen gegen die Menschlichkeit', in Justizministerium Nordrhein-Westfalen (NRW) (ed.), *Verbrechen gegen die Menschlichkeit: Der Oberste Gerichtshof der Britischen Zone* (2012), 8, at 23.

[45] This was similarly the case for ALFSEA Instruction No. 1. See ALFSEA Instruction No. 1, *supra* note 33, Part 1, para. 4. Cf. BAOR Instruction No. 104, *supra* note 32, Part 1, para. 3.

[46] Crimes against peace, however, did not play a role in practice. Under Art. II(1)(c), Control Council Law No. 10, 'crimes against humanity' were defined as follows: 'Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.'

[47] See German Supreme Court for the British Zone, Military Government Gazette Germany, British Zone of Control, Ordinance No. 98, 1 September 1947, Preamble.

[48] G. Werle and F. Jessberger, *Principles of International Criminal Law* (2014), 12.

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5.1. Administering and co-ordinating multiple trials

One challenge encountered by the British authorities was the co-ordination of investigations and prosecutions between different Allied powers and between different courts, all of which had jurisdiction over the same offences. At the international level, the United Nations War Crimes Commission (UNWCC) circulated lists of suspects and sought to organize the transfer of suspects between Allied powers.[49] However, co-ordination remained difficult as national authorities 'largely ignored' the UNWCC's co-ordination attempts.[50] The DJAG office in London does not appear to have taken up the role of co-ordinating cases between the Allies in a substantial way. Its role was limited to the collection of evidence from repatriated prisoners of war, the supervision of investigation dossiers in cases from Europe, and policy overview in cases from Asia.

Co-operation among the Allies was therefore not always smooth. It differed from region to region, and was often influenced by politics and personalities. In particular, emerging Cold War politics affected co-operation among the Allies. For example, there is evidence that the British had problems in obtaining information about accused held by the Soviet authorities in Asia.[51] The British also did not trust the Soviets with information. When British war crimes investigators in Tokyo asked the British liaison mission to contact the Soviet mission in Tokyo for a number of Japanese accused known to be in their custody, the mission advised that nothing be mentioned to the Russians and that the British investigators 'simply wait' until the accused were returned to Japan 'in the normal course of repatriation'.[52] The mission was concerned that giving the names of Japanese accused to the Russians would give the latter 'an extra hold over the individuals' who may then 'voluntarily' decide to remain in the Soviet Union.[53]

In Germany, the British experienced additional co-ordination problems due to the existence of Control Commission courts alongside the Royal Warrant courts. There were no clear rules on when a trial should be conducted before a Royal Warrant court or a Control Commission court. The procedural rules for the Royal Warrant courts in BAOR Instruction No. 104 did not clarify this, but rather added to the confusion because, as already noted, this instruction included within the category of 'war crimes' crimes against 'the laws of humanity' against 'civilians of whatever nationality'.[54]

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[49] For an overview of the UNWCC's tasks and history, see D. Plesch and S. Sattler, 'Before Nuremberg: Considering the Work of the United Nations War Commission of 1943–1948', in Bergsmo et al., *supra* note 5, Vol. 1, 437; N. Morris and A. Knaap, 'When Institutional Design Is Flawed: Problems of Cooperation at the United Nations War Crimes Commission, 1943–1948', (2017) 28 *European Journal of International Law* 513.

[50] Wilson et al., *supra* note 5, at 44.

[51] Judge Advocate General's Office, War Crimes in Far East, Miscellaneous Correspondence, United Kingdom Liaison Mission in Japan to War Crimes Section, Foreign Office, London, 16 April 1947: WO 311/541, TNA.

[52] Ibid.

[53] Ibid.

[54] BAOR Instruction No. 104, Part 104, para. 3, *supra* note 32. At least an internal letter by the DJAG to the General Officer Commanding in Chief of August 1947 set out some rough guidelines to solve this problem. According to this document, Royal Warrant courts would not have jurisdiction in three scenarios: (i) A war crime was in question, which had been committed against an allied national on the territory which later became the British occupation zone and for which a foreign government asked for extradition of an alleged

5.2. Collecting evidence

Another challenge that the British faced in Germany and Singapore was evidence collection. In the Nuremberg trial, which focused on high-ranking accused persons, copious documentation was made available as evidence of the planning of crimes.[55] For the Tokyo trial and other trials of Japanese war criminals, evidence preservation and collection were complicated by the fact that as the war drew to a close the Japanese military had ordered the destruction of official records.[56] With respect to the Royal Warrant trials, as they dealt with lower-ranking personnel charged with the commission rather than planning or organizing of crimes, such official documentation was often not available or relevant as evidence.

The evidence presented in the Royal Warrant trials was at times very thin. Indeed, the Royal Warrant regulations anticipated that the British authorities would have significant difficulties locating evidence of a quality and quantity required by law in times of peace. The regulations therefore provided for the relaxation of evidential rules. Regulation 8(i) specifically stated that Royal Warrant courts could consider any:

> oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court-Martial . . .[57]

In some major proceedings in Germany, such as the *Belsen* trial which dealt with mass crimes committed at the Auschwitz and Bergen-Belsen concentration camps, the prosecution put forward documentary evidence such as maps, film footage of the camps after their liberation, and photographs.[58] However, many trials in Germany relied heavily on affidavits or witness testimony. The evidentiary value of these was sometimes questionable. An example may be found in internal correspondence within the DJAG office in 1949 regarding an appeal against a life sentence that was handed down in the *Essen Lynching* trial in December 1945. The trial dealt with the

perpetrator in British custody. In these cases, the person should not be extradited, but he or she should rather be tried before a Control Commission court; (ii) When the nationality of the victim was unclear, due to the lack of jurisdiction of British military courts for crimes against non-Allied nationals, a Control Commission court should take over such cases, given that Control Council Law No. 10 allowed for such trial; and (iii) Victims were of both Allied and German nationalities. See Judge Advocate General's Office, Cases submitted by Control Commission for Germany for Trial under Army Order 81 of 1945, 27 August 1947: WO 311/31, TNA.

55 See International Military Tribunal (Nuremberg), Judgment of 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (1947), 14.

56 E.J. Drea, *Japan's Imperial Army: Its Rise and Fall, 1853–1945* (2009), 260.

57 Royal Warrant and Regulations, *supra* note 26, Reg. 8(i).

58 Judge Advocate General's Office, *Josef Kramer and 44 others*, Bergen-Belsen and Auschwitz concentration camps case, Case No. 12, 17 September–17 November 1945: WO 235/13, TNA. See also UNWCC, *Law Reports of Trials of War Criminals*, Vol. II, *The Belsen Trial* (1947). The crimes committed at Auschwitz, in general, did not fall under the jurisdiction of the British courts in Germany. However, among the accused in the *Belsen* trial, all of whom were captured at the Bergen-Belsen concentration camp (located in the British zone), 12 had previously served at Auschwitz. The crimes which these accused committed there were made part of the indictment.

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killings of two British prisoners of war by a mob in the German city of Essen.[59] In a letter of 25 July 1949, the British officer concerned with the appeal against the sentence expressed his astonishment that the verdict was based only on the statements of two witnesses, who were in his view unreliable, and one affidavit by a person not present at trial. He concluded: 'In my opinion no reasonable court should have convicted the appellant upon such flimsy material and in any event the finding of guilty in his case should, in my opinion, never have been confirmed'.[60] The British officer responding to this complaint disagreed in a response dated 4 August 1949, arguing that it was clearly shown that the appellant had been present when the killings took place, had taken an active part in the mob, and was therefore guilty of aiding and abetting the killings concerned. However, the British officer also admitted:

> This is one of those cases which were tried in the very early days of War Crimes trials, when it appears that zeal occasionally outran discretion and there was a tendency to cast the net too wide and charge a number of accused against some of whom there was but little evidence.[61]

The Singapore trials also experienced evidential challenges. As Singapore served as the hub for British war crimes trials in Asia, the trials there dealt with atrocities committed in diverse locations, such as present-day Thailand, Myanmar, Cambodia, Vietnam, Palau, and the Andaman and Nicobar Islands of India. It would have been both costly and time-consuming to secure the presence of witnesses residing in these far-flung locations. In addition, many former prisoners of war or military personnel who could have served as witnesses had been repatriated to their homes from Singapore. Royal Warrant Regulation 8(i)(a) expressly addressed this scenario by permitting courts to accept 'secondary evidence of statements' made by witnesses who were 'unable to attend' trial.[62] As a result, a substantial number of affidavits or statements were admitted in the Singapore trials though their authors did not testify at trial.

The prosecution's use of less reliable evidence, such as affidavits, was compounded by the fact that courts did not issue comprehensive decisions, either in Singapore or Germany. It must have been difficult for DJAG personnel and the confirming officer to conclusively ascertain and assess at the post-trial confirmation stage how much weight these courts had placed at trial on the affidavit evidence. Nevertheless, there were cases when the DJAG and confirming officer were able to determine that the court had erred when assessing evidence. For example, in the Singapore case of *Kokubo Nagataro and others*, the DJAG review report concluded the court had inaccurately assessed the affidavit evidence submitted by the prosecution against one of the

[59] Judge Advocate General's Office, *Erich Heyer and six others*, Essen-West case, Case No. 44, 18–19, 21–22 December 1945: WO 235/56, TNA. See also UNWCC, *Law Reports of Trials of War Criminals*, Vol. I (1947), 88–92.
[60] *Heyer and six others*, 25 July 1949, (without page numbers), *supra* note 59.
[61] Ibid., 4 August 1949.
[62] Royal Warrant and Regulations, *supra* note 26, Reg. 8(i)(a).

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accused, Takayama Nobomutsu.[63] Takayama had been found guilty of one of the two charges brought against him by the prosecution and sentenced to death. The DJAG review report recommended that this finding and sentence not be confirmed, observing that the evidence against Takayama on this charge comprised only five affidavits and only one of these had identified him by photograph. The report noted that the 'whole case against the accused on this charge rested on that identification' and that the court 'can only have been so satisfied on the identification contained in the one affidavit' that Takayama was the one concerned.[64] The report also noted that the accused had put up a 'strong defence on the question of identification' and was 'supported by witnesses called to establish an alibi'. Accordingly, the DJAG review report recommended that the second charge not be confirmed, and the confirming officer adopted this recommendation.

The quality of evidence considered in the German and Singapore trials was also affected by the lack of trained investigative personnel. Particularly in the early cases, the British military faced serious investigative problems due to a lack of trained staff. For example, in Germany the investigation officers of the war crimes investigation team that examined crimes committed at Bergen-Belsen concentration camp were mostly advocates and solicitors by profession who did not have any experience whatsoever with the investigation of criminal cases. Most of them interrogated suspects for the first time in their lives at Bergen-Belsen.[65] The military police officers who worked under the investigation officers at least had some experience to investigate civil cases, given that they had previously worked as police officers. However, they had no legal background and therefore were not allowed to take affidavits.[66]

In Singapore, the British military was expected to obtain all necessary trial personnel from its own ranks, but had problems doing so when scores of personnel were repatriated to their homes.[67] Personnel shortages were met in *ad hoc* ways. For example, former policemen from Shanghai were given temporary commissions so they could assist with military investigations in Asia.[68] These *ad hoc* measures impacted on the quality of evidence, and many of out-of-court statements were not prepared according to court requirements. In the Singapore trial of *Hasegawa Hidefumi*, in which the defendant was prosecuted for the interrogation and killing of a British prisoner of war, the prosecutor referred to an out-of-court statement of the accused.[69] The court expressed its strong disapproval after examining this statement, observing that it contained prejudicial material not linked to the war crime at hand. Also, much prejudicial material had not been clearly excised or 'obliterated' from the

[63] Judge Advocate General's Office, War Crimes Case Files, *Kokubo Nagataro and Others*, Case No. 101, 1 September 1945–8 December 1946: WO 235/913, TNA.
[64] Ibid., War Crimes Courts (DJAG Review Report), SP 9.
[65] Cramer, *supra* note 5, at 49–50.
[66] Ibid.
[67] War Office, General Headquarters, Far East Land Forces, War Crimes, Quarterly Historical Report, for the quarter ending December 1946, para. 4(b): WO 268/102, TNA.
[68] Judge Advocate General's Office, War Crimes in Far East, Miscellaneous Correspondence, M.C. Dempsey, Commander-in-Chief to Ronald F. Adam, Adjutant General, Delay in Bringing Minor War Criminals to Trial, 31 December 1945, 1: WO 203/4927A, TNA.
[69] Judge Advocate General's Office, War Crimes Case Files, *Hasegawa Hidefumi*, Case No. 213, 31 July–14 September 1947, SP 00059: WO 235/1025, TNA.

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statement. The judge criticized the quality of statements as 'very, very bad', noting that he had never seen 'such bad statements as … in these war crimes trials'.[70]

5.3. Dealing with the legal framework

Unlike the statutes of the Nuremberg and Tokyo tribunals that also provided for crimes against peace and crimes against humanity – which had been introduced for the first time in the Statute of the International Military Tribunal in Nuremberg – the Royal Warrant provided exclusively for the prosecution of war crimes. This was the most developed core crime under international law at that time, and thus the Royal Warrant rested on a stronger legal basis.[71] In addition, the warrant also drew on existing law and thereby avoided, at least to some extent, the criticism of applying laws retroactively that has been voiced against the Nuremberg and Tokyo tribunals.[72] Nevertheless, participants in the Royal Warrant trials faced substantive legal challenges due to the nature of the legal framework and the existing state of international law. In the middle decades of the twentieth century, there were only a few international conventions regulating armed conflict. Furthermore, these conventions aimed to govern the relationship between states and did not have as their purpose the determination of individual criminal responsibility.

It is therefore understandable that participants in the Royal Warrant trials resorted to citing diverse sources in their arguments. Furthermore, the Royal Warrant framework authorized courts to refer to a mix of international law, British military law, and English common law. In the German and Singapore trials, the DJAG personnel and judges referred to international treaties such as the Geneva Prisoners of War Convention of 1929,[73] the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,[74] the Annex to the Fourth Hague Convention of 1907,[75] and the Tenth Hague Convention of 1907 for the Adaption to the Naval War of the Principles of the Geneva Convention.[76] In addition, general reference was made to customary international law[77] and the British Manual of Military Law.[78] Interestingly, some trials saw participants citing the military laws of other countries, for example the US Rules of Land Warfare of

[70] Ibid., SP 00060.
[71] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), 136–7.
[72] Ibid.
[73] See, for example, Judge Advocate General's Office, War Crimes Case Files, *Karl Buck and Others*, Gaggenau case, Case No. 155, 6–10 May 1946, Flag 4, 15: WO 235/185, TNA; *Arno Heering*, 25–26 January 1946, UNWCC, *Law Reports of Trials of War Criminals*, Vol. XI (1949), 79; *Kurt Student*, 6–10 May 1946, UNWCC, *Law Reports of Trials of War Criminals*, Vol. IV (1948), 118, 120; *Gozawa Sadaichi and Others*, *supra* note 43.
[74] See, for example, *Kurt Student*, *supra* note 73, at 118, 120.
[75] See, for example, *Buck and Others*, *supra* note 73, Flag 4, 15; *General von Mackensen and General Maelzer*, 18–30 November 1945, UNWCC, *Law Reports of Trials of War Criminals*, Vol. VIII (1949), 3; *Gozawa Sadaichi and Others*, *supra* note 43.
[76] See for example *Helmut von Ruchteschell*, 5–21 May 1947, UNWCC, *Law Reports of Trials of War Criminals*, Vol. IX (1949), 82, 88.
[77] Judge Advocate General's Office, War Crimes Case Files, *Hans Eck and Others*, SS *Peleus* case, Case No. 5, October–December 1945, 2: WO 235/5, TNA. The DJAG argued: 'The deliberate killing of shipwrecked sailors, themselves not even combatant, after their ship is torpedoed, is a breach of the customary laws of war not of any Article of a specific Convention'.
[78] See, for example, *Max Wielen and 17 others*, Stalag Luft III case, 1 July–30 September 1947, UNWCC, *Law Reports of Trials of War Criminals*, Vol. XI (1949), 31, 51; *Mackensen and Maelzer*, *supra* note 75, at 3ff.

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1940.[79] Reference was also made to decisions by English and American courts and even to the German decisions in the Leipzig trials.[80] Another important source for the determination of war crimes were scholarly legal writings, for example books by Oppenheim and Lauterpacht,[81] Hall and Higgins,[82] and Lawrence.[83]

In the Singapore trials, an additional problem arose with regard to the 1929 Geneva Convention relative to the Treatment of Prisoners of War. While Germany had ratified this convention, Japan had signed but not ratified it. The first trial held in Singapore, *Gozawa Sadaichi and others*, started prior to the commencement of the Tokyo tribunal and concerned the abuse of Indian prisoners of war by Japanese military personnel. The prosecution, in its opening statement, cited provisions of the 1929 Geneva Convention to 'remind the Court of those articles that will be relevant to this case'. However, defence counsel highlighted that Japan 'did not subscribe' to the 1929 Geneva Convention and that 'no evidence of their subsequent accession has been adduced'.[84] The *Gozawa* prosecutor sought to overcome this argument in his closing statement. First, he argued that the 1929 Geneva Convention was part of the 'laws and usages of war' and that the Royal Warrant and its regulations defined a war crime as a 'violation of the laws and usages of war'. As these regulations were said to be passed by 'a most august body than any to be found', the court did not have jurisdiction to deal with this question and hold otherwise.[85] Second, even if Japan was not bound by the 1929 Geneva Convention, it 'stands as a guide' for Japan's 'regulation' of conduct.[86] Third, he argued that Japan had subscribed to the 1907 Hague Convention respecting the Laws and Customs of War on Land which set out relevant duties towards prisoners of war.[87] Fourth, Japan was 'certainly bound morally' to observe the 1929 Geneva Convention as Japan had committed in February 1942 to apply it to British personnel.[88] Based on its findings of guilt, the court appears to have accepted the applicability of rules concerning the humane treatment of prisoners of war, though its basis for doing so is not clear.

Some commentators observe that the use of established and existing, though varied, sources possibly aimed to avoid concerns relating to retroactivity.[89] On the one hand, this made the Royal Warrant trials less problematic compared to the Nuremberg and Tokyo trials, which were authorized to only apply international law despite its undeveloped state. On the other hand, the use of diverse legal sources at times

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79 For example, *Mackensen and Maelzer*, *supra* note 75, at 6.

80 See *Heinz Eck and four others*, Peleus trial, 17–20 October 1945, UNWCC, *Law Reports of Trials of War Criminals*, Vol. I (1947), 11.

81 L. Oppenheim and H. Lauterpacht, *International Law* (1940), Vol. 2, which was referred to in the *Belsen* trial, the *Mackensen* trial and in many others.

82 W.E. Hall and A.P. Higgins, *A Treatise on International Law* (1924), referred to in the *Mackensen* trial.

83 T.J. Lawrence, *The Principles of International Law* (1915), referred to, for example, in the *Ruchteschell* trial.

84 *Gozawa Sadaichi and Others*, Opening Address by Defence Counsel, SP 00143, *supra* note 43.

85 *Gozawa Sadaichi and Others*, Notes of Final Address by Prosecutor, SP 00383, *supra* note 43. Interestingly, a similar strategy was adopted by the Tokyo tribunal when addressing jurisdictional challenges.

86 Ibid.

87 Ibid.

88 Ibid.

89 A.-E. Wenck, 'Verbrechen als "Pflichterfüllung"? Die Strafverfolgung nationalsozialistischer Gewaltverbrechen am Beispiel des Konzentrationslagers Bergen-Belsen', in K. Buck et al. (eds.), *Die frühen Nachkriegsprozesse* (1997), 38, at 40. Cf. Cramer, *supra* note 5, at 29.

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led to a confusion or an elision of domestic and international legal sources among trial participants. In the *Essen Lynching* trial,[90] for example, in which, according to the charge sheet, seven men were accused of 'committing a War Crime in that they [were] concerned in the killing of three unidentified British airmen prisoners of war', the prosecutor, Major Tayleur, explained in his closing speech:

> When I opened this case … I used the word "murder". As the Legal Member pointed out it is quite true that … murder is a word connected with the law of England and not with the Laws and Usages of War, that was in a sense an illustration.[91]

The somewhat confusing point he then made was that the prosecution brought 'exactly the same evidence that they would bring on a charge of murder bearing in mind that in England on a charge of murder it is open to the Court to find a verdict of manslaughter'. He concluded that:

> if you have evidence which would justify you in England in finding any of these accused guilty of either murder or manslaughter then the prosecution, if they have satisfied you of that, have satisfied you that the accused are guilty within the meaning of this charge.[92]

This example gives an impression of how British trial participants often referred to domestic law, which they were more familiar with, as compared to international law, which was unknown territory for them.

5.4. Finding sufficiently trained legal personnel

It could be argued that given the developmental state of war crimes law the distinction between domestic offences and war crimes was not yet fully understood at this period. The confusion between domestic law and international law, however, may also reflect the trial participants' misunderstanding of the law and the court's role as a British military court prosecuting violations of 'laws and usages of war'. This highlights another challenge experienced by the trial organizers, namely, a shortage of sufficiently trained legal personnel.

Most of the accused in British military courts were represented by German or Japanese defence counsel who were appointed by the convening officer. These legal representatives were normally unfamiliar with British trial procedure. Therefore, in most cases, if defendants were represented by defence counsel from their own country, the authorities would assign defence advisory officers from the British military to the defence team to provide advice.[93] Though some German and Japanese defence counsel delivered notable performances, securing acquittals and sentence mitigations for their clients, there is evidence that some felt they needed more legal assistance. In the German *Belsen* trial, the defence applied as a possible expert for 'Prof. Lauterpark [*sic*] of Cambridge University, or failing him, Prof. Brierly [*sic*] of Oxford

[90] *Heyer and six others*, *supra* note 59.
[91] Ibid., Major Tayleur, Closing Speech, 21 December 1945, at 65.
[92] Ibid.
[93] BAOR Instruction No. 104, *supra* note 32, Part II, para. 17. ALFSEA Instruction No. 1, *supra* note 33, Part II, para. 48.

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University, or failing him, an English authority on international law nominated by Prof. Lauterpark'.[94]

Apart from defence counsel, prosecution counsel also demonstrated legal confusion and, in certain cases, made basic and serious legal errors. In the Singapore trial of *Ikegami Tomoyuki and others*, the prosecution's arguments and court's findings showed a clear misunderstanding about the distinction between British law and international law.[95] In this case, the defence argued that the captured Indian victims, members of the British Indian army, had renounced their British allegiance and joined the Japanese military. The prosecutor argued that, based on the 1914 British Nationality and Status of Aliens Act and existing British case law, no renunciation of nationality was permissible during war. The court decided that it was unable to decide on the issue and to consult the convening authority.[96] After doing so, the court held that based on 'International Law and the Constitutional Laws of the Empire', subjects could not renounce their allegiance during a state of war.[97] The post-trial DJAG review pointed out the prosecutor's and court's failure to distinguish between domestic law and international law. The DJAG report drew a distinction, acknowledging that based on the 'domestic law of England', it was not possible for a British subject to renounce his or her nationality while on enemy or enemy-occupied territory during war.[98] If a British subject did so, he would be guilty under the 'English law of treason'. However, under 'international law', when an individual 'voluntarily' joined enemy forces, disciplinary action against him pursuant to the enemy's military law would not be considered a war crime.[99]

6. Contextual divergences

Though the German and Singapore trials were organized pursuant to the same legal framework and experienced common challenges, the implementation of these trials fell under the authority of British armies operating in different regions. These armies faced different on-the-ground conditions and had access to varying resources. In addition, these trials were shaped by profoundly dissimilar social and political conditions existing in Germany and Singapore. They were also influenced by their subject matter and by the types of atrocities committed by the Nazis and Japanese.

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[94] *Josef Kramer and 44 others*, *supra* note 58, at 13. The spelling errors in the trial transcripts demonstrate how scarce resources were and the rushed manner in which the trials were conducted. In the end, Herbert Arthur Smith was the legal expert in the trial. The limited knowledge of the defence counsel with regard to international law was sometimes apparent. At the very beginning of the *Belsen* trial, the DJAG asked the defence: 'Is it your point that you would like to attack the charge sheet but that you cannot do it until you have had expert advice?' The response of counsel Major Cranfield was: 'Yes. We find ourselves in a considerable difficulty in that between us we have very little knowledge of international law. It appears to us that there are some points on international law which arise in this case and we do not know where we are because we have not sufficient knowledge to apply our minds to the points'.

[95] Judge Advocate General's Office, War Crimes Case Files, *Ikegami Tomoyuki and Others*, Case No. 167, 19 November 1946–27 April 1947: WO 235/979, TNA.

[96] Ibid., Prosecution's Submission on Oaths of Allegiance, at SP 00051.

[97] Ibid., at SP 00052.

[98] Ibid., War Crimes Trial, DJAG Review Report, 13 February 1947, SP 00013.

[99] Ibid.

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As a result, there were also important differences in how the German and Singapore trials developed.

6.1. Establishing lists of war crimes

The Royal Warrant framework adopted an open-ended approach to defining what crimes fell within the jurisdiction of British military courts established under its auspices. The regulations authorized the courts to judge 'violations of the laws and usages of war' without further defining what conduct fell within this category of violations. However, BAOR Instruction No. 104 and ALFSEA Instruction No. 1, which supplemented the Royal Warrant, contained substantive lists of conduct considered as 'war crimes'. Different lists were set out in each instruction, and different lists of war crimes therefore applied to Germany and Singapore.

BAOR Instruction No. 104 and ALFSEA Instruction No. 1 both established lists of conduct, including positive acts and omissions, amounting to 'main offences constituting war crimes'. The former's list had 16 types of conduct,[100] while the latter's list had 14.[101] The list of offences set out in BAOR Instruction No. 104 greatly overlapped with the list of war crimes in the 1940 edition of Oppenheim and Lauterpacht's *International Law*.[102] Another document found in the archival file of BAOR Instruction No. 104 sheds further light on the list. This document is entitled 'War Crimes, Based on list suggested by Gen. de Baer in the course of the proceedings of Sir Arnold McNair's Commission IV, 127', and it mirrors a proposal that a sub-committee of the 'International Commission on Penal Reconstruction and Development' (known also as the Cambridge Commission) developed in 1942.[103] The list set out three categories of war crimes: (i) 'Acts directly connected with warfare and contrary to customs of war'; (ii) 'Acts not directly connected with warfare and

[100] BAOR Instruction No. 104, *supra* note 32, Part 1, para. 2. These were: Making use of poisoned and otherwise forbidden arms and ammunition (a), killing of the wounded (b), refusal of quarter (c), treacherous request of quarter (d), maltreatment of dead bodies on battlefield (e), ill-treatment of prisoners of war (f), firing on undefended localities (h), abuse of the flag of truce (i), firing on the flag of truce (j), misuse of the Red Cross flag and emblem and other violations of the Geneva Convention (k), use of civilian clothing by troops to conceal their military character during battle (l), bombardment of hospital and other privileged buildings (m), improper use of privileged buildings for military purposes (n), poisoning of wells and streams (o), pillage and purposeless destruction (p).

[101] ALFSEA Instruction No. 1, *supra* note 33, Part 1, para. 4. These were: Shooting and killing without justification (a), shooting and killing on the false pretence that the prisoner was escaping (b), assault with violence causing death, and other forms of murder or manslaughter (c), shooting, wounding with bayonet, torture and unjustified violence (d), other forms of ill-treatment causing the infliction of grievous bodily harm (e), theft of money and goods (f), unjustified imprisonment (g), insufficient food, water and clothing (h), lack of medical attention (i), bad treatment in hospitals (j), employment on work having direct connection with the operations of the war, or on unhealthy or dangerous work (k), detaining allied personnel in an area exposed to the fire of the fighting zone (l), making use of prisoners of war or civilians as a screen (m); and such cases as attacks on hospital ships, and on merchant ships without making provisions for survivors (n).

[102] Oppenheim and Lauterpacht, *supra* note 81, at 451. The list of war crimes by Oppenheim and Lauterpacht is more comprehensive, although the list in BAOR Instruction No. 104 sporadically includes war crimes which are not explicitly included in the list of Oppenheim and Lauterpacht, for example '[p]oisoning of wells and streams'. BAOR Instruction No. 104, *supra* note 32, Part 1, para. 2(o).

[103] Since 1941, under Sir Arnold McNair as chairman, the Cambridge Commission had analyzed the possibility of creating an international criminal court to prosecute war crimes; the sub-committee on war crimes was led by General Marcel de Baer from Belgium. Cf. UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), 94–9.

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which have caused death, illness, bodily harm or loss of liberty to those to whom they were applied'; and (iii) 'Serious crimes against property'.

The list in ALFSEA Instruction No. 1, by contrast, was most likely tailored to the types of atrocities committed by the Japanese military and its associated personnel in Singapore and the wider region. For example, one of the offences in this list was '[s]hooting, wounding with bayonet, torture and unjustified violence'.[104] The reference to 'bayonet' probably aimed to address Japanese military personnel's common use of this weapon during the war. A number of offences listed in ALFSEA Instruction No. 1, but not in BAOR Instruction No. 104, aimed at addressing types of prisoner of war abuse commonly perpetrated by Japanese military personnel, such as '[i]nsufficient food, water and clothing', '[l]ack of [m]edical attention', and '[b]ad treatment in hospitals'.[105] The listed offence of '[e]mployment on work having direct connection with the operations of the war, or on unhealthy and dangerous work' probably targeted, among others, the Japanese military's use of Allied prisoners of war on the notorious Burma–Siam death railway.[106] Another offence stated in ALFSEA Instruction No. 1 is '[i]nterrogation by "third degree" or other forcible methods', referring to the torture and interrogation techniques employed by the Japanese military police (*Kempeitai*) during the war.[107]

These lists gave guidance to investigators and prosecutors on the types of crimes they should focus on. However, they did not always reflect the types of crimes committed. The BAOR Instruction No. 104 list was based on a typology developed before the Second World War and largely addressed war crimes done in connection with fighting. There were indeed complaints by German investigation teams that the list in BAOR Instruction No. 104 did not help much when investigating the atrocities in concentration camps, for example.[108] In his overall report on the trials, Shapcott observed that in Germany, when investigations began, the 'nature and extent of atrocities in concentration camps were perhaps half realised' and that there were '[r]elatively few war crimes [that] were committed by fighting soldiers'.[109] ALFSEA Instruction No. 1's list, by contrast, appears to have been more closely tailored to the type of war crimes committed in Asia. Nevertheless, it is notable that it did not mention systematic atrocities committed against civilians, such as the use of forced civilian labour, as opposed to the wrongful use of labour by prisoners of war, or the sexual slavery instituted by the Japanese military's so-called comfort women system.

6.2. Locating the accused

The British encountered more problems in locating the accused in Germany than in Singapore and other parts of Asia, where 'a very substantial proportion of the wanted persons were in custody'.[110] In Asia, as set out in ALFSEA Instruction No. 1, the British

[104] ALFSEA Instruction No. 1, *supra* note 33, Part 1, para. 4(d).
[105] Ibid., para. 4 (h)–(j).
[106] Ibid., para. 4(k).
[107] Ibid., para. 4(n).
[108] See Cramer, *supra* note 5, at 50–1, who quotes an interim report of the war crimes investigation team of 22 June 1945, in which the officer complains about 'the lack of certainty as to the precise legal position'.
[109] Minute by Shapcott, *supra* note 39, para. 5.
[110] Ibid., para. 19.

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military had decided to undertake the 'automatic arrest' of those falling in certain categories, in addition to those appearing on wanted lists.[111] Specifically, British military personnel were ordered to automatically arrest all members of the Japanese military police, all those 'connected' to the sea transport of prisoners of war, staff of prisoners of war and internee camps, and those in units or commands that used prisoner of war labour.[112] The presumption was that these individuals, due to their formal roles and unit membership, might have committed war crimes. This approach to locating accused may have also influenced the types of crimes prosecuted. Many trials conducted in Singapore concerned lower-ranking accused.[113] In Germany, the British military took a different approach. It seems that the only category identified for automatic arrest were 'ex members of enemy concentration or PW camp staffs'.[114] Additionally, due to its 'bulky' nature, it was decided that there would be no 'wide distribution' of the wanted list.[115] However, alternative mechanisms to locate the accused did not seem to work properly. In his summing-up report, Shapcott was highly critical of the role played by the Central Registry of War Criminals and Security Suspects in Germany when it came to locating the accused, noting that the registry 'for one reason or another proved quite useless in practice as a means of tracing any wanted war criminals'.[116]

This difference in approach towards the locating of accused in Europe and Asia may be explained by varying levels of organizational efficiency. Nevertheless, it is noteworthy that Shapcott, in describing the situation in Germany, noted that '[m]any of the prison camp guards managed to escape' and 'Gestapo officials were often in possession of false identity documents', and this 'greatly increased the difficulty of tracing them months after they had disappeared'.[117] The accused in Germany were in familiar territory. They were able to quickly disguise themselves and disappear into the local population. By contrast, the majority of Japanese accused in Singapore and Asia did not speak local languages and were not familiar with local ways and customs. This certainly made the location and identification of Japanese accused easier.

6.3. Preventing delays

The British authorities intended their war crimes trials to be completed in an expeditious manner. In Germany, however, the length of these trials differed considerably. There were trials that took several weeks, in particular those that dealt with crimes in

[111] ALFSEA Instruction No. 1, *supra* note 33, Part 1, para. 15.
[112] Ibid.
[113] In Germany, a number of lower-ranking military and concentration camp guards were prosecuted before the Royal Warrant courts. However, there were also higher-ranking figures brought before the courts, such as Josef Cramer, the commandant of the Bergen-Belsen concentration camp, or Field Marshal Erich von Manstein.
[114] BAOR Instruction No. 104, *supra* note 32, Part I, para. 31.
[115] Ibid., para. 33.
[116] Minute by Shapcott, *supra* note 39.
[117] Ibid.

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concentration camps such as Bergen-Belsen,[118] Neuengamme[119] or Ravensbrück.[120] But there were also trials of just a day or two in duration.[121] In Singapore, the longest trial lasted 31 days while the shortest lasted one day.[122]

There appears to have been more emphasis on expeditious trials in Singapore, as trial organizers in Asia sought to learn from the delaying tactics or 'mistakes' that occurred in earlier trials conducted in Germany. Specifically, ALFSEA Instruction No. 1 recognized the 'summary nature' of the trials in Asia and that all should remember that 'justice be administered promptly and efficiently'.[123] BAOR Instruction No. 104 contained no comparable provision for Germany. Rather, this instruction only stated that the accused should have 'reasonable time' to prepare for his defence and 'delaying tactics' would not be allowed.[124] A similar provision prohibiting 'delaying tactics' was stated in ALFSEA Instruction No. 1.[125]

The organizers of British war crimes trials in Asia kept track of developments in other war crimes trials and discussed problems encountered by early Allied trials with the aim of preventing these problems from occurring. In a 17 November 1945 memorandum, the Supreme Allied Commander of South East Asia Command, Lord Louis Mountbatten, emphasized the need for British war crimes trials in Asia to avoid the delays and legal obstacles encountered in the British-run *Belsen* trial, the French-run *Laval* trial in Europe, and the US-run *Yamashita* trial in the Philippines.[126] In a 19 November 1945 memorandum, Chief of Staff Frederick A.M. Browning observed to Mountbatten that they had 'the advantage of seeing the mistakes made in Europe' and that before trials started in Asia, they should ensure that the 'drill' was 'absolutely simple, clear cut and speedy'.[127]

6.4. Including the Department of the Judge Advocate General in the trial process

Another significant difference between the German and Singapore trials relates to the role played by the DJAG at trial. The Royal Warrant regulations anticipated the

[118] The first Belsen trial, which concerned crimes committed at Bergen-Belsen and Auschwitz, took place on 19 October–17 November 1945. It was followed by two more trials concerning crimes in, among others, Belsen concentration camp that were much shorter (Belsen trial II, 16–22 May 1946; Belsen trial III, 14–16 April 1948) due to the lower number of defendants.

[119] 18 March–3 May 1946. This trial dealt with the major accused persons and it was followed by six further Ravensbrück trials.

[120] 5 December 1946–3 February 1947. There were a number of further shorter trials that dealt with crimes in the main camp as well as adjunct camps of Neuengamme.

[121] For an overview of the trials, see Hassel, *supra* note 5, at 262–79.

[122] The longest trial was Judge Advocate General's Office, War Crimes Case Files, *Otsuka Misao and Others*, Case No. 163, 8 August 1946–27 April 1947: WO 235/975, TNA. Examples of trials lasting one day include Judge Advocate General's Office, War Crimes Case Files, *Tamura Shinji*, Case No. 4, 27 January–28 April 1946: WO 235/816, TNA; and Judge Advocate General's Office, War Crimes Case Files, *Aoki Toshio*, Case No. 5, 17 November 1945–28 April 1946: WO 235/817, TNA.

[123] ALFSEA Instruction No. 1, *supra* note 33, Part II, para. 40.

[124] BAOR Instruction No. 104, *supra* note 32, Part II, para. 23.

[125] ALFSEA Instruction No. 1, *supra* note 33, Part II, para. 52.

[126] War Office, South East Asia Command, Military Headquarters Papers, Procedure for War Criminal Trials in SEAC, 17 November 1945, paras. 1–4: WO 203/4571A, TNA.

[127] War Office, South East Asia Command, Military Headquarters Papers, Chief of Staff to Supreme Allied Commander, 19 November 1945: WO 203/4926A, TNA.

presence of a DJAG representative during the trials. Regulation 5 provided that if no DJAG personnel was deputed or appointed, the convening officer:

> should appoint at least one officer having one of the legal qualifications mentioned in Rule of Procedure 93 (B) as President or as a member of the Court, unless, in his opinion, such opinion to be expressed in the Order convening the Court and to be conclusive, no such officer is necessary.

Based on this, it could be said that the drafters of the warrant originally saw the absence of DJAG personnel during the trial as an exception rather than the rule. The DJAG personnel at trial was to sum up the case and provide legal recommendations to the court.

In the trials in Germany, this summing up by DJAG personnel was often a thorough reflection of the trial that could take considerable time. In the *Belsen* trial, for example, it took two and a half days, from 14 to 16 November 1945. The influence of the DJAG personnel's summing up on the court's final judgment cannot be underestimated, given that in his speech the DJAG personnel, among others, summarized and evaluated the evidence against and in favour of every defendant, and gave recommendations to the judges as to which arguments, in his view, should be regarded as relevant or not. According to Honig, who was a DJAG personnel during the Royal Warrant trials in Germany, the summing up was supposed to enhance the decision of the judge on the question of guilt.[128] A more recent analysis by Cramer even describes the DJAG as the 'court's navigator'.[129]

There appears to have been DJAG personnel at most trials conducted in Germany. This was not the case in Singapore. Based on records of the Singapore trials, there were no DJAG personnel who provided a summing up at the end of the trial. This was likely due to the severe shortage of legally skilled British military personnel in Asia. Nevertheless, just as in the trials conducted in Germany, the trials in Singapore benefited at the post-trial stage from advice given by DJAG personnel. At this stage, the DJAG personnel issued review reports that set out the facts of the case, relevant legal issues, and recommendations to the confirming officer.

These DJAG post-trial review reports played a role in correcting glaring factual and legal errors made by courts at the trial stage in the Singapore trials. For example, in *Hasegawa Hidefumi*, the post-trial DJAG review report recommended that the accused person's conviction not be confirmed. The court had sentenced the accused to death, but when doing so the court also noted that there was 'reasonable doubt as to who did the actual killing'. [130] On this basis, the court had also recommended mercy. The post-trial DJAG review report noted that the court 'obviously had a reasonable doubt on the very point which they had to decide', namely the guilt of the accused.[131] It is noteworthy that the DJAG was able to conclude in this manner as the court had explained, albeit briefly, the grounds for its findings and sentence.

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[128] F. Honig, 'Kriegsverbrecher vor englischen Militärgerichten', (1947) 62 *Schweizerische Zeitschrift für Strafrecht/Revue Pénale Suisse* 20, at 28.
[129] Cramer, *supra* note 5, at 155–6 (in German: '*Gerichtslotse*').
[130] *Hasegawa Hidefumi*, SP 00114, *supra* note 69.
[131] Ibid., DJAG Review Report, SP 00004.

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In most of the Singapore trials, courts did not issue such explanations, restricting themselves to announcing their findings of guilt or innocence and sentences. The lack of comprehensive explanatory court judgments in these trials must have limited the DJAG's ability to conduct post-trial reviews.

7. Conclusion

7.1. Summary of research findings

Based on the Royal Warrant framework, the British intended war crimes trials in both Europe and Asia to be conducted by military personnel and modelled on the British court martial system. The British experienced common challenges in both sets of trials due to the immense scale and relative novelty of the undertaking. In particular, there were problems with the co-ordination of trials and the collection of evidence, legal issues resulting from the brief and open formulation of the Royal Warrant framework, and the undeveloped nature of war crimes law, as well as practical issues as a result of the shortages of skilled and legally qualified personnel. Though the Royal Warrant trials still were on firmer legal footing than the Tokyo and Nuremberg tribunals, all these factors taken together resulted in a great deal of legal uncertainty.

There were also divergences between the Royal Warrant trials in Germany and Singapore relating in particular to the lists of war crimes in the army instructions, the strategies of locating accused persons, the prevention of delaying tactics, and the presence of a DJAG representative during the trials. These differences were greatly influenced by context. Trial organizers were circumscribed and guided by practical factors such as resources and time restraints when designing and implementing the trials. The Royal Warrant framework was sufficiently flexible and facilitated adjustments for these contextual differences. Many of its provisions contained exceptions that were used by the British military to overcome resource shortages and also evidential challenges. While these exceptions give rise to concerns over the abuse of discretionary power, they also facilitated different trial approaches in Germany and Singapore that were shaped by each location's specific circumstances.

With regard to the question how the trials relate to each other, it can be argued, in general terms, that the trials in Europe and Asia were of the same Royal Warrant 'tree', but constituted different branches. On the one hand, this degree of flexibility was favourable because it allowed the British to tailor their responses to the very different conditions in Europe and Asia. On the other hand, though there was some information exchange and learning between trial decision-makers in Germany and Singapore, the British military did not seem to have made any sustained or systematic effort to co-ordinate trials. Trial decision-makers pursued different interpretations and implementation strategies in response to particular on-the-ground conditions. In this more practical sense, the trials can be better understood as two different microcosms.

7.2. Achievements and deficiencies of the Royal Warrant trials

The aim of the British in organizing these Royal Warrant trials was to expedite a large number of trials, especially when compared to the Nuremberg and Tokyo

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trials. Based on the statistical information at our disposal, it is fair to say that they conducted relatively expeditious and extensive trials, at least initially. The number of trials pursued substantially reduced over time, not least because Cold War imperatives required the Western powers to court Germany and Japan.[132] But the swift completion of so many trials also gave rise to issues of fairness and accuracy, especially when they are assessed against present-day rule of law requirements and human rights standards. Among the most glaring shortcomings were insufficiently trained personnel (including defence counsel), the lack of comprehensive written judgments, poor quality control over evidence, and the absence of a public appeals procedure. Yet it is important to note that, despite the trials' inadequacies, they were favourably received by at least some segments of the public.[133] At the end of the *Belsen* trial, for example, the *News Chronicle* wrote that the 'spectators at the trial talked afterwards about its fairness, and declared the verdicts and sentences true and merited'.[134] In his study of British trials conducted in Singapore and Malaya, Smith suggests that only a few trials attracted public criticism, noting that 'the lack of controversy' may reflect that the public 'was in broad agreement' with the British war crimes endeavour.[135]

7.3. Relevance of the trials

The current relevance of the trials can be seen at two different levels. First, although the trials did not produce written judgments, there exists a huge amount of legal documents that have only been partly examined and evaluated to date. From these materials, it is possible to discern how trial participants sought to conceptualize and formulate legal arguments about issues that are today at the core of international criminal law debates. Examples of such discussions include the joint commission of crimes under international law, superior responsibility, and the defence of acting upon orders. To evaluate these documents is a task for further research projects.[136]

Second, the Royal Warrant trial experience also provides us with some relevant lessons for today from a transitional justice perspective. A key message is that war crimes trials require significant resources and time. These circumstances proved more influential than political factors in explaining the differences between the German and Singapore trials. Another lesson is that, when designing legal regulatory frameworks that are to apply in different contexts, sufficient flexibility must be built in to allow for context-specific adjustments. Scholars working in the field of international criminal law and transitional justice have criticized the tendency for the international community to automatically promote or fall back on

[132] See Wilson et al., *supra* note 5, and Narayanan, *supra* note 4, at 9, for the Singapore trials; see Hassel, *supra* note 5, at 201, for the German trials.

[133] It should also be noted there were also significant segments of the public who were unhappy with trial results. Narayanan, *supra* note 4, at 11.

[134] *News Chronicle*, 19 November 1945, quoted verbatim in Cramer, *supra* note 5, at 325.

[135] S. C. Smith, 'Crimes and Punishment: Local Responses to the Trial of Japanese War Criminals in Malaya and Singapore, 1946–48', (1997) 5 *South East Asia Research* 52.

[136] An example of work highlighting contemporary issues raised in these trials is Cheah W.L., 'The Superior Orders Defence at the Post-War Trials in Singapore', in Sellars, *supra* note 5, at 100. On the British Royal Warrant trials held in Hong Kong, see generally Linton, *supra* note 5.

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specific technical solutions or 'tools'. These are then applied regardless of context. An effective case-specific approach ought to take into account socio-political and other place-based conditions.[137] Others have highlighted how war crimes trials, while being part of the criminal law toolbox, can be structured to offer more context-specific approaches to dealing with mass atrocity.[138] This article has shown that the British trials benefited from the flexibility built into the Royal Warrant framework, which facilitated context-specific adjustments as the trials evolved. Although, from today's perspective, one would demand a strict compliance with general fair trial rights, the Royal Warrant trials remind us of the current emphasis on a need for a contextual rather than a one-size-fits-all approach to transitional justice.

[137] According to L.E. Fletcher, H.M. Weinstein and J. Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective', (2009) 31 *Human Rights Quarterly* 170, a uniform approach, which includes war crimes trials, 'appears to emphasize a standardized "tool kit" of interventions that can be applied in different contexts'. By contrast, a more contextual approach 'implies thinking of specific mechanisms as processes within a social and political continuum'. See also B. Conley-Zilkic, S. Brechenmacher and A. Sarkar, 'Assessing the Anti-Atrocity Toolbox', (2016) *Occasional Paper World Peace Foundation* 1, at 4. This includes the flexibility to make changes or adjustments along the way in response to context-specific challenges.

[138] Dickinson argues that hybrid tribunals, such as the Kosovo War and Ethnic Crimes Court and Cambodia's Extraordinary Chambers in the Courts of Cambodia, take a more effective contextual approach, being the result of 'on-the-ground innovation' instead of 'grand institutional design'. L. A. Dickinson, 'Transitional Justice in Afghanistan: The Promise of Mixed Tribunals', (2002) 31 *Denver Journal of International Law and Policy* 27.