

INTERNED OR IMPRISONED?:
THE SUCCESSES AND FAILURES OF INTERNATIONAL LAW
IN THE TREATMENT OF AMERICAN INTERNEES IN SWITZERLAND, 1943-45

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ABSTRACT

Dwight S. Mears: Interned or Imprisoned?: The Successes and Failures of International Law in the Treatment of American Internees in Switzerland, 1943-45
(Under the direction of Wayne E. Lee)

During World War II, over 100,000 soldiers of various nationalities sought refuge in neutral Switzerland, including over 1,500 American airmen from damaged U.S. bombers. As a result of the U.S. violations of Swiss neutrality and other external factors, the Swiss government was unwilling to apply the 1929 Geneva Convention prisoner of war protections to the U.S. airmen when they were punished for attempting escape. The politicization of internment procedures resulted in a diplomatic stalemate in which the ambivalence of Swiss officials prolonged mistreatment of U.S. airmen in violation of emerging customary international law. I believe that answering the question of how international law functioned in the scenario of Swiss internment will demonstrate both the cultural importance of Swiss adherence to international law, as well as the process by which states frequently interpret ambiguous international law to their advantage.

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Introduction

The questionable actions of many governments during international conflicts in the twentieth century underscores the difficulty of creating and enforcing rules for wartime conduct. Not only is the international law of armed conflict difficult to enforce, but the evolutionary nature of the law lags behind the infinite possibilities of combat, and loopholes in the law are often addressed only after they have been exploited. Warfare generates new permutations of combatants and technology that are not codified clearly under existing international law. The process of interpreting this gray area illustrates how governments behave in response to treaties, as well how individuals and governments can take advantage of the inherent ambiguity of international law.

In World War II, over 1,500 American airmen were interned by neutral Switzerland, the vast majority being U.S. Army Air Force (USAAF) aircrews from damaged B-17 and B-24 bombers. As required by the Hague Convention of 1907, “a neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.”¹ Many of these internees were treated well, but others who unsuccessfully attempted escape were punished well beyond the limits of emerging international law through imprisonment in punitive confinement camps. The Swiss refusal to afford military internees the legal protections of Prisoners of War (POWs) was a questionable decision under emerging

¹ Art. 11, *The 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* (The Hague: 18 October 1907), available at: <http://www.icrc.org/IHL.nsf/INTRO?OpenView>.

international law. This paper will explore the diplomacy surrounding the internment of American airmen in Switzerland in 1944 in order to determine how the Swiss negotiated emerging international law on prisoner treatment, and what this means in the larger context of other states adhering to international law.

The internment of American airmen in Switzerland during World War II began with a B-24 Liberator bomber nicknamed “Death Dealer.” A high-altitude heavy bomber with a crew of ten, four engines, and a bomb load of six tons, the B-24 was a critical part of the Allied strategic bombing campaign in Europe.² Death Dealer was assigned to the 9th Air Force in North Africa, and was considered a lucky ship after surviving the infamous August 1, 1943 raid on the oil refinement facilities in Ploesti, Romania, known as Operation Tidal Wave. Of 177 aircraft on the mission 53 were lost and 55 damaged.³ In that raid, highly accurate anti-aircraft fire ripped through Death Dealer’s fuselage, disabling two of its engines and mortally wounding one of the machine gunners on the crew, Sgt. Paul Daugherty. Despite a gaping wound in his chest, Sgt. Daugherty lived long enough to ask his pilot “Will you say a prayer for me?” The pilot did, just before Daugherty died in his arms.⁴

Less than two weeks later, early in the morning of August 13, 1943, Death Dealer went airborne from its base in North Africa and maneuvered into tactical formation with 113 of its sister ships. Its mission was to fly over the Alps and drop its high explosive payload on the Messerschmitt fighter aircraft factories in Wiener-Neustadt, Austria. As it

² “Battle Log of the Liberators,” *Popular Mechanics*, (Sep. 1943), p. 28-9.

³ See Jay A. Stout, *Fortress Ploesti: The Campaign to Destroy Hitler's Oil Supply* (Havertown: Casemate Publishers, 2003), 76, and James Dugan and Carroll Stewart, *Ploesti: The Great Ground-Air Battle of 1 August 1943* (New York: Random House, 1962), 222.

⁴ Dugan, *Ploesti*, 216.

did for huge numbers of strategic bombers during the war, Death Dealer's luck finally ran out. One of the aircraft's engines sputtered to a halt enroute to the target, and another engine was violently shot out by anti-aircraft fire while over the Messerschmitt factory. The pilot, USAAF Lt. Alva Geron, struggled in vain to maintain altitude with only two engines. He knew that the smoking aircraft was in trouble. After deciding that he could not return to base in North Africa, Geron requested a heading to neutral Switzerland from his navigator. Soon Death Dealer passed over a large lake at the northern foot of the Alps, which the navigator correctly identified as the border on the Rhine between Germany and Switzerland. The ground already loomed too close for the crew to parachute from the crippled bomber, so Geron prepared for a crash-landing. Spotting an open field, Geron lowered the wheels as the remainder of the crew braced for impact. The aircraft touched down and shook violently as it lumbered to a halt, plowing its nose into the earth as its forward landing gear collapsed. Improbably, the entire crew survived. Uncertain whether he was in enemy territory, Geron ordered the crew to burn the aircraft to prevent its capture by a foreign government. As the crew set off explosive charges, curious onlookers approached the bomber amid the drone of air raid sirens. In fact Death Dealer had landed in Wil, a small village in the canton of St. Gallen in western Switzerland. The navigator had accurately guided the doomed Death Dealer into a neutral country, and one can only imagine that the crew felt a palpable sense of relief at having avoided capture by the Germans. Even neutral internment had its price, however. The lieutenant and his crew were soon arrested by uniformed Swiss soldiers and escorted to Zurich for interrogation and quarantine.⁵ Whether killed or captured by an enemy or

⁵ Stephen Tanner, *Refuge from the Reich: American Airmen and Switzerland during World War II* (Rockville Centre, NY: Sarpedon, 2000), 79-80. Internees were only one segment of the military refugees

neutral, only about one in four B-17 or B-24 bomber crews in 1943 completed the required 25 missions to finish a combat tour.⁶ Death Dealer's crew would be the first of many to end up in Switzerland, and they would test the limits of that country's commitment to neutrality and the rule of international law.

Historians have examined aspects of Switzerland's neutrality and role in the war since the war ended. Initial perceptions of Swiss wartime policies were largely nationalistic and celebrated the Swiss spirit of resistance. This attitude was exemplified by the works produced by the works of Hans Rudolf Kurz, the official historian of the Swiss Federal Military Department.⁷ The first debates over the Swiss actions during the war emerged in the early 1960s, and focused on the collaboration between Swiss government officials and the Nazis.⁸ In 1962, the Swiss government commissioned a study of Swiss wartime neutrality, the Bonjour Report, which dealt primarily with the impact of military decisions on foreign policy.⁹ Given the heavily restricted archive access to World War II records, the Bonjour Report "monopolized" Swiss history of the war until the revision of the Federal Archive Regulation in 1973. This step eased restrictions on archive records, and in one historian's view, "created the necessary

in Switzerland; those who evaded capture and entered on foot, as well as those who escaped from belligerent prisoner of war camps were not interned but rather offered asylum.

⁶ Steward H. Ross, *Strategic Bombing by the United States in World War II: The Myths and the Facts* (Jefferson, NC: McFarland & Company, 2003), 9. The required number of missions to complete a tour rose by the end of the war.

⁷ See Rudolf Juan, "The Military National Defence, 1939-45," in *Switzerland and the Second World War*, ed. Georg Kreis (London: Frank Cass, 2000), 197, and Hans Rudolf Kurz, *Die Schweiz im Zweiten Weltkrieg: das grosse Erinnerungswerk an die Aktivdienstzeit 1939-45* (Thun: Ott Verlag, 1959).

⁸ See Alice Meyer, *Anpassung oder Widerstand. Die Schweiz zur Zeit des deutschen Nationalsozialismus* (Frauenfeld: Verlag Huber, 1965).

⁹ Juan, "The Military National Defence, 1939-45," 198.

conditions for the evolution of an independent historiography of Switzerland's role in the Second World War."¹⁰

A debate over the Swiss Army's role in the war emerged in 1974, following the publication of Max Frisch's *Dienstbüchlein* (Service Booklet).¹¹ In this work, the popular story of the Swiss Army's defensive National Réduit strategy as a deterrent to German invasion was portrayed as a myth,¹² which eventually gave rise to the suggestion that Switzerland retained its autonomy because of its willingness to collaborate economically with the Nazis.¹³ The importance of these economic ties was confirmed in 1985 by Werner Rings' *Raubgold aus Deutschland* (Looted Gold from Germany), which linked Switzerland's independence to its financial relationship with Germany.¹⁴ In 1989, the issue again entered the public sphere with Markus Heiniger's *Dreizehn Gründe: Warum die Schweiz im Zweiten Weltkrieg nicht erobert wurde* (Thirteen Reasons why Switzerland was not Conquered), which addressed the financial, strategic, and political benefits that Swiss neutrality provided to Berlin.¹⁵

¹⁰ Sacha Zala, "Governmental Malaise with History: From the White Paper to the Bonjour Report," in *Switzerland and the Second World War*, ed. Georg Kreis (London: Frank Cass, 2000), 328-9.

¹¹ Max Frisch, *Dienstbüchlein* (Frankfurt: Suhrkamp Taschenburch, 1974).

¹² Kreis, ed., *Switzerland and the Second World War*, 5.

¹³ The National Réduit strategy would apply during an invasion, and entailed surrendering indefensible parts of the country and moving the bulk of the Swiss Army into alpine fortresses that controlled key roads. See Hugh R. Wilson, *Switzerland: Neutrality as a Foreign Policy* (Philadelphia: Dorrance & Company, 1974), 11-12.

¹⁴ See Kreis, *Switzerland and the Second World War*, 3-4, and Werner Rings, *Raubgold aus Deutschland : die "Golddrehscheibe" Schweiz im Zweiten Weltkrieg* (Muenchen: Artemis, 1985).

¹⁵ See Neville Wylie, Review: "'Life Between the Volcanoes,' Switzerland during the Second World War," *The Historical Journal*, vol. 38 (Sep. 1995), 760, and Markus Heiniger, *Dreizehn Gründe: Warum die Schweiz im Zweiten Weltkrieg nicht erobert wurde* (Zurich: Limmat Verlag, 1989).

Although historians had already uncovered much of Switzerland's controversial wartime actions prior to the 1990s, the debate remained largely in academic circles until the release of the U.S. government's "Eizenstat Report" in 1997. The Eizenstat Report bluntly accused Switzerland of using neutrality as "a pretext for avoiding moral considerations," and of prolonging the war by financing the Axis.¹⁶ The Swiss were labelled as sharing culpability for the Holocaust as a result of receiving "tainted" gold looted from Holocaust victims. Private citizens targeted the Swiss banking system for retribution, and a boycott of Swiss banking in New York City was threatened.¹⁷ The Eizenstat Report also triggered an outpouring of polemics defending Switzerland's conduct in the Second World War. Amid this furor, the Swiss government sought to influence the debate by commissioning an Independent Committee of Experts (ICE) to render an impartial verdict on wartime collaboration. The ICE found that, outside of scholarly circles, "hardly any critical questions were posed regarding the past," which resulted in an "idealised collective memory" of the war.¹⁸

The historiography of Swiss military internment of American airmen was originally a part of the Swiss grand narrative that emphasized the accomplishments of Swiss humanitarian efforts during the war. In the 1970s, one author incorrectly related that American airmen in Switzerland "had a splendid time, except when they suffered

¹⁶ "Major Conclusions and Policy Implications," in *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (U.S. Dept. of State, 1997), available at: <http://fcit.usf.edu/Holocaust/resource/gold/GoldMenu.htm>. See also Hans Senn, "Defending Switzerland: The Impact of Armed Neutrality in World War II," in *Switzerland Under Siege, 1939-1945: A Neutral Nation's Struggle for Survival*, ed. Leo Schelbert (Rockport: Picton Press, 2000), 15.

¹⁷ Angelo M. Codevilla, *Between the Alps and a Hard Place: Switzerland in World War II and Moral Blackmail Today* (Washington D.C.: Regnery, 2000), x.

¹⁸ Independent Commission of Experts (ICE) Switzerland – Second World War, *Switzerland, National Socialism and the Second World War* (Zürich: Pendo, 2002), 497.

from boredom and homesickness.”¹⁹ The subject remained overshadowed by the issues of Swiss civilian refugee and financial policies during the war until the 1990s, when the release of archival records permitted a more thorough investigation. Swiss historian Peter Kamber’s *Schüsse auf die Befreier* (1993) was the first in-depth study of the American internee experience. Kamber described a *de facto* war between Swiss air defenses and Allied airplanes as well as mistreatment of interned Allied aviators in punishment camps.²⁰ He also questioned the legality of internment policies and criticized the denial of POW protections to internees.²¹ Kamber’s work was followed by Olivier Grivat’s *Internés en Suisse* (1995), another Swiss history which placed the internment of American airmen in the context of all interned nationalities. Grivat drew similar conclusions about the internment of Americans and blamed poor oversight of Swiss Army officials in charge of internment camps.²²

In the 2000s, the first U.S. authors published works that dealt exclusively with American internees in Switzerland, such as Stephen Tanner’s *Refuge from the Reich* (2000) and Cathryn Prince’s *Shot from the Sky* (2003).²³ Both works concentrated on the oral history of American internees, including combat experiences, internment, and escape or repatriation. Prince accused Swiss government officials of denying American internees the protections of international law, but stopped short of analyzing the military

¹⁹ Heinz K. Meier, *Friendship under Stress: U.S.-Swiss Relations 1900-1950* (Bern: Herbert Lang & Co, 1970), 299.

²⁰ See Peter Kamber, *Schüsse auf die Befreier: Die "Luftguerilla" der Schweiz gegen die Alliierten 1943-45* (Zurich: Rotpunktverlag, 1993).

²¹ *Ibid.*, 221.

²² Olivier Grivat, *Internés en Suisse 1939-1945* (Chapelle-sur-Moudon: Editions Ketty & Alexandre, 1995).

²³ See Stephen Tanner, *Refuge from the Reich: American Airmen and Switzerland during World War II* (Rockville Centre, NY: Sarpedon, 2000), and Cathryn J. Prince, *Shot from the Sky: American POWs in Switzerland* (Annapolis: U.S. Naval Institute Press, 2003).

tribunals of American airmen or other legal implications of internment. American internees of Switzerland are also mentioned in several works about the larger air battle for Europe, but the scope of these works afforded little room for protracted discussion of the internment experience.²⁴ The polarization of the Swiss literature in the wake of the Eizenstat Report has influenced some portrayals of American internees in Switzerland: Stephen Halbrook's *Target Switzerland* (1998) cites only effusive statements about Swiss internment from two American internees, in what could only be described as a mischaracterization.²⁵

Thus several American and Swiss authors have mentioned the questionable internment policies of the Swiss government, but none fully contextualize the problem within the malleability of developing customary international law. Most works on the larger debate over Swiss wartime conduct mention Swiss military internment only in the aggregate, and therefore American internees are subordinated to the superior numbers of many other interned nationalities.²⁶ This study will significantly rewrite this story through a more thorough analysis of sources in the U.S. and Swiss Archives, complicating the current understanding of Swiss actions during the war by including perspectives of both internees and their captors. Furthermore, I demonstrate that the Axis and Allies concurrently asserted pressure on the Swiss, both in terms of internment and

²⁴ See Rob Morris, *Untold Valor: Forgotten Stories of American Bomber Crews over Europe in World War II* (Washington D.C.: Potomac Books Inc, 2006), and Donald L. Miller, *Masters of the Air: America's Bomber Boys Who Fought the Air War Against Nazi Germany* (New York: Simon & Schuster, 2006).

²⁵ See Stephen P. Halbrook, *Target Switzerland : Swiss Armed Neutrality in World War II* (Rockville Centre, NY: Sarpedon, 1998), 203.

²⁶ American military internees numbered only 1,516 airmen, while approximately 104,000 military refugees were interned over the course of the war. See Prince, *Shot from the Sky*, 24, and Independent Commission of Experts Switzerland – Second World War, *Switzerland and Refugees in the Nazi Era* (Bern: ICE, 1999), 21.

other wartime concerns. Perhaps most crucially, I also add an extensive framework of legal analysis that has yet to appear in any accounts of Swiss internment.

Of particular use in understanding how Switzerland navigated its way between the competing pressures of diplomacy, military threat, and international law is a consideration of how law functions in a society. A substantial and growing body of work on law and culture informs the analysis presented here. The field was pioneered by nineteenth century anthropologists with legal training such as Lewis Morgan and Henry Maine. By the early twentieth century, the ethnographic fieldwork of Bronislaw Malinowski shifted the discipline from a focus on jurisprudence to all forms of disputes and social control. In the 1950s, scholars such as Max Gluckman and Victor Turner founded the processual approach, or the study of law “as process rather than as rules and outcomes.” The most influential scholar of this field is Laura Nader, whose book *The Disputing Process: Law in Ten Societies* (1978) studied different types of dispute settlement in various cultures.²⁷ As expressed by Lawrence Rosen, law is a “cultural domain” which can help to “understand how a culture is put together and operates.”²⁸ Although this field rarely focuses on disputes over international law, my analysis of the legal policies of Swiss internment nevertheless examines a similar “push and pull of contestation” during cultural negotiations over how the law is interpreted and what it means.²⁹ By presenting the internment of Americans in Switzerland as a case study, I hope to demonstrate what the rule of international law meant to Swiss officials, how

²⁷ Dorothea H. Bracey, *Exploring Law and Culture* (Long Grove IL: Waveland Press, 2006), 13-16.

²⁸ Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006), 4-5.

²⁹ Austin Sarat and Thomas R. Kearns, “The Cultural Lives of Law,” in *Law in the Domains of Culture* (Ann Arbor: The University of Michigan Press, 1998), 8-9.

contestation over the law influenced decisions well below the architects of legal policy, and how similar exploitation of the law can occur in contemporary conflicts.

Swiss Neutrality

The precedent for internment of belligerent aircraft and their crews was established well prior to the arrival of Death Dealer in Switzerland. International law defined the obligations of neutral Switzerland to intern belligerents. Neutrality, defined by T.J. Lawrence in 1925 as “the condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents,” has a particular meaning when discussed in the context of Swiss history.³⁰ Switzerland pioneered much of the contemporary international law governing neutrality, making the practice one of the defining characteristics of the Swiss state.

Switzerland’s neutrality during World War II was the continuation of a policy of longstanding or “perpetual neutrality” that had its roots prior to Switzerland’s existence as a federated state. Switzerland began in the fourteenth century as a defensive alliance, called the *Eidgenossenschaft* or Swiss Confederation.³¹ The Swiss Confederation adopted the policy of neutrality after its loss to the French at the Battle of Marignano, near Milan, Italy in 1515.³² The defeat convinced the Swiss that their small confederation was best suited for defensive wars, a decision that was reinforced by the reality that the Swiss were a culturally heterogeneous population with a decentralized

³⁰ Thomas J. Lawrence, *A Handbook of Public International Law* (London: Percy H. Winfield, 1925), 149.

³¹ James M. Luck, *A History of Switzerland: The First 100,000 Years: Before the Beginnings to the Days of the Present* (Palo Alto: Society for the Promotion of Science and Scholarship, 1985), 37.

³² Max Habicht, “The Special Position of Switzerland in International Affairs,” *International Affairs* (October, 1953), 457, Halbriick, *Target Switzerland*, 8.

political system.³³ Switzerland's neutral position was further cemented by Allied guarantees of perpetual Swiss neutrality in 1815 after violations of Swiss territory occurred during the War of the Sixth Coalition against Napoleon.³⁴ In addition, the Swiss Constitution of 1848 made Switzerland a federative state instead of a confederation, providing a central government and army that allowed the political declaration and enforcement of neutrality.³⁵

Swiss obligations as an "active neutral" include providing humanitarian assistance to belligerents, hosting international conferences on humanitarian law, and receiving both civilian and military wartime refugees. These services all set Switzerland apart from other neutral states in global conflicts.³⁶ The Swiss custom of interning foreign belligerents took several centuries to develop, as the policy entailed more than simply humanitarian concerns. In the Evangelical Conference of 1644, the Swiss decided to deny asylum to foreign armies because of the danger that a pursuing army would follow the interned forces and fight them in Switzerland.³⁷ In 1709, approximately 4,000 Austrian cavalry troops trespassed on Swiss territory and highlighted the weaknesses of the existing policies governing Swiss responses to belligerents. Despite engagement of the Austrians by Swiss forces, French General du Bourg accused the Swiss of aiding the

³³ Halbrook, *Target Switzerland*, 8.

³⁴ Georges André Chevallaz, *The Challenge of Neutrality: Diplomacy and the Defense of Switzerland* (Lanham: Lexington Books, 2001), 2.

³⁵ *Ibid.*, 3.

³⁶ Neville Wylie, *Britain, Switzerland, and the Second World War* (Oxford: Oxford University Press, 2003), 96.

³⁷ Luck, *A History of Switzerland*, 214-5.

Austrian cavalry by allowing them to evade and fight another day.³⁸ This jeopardized Swiss neutrality by appearing to provide a military advantage to one belligerent. New policies were developed in reaction to this problem, namely disarmament and internment of belligerents to preclude their further use in a conflict.

During the War of 1859, or the Second Italian War of Independence, the Swiss Federal Council issued instructions to the Swiss Army to disarm any belligerent troops “pushed on Swiss territory,” and intern them in “the interior of Switzerland.” This decree was the first instance in history where a government stipulated requirements of a neutral country toward belligerent troops during international armed conflicts. The decree was soon enforced when seven Italian soldiers crossed the Swiss border, soon followed by a contingent of 650 Austrian soldiers. All parties were interned in castles and military barracks, and were released upon the conclusion of the conflict.³⁹

The Swiss government next resorted to internment of belligerents in 1871 during the Franco-Prussian War, when nearly 88,000 soldiers of the First French Army, known as the Bourbaki Army, crossed into Switzerland at Les Verrières and were disarmed and interned by the Swiss military. The massive number of internees forced the Swiss to distribute the internees among 188 villages in nearly every canton, where internees were under the administration of local military authorities.⁴⁰ The Federal Council gave the Swiss Army jurisdiction over internees who committed criminal offenses, including

³⁸ Ibid., 288.

³⁹ Max Steiner, *Die Internierung von Armeeehörigen kriegführender Mächte in neutralen Staaten, insbesondere in der Schweiz während des Weltkrieges 1939/45* (Zürich: Ernst Lang, 1947), 15-18.

⁴⁰ See François Bugnion, “The Arrival of Bourbaki's Army at Les Verrières,” *International Review of the Red Cross*, no 311 (1996), available at: <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JN32>, and Steiner, *Die Internierung von Armeeehörigen kriegführender*, 23.

escape attempts. Internees who were caught outside their assigned districts were confined at the criminal garrison at Luziensteig.⁴¹

Although the obligation for a neutral state to intern belligerents only existed under customary international law in 1871, the example of the internment of the Bourbaki Army directly influenced subsequent written law of armed conflict conventions.⁴² The 1874 Conference of Brussels drafted articles listing the obligation of a neutral power to intern belligerents, in particular the requirement to intern soldiers “at a distance from the theatre of war,” the provision of basic humanitarian needs, and the possibility for wounded troops to be transported through neutral territory. The Brussels Declaration also listed the requirement that “The Geneva Convention applies to sick and wounded interned in neutral territory,” which referenced the largely inadequate Geneva Convention of 1864.⁴³ Although the Brussels Declaration was not ratified, the 1907 Hague Convention (V) soon codified these requirements verbatim into treaty law.⁴⁴ In addition, the Hague Convention added neutral responsibilities such the use of force to prevent belligerents from utilizing neutral territory and the equal application of trade restrictions to all belligerent powers.⁴⁵

The Swiss again interned soldiers of belligerent governments during World War I. The practice of neutrals interning aircraft of belligerent powers also developed during this

⁴¹ Steiner, *Die Internierung von Armeeangehörigen kriegsführender*, 23-24.

⁴² Bugnion, “The Arrival of Bourbaki’s Army at Les Verrières.”

⁴³ *Project of an International Declaration Concerning the Laws and Customs of War* (Brussels: 27 August 1874), available at: <http://www.icrc.org/IHL.NSF/FULL/135?OpenDocument>.

⁴⁴ Bugnion, “The Arrival of Bourbaki’s Army at Les Verrières.”

⁴⁵ See Articles 3, 9, and 11 of *The 1907 Hague Convention (V)*.

conflict, and by the end of the war all neutral states unanimously adhered to the rule.⁴⁶ The right of a neutral state to prevent belligerents from violating its airspace is an extension of the right of territorial integrity.⁴⁷ During this period, arguments were raised that the obligation to intern belligerent aircraft should not apply in cases of erroneous overflight, force majeure, or aircraft in distress.⁴⁸ However, these cases were judged to be “too indefinite to differentiate from intentional entrance” by belligerent aircraft, and so neutral states adopted a strict interpretation of the obligation to intern.⁴⁹ Among these neutrals were the Swiss, who forged many of their internment policies during World War I. Although aviators made up a small minority of internees in Switzerland during World War I, at least three American pilots were interned.⁵⁰ 2nd Lt. James Ashenden crash-landed his French Nieuport 28 fighter in Solothurn Canton on 24 June 1918 after his propeller was damaged by enemy fire.⁵¹ Another American aircrew was interned when a two-man airplane landed near Fahy, Switzerland on September 14, 1918.⁵²

The sovereignty of airspace was codified in international law after World War I in the Air Navigation Convention of October 13, 1919, and later appeared in the 1923

⁴⁶ James M. Spaight, *Air Power and War Rights* (London: Longmans, Green and Company, 1924), 421.

⁴⁷ Detlev F. Vagts, “Switzerland, International Law and World War II,” *The American Journal of International Law*, Vol. 91, No. 3 (Jul., 1997), 467.

⁴⁸ Force majeure means an act of God, or in context a course necessitated by the “stress of weather.” See Daniel P. O’Connell and Ivan A. Shearer, *The International Law of the Sea*, Vol. II (Oxford: Clarendon Press, 1984), 853.

⁴⁹ K. V. R. T., “Aerial Warfare and International Law,” *Virginia Law Review*, Vol. 28, No. 4 (Feb., 1942), 519.

⁵⁰ Some sources list as few as 15 belligerent aircraft interned during World War I. See Fiona Lombardi, *The Swiss Air Power: Where From? Where To?* (Zurich: Hochschulverlag, 2007), 27.

⁵¹ See Jon Guttman and Harry Dempsey, *USAS 1st Pursuit Group* (Oxford: Osprey Publishing, 2008), 6, 34, and *Gorrell’s History of the American Expeditionary Forces Air Service, 1917-1919*, NARA M990, Series M, Vol. 10.

⁵² “Swiss Intern Two American Airmen,” *New York Times*, 15 September 1918.

Report of the Hague Commission of Jurists upon the Revision of the Rules of Warfare.⁵³

This set the stage for Swiss internment during World War II, a conflict in which 104,000 military refugees were accepted into the small nation of only 4.2 million people.⁵⁴ By the start of the war, the duty of a neutral to intern belligerent aircraft was well known among the general public, and even appeared in American media stories describing Swiss internment. In a story published in the *New York Times* in May 1944, the newspaper listed “the international rules governing the internment of belligerent fliers who violate neutral territory,” and explained that “a neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after [the aircraft lands] for any reason whatsoever.”⁵⁵

Internment in World War II

The Swiss Army was responsible for supervision of interned soldiers during World War II. At least 850,000 Swiss citizens served in the Swiss Army during the war, although not all of these troops were mobilized simultaneously.⁵⁶ The vast majority of soldiers in the Swiss Army were reservists called to service because of the state of national emergency, and only a small percentage were professional soldiers. The Swiss Army was based on a militia system of compulsory conscription, wherein able-bodied males underwent a short period of military training at the age of 20 and were then assigned to reserve divisions based on age and training until the age of 48, although in the

⁵³ K. V. R. T., “Aerial Warfare and International Law,” 518.

⁵⁴ Independent Commission of Experts (ICE) Switzerland – Second World War, *Switzerland, National Socialism and the Second World War* (Zürich: Pendo, 2002), 110, and Leo Schelbert, *Historical Dictionary of Switzerland* (Landam: The Scarecrow Press, 2007), lxxvii.

⁵⁵ “Neutrals Holding 1,000 U.S. Airmen,” *New York Times*, 7 May 1944, 3.

⁵⁶ Luck, *A History of Switzerland*, 803.

late 1930s the age limit was increased to 60 on account of the wartime emergency.⁵⁷ The service of most officers was also compulsory; there were so few permanent positions in peacetime that the Swiss Army required any soldier to accept a commission or take a command as a contingency.⁵⁸

Even the Swiss Army's top rank of four-star General was constitutionally limited to times of national emergency after an election by the Federal Assembly.⁵⁹ This was a reflection not only of Switzerland's defensive military posture, but also the reality of decentralized control of military affairs in which troops often resented leaders who were not from a canton of like cultural affiliation.⁶⁰ In August 1939, the Swiss Federal Assembly promoted corps commander Henri Guisan to the rank of General and commander in chief in response to the expectation that French troops massing on the border would infringe Swiss neutrality.⁶¹ Guisan was only the fourth Swiss soldier in history to attain the rank, which he held for the remainder of the war.⁶² Guisan's superior

⁵⁷ See Robert C. Brooks, *Civic Training in Switzerland: A Study of Democratic Life* (Chicago: University of Chicago Press, 1930), 142-5, and Constance Howard, "Switzerland, 1939-46," in *The War and the Neutrals*, eds. Arnold Toynbee and Veronica Toynbee (London: Oxford University Press, 1956), 202.

⁵⁸ Frederick A. Kuenzli, *Right and Duty or Citizen and Soldier: Switzerland Prepared and at Peace* (New York: National Defense Institute, 1916), 169.

⁵⁹ See Remy Faesch, *The Swiss Army System* (New York: G.E. Stechert & Co., 1916), 16, and Thomas Fleiner, Alexander Mistic, and Nicole Töpperwein, *Swiss Constitutional Law* (The Hague: Kluwer Law International, 2005), 217-18.

⁶⁰ Brooks, *Civic Training in Switzerland*, 350.

⁶¹ Willi Gautschi, *General Henri Guisan: Commander-in-Chief of the Swiss Army in World War II* (Rockville Centre: Front Street Press, 2003), 38-9.

⁶² Gegory A. Fossedal, *Direct Democracy in Switzerland* (New Brunswick: Transaction Publishers, 2002), 62.

was the minister of the Swiss Federal Military Department, a politician selected from the seven-person Federal Council.⁶³

In 1940, the Swiss Federal Military Department created a Federal Commissariat for Internment and Hospitalization (FCIH) to oversee the considerable task of supervising internees from the fighting between French and German forces. On June 18, 1940, approximately 45,000 soldiers from the Forty-fifth French Corps sought refuge in Switzerland after facing encirclement by German panzer units, forcing the issue of centralized federal control over internment.⁶⁴ The commissioner of the newly-created FCIH answered to the chief of the Swiss Army General Staff as per a decree of the Swiss Federal Council in December 1940.⁶⁵ Command of the FCIH was passed from a major general to a lieutenant colonel in its first year of existence, and then subordinated as a section under the adjutant general of the Swiss Army in January 1942.⁶⁶ In early 1943 the adjutant general himself, Major General Ruggero Dollfus, was officially appointed as the FCIH commissioner, a post he held through late 1944.⁶⁷ That Dollfus served

⁶³ See Gautschi, *General Henri Guisan*, 367, and Robert C. Brooks, *Government and Politics of Switzerland* (New York: World Book Co., 1921), 262.

⁶⁴ Bugnion, "The Arrival of Bourbaki's Army at Les Verrières."

⁶⁵ "Vierter Bericht des Bundesrates an die Bundesversammlung über die auf Grund der ausserordentlichen Vollmachten ergriffenen Massnahmen Vom 21. Mai 1941," *Bundesblatt 1941*, Band 1, Heft 17, Swiss Federal Archives at Bern (hereafter SFA), Ref. No. 10 034 515, available at <http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.jsp?ID=10034525>.

⁶⁶ René Probst, *Schlussbericht des Eidg. Kommissariates für Internierung und Hospitalisierung über Die Internierung fremder Militärpersonen von 1940–1945*, Bibliothek am Guisanplatz, Bern, Switzerland, Box W1235A, p. 9.

⁶⁷ Dollfus' rank was colonel divisionnaire, but I am substituting the equivalent rank of major general to avoid confusing non-Swiss readers; all Swiss Army officers from the rank of O-5 to O-9 are different grades of colonels. For Dollfus' rank and duties, see "Personen- und Organisationenregister," dated 11 June 1946, *Diplomatische Dokumente der Schweiz*, Band 15, Dokumentennr J, SFA, Ref. No. 60 007 251, available at <http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.jsp?ID=60007251>.

concurrently as the FCIH commissioner and the adjutant general during an unprecedented military mobilization testifies to the understaffed and overburdened Swiss officer corps.

As FCIH commissioner, Dollfus ran an organization that consisted largely of conscripts and volunteers. As reported by General Cartwright, the military attaché at the British Legation in Switzerland, senior Swiss Army officers often complained of “the poor type of officer serving in the Commissariat, who would not have been there if he had been capable of earning a decent living in civil life.” According to the attaché, senior FCIH officers mistrusted their subordinates and were hesitant to delegate decisions to the camp level.⁶⁸ This view of the FCIH was evidently shared by other Allied diplomats, such as those at the U.S. Legation. Whether or not the FCIH was really this poorly administered, the internal friction in the organization did eventually hamper communication and impede inquiries into internment conditions.

By February 1944, about 100 American airmen were interned in Switzerland under the supervision of the FCIH. The first American internees were housed at the resort town of Adelboden, which the Swiss General Staff selected for its remote location and numerous hotels normally used to accommodate tourists in peacetime.⁶⁹ The Swiss government eventually constructed 768 camps for foreign military and civilian refugees, although the Americans were generally segregated into their own camps as were most nationalities.⁷⁰ The number of American internees in Switzerland spiked dramatically starting in the spring of 1944, as the increased tempo of the Allied strategic bombing

⁶⁸ Report from British military attaché General Harry Cartwright to British Minister in Switzerland Clifford Norton, dated 15 October 1944, The National Archives of the United Kingdom (TNA), War Office Department (WO), 208/3481.

⁶⁹ Brigadier General B.R. Legge, *Report of Internment Situation in Switzerland*, dated 18 December 1944, U.S. National Archives (hereafter NARA) at College Park, College Park, MD, Record Group 319, E47, p. 1. Legge was the military attaché to the U.S. legation in Bern, Switzerland during World War II.

⁷⁰ Prince, *Shot from the Sky*, 70.

offensive sent American bombers farther into France and Germany in a coordinated attempt to destroy the German Luftwaffe prior to the Normandy landings.⁷¹ Sixteen damaged heavy bombers landed in Switzerland on a single day in March 1944, and the landings continued unabated through July, a month that saw the internment of forty-five U.S. warplanes with 404 airmen.

The influx of new Americans prompted the Swiss to open a second camp at Davos in June 1944, followed by a third camp at Wengen in August 1944.⁷² A total of 1,516 American airmen were interned in Switzerland during the war, although there were never this many held all at once due to repatriations and successful escapes.⁷³ The number of interned Americans reached its apex in September 1944, with 1,179 airmen, and declined to 700 by December 1944 due to what the U.S. military attaché, Brigadier General Barnwell R. Legge, referred to as an “exodus” of “internees escaping from Swiss territory” via the French border.⁷⁴ Once Allied forces reached the Swiss border in August 1944, escape attempts increased dramatically as American internees aspired to rejoin friendly lines.⁷⁵ At least 149 Americans who were caught attempting escape in 1944 were sent to a special punishment camp at Wauwilermoos, where their confinement would eventually test the limits of international law.⁷⁶

⁷¹ United States Strategic Bombing Survey, Office of the Chairman, *Summary Report, European War* (Washington: GPO, September, 1945), 6.

⁷² For internee arrival periods and dates of camp establishment see Legge, *Report of Internment Situation, 18 December 1944*, NARA, RG 319, E47, p. 1-2, and Prince, *Shot from the Sky*, 95.

⁷³ Prince, *Shot from the Sky*, 24.

⁷⁴ Legge, *Report of Internment Situation, 18 December 1944*, NARA, RG 319, E47, p. 1.

⁷⁵ See Halbrook, *Target Switzerland*, 209, and Legge, *Report of Internment Situation, 18 December 1944*, NARA, RG 319, E47, p. 2-3.

⁷⁶ Data compiled from military tribunals of American airmen, SFA Box E 5330-01 1975/95.

In early December 1944, U.S. Army Air Force First Lieutenant Wally Northfelt was nearing his second month of imprisonment in the punishment camp at Wauwilermoos. Nine months earlier as the navigator on a B-24 bomber based in England, he was shot down by German anti-aircraft fire while on a mission to bomb the Dornier Aircraft Factory in Friedrichshafen. Since the target city was near the Swiss border, the pilot diverted the damaged plane to Switzerland and crash-landed at Dübendorf Airfield in Zurich. Northfelt attempted to escape from Switzerland near Geneva in September 1944, but he was apprehended by border guards and confined at Wauwilermoos. After his arrival at the punishment camp, Northfelt quickly tired of the meager rations of coffee, bread, and thin soup, which he blamed in part for his weight loss of forty pounds over the course of his time in Switzerland. He professed that “I never did sit down to a meal where I was completely satisfied,” and claimed that he was only able to get enough food to survive by purchasing it off the black market. Northfelt was also ill; sleeping on dirty straw had caused him to break out in sores all over his body, and he had problems with his prostate gland. Appeals for medical care had resulted in a consultation with a doctor who, Northfelt claimed, “specialized in women’s cases” and was unqualified to help him. Northfelt thought the doctor “knew about as much about medicine as I did,” judging by the fact that he “puttered around” and “wasn’t doing anything for me.” Northfelt also disliked the camp administrators, who, he claimed, were “pro-Nazi,” and only cleaned up the camp when inspections by high ranking officers or American dignitaries were announced. He resolved to make a formal complaint to U.S. authorities when, and if, he was released from Wauwilermoos.⁷⁷

⁷⁷ Deposition of 1st Lt. Wallace O. Northfelt for the War Crimes Office, Judge Advocate General’s Department, War Department, dated 17 September 1945, NARA, RG 153, E279, File 23-6.

Wauwilermoos was built in 1940 in Lucerne, Switzerland, about twenty-six miles south of the German border. Run by the Swiss Army, the camp housed military internees of various nationalities, including Poles, Italians, French, English, Germans, Yugoslavs, Greeks, and Americans.⁷⁸ Military-run prisons like Wauwilermoos were established earlier in the war, after cantonal prisons became overcrowded with prisoners convicted in military courts. According to a decree of the Swiss Federal Council in 1941, military prisoners would be confined according to whether their offenses qualified them for “*custodia honesta*,” or honorable confinement. Special military-run prisons would offer confinement for “certain offenses of purely military character,” since honorable crimes such as “escape and escape attempts . . . are usually not the crimes of common criminals.”⁷⁹ Regardless of the intent of the Federal Council, for most of 1944 the FCIH did not follow the *custodia honesta* model, but rather grouped American internees with common criminals in Wauwilermoos.

From 1941-1945, Wauwilermoos was under the command of Swiss Army Captain Andre Béguin, a politically controversial figure who shouldered much of the blame for the camp’s conditions.⁸⁰ Born in the French-speaking canton of Neuchâtel, Béguin had obtained a commission as a Swiss artillery officer in 1928, but subsequently was discharged due to excessive personal debt. In the 1930s he became active in politics and

⁷⁸ Colonel A. Rilliet, *Rapport No. 4*, dated 16 May 1944, International Committee of the Red Cross Archives, Geneva, Switzerland, Record Group B/G2, Internés en Suisse.

⁷⁹ For Federal Council decree of 12 May 1941 see “Vierter Bericht des Bundesrates an die Bundesversammlung über die auf Grund der ausserordentlichen Vollmachten ergriffenen Massnahmen Vom 21. Mai 1941,” *Bundesblatt 1941*, Band 1, Heft 17, SFA, Ref. No. 10 034 515, and for explanation of “*custodia honesta*” see Lionel W. Fox, *The English Prison and Borstal Systems: An Account of the Prison and Borstal Systems in England and Wales after the Criminal Justice Act, 1948* (London: Routledge & Kegan Paul, 1952), 290.

⁸⁰ *Schweizerische Eidgenossenschaft Urteil des Divisionsgericht 8 im Straffalle des Hptm. Andre Béguin*, dated 20 February 1946, SFA, Box E5330, Versement 1975/95, Vol. 1945/2518I, p. 3.

joined the National Union in Geneva,⁸¹ an anti-Semitic and pro-Nazi political party which was a popular fascist movement in Switzerland during the period.⁸² According to a Zurich newspaper, Béguin was an avowed Nazi who signed his correspondence with “Heil Hitler.”⁸³ In 1937, he was arrested for illegally wearing a pro-Nazi “party uniform” to a political rally in Yverdon, Switzerland.⁸⁴ Around the same time, Béguin was also forced to resign from the National Union after he embezzled party funds.⁸⁵ Despite his tarnished record, he obtained work in 1940 as a civilian employee of the FCIH, a job translating artillery manuals that led to a second commission in the Swiss Army in as an ordinance officer.⁸⁶ This ill-advised appointment was almost certainly due to the national state of emergency and manpower shortage in the Swiss Army, although this does not explain the decision to place Béguin in charge of soldiers of other nationalities. In July 1941, Béguin was given command of Wauwilermoos, a post he held until August 1945.⁸⁷

In his position as camp commandant, Béguin had no sympathy for the Americans under his charge; his correspondence reveals that he found American internees to be undisciplined and ungrateful, claiming that they were “too spoiled by their stay in hotels

⁸¹ See letter from Andre Béguin to Capt. Baumgartner, Magistrate Ter.Ger. 2B, dated 25 Jan 1944, SFA, Box E5791, Vol. 1000/949, 687, and “Der Fall des Hptm. Beguin vor Divisionsgericht 8,” *Neue Zürcher Zeitung*, 19 February 1946, Blatt 6.

⁸² Schom, Alan Morris. *A Survey of Nazi and Pro-Nazi Groups in Switzerland: 1930-1945* (Los Angeles: Simon Wiesenthal Center, 1998).

⁸³ “Der Fall des Hptm. Beguin vor Divisionsgericht 8,” *Neue Zürcher Zeitung*, 19 February 1946, Blatt 6.

⁸⁴ *Schweizerische Eidgenossenschaft Urteil das Divisionsgericht 8 im Straffalle des Hptm. Andre Béguin*, dated 20 February 1946, SFA, Box E5330, Versement 1975/95, Vol. 1945/2518I, p. 27.

⁸⁵ See “Der Fall des Hptm. Beguin vor Divisionsgericht 8,” *Neue Zürcher Zeitung*, 19 February 1946, Blatt 2., and Peter Kamber, *Schüsse auf die Befreier: Die "Luftguerilla" der Schweiz gegen die Alliierten 1943-45* (Zurich: Rotpunktverlag, 1993), 200.

⁸⁶ *Schweizerische Eidgenossenschaft Urteil das Divisionsgericht 8 im Straffalle des Hptm. Andre Béguin*, dated 20 February 1946, SFA, Box E5330, Versement 1975/95, Vol. 1945/2518I, p. 3, 24.

⁸⁷ “Der Fall des Hptm. Beguin vor Divisionsgericht 8,” *Neue Zürcher Zeitung*, 19 February 1946, Blatt 6.

in the mountains and do not understand purely military treatment.” Béguin also looked down on the Americans because of their common background as airmen, claiming that due to their brief military education “they are specialists, but not soldiers.” To support this view, he argued that “They do not know of barracks life, nor that of soldier campaigning; they are uniformed workers and technicians who service aircraft.” In Béguin’s view, this lack of professional military education produced an absence of “elementary courtesy and politeness,” resulting in an “atmosphere ... as painful for us as it is for them.”⁸⁸

In response to the complaints of American internees, Béguin professed that the discomfort experienced at Wauwilermoos was due to overcrowding; the officer barracks were designed for only 20 occupants, but had 86 by the fall of 1944. As a result, he explained that he could no longer provide amenities such as sheets and shaving mirrors for officers below the rank of captain. Firewood to heat the barracks stoves was also in short supply. In response to the Americans “who [threatened to cut] up tables and benches to keep warm,” Béguin claimed surprise at “the attitudes of those who wished to burn all the furniture,” and resolved that “if they behaved churlishly we could no longer treat them like officers.” He claimed that the allocation of firewood was greater than the quantity rationed to Swiss soldiers, a comparison used to justify many conditions around the camp. Béguin also stressed that the barracks were built according to regulations, and despite their shortcomings, were “of the same type as those used in the Army.” He bluntly professed that “Yielding [to American pressure] would be a sign of weakness,”

⁸⁸ Memo from Captain Andre Béguin to Swiss Federal Commissioner of Internment and Hospitalization, “Concern: Les internés américains et le camp pénitentiaire de Wauwilermoos,” dated 22 November 1944, SFA, Box E5791, Vol. 8/24.

and attributed American complaints to internees who “do not understand the special functions of our military justice system, which includes slowness.”⁸⁹

Officials at the U.S. Legation in Switzerland disagreed with Béguin’s tempered description of conditions at Wauwilermoos. According to General Legge, the camp was “of the stockade type,” and the barracks were “surrounded by barbed wire, constantly patrolled by dogs and guards with sub-machine guns.” Conditions were “unreasonably severe,” with internees sleeping on loose straw, food “at the lowest subsistence level,” and mud “ankle deep.” General Legge labeled these conditions “disgracefully bad” and considered them worse than those in German POW camps. Prior to the escape attempts of the summer of 1944 the Swiss sent only a few American internees to Wauwilermoos, normally for “drunkenness and disorderly conduct” and with the tacit approval of the U.S. legation. Once the escape attempts began in earnest, the Swiss government sent every offender to Wauwilermoos, normally for two or three months without trial. By the fall of 1944, over 100 American internees were incarcerated in Wauwilermoos, and the Swiss government threatened to keep them there without trial for six to seven months.⁹⁰ Many of the American internees in Wauwilermoos were eventually charged in the Swiss military justice system, an experience that forever changed their perceptions of Swiss neutrality.

⁸⁹ Ibid.

⁹⁰ Legge, *Report of Internment Situation, 18 December 1944*, NARA, RG 319, E47, p. 3-4.

A Day in Court

The majority of Americans held in Wauwilermoos in the fall of 1944 were in pretrial confinement, awaiting a military tribunal by the Swiss Army for the crime of attempting escape. The tribunals were convened by territorial courts, whose jurisdiction was established by decree of the Federal Council in 1939.⁹¹ Operating under the Swiss Military Court Regulations of 1889 and the Swiss Military Penal Code of 1927, the tribunal panels consisted of a mix of six officers and noncommissioned officers under a judge, or “chief justice.” The panel members and judge were elected by the Federal Council for three-year terms and retained their regular military positions while serving the court. The judge was not required to be trained in law despite his position as “chairman of the court,” although the Military Court Regulations specified that he must “at least hold a major degree.” Also present at tribunals were a prosecutor, defense attorney, court clerk, and in the case of foreign defendants, a translator.⁹²

The authority to try military internees was written into the original Military Penal Code, which meant that the intent to apply internal Swiss law to internees predated World War II.⁹³ Internees on trial for escape normally faced charges for “disregard of regulations,” an article of the Military Penal Code that allowed punishment of up to six

⁹¹ Steiner, *Die Internierung von Armeeinghörigen kriegsführender*, 66.

⁹² See Memo from Swiss Minister Karl Kobelt to Brigadier General B.R. Legge, number 8211.117.N/G, dated 2 December 1944, NARA, RG 84, E3207. For the tribunal panel requirements, see Art. 12, 13, & 107, *Militärstrafgerichtsordnung (Bundesgesetz vom 28. Juni 1889)*, Bundesblatt 1889, Band 3, Heft 37, SFA, Ref. No. 10 014 517, available at <http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.jsp?ID=10014517>. Data on military tribunals conducted against Americans were referenced from Bern Archives, SFA Box E 5330-01 1975/95.

⁹³ Art. 3, Section 2 of the Military Penal Code. See *Militärstrafgesetz Bundesgesetz vom 13 Juni 1927*, Bundesblatt 1927, Band 1, Heft 25, SFA, Ref. No. 10 030 071, available at <http://www.amtsdruckschriften.bar.admin.ch/loadDocQuery.do?context=results&documentIndex=24&dsUID=1cd0888:12438d84b35:-6aa7>

months of penal servitude or imprisonment in times of war.⁹⁴ However, the Military Penal Code did not specify a minimum sentence and even permitted the downgrade of the offense to disciplinary punishment in “mild cases.”⁹⁵ This subjectivity gave military tribunals wide latitude to treat escape attempts as minor infractions, or instead classify them as criminal felonies.

Once a tribunal convened, the burden of proof was normally substantiated by escape reports from internment camp commanders, arrest reports from local police, and interrogations conducted after the internees were recaptured.⁹⁶ Assembling this evidence was the responsibility of an official investigator, who was appointed to the court for a three-year term.⁹⁷ This preliminary investigation was a laborious process of cataloging all of the relevant paperwork, and did not facilitate the swift execution of justice. Adding to this burden was the fact that many internees traveled across Switzerland before their apprehension, which required the investigator to obtain depositions from diverse locations. The Swiss military justice system was quickly overwhelmed by the rash of escape attempts in the summer of 1944. From 1944 to 1945, at least 183 Americans were charged by military tribunal, but only about 55 of these men ever received verdicts due to the combination of the time it took to complete a trial and the large number of internees that were repatriated or successfully fled the jurisdiction in the interim. For the minority of indicted internees who eventually received verdicts, the average sentence was 74 days

⁹⁴ For charges against American internees, see military tribunals, SFA Box E 5330-01 1975/95. For the charge of “disregard of regulations” under the Military Penal Code, see Art. 72, *Militärstrafgesetz Bundesgesetz*, SFA, Ref. No. 10 030 071.

⁹⁵ Art. 72, *Militärstrafgesetz Bundesgesetz*, SFA, Ref. No. 10 030 071.

⁹⁶ Tribunal Militaire #44-5096, SFA Box E 5330-01 1975/95.

⁹⁷ Art. 31-32, *Militärstrafgesetz Bundesgesetz*, SFA, Ref. No. 10 030 071.

in prison, but the average time to complete the investigations and military tribunals was 82 days, underscoring the American criticisms of the Swiss military justice system.⁹⁸

Sgt. Dale Ellington, a young gunner on a B-17 bomber based in England, was bombing an aircraft factory near Munich in April 1944 when his airplane was shot down by German anti-aircraft fire in April 1944. The airplane was shot at again by Swiss fighters and anti-aircraft batteries after crossing the Swiss border and then landed in Dübendorf, Switzerland, with no less than 35 shell and bullet holes in its fuselage. Miraculously, the aircraft made it to Switzerland despite severe damage to a fuel cell, severed control cables, one engine out, and only 40 minutes of fuel remaining. Interned in Adelboden, Switzerland, Ellington remained in his internment camp until September, when he heard that American forces were approaching the Swiss border with France. On September 17, 1944, Ellington slipped out of Adelboden and used his passable German to purchase train tickets for himself and three other internees. Dressed in civilian clothes, the group managed to travel unaccosted to a city near France, only to be questioned and arrested by an observant Swiss soldier on a bicycle only miles from the French border. The Americans were first confined in the Basel city jail for three days and then transferred to Wauwilermoos, where Ellington recalled “barbed wire, straw bunks, and guard dogs.” After nearly a month in Wauwilermoos, Ellington and his fellow would-be-escapees were transported to Bern to appear at the arraignment for their military tribunal.⁹⁹

⁹⁸ Various military tribunals, SFA Box E 5330-01 1975/95.

⁹⁹ Dale C. Ellington, *Memoirs of Internment: “Internee-Escapee, 1944,”* unpublished manuscript, 3-7, and Internment Data Card of Dale C. Ellington, SFA, Box E 5791 1988/6.

At the arraignment each defendant was given a copy of the poorly translated charges, in fact the only trial record they received. The document was titled “Act of Accusation,” and methodically listed the identities of the defendants, the charges against them, a catalog of evidence, and the names of their tribunal jurors. The internees faced the charge of disregard of regulations, listed on a translated indictment as “non-compliance of the rules of service.” The evidence on the indictment was listed as “documents of [preliminary] examination,” and “production of the four defendants.” The defendants were brought in front of the tribunal panel, which consisted of three Swiss officers and three enlisted soldiers, the highest ranking of which were two captains.¹⁰⁰ The panel jurors were permitted to question the defendants to determine the validity of the charges, part of the normal arraignment process.¹⁰¹ During this interrogation, a Swiss captain on the jury panel asked the Americans why they had traveled so far from their camp at Adelboden. In response, one of the airmen defiantly informed the juror that “We were chasing butterflies.” According to Ellington, this lack of candor was not well-received; the officer was “obviously vexed by the remark,” and immediately responded: “You have served thirty days at the detention camp and you will now return there and serve forty five more!” The captain was good to his word; Ellington was returned to Wauwilermoos until 1 December.¹⁰²

The verdict for Ellington’s tribunal was not delivered for another twenty days, by a slightly altered panel in which one of the Swiss captains had been replaced by another

¹⁰⁰ Ellington, *Memoirs of Internment*, 4, and Art. 13, 124, *Militärstrafgerichtsordnung*, SFA, Ref. No. 10 014 517.

¹⁰¹ Art. 73, *Militärstrafgerichtsordnung*, SFA, Ref. No. 10 014 517.

¹⁰² Ellington, *Memoirs of Internment*, 3-7, and Internment Data Card of Dale C. Ellington, SFA, Box E 5791 1988/6.

officer of the same rank. The verdict was 75 days confinement for all four defendants, with 45 days deducted for pretrial confinement. In addition, the defendants were assessed their pro-rated share of the trial cost, 17.5 Swiss Francs.¹⁰³ The defendants were not present for the verdict, as a personal appearance was only required during the arraignment phase of the tribunal.¹⁰⁴ According to the Military Court Regulations, a defendant “has a right to be present only when the trial takes place at the place where he is in custody,” and trials were not conducted at Wauwilermoos.¹⁰⁵ Ellington was unaware that the tribunal continued after his departure, and was never informed of the actual verdict. He believed that the statement made by the Swiss officer at his arraignment was the reading of his sentence, when in fact it was probably a rebuke for being in contempt of court.¹⁰⁶ Ellington’s confusion at his arraignment demonstrates that internees had difficulty comprehending their experience with Swiss military justice due to both language and cultural differences, and the fact that they were effectively serving their sentences in advance of the tribunal verdicts.

Another veteran of the Swiss military justice system was Tech. Sgt. Daniel Culler. A turret gunner on a B-24 bomber, Culler’s airplane was shot down by German anti-aircraft fire while bombing Friedrichshafen on March 18, 1944.¹⁰⁷ Less than two months after his arrival in Switzerland, Culler attempted to escape from Adelboden along with his former crewmember Staff Sgt. Howard Melson and a British soldier, Matthew

¹⁰³ Tribunal Militaire 44-5096, SFA Box E 5330-01 1975/95.

¹⁰⁴ Ellington, *Memoirs of Internment*, 4.

¹⁰⁵ Art. 132, *Militärstrafgerichtsordnung*, SFA, Ref. No. 10 014 517.

¹⁰⁶ Ellington, *Memoirs of Internment*, 4.

¹⁰⁷ Daniel Culler, *Black Hole of Wauwilermoos* (Green Valley: Circle of Thorns Press, 1995), 150, 156,

Thirlaway, a former POW who had escaped from an Italian POW camp.¹⁰⁸ The trio had planned to escape over the Italian border at Bellinzona and seek refuge with a family that had previously sheltered Thirlaway during his initial escape from captivity. The group successfully made the journey to Bellinzona by train, but then became lost in the mountains. After eating poisonous berries and becoming ill, Culler turned back and made the return trip to Adelboden. From here he was placed in solitary confinement in a local jail for twelve days, and then returned to Adelboden under house arrest. The local Swiss military commander informed him that he would now be sent to a federal prison and was “no longer a military prisoner, but was now classified as a civilian prisoner.”¹⁰⁹

Culler was transferred to Wauwilermoos in June 1944, where he was in fact a military prisoner in a military-run penitentiary.¹¹⁰ However, in his grouping with soldiers of various nationalities who had committed various crimes, Culler did not receive the legal protections or rights that a military prisoner would normally expect. Very few Americans were confined in Wauwilermoos until August 1944, and as a result Culler only briefly saw one other soldier who might have been an American during his first month in the compound. Forced to bunk with Russian prisoners, Culler was repeatedly raped and assaulted by fellow inmates, but his complaints to the guards and camp commandant went unheeded. Eventually Culler developed open boils all over his body and contracted tuberculosis, which went untreated for a considerable time. After a month

¹⁰⁸ Tribunal Militaire 44-2527, SFA Box E 5330-01 1975/95.

¹⁰⁹ Culler, *Black Hole of Wauwilermoos*, 188, 196-203.

¹¹⁰ Internment Data Card of Daniel Culler, SFA, Box E 5791 1988/6.

in Wauwilermoos, Culler was informed that he would be leaving the compound not for medical treatment, but for his military tribunal arraignment in Baden.¹¹¹

Culler was tried along with his fellow would-be-escapees, who were recaptured by Swiss border guards during the ill-fated escape attempt. Culler was unaware that his former crewmember, Sgt. Howard Melson, and the British soldier, Matthew Thirlaway, had both been imprisoned in civilian jails and then confined in Wauwilermoos in a different barracks. Melson had made an additional attempt to escape from Wauwilermoos in June, and was apprehended and jailed in the district prison at Bern. Culler and Melson were both charged with disregard of regulations for leaving Adelboden without permission. Thirlaway was not charged with this article of the Military Penal Code because as an escapee he was in a different legal category than the military internees, and thus subject to different regulations. All three defendants were charged with disobeying general orders, in this case traveling across Switzerland without permission with the intent to cross the border. This article of the Military Penal Code targeted infractions that contravened “publicly advertised regulations or general orders” from the Federal government, Swiss Army command, or cantonal governments, and authorized punitive measures from disciplinary punishment to prison time. In this case, the infraction violated the Swiss Federal Council Resolution of September 25, 1942 regarding the partial closure of the border.¹¹²

Culler’s appearance at his military tribunal arraignment was preceded by a meeting with his defense attorney, a well-dressed man named Max Brand who spoke

¹¹¹ Culler, *Black Hole of Wauwilermoos*, 213, 217, 224, 232, 253.

¹¹² For tribunal charges, see Tribunal Militaire 44-2527, SFA Box E 5330-01 1975/95. Disregard of regulations was Article 72 of the Swiss Military Penal Code, and disobeying general orders was Article 107. See *Militärstrafgesetz Bundesgesetz*, SFA, Ref. No. 10 030 071.

English. Although not in uniform, the fact that the courtroom guards came to attention and saluted Brand gave Culler the distinct impression that he was a Swiss officer. Brand produced a message that Culler had previously passed to a British soldier in Wauwilermoos describing his severe treatment, in the hope that it would make its way to the US Legation. Brand informed Culler that the message had been passed to the Swiss Embassy, and would now be used as evidence against him at trial. Culler attempted to tell Brand about the severe treatment he had experienced at Wauwilermoos, but the attorney “wouldn’t listen to any of my complaints,” and “kept harping on that message I illegally sent to the British Embassy.” In the process of his conversation with Brand, Culler became excited and “began to cough up blood and other sickening fluids into a wastebasket by the table.” This was the extent of the contact that Culler had with his attorney, who subsequently “moved even farther away from me—probably not wanting to catch what he thought I had.”¹¹³

When brought in front of the tribunal panel with his codefendants, Culler was surprised by “a person who was seated front and center before the judges’ bench” who stood and recited a brief family history of each of the accused in English, including parents’ names and home addresses. Presumably, this was the court clerk or translator. The recitation of family history unsettled Culler, who wondered exactly how the Swiss had obtained information that he had never offered to them. The remainder of the tribunal hearing was conducted in German, and since Culler’s lawyer never spoke to him in English during the proceedings, he therefore had very little understanding of what transpired. He recalled that “Many times all six judges and my defender were looking me

¹¹³ Culler, *Black Hole of Wauwilermoos*, 233, and Tribunal Militaire 44-2527, SFA Box E 5330-01 1975/95.

up and down while they talked, and several leaned over the bench to get a better look at me. Several times, as he spoke, my defender would make [gestures] towards me and everyone had big smiles on their faces.” At the end of the hearing, the same person who had given Culler’s family history approached him and read from a paper: “The judges took into account that you are a very young soldier who took too seriously the orders to escape that came from your commanders in England . . . If you had been older and wiser, like most of the others in the internment camp, you would have realized escape was impossible. There is nowhere to go, even for those lucky enough to cross the border.” Culler was given a translated copy of his indictment which, like Ellington’s, only listed the defendants, charges, and jurors. Confused, he wondered why “the accusation papers never mentioned how long we would be sentenced for, or how long we had already served.” Culler inquired about his verdict and the length of his sentence, and was told that he would be informed after returning to Wauwilermoos. He then became agitated, yelling: “You mean you’re sending me back to that hellhole, Wauwilermoos?” This finally elicited a response from his defender in English: “Yes!”¹¹⁴

Although unknown to him at the time, Culler’s only court appearance was merely the arraignment for his military tribunal, and the tribunal would not produce a verdict until the following week under a different set of judges in Bern. As with Ellington, Culler also misunderstood the function of the arraignment process due to language and cultural barriers. Culler was later convicted of disregard of regulations, and received a sentence of 90 days imprisonment with 52 days deducted for pretrial confinement. His codefendant, Sgt. Howard Melson, was also convicted of disregard of regulations, and

¹¹⁴ Culler, *Black Hole of Wauwilermoos*, 234-5.

received a stiffer penalty of 105 days imprisonment.¹¹⁵ The increase in his sentence relative to Culler's was almost certainly due to Melson's second escape attempt, as well as the fact that Culler had voluntarily returned to his camp in Adelboden.

Although the tribunal judges may have legitimately believed that they were exercising leniency in Culler's case, any chance at gratitude was lost between the prospect of further incarceration at Wauwilermoos and the lack of transparency during the tribunal proceedings. Culler claimed that during his trial he "felt much resentment coming from the judges, my defender, and the Swiss military establishment." Perhaps this perception was a misunderstanding, but it was a foreseeable consequence of a prosecution conducted in a foreign language. The process produced a lifelong critic of the Swiss notions of justice and adherence to the rule of law. In Culler's opinion, his day in court "was nothing more than a mock trial, so the Swiss could clear the records—just in case someone, sometime, might question my sentencing and treatment without a court trial."¹¹⁶

Matthew Thirlaway was the sole defendant convicted of disobedience of general orders, and was sentenced to the 40 days he had already spent in prison; "ausgestandene Untersuchungshaft," or time served.¹¹⁷ Despite the fact that Thirlaway committed roughly the same offenses as Culler and Melson, he was treated more leniently by the court because of his status as an escaped POW, which afforded him different rights than internees. According to the 1907 Hague Convention (V), "a neutral Power which

¹¹⁵ Tribunal Militaire 44-2527, SFA Box E 5330-01 1975/95.

¹¹⁶ Culler, *Black Hole of Wauwilermoos*, 234.

¹¹⁷ *Ibid.*

receives escaped prisoners of war shall leave them at liberty,”¹¹⁸ which meant that Switzerland had less legal standing to regulate Thirlaway’s movements and restrict him to a camp. The court therefore determined that he had not committed an offense under military law, and instead treated him “as a civilian, regardless of his status as an escaped prisoner of war.” Although originally charged with the same disobedience of general orders as Thirlaway, Culler and Melson were not convicted of this crime. Ostensibly, the tribunal determined that convicting them of both disregard of regulations and disobedience of general orders would amount to illegally punishing them twice for elements of the same underlying offense of attempted escape.¹¹⁹

By the end of October 1944, both Culler and Melson had successfully escaped from Switzerland. However, Ellington and his codefendants were still incarcerated at Wauwilermoos. They were among only about five Americans in confinement who had received verdicts from their military tribunals, which left at least 95 other American prisoners in legal limbo at the camp.¹²⁰ Although U.S. officials were concerned about the Swiss military’s version of pretrial confinement and their methodical timetable for dispensing justice, they also contested the Swiss interpretation of international law that allowed prosecution of internees under the Swiss Military Penal Code. In the view of the U.S. Legation, the Swiss military justice system circumvented the protections of international law and produced open-ended verdicts that were disproportional to the crime of escape, an antithetical practice for a neutral state that claimed to hold the rule of

¹¹⁸ See Article 13 of *The 1907 Hague Convention (V)*.

¹¹⁹ Tribunal Militaire 44-2527, SFA Box E 5330-01 1975/95.

¹²⁰ SFA Box E 5330-01 1975/95.

law in high regard. This disagreement instigated a diplomatic crisis between U.S. and Swiss officials over the scope and intent of international law.

The Debate over International Law

The debate that emerged over the application of international law to American internees was also a debate over Swiss neutrality, as the creation and enforcement of this law was interwoven with the principles of neutrality that ensured Switzerland's reputation as an exceptional state perpetually devoted to peace and humanitarian principles. According to Hans Kohn, "The Swiss national idea is not based upon race or biological factors, it rests on a spiritual decision."¹²¹ However, many Swiss still identified strongly with their ethnic and cultural roots. With this in mind, the ideological model of the Swiss state, termed "civic exceptionalism" by some scholars, was necessary to overcome the ethnic and cultural plurality that might otherwise override Swiss nationalism. During World War II, Swiss civic exceptionalism was strongly tied to the enforcement of humanitarian law, since this mandate represented "the voluntary commitment to a set of values and institutions" that distinguished Switzerland from other countries in Europe.¹²² Within this context, the decision by Swiss officials to limit the application of international law would not have been taken lightly, as it could potentially challenge the very basis of Swiss neutrality and statehood.

In embracing its mandate as the guardian of international law during World War II, Switzerland accepted a considerable responsibility as the designated "protecting

¹²¹ Hans Kohn, *Nationalism and Liberty: The Swiss Example* (New York: Macmillan, 1956), 129.

¹²² Oliver Zimmer, *A Contested Nation: History, Memory and Nationalism in Switzerland, 1761-1891* (Cambridge: Cambridge University Press, 2003), 200-201.

power” between thirty-five different belligerents.¹²³ This designation entailed acting as a proxy for a state that had severed diplomatic relations with its enemy, in order to “safeguard the [state’s] interests and its nationals in relation to a third State.”¹²⁴ Among its 219 wartime mandates, the Swiss represented U.S. interests in twelve separate enemy countries, including Germany, Italy, and Japan.¹²⁵ The duties of a protecting power were rooted in customary international law, but were first codified in the 1929 Geneva Conventions. These duties included the establishment of a bureau of relief and information concerning POWs, representation of POWs and belligerent countries in disputes over the application of the Conventions, provision of counsel for POWs in military tribunals, and even the responsibility to ship reading materials to POWs.¹²⁶ In World War II, some of the protecting power responsibilities were partly delegated to the International Committee of the Red Cross (ICRC), such as inspecting POW camps and maintaining a Central Agency for Prisoners of War that tracked each prisoner and facilitated correspondence.

The ICRC, founded in 1863, depended entirely on Swiss neutrality to carry out its mandate. The ICRC had a total of 2,500 employees in twenty-seven offices in Switzerland by the end of the war.¹²⁷ The central ICRC committee was permanently fixed at a maximum of twenty-five Swiss citizens, and the president was normally a

¹²³ Raymond Probst, *“Good Offices” in the Light of Swiss International Practice and Experience* (Dordrecht: Martinus Nijhoff Publishers, 1989), 112.

¹²⁴ *Ibid.*, 123.

¹²⁵ Schelbert, *Historical Dictionary of Switzerland*, lxxvii, 112.

¹²⁶ See Articles 31, 39, 42, 62, 77 of *The Geneva Convention Between the United States of America and Other Powers, Relating to Prisoners of War; July 27, 1929* (Geneva, 1929), available at http://avalon.law.yale.edu/20th_century/geneva02.asp. Hereafter *1929 Geneva Convention*.

¹²⁷ Urs Schwarz, *The Eye of the Hurricane : Switzerland in World War Two* (Boulder: Westview Press, 1980), 129.

former Swiss diplomat.¹²⁸ The ICRC was independent of the Swiss government, but was heavily influenced by Swiss politics due to the crossover of leadership and the fact that it still depended on the Swiss government for over two-thirds of its regular income.¹²⁹ Thus, despite the independence of the ICRC in principle, the Swiss government could influence the actions of the committee, as it did in World War II to prevent an ICRC declaration against the Holocaust.¹³⁰ The ICRC also collaborated closely with the Swiss government in the arena of influencing developing international law of armed conflict.¹³¹ However, the ICRC mandate was broader than that of Switzerland, since the Swiss obligations as a neutral only apply during times of interstate war, whereas all of the ICRC's humanitarian activities continue whether or not a conflict is in progress.¹³²

The ICRC's humanitarian mandate made it an authority on the international law of armed conflict, including the law which protected internees of neutral countries.

During World War II, concern over potential abuses of the law prompted the organization

¹²⁸ See J. D. Armstrong, "The International Committee of the Red Cross and Political Prisoners," *International Organization*, Vol. 39, No. 4 (Autumn, 1985), 617-618. See also Statutes of the International Committee of the Red Cross at <http://www.icrc.org/web/eng/siteeng0.nsf/html/icrc-statutes-080503> or ICRC, League of Red Cross Societies, *International Red Cross Handbook* (Geneva: ICRC, 1983), 423, and Hans-Peter Gasser, "The International Committee of the Red Cross and its Development Since 1945," in *Swiss Foreign Policy, 1945-2002*, eds. Jürg Gabriel and Thomas Fischer (Houndmills: Palgrave Macmillan, 2003), 105.

¹²⁹ Armstrong, "The ICRC and Political Prisoners," 617.

¹³⁰ Neville Wylie, "Switzerland: a Neutral of Distinction?," in *European Neutrals and Non-Belligerents during the Second World War*, ed. Neville Wylie (Cambridge: Cambridge University Press, 2002), 352.

¹³¹ Armstrong, "The ICRC and Political Prisoners," 619.

¹³² François Bugnion, Dir. of Int'l Law and Cooperation, ICRC, *Swiss Neutrality as Viewed by the International Committee of the Red Cross, Address Before the Nouvelle Société Helvétique at the International Red Cross and Red Crescent Museum* (May 26, 2004) (ICRC, trans.), <http://www.icrc.org/web/eng/siteeng0.nsf/html/629CJX>. In more recent times, the ICRC has expressed a desire to emphasize its independence from the Swiss government in the belief that political autonomy would garner more international acceptance, by guaranteeing freedom of action from government influence. See Cornelio Sommaruga, President of the ICRC, "Swiss Neutrality, ICRC Neutrality: Are They Indissociable? - An Independence Worth Protecting," *International Review of the Red Cross*, No. 288 (May-June 1992), 269.

to clarify the customary international of internment. According to a retrospective ICRC analysis of World War II policies published in 1948, the ICRC's position on treatment of military internees during the war was that "in the absence of definite treaty stipulations covering conditions of internment and treatment, the Committee always laid stress on the principle that conditions of internees in a neutral country should be at least equal to those in force for [POWs] in enemy hands."¹³³ However, the ICRC conceded that only Articles 11 and 12 of the 1907 Hague Convention (V) as well as Article 77 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War directly applied to internees in neutral countries during World War II.¹³⁴ These articles were silent on the exact administration of internment policies, and only enumerated the requirement to provide basic humanitarian protections. Since the Hague Convention failed to "specify the system [governing administration of] military internees in neutral countries," upon the outbreak of World War II the ICRC took the initiative to recommend "ad hoc measures in cases where conventional international law does not provide sufficient basis to assure victims of the war precise treatment in accordance with humanitarian principles."¹³⁵

In circular letters of April 1940, addressed to all neutral powers in the conflict, the ICRC maintained that the provisions of the 1929 Convention should be the minimum protection for military internees.¹³⁶ Under this interpretation internees would receive the same explicit minimum guarantees as POWs in the provision of internment locations,

¹³³ International Committee of the Red Cross, *Report of the International Committee of the Red Cross on its Activities during the Second World War, September 1, 1939-June 30, 1947*, Vol. 1 (Geneva: ICRC, 1948), 558-9.

¹³⁴ Jean S. Pictet, ed., *Commentary on Geneva Convention III Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), 69.

¹³⁵ ICRC, *Activities during the Second World War*, Vol. 1, 559.

¹³⁶ *Ibid.*

housing conditions, food and clothing rations, sanitary amenities, and medical care.¹³⁷

The 1929 Convention also provided legal protections to POWs, stipulating that “escaped prisoners of war who are retaken before being able to rejoin their own army or to leave the territory occupied by the army which captured them shall be liable only to disciplinary punishment,” which by definition limited punishment for escape to a maximum of 30 days local arrest.¹³⁸ The 1929 Convention further specified that “preventative arrest shall be reduced to the absolute minimum,” and “in no case may prisoners of war be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) there to undergo disciplinary punishment.”¹³⁹ It is clear that affording Americans internees the rights of the 1929 Convention would have precluded their detention in Wauwilermoos for attempting escape and also limited the time of their detention. The ICRC circular thus attempted to clarify the legal status of internees. Not unlike an *amicus* brief to a court, such a circular had no real standing in law, but given its source it should certainly have influenced the neutral governments. The history of internment was relatively short even by World War II, and so it could be argued that “customary” international law--the law as defined by commonly accepted practice--had not settled on a single solution. The 1940 circular sought to fix custom and close loopholes in the written conventions, but could not carry the full weight of either.

Nevertheless, in response to the circular the ICRC “received assurances from most belligerent governments that the same 1929 Convention is also extended by analogy

¹³⁷ Art. 9-15, 1929 Geneva Convention.

¹³⁸ Art. 50, 54, 1929 Geneva Convention.

¹³⁹ Art. 47, 56, 1929 Geneva Convention.

to internees who are enemy civilians, as well as military internees in neutral countries.”¹⁴⁰

Neutrals such as Hungary and Romania accepted the ICRC interpretation of the 1929 Convention without reservation. The consulate general of Hungary informed Mr. Huber that tighter restrictions were applied to internees based on “mass escapes,” but despite this problem “the Hungarian Government is prepared to consider the provisions of this Convention as the treatment will benefit the Polish [internees].”¹⁴¹

In a marked and even ironic contrast, the Swiss government, “whilst admitting that the stipulations of the Convention were by analogy applicable to internees,” also expressed the reservation that the disciplinary punishments in the Conventions were an insufficient deterrent to escape attempts. The Swedish government expressed similar reservations in 1940, claiming that “it would not be fair to add to [neutral states’] problems by subjecting them to the extremely detailed provisions of the 1929 Convention.”¹⁴²

As the legal recommendation of a universally recognized organization operating under international mandate, the ICRC circular opinions represented “soft law” that while not yet binding on states, reflected the emerging customary international law of the period.¹⁴³ In the absence of codified treaty law, customary international law represents another type of “hard law” that “consists of the rules of law derived from the consistent

¹⁴⁰ Letter from ICRC President to Hungarian Minister of Foreign Affairs, dated 9 April 1940, ICRC Archives, B SG 3, Hongrie et Roumanie.

¹⁴¹ Letter from Hungarian Consulate General to ICRC President, dated 20 July 1940, ICRC Archives, B SG 3, Hongrie et Roumanie.

¹⁴² ICRC, *Activities during the Second World War*, Vol. 1, 559.

¹⁴³ Ingrid Detter, *The International Legal Order* (Aldershot: Dartmouth Publishing, 1994), 178, 212.

conduct of States acting out of the belief that the law required them to act in that way.”¹⁴⁴

As expressed by the ICRC, both “physical and verbal acts” can constitute state practice, such as “military manuals, national legislation, national case-law, instructions to armed and security forces, military communiques during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations.”¹⁴⁵

The legal position of the U.S. government over internment rights was the same as that of the ICRC, in that U.S. diplomats and their attorneys espoused the view, in the same phrase, that military internees enjoyed, “by analogy,” the full benefits of the 1929 Conventions.¹⁴⁶ In November 1944, General Legge reported to Leland Harrison, the minister of the U.S. Legation in Switzerland, that internees were held incommunicado in civilian prisons in violation of Article 56 of the 1929 Convention; possessions were confiscated in violation of Article 6; sentences to Camp Wauwilermoos were often six to seven months in violation of Article 54; Red Cross packages were refused in violation of Article 37; and conditions in Camp Wauwilermoos were “worse than in enemy prison camps according to reports in possession of American Interests.”¹⁴⁷ General Legge also advised the U.S. War Department that strong action was necessary to make the Swiss “act

¹⁴⁴ Shabtai Rosenne, *Practice and Methods of International Law* (London: Oceana Publications, 1984), 55.

¹⁴⁵ Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,” *International Review of the Red Cross*, Volume 87, No. 857 (March 2005), p. 179.

¹⁴⁶ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 2009, dated 5 January 1945, NARA, RG 319, E57.

¹⁴⁷ Memo from U.S. Military Attaché in Switzerland to Minister, U.S. Legation in Switzerland, dated 1 November 1944, NARA, RG 84, Entry 3207.

promptly” and he coordinated with Harrison to present the case to the Swiss Foreign Office.¹⁴⁸ The U.S. complaints were presented by General Legge and Minister Harrison to high-level Swiss authorities: the Federal Commissioner of Internment and Hospitalization and the Minister of the Swiss Military Department.¹⁴⁹

The U.S. legation emphasized the two most widespread violations of international law in its complaints. First, the incarceration of internees at Wauwilermoos for months or indefinite periods violated the 1929 Convention, which stated that “the duration of a single punishment may not exceed thirty days.” General Legge believed that under the “by analogy” interpretation of the 1929 Convention, “internees certainly should not suffer worse punishment for [attempted escape] than prisoners of war.”¹⁵⁰ Second, the deplorable conditions in the camp violated multiple provisions of the 1929 Convention, such as requirements that POWs “be lodged in buildings or in barracks affording all possible guarantees of hygiene and healthfulness” and receive food rations “equal in quantity and quality to that of troops at base camps [of the detaining Power].”¹⁵¹ Legge and Harrison could both attest to these conditions, as they had visited Wauwilermoos on November 3, 1944.¹⁵²

In concert with U.S. diplomatic efforts, their counterparts in the British legation in Bern protested the same mistreatment of British internees in Wauwilermoos. Wing

¹⁴⁸ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1892, dated 7 November 1944, NARA, RG 319, E57.

¹⁴⁹ See diplomatic protests in SFA Box E27/14510.

¹⁵⁰ Legge, *Report of Internment Situation, 18 December 1944*, NARA, RG 319, E47, p. 4.

¹⁵¹ See Articles 10, 11, & 54, *1929 Geneva Convention*.

¹⁵² Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1892, dated 7 November 1944, NARA, RG 319, E57.

Commander W.O. Jones, the assistant air attaché to the British Legation, wrote the Swiss Federal Commissioner of Internment and Hospitalization protesting the length of imprisonment, as well as the conditions. Drawing from his own experience as a POW, Jones claimed that conditions at Wauwilermoos were “inferior to everything I saw during my 20 months of imprisonment in Italy,” and added “I am sure that the Swiss Government does not desire to subject the imprisoned British soldiers located on your territory to conditions worse than those existing, under this report, in the camps of prisoners in the countries of our enemies.”¹⁵³ In response, the Swiss Commissioner claimed that internees were simply under different regulations than POWs and therefore subject to penalties surpassing thirty days of confinement.¹⁵⁴

As a result of the diplomatic protests, U.S. and Swiss authorities met several times to address the accusations of noncompliance with international law. General Legge visited Minister Karl Kobelt, the head of the Swiss Military Department, several times between mid-1944 and early 1945.¹⁵⁵ However, the Swiss government never conceded the validity of the U.S. legal position. After a meeting with Minister Kobelt in January 1945, General Legge reported to the U.S. War Department that trials for internees who had attempted escape “will continue with punishment at discretion [of] Swiss Military Courts without reference by analogy to 30 day confinement of POW’s under [the 1929] Geneva Convention,” since “our internees are under Swiss law,” as opposed to the

¹⁵³ Letter from Wing Commander Jones to Swiss Federal Commissioner of Internment and Hospitalization, dated 8 November 1944, SFA, Box E27/1450G, British Internees 1940-1948.

¹⁵⁴ Letter from Swiss Federal Commissioner of Internment and Hospitalization to Wing Commander Jones, dated 14 November 1944, SFA, Box E27/1450G, British Internees 1940-1948.

¹⁵⁵ *Final Report of the Swiss Commissariat for Internment and Hospitalization on the Internment of Foreign Military Personnel from 1940-1945*, Swiss Internees Association Archives (hereafter SIAA), Document # 27-14927-16, p. 103.

protections of international treaties. Legge had hoped to convince the Swiss that in view of the approaching end of the war, the Swiss “might consider shortening sentences.”¹⁵⁶ Warnings that the conditions of internment would “certainly be harmful to Swiss-American relations when this entire matter comes into the light” greatly concerned Swiss officials such as the Federal Commissioner of Internment and Hospitalization.¹⁵⁷

In addition to the Allied protests, Swiss military and civilian observers also bombarded Swiss internment officials with concerns about the effects of internment policies. In November 1944, Swiss Army Major W. Huber wrote the Federal Commissioner of Internment and Hospitalization worrying that “Switzerland is grossly violating the minimum guarantees of the Geneva Convention of 1929 on the treatment of prisoners of war” with respect to internees in Wauwilermoos. Huber, an officer assigned to the Swiss Army Office of the Chief of the General Staff, complained that “it is incomprehensible why Switzerland gives its internees much harsher treatment than Germany's prisoners of war,” and believed that the length of confinement and lack of due process was “not just a violation of the Geneva Convention, but a violation of any law per se.” Huber claimed that conditions in Wauwilermoos had resulted in Americans losing “all respect for the Swiss Army and Switzerland,” and that the internees had “learned to hate the country and the Swiss.” Huber stated that simply releasing the internees was not enough to restore Swiss credibility and repair the damage caused by the internment crisis. Rather, he argued that the perception that the Swiss government and

¹⁵⁶ Memo from U.S. Military Attaché in Switzerland to U.S. War Department dated 5 January 1945, Number 2009, NARA, RG 319, E57.

¹⁵⁷ Memo from Swiss Army Adjutant General Dollfus to Swiss Minister Kobelt, number 23039, dated 13 November 1944, SFA, Box E27/14510, American Internees. Kobelt was the Swiss Minister of Military Affairs during World War II.

Swiss Army were hostile to Americans must also “be rebutted by evidence that the reprehensible treatment of American detainees was not ordered by the responsible officers in Bern and did not represent the politics of the country and public opinion.”¹⁵⁸

The direct intervention of an outsider like Huber demonstrates that there were some in the Swiss Army who were concerned about how adherence to the spirit of international law would affect the legacy of Swiss neutrality beyond the end of the war.

Another unsolicited voice in the debate over treatment of American internees was the Swiss press. Despite wartime censorship of the Swiss media, various newspaper editors felt that it was their duty to report violations of neutrality to the government even if they lacked unfettered access to the public. This was the case for Albert Adler, editor of *The Wartime Observer*, who personally visited Wauwilermoos on October 25, 1944 as a result of “persistent rumors spread in Davos that mentioned the penal camp Wauwilermoos . . . where appalling conditions prevail that would be no credit to our country.”¹⁵⁹ After spending four hours at the camp, Adler confessed that “The results exceeded my worst expectations.” He described crowded barracks surrounded by barbed-wire and mud, hygiene facilities “in the most primitive state,” and leadership which refused to distribute Red Cross aid parcels.¹⁶⁰

Looking beyond the problem of simply ensuring the confinement of internees, Adler saw the issue as one of ideology. How could Switzerland, with its mandate to inspect compliance with international law in “just about every prison camp in the world,”

¹⁵⁸ Letter from Maj. W. Huber to Oberstdiv. Roggero Dollfus dated 17 Nov. 1944, SFA, Box E5791 1000/849 652.

¹⁵⁹ See Kamber, *Schüsse auf die Befreier*, 239, and Letter from Editor Alber Adler, SFA, Box E5791. 1000/849 652.

¹⁶⁰ Letter from Editor Alber Adler, SFA, Box E5791 1000/849 652.

fail to uphold the same standards itself? Adler's conversations with interned Americans convinced him of the damaging effects of the internment policies. Airmen who had previously espoused kinship with the Swiss had experienced a radical change of heart, such that "the Swiss people in general are not seen as neutral, but considered exactly the same as nationals of the enemy." The cause, he explained, was that "people do not consider an escape attempt as dishonorable," and although escape attempts justified some manner of legal response, the punishment meted out at Wauwilermoos was "in no way proportional to the offense."¹⁶¹

Adler realized that the legacy of Swiss actions would affect Switzerland's postwar position among the world powers, and predicted that "If this method of punishing the American internees is continued in the same way, then the worst consequences can be expected for our country." In his opinion, the current policy reflected "pure legalism" and certainly could be falsely justified "with a legal or bureaucratic sham," but this symptomatic approach only addressed immediate diplomatic complaints. Failure to rectify the underlying problems of Swiss military justice and the conditions in Wauwilermoos would result in the shift of public opinion against Switzerland, which Adler believed would cause "incalculable damage to our country." In his view, "The population would probably be very surprised if they knew what the American flying officers think about our country today and are willing to tell other [people] afterwards."¹⁶²

Huber and Adler's protests reveal that the Swiss attitude toward the application of international law to internees was hardly monolithic. Rather, these individuals sought to

¹⁶¹ Ibid.

¹⁶² Ibid.

abrogate the government policies for both the sake of the internees themselves as well as the implications that legal recalcitrance posed for the Swiss national legacy. This dispute can therefore shed light on the cultural values that were threatened by the FCIH policies. According to José Marina, “Law is a part of the regulatory system of a culture, which coercively imposes the compliance of certain rules and procedures to solve conflicts.” He believes that law was created to preserve a society’s “fundamental values” from social conflict, values such as peace, justice, survival, and public order that are necessary for coexistence.¹⁶³ Perhaps the values that Huber and Adler sought to protect were in part the rule of international law and commitment to humanitarian principles, both important facets of Swiss exceptionalism. The enforcement of questionable internment policies may have served the purpose of ensuring Swiss sovereignty by demonstrating strict neutrality and possibly averting German reprisals, but at what cost? If Switzerland sacrificed the ideals that it stood for, then the price was too high for Huber and Adler.

Huber and Adler’s resistance to the government’s administration of international law is also reminiscent of how culture can influence the law through the pursuit of cultural justice. According to Andrew Ross, this type of contestation occurs when legal processes are “too mechanistic in their attention to procedural rules, and not sensitive enough to the cultural security and social aspirations of citizens.”¹⁶⁴

It is also important to note that individuals like Huber and Adler were resistant to both the Swiss government’s legal position over internment as well as the manner in which these laws were enacted. The distinction is important because “disciplinary

¹⁶³ José Antonio Marina, “Genealogy of Morality and Law,” *Ethical Theory and Moral Practice*, Vol. 3, No. 3 (Sep., 2000), 310, 314-15.

¹⁶⁴ Andrew Ross, “Components of Cultural Justice,” *Law in the Domains of Culture* (Ann Arbor: The University of Michigan Press, 1998), 203.

policies and practices are shaped both by the structure in which they occur and the semi-autonomous individuals who participate in them and who enact the policies.”¹⁶⁵ The Swiss legal position enabled the conditions at Wauwilermoos by denying the protections of the Geneva Conventions that would have limited the length and type of punishments available to military tribunals. However, the mistreatment in Wauwilermoos was not inevitable simply because internees were punished under the Swiss Military Penal Code. The fact that such a camp existed at all in conjunction with its inept leadership were also to blame, as both factors were preventable. Finally, the Swiss military tribunals frequently sentenced American airmen to lengthy prison terms rather than the authorized reduction to disciplinary punishment. Had any of these additional factors been mitigated, it is conceivable that Americans might not have suffered abuse despite the lack of explicit protections under international law. In this scenario, the debate over international law would never have occurred.

Complaints by the Allied governments and concerned Swiss citizens were insufficient to change underlying Swiss policy. The Swiss rebuttal began with a different interpretation of international law. The Swiss government argued that treating military internees as POWs was inconsistent with existing precedents and would itself amount to a violation of international law. In contravention to the legal position outlined in earlier correspondence with the ICRC, the Swiss government maintained that the “by analogy” extension of POW protections to internees was “nowhere stipulated” in the 1929 Convention. Therefore, absent the protection of international law over escape attempts, internees would be “governed by the domestic law of the contracting parties.” In this case the domestic law was the Swiss Military Penal Code, which permitted open-ended

¹⁶⁵ Susan Sibley, “Making a Place for a Cultural Analysis of Law,” *Law and Social Inquiry* 17 (1992), 42.

punishments that the Swiss argued were “proportionate to the offence committed and the necessity of preventing re-occurrence.”¹⁶⁶

The Swiss also cited case law as a precedent for denying the protections of the 1929 Convention to military internees. After the internment of the Forty-fifth French Corps in 1940, Swiss military tribunals determined that internees could be punished more severely than POWs.¹⁶⁷ The Chief Swiss Prosecutor expressed the view that Switzerland was obligated to use force against internees, including long-term imprisonment and criminal sanctions, or would “run the risk of being forced out of [its] neutral position.”¹⁶⁸ The Swiss claimed that failure to adequately punish U.S. internees for escape attempts could be regarded as a violation of their obligation to uphold the 1907 Hague Convention, and therefore incite Germany “to reprisals or even hostile measures” against Switzerland.¹⁶⁹

This argument from law reflected real structural pressures. The Swiss position seemed dubious to the U.S. legation, but this policy had been in force well prior to the internment of the first American airmen in 1943, and reflected the immense burden that internment imposed on the Swiss government. During the war, Switzerland provided safe haven for nearly 300,000 refugees, over 100,000 of whom were military refugees. One and a half divisions of the thinly-stretched Swiss Army were detailed to guard

¹⁶⁶ Memo from Swiss Minister Karl Kobelt to Brigadier General B.R. Legge, number 8211.117.N/G, dated 2 December 1944, NARA, RG 84, E3207.

¹⁶⁷ Ibid.

¹⁶⁸ *Final Report of the Swiss Commissariat*, SIAA, document # 27-14927-16, p. 104.

¹⁶⁹ The Swiss position was that inadequate punishment of Allied internees could be perceived as favorable treatment in violation of Swiss neutrality. In theory, this could be cited by Germany as the justification for a reprisal, defined as a discrete violation of the law of war intended to encourage future Swiss compliance. See Memo from Colonel Karl Kobelt to Brigadier General B.R. Legge, number 8211.117.N/G, dated 2 December 1944, NARA, RG 84, E3207, p. 3-4.

military internees, representing an enormous logistical burden that also undermined defense against violations of Swiss neutrality.¹⁷⁰ The considerable expenses of internment were also shouldered by Switzerland, with little likelihood of reimbursement in the case of internees whose countries were under occupation.¹⁷¹ In this light, harsher punishment of internees to enhance control likely seemed prudent to Swiss authorities, who were almost certainly overwhelmed by the many problems posed by internment.

In some cases, Swiss officials simply could not conceptualize the need to treat internees with the protections of POWs. General Dollfus was one such official who was well-insulated from the actual implementation of his policies as the FCIH commissioner. In rebutting claims that internees should receive the protections of the 1929 Geneva Convention, Dollfus explained that “as a layman, and using my common sense, I tell myself that the Swiss internees, the unguarded so to speak . . . cannot be compared to prisoners of war who risk their lives trying to escape.” He made this distinction because he claimed the internees escaped from hotels, rather than the “barbed wire and machine guns” of a traditional POW camp where prisoners “risk their lives trying to escape.” Dollfus certainly knew that once caught escaping, subsequent escape attempts were from barbed-wire compounds like Wauwilermoos, where conditions were harsh and machine-guns were fired at escapees. Yet he was silent as to whether those in punishment camps were now deserving of POW protections by virtue of their surroundings. If Dollfus believed his excuses, then he legitimately thought that the accusations about Wauwilermoos conditions were “completely untenable,” inferring that they were not in

¹⁷⁰ Stephen P. Halbrook, *The Swiss and The Nazis: How the Alpine Republic Survived in the Shadow of the Third Reich* (Philadelphia: Casemate Publishers, 2006), 120, 225.

¹⁷¹ The Swiss spent 128 million Swiss francs on refugees in Switzerland during the wartime period. See Halbrook, *The Swiss & The Nazis*, 226.

fact comparable with Axis POW camps.¹⁷² This attitude can perhaps be explained by the mixed signals that Dollfus received about camp conditions, as well as his relative isolation from those who actually carried out the policies of the FCIH.

Although the Swiss refused to modify their legal position, the internal and external pressures did have some effect, at least in that they took measures to inspect Wauwilermoos for proper conditions. Inspection of the camp fell under the joint purview of the Swiss government and the ICRC, since both shared the duties of a protecting power. While apparently well-intentioned, these inspections reveal the problems inherent in the requirement for a protecting power to police itself. Both Switzerland and the ICRC used Swiss Army officers to inspect Wauwilermoos, resulting in reports that often praised Captain Béguin and gave the camp a clean bill of health. Inspections for the Swiss government were performed by the FCIH. Swiss Army Major Florian Imer, the Chief of Internment Legal Services for the Commissariat from 1941-1945, reported to his superior in 1942 that “complaints about the treatment of internees at Wauwilermoos are not justified and most exaggerated,” and professed that the rigors of a punishment camp were necessary to enforce discipline. Imer had “an excellent impression of the camp leadership,” and singled out Béguin as “the man it takes to run a camp like this.”¹⁷³ Even as late as July 1945, while investigating the conditions of Russian military internees at Wauwilermoos, Major Imer again adopted an apologetic stance toward Béguin, claiming that articles in the press “garbled” the facts and displayed a “tendentious intent.” Imer also reported that some Russian internees told him that Wauwilermoos had “a spirit of

¹⁷² Letter from Oberstdivisionär Ruggero Dollfus to Major W. Huber, dated 20 Nov 1944, SFA, Box E5791 1000/849 652.

¹⁷³ See Report from Major Florian Imer, dated 19 July 1945, SFA, Box E5791, Volume 8/23, and Report from Major Florian Imer to Major Cottier, dated 18 May 1942, SFA, Box E5791, Volume 8/23.

fairness and good fellowship...which was not always to be had in other camps.”

Paradoxically, in the same report Imer cited several manslaughter investigations against Russian internees as well as a mutiny among the same group in February 1944, both of which seemed at odds with claims of “good fellowship.”¹⁷⁴

The ICRC inspections of Wauwilermoos, also conducted by a Swiss Army officer, were only slightly more critical. According to the ICRC, Switzerland only granted “occasional” internal camp visitations by the Red Cross until April 1944, after which regular inspections were permitted. The ICRC recorded 864 inspections of military internment camps in Switzerland from 1944 through the end of the war.¹⁷⁵ Wauwilermoos received only four ICRC inspections from 1944 to 1945, all performed by ICRC delegate and Swiss Army Colonel Auguste Rilliet.¹⁷⁶ In his inspection in May 1944, Rilliet described the camp as “surrounded by barbed wire,” “guarded by armed guards and assisted by a detachment of military dogs,” and having the capacity for four hundred internees. Rilliet recorded only six Americans in the camp, and noted that the barracks of the English and American internees were “the least tended to.” Rilliet found that most of the interned officers he questioned “do not know why they are kept here,” and cited the case of one Polish officer who already had been incarcerated for nine months without explanation. However, Rilliet’s overall assessment was that “the discipline in the camp and the uniform order made a good impression.”¹⁷⁷

¹⁷⁴ Report from Major Florian Imer, dated 19 July 1945, SFA, Box E5791, Volume 8/23.

¹⁷⁵ ICRC, *Activities during the Second World War*, 560.

¹⁷⁶ See ICRC Archives, B/G2, Internés en Suisse.

¹⁷⁷ Rilliet, *Rapport No. 4*, dated 16 May 1944, ICRC Archives, B/G2, Internés en Suisse.

Colonel Rilliet's next inspection of Wauwilermoos in October 1944 documented the arrival of twenty American officers. He noted that the internees who were awaiting military tribunals often spent longer in pretrial confinement at Wauwilermoos than the sentences they eventually received. Colonel Rilliet quoted the commandant, Captain Béguin, who blamed the Swiss military courts for the plight of the military internees and called their situation "unfortunate." Béguin also told Rilliet that he was irritated by the fact that the soldiers sentenced to Wauwilermoos for attempted escape "receive the harshest punishments," as if he believed that would-be escapees were being punished unnecessarily and unfairly.¹⁷⁸ These sentiments seem dubious in light of Béguin's disparaging comments about interned Americans in his private correspondence to the Commissioner of Internment and Hospitalization, particularly since the American internees almost certainly constituted the majority of would-be escapees in the camp at that particular time.¹⁷⁹ Therefore, it is likely that Béguin made these comments simply to put his apologetic comments on the record, since he was the person most likely to be blamed for any misconduct at Wauwilermoos.

Compromise

Despite the failure of diplomacy to quickly remedy the incarceration of internees and the conditions at Wauwilermoos, the Swiss government eventually bowed to U.S. pressure and compromised. The Swiss brokered a deal to release the majority of American internees in Wauwilermoos back to their regular camps on thirty day paroles in

¹⁷⁸ Rilliet, *Rapport No. 19A*, dated 16 October 1944, ICRC Archives, B/G2, Internés en Suisse.

¹⁷⁹ Ibid. Rilliet reported 283 total internees of varying nationalities, but did not reference the number of Americans save the 20 that were transferred to the camp during the inspection. General Legge reported that 85 Americans were in the camp in early November 1944, about half a month after Rilliet's inspection. He also documented that over 100 Americans were interned in Wauwilermoos at some point after August 1944, but no exact date was given. See Legge, *Report of Internment Situation, 18 December 1944*, NARA, RG 319, E47, p. 3.

mid-November 1944.¹⁸⁰ This entailed written “promises” by the internees to refrain from further attempts to escape, countersigned by the U.S. Legation. This placed both the internees and the U.S. government under a binding obligation to “respect the terms” of the paroles. Thus, a breach of parole through escape was “an offense against the laws of war” and required the return of the internee in question.¹⁸¹ Granting the paroles facilitated the evacuation of eighty American internees, leaving five still confined at Wauwilermoos. Of these five, one remained in Wauwilermoos because he refused to sign a parole, and the remaining four because they had already been sentenced by military tribunals. General Legge considered this only a partial solution, negotiated in a “typically evasive manner” by the Swiss and “inexplicable” from a legal perspective.¹⁸²

Although the compromise released most American internees from Wauwilermoos, the paroles were only a temporary solution. General Clayton L. Bissell, Assistant Chief of Staff for Intelligence (G2) on the War Department General Staff, refused to authorize subsequent extension of the paroles, explaining that “further use of paroles only compromises the integrity of our position and is contrary to their obligations as members of US armed forces.”¹⁸³ This position was consistent with U.S. policy at the time, which normally prohibited the authorization of paroles, but allowed them by

¹⁸⁰ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1906, dated 13 November 1944, NARA, RG 319, E57.

¹⁸¹ *Law of Land Warfare, Judge Advocate General's School Text No. 7* (Ann Arbor, MI: Judge Advocate General's School, 1943), 113-14, 120. See also Article 10, *1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land* (The Hague: 29 July 1899), available at: <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>.

¹⁸² Legge, *Report of Internment Situation, 18 December 1944*, NARA, RG 319, E47, p. 3-4.

¹⁸³ Memo from General Clayton Bissell to General Barnwell Legge, Number 73498, dated 6 December 1944, NARA, RG 319, E57.

exception so long as they were obtained with the permission of a military superior.¹⁸⁴

General Legge described the Swiss as “actively antagonistic” in direct reaction to the U.S. refusal to grant further paroles. American internees were not sent back to Wauwilermoos upon expiration of the paroles in mid-December 1944, but instead were confined to the “isolation” camps at Hünenburg, Greppen, and Diablerets until the majority of remaining internees were repatriated in mid-February 1945.¹⁸⁵

In an apparent reaction to American diplomatic pressure, the Swiss military tribunals also transitioned to punishments that were more proportional to the crime of attempted escape. Although tribunals continued for American internees after the release of most Americans from Wauwilermoos in mid-November 1944, the sentences dropped considerably from the penalties assessed through late 1944. When 1st Lt. James Mahaffey was convicted of multiple escape attempts and sentenced to 300 days imprisonment on December 5, 1944, the average American sentence for such “disregard of regulations” stood at 87 days. However, after mid-January 1945 the average sentence dropped to only 48 days, not including at least a dozen escape cases that were reduced to disciplinary punishment in lieu of prison time.¹⁸⁶

The decision to downgrade escape charges to disciplinary punishment normally occurred in lieu of referral to a military tribunal. However, in at least one case in April

¹⁸⁴ *Law of Land Warfare, JAGS*, 115n320. See also *Field Manual 27-10, Rules of Land Warfare* (Washington: U.S. War Department, 1940), paragraph 151, p. 37. Some states, such as the U.S., forbid paroles as a general matter of policy: see Sec. 111, Cir. 400, WD, Dec. 10, 1942. U.S. soldiers were duty-bound to attempt escape; neglecting this obligation was considered dishonorable.

¹⁸⁵ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 2005, dated 31 December 1944, NARA, RG 319, E57. For reference to Hünenburg, see Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 2062, dated 31 January 1945, NARA, RG 319, E57. For reference to repatriation, see Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 2102, dated 18 February 1945, NARA, RG 319, E57.

¹⁸⁶ Lt. Mahaffey’s case is Tribunal Militaire #44-4912, SFA Box E 5330-01 1975/95. For aggregate case statistics see various tribunals in SFA Box E 5330-01 1975/95.

1945 a judge downgraded charges that had already been referred to a tribunal. On trial were Sgt. Joseph D’Atri and Sgt. James Stanley, who both escaped from their confinement camp at Les Diablerets and were arrested while trying to cross the French border on March 7, 1945. According to a letter from the FCIH section chief, Colonel Probst, “the preventive detention suffered seems sufficient to offset the penalty incurred.” Probst may have also taken pity on D’Atri and Stanley because they were caught in a snowstorm prior to their arrest in March, and subsequently hid in a stable for three weeks while subsisting on scavenged food and rations from Red Cross parcels. As a result, both internees explained to their arresting officer that “we have been very ill and were nearly dying.” However, both men were already repatriated by the time the charges were dismissed, which raises doubts about the real motivation behind the decision. As with over 100 other cases, when Americans were repatriated or successfully escaped their tribunals were halted because the Swiss Army could no longer enforce a verdict when the internee was out of their jurisdiction. This fact in itself would be a normal justification to dismiss the charges. Instead, the FCIH section chief emphasized that the hardship of the prior detention was punishment enough, reflecting a distinct shift from earlier hard-line views on enforcement of FCIH policies.¹⁸⁷

In February 1945, the Swiss Chief of Legal Services also announced a formal policy shift under which internees convicted of escape attempts would serve a maximum of 45 days imprisonment.¹⁸⁸ A sentence of greater than 30 days was still excessive under

¹⁸⁷ For trial of Joseph D’Atri and James Stanley see Tribunal Militaire #45-1816, SFA Box E 5330-01 1975/95. Data on all military tribunals against American internees came from all cases in SFA Box E 5330-01 1975/95.

¹⁸⁸ Memo from Swiss Chief of Legal Services to Commandant of Punishment Camp Wauwilermoos, “Betr. Haft wegen Evasion,” dated 17 February 1945, SFA, Box E5791 1000/849 652.

the U.S. interpretation of international law, but it nevertheless indicated the Swiss government's desire to accommodate the U.S. position and bring their policies into conformance with the spirit if not the letter of the law.

Other Influences over Internment

The treatment of American internees was determined by a host of factors beyond mere quibbling over the exact meaning and application of international law. Perhaps most importantly, at the same time that U.S. diplomats were protesting the mistreatment of U.S. internees, USAAF planes committed numerous and repeated violations of Swiss neutrality. These violations, in the form of accidental bombings and territorial incursions, jeopardized the U.S. diplomatic position and likely prolonged resolution of the internment issues.

On the afternoon of April 1, 1944, General Legge walked through the smoldering wreckage of the city of Schaffhausen, the capital of Switzerland's northernmost canton on the border with Germany. At the time the civilian death toll stood at 28 dead and over 100 wounded, but the number of deaths would later climb to 40, including a national councilor. Some of the buildings were still on fire, and the losses included Schaffhausen's railway station, the city museum, several factories, and numerous houses.¹⁸⁹ Earlier that morning, two waves of U.S. Army Air Force B-24 bombers had dropped their incendiary payloads on the city, under the mistaken belief that they were over Singen, a nearby German town with a strategic railway junction. The bombing of Schaffhausen caused a significant diplomatic rift that undermined future relations

¹⁸⁹ For the description of General Legge's inspection of Schaffhausen, see Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1283, dated 2 April 1944, NARA, RG 319, E57. For final death toll, see Kreis, *Switzerland and the Second World War*, 98.

between the U.S. and Switzerland for the remainder of the war, in terms of both U.S. influence and financial indemnity.¹⁹⁰

American diplomats sought to mitigate the fallout from the Schaffhausen incident by agreeing within a day of the bombing to immediate initial reparations of \$1 million, with more funds forthcoming if necessary.¹⁹¹ U.S. Secretary of State Cordell Hull and U.S. Secretary of War Henry Stimson offered formal apologies.¹⁹² Unfortunately, within days of the incident the U.S. Strategic Air Forces Command for the European Theater released a communication blaming the bombing on “unfavorable weather conditions,” which contradicted the testimony of Swiss observers in Schaffhausen who reported only light clouds.¹⁹³ This provoked a storm of criticism in the Swiss press, such as statements that “The excuse of ‘bad weather’ is worthless,” and “Stick to the Truth, Please!”¹⁹⁴ These reactions prompted General Legge to recommend that the U.S. “accept full responsibility without seeking reasons to excuse.” He recommended full settlement for the damages prior to a conclusive investigation, reminding the War Department that “our

¹⁹⁰ See Jonathan E. Helmreich, “The Diplomacy of Apology: U.S. Bombings of Switzerland during World War II,” *Air University Review*, May/June 1977, Vol. XXVII, No. 4, Halbrook, *Target Switzerland*, and Kreis, *Switzerland and the Second World War*.

¹⁹¹ Telegram from the U.S. Secretary of State to the U.S. Minister in Switzerland, Number 1176, dated 6 April 1944, in United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1944: Europe*, Volume IV (Washington: U.S. Government Printing Office, 1966), 795-6.

¹⁹² Halbrook, *Target Switzerland*, 204.

¹⁹³ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1285, dated 4 April 1944, NARA, RG 319, E57.

¹⁹⁴ Telegram from the U.S. Minister in Switzerland to the U.S. Secretary of State, Number 2086, dated 4 April 1944, in United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1944: Europe*, Volume IV (Washington: U.S. Government Printing Office, 1966), 793-4.

prestige [is] at stake.”¹⁹⁵ Similarly, Minister Harrison wrote the Secretary of State to express that the explanation of poor weather “has had an unfavorable reception,” and argued that the “attempt [by] headquarters to minimize severe misfortune and [the] distortion [of] facts must be energetically rejected.”¹⁹⁶

Legge and Harrison correctly understood that the Schaffhausen incident would significantly undermine their diplomatic leverage with the Swiss, who had already accused the Allied forces of bombing the town of Samaden in October 1943. Since this was not the first Allied bombing of Switzerland, promises were made that new steps would be taken to avoid repeat incidents. General Legge coordinated with the Chief of the Swiss Air Corps to clarify national boundaries on U.S. pilot maps, create a system of marking the border to make it visible from the air, as well as establish a fifty mile safety zone around the Swiss border in which no bombings should be attempted.¹⁹⁷

Had the bombing of Schaffhausen remained an isolated incident, it is likely that the U.S. Legation successfully would have quelled most of the resultant diplomatic rancor with apologies and reparations. However, as the Allied air campaign expanded east, aerial violations of Swiss neutrality grew in frequency, establishing a “pattern of violation, apology, reparation, and new violation.”¹⁹⁸ A particularly volatile set of incidents occurred in September 1944, beginning with an aerial dogfight between Swiss

¹⁹⁵ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1285, dated 4 April 1944, NARA, RG 319, E57.

¹⁹⁶ Telegram from the U.S. Minister in Switzerland to the U.S. Secretary of State, Number 2086, dated 4 April 1944, in United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1944: Europe*, Volume IV (Washington: U.S. Government Printing Office, 1966), 793-4.

¹⁹⁷ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1315, dated 20 April 1944, NARA, RG 319, E57.

¹⁹⁸ Helmreich, “The Diplomacy of Apology,” 24.

and U.S. fighters on 5 September 1944. The Swiss fighters were escorting two U.S. bombers to Dübendorf Airfield in Zurich when two U.S. Army Air Force P-51 Mustangs appeared and shot down both Swiss aircraft. One Swiss pilot was killed, and the other was seriously injured in the incident. Only days later on 8 September, U.S. P-51s again violated Swiss airspace and attacked the railway stations at Delémont and Moutier, destroying a locomotive and injuring four civilians. On 9 September, a freight train was attacked at Rafz, injuring three Swiss civilians. In addition, forty-two Allied violations of Swiss airspace near the city of Jura were reported.¹⁹⁹

The U.S. Legation in Switzerland had little influence over operational employment of U.S. bombers in England and North Africa, and therefore was unable to affect or limit violations of Swiss neutrality beyond sending suggestions to senior U.S. Army Air Force leadership and attempting to placate Swiss authorities. As a result of the incidents in September 1944, General Legge sent descriptions of Swiss airplane markings to General Henry H. Arnold, Commanding General of the USAAF, in the hope that this would aid U.S. pilots to differentiate between Swiss and German fighters.²⁰⁰ This was considered a contributing factor in misidentification of Swiss aircraft, since the Swiss Air Force possessed Messerschmitt Bf 109E fighters, which were manufactured and predominantly used in Germany.²⁰¹ Legge also passed on details of Swiss efforts to avoid a repeat of aerial attacks, including the painting of Swiss crosses on fields and the roofs of houses along the border, flying observation balloons with Swiss colors, and even

¹⁹⁹ Memos from U.S. Military Attaché in Switzerland to U.S. War Department, Numbers 1717, 1729, and 1738, dated 5, 8, and 10 September 1944, NARA, RG 319, E57.

²⁰⁰ Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1778, dated 23 September 1944, NARA, RG 319, E57.

²⁰¹ Prince, *Shot from the Sky*, 13, 169.

Swiss Army Commander in Chief General Henri Guisan's suggesting the attachment of Swiss military observers to a higher U.S. Army headquarters.²⁰² However, senior U.S. commanders resisted such requests, and often tried to avoid responsibility for the bombings. In November 1944, General Arnold suggested to U.S. intelligence officials that recent bombings of Switzerland might be the result of Germans flying captured U.S. bombers, an assertion deemed utterly absurd by intelligence officials on the ground in Switzerland.²⁰³

The U.S. and Swiss efforts to curb accidental bombings were to no avail, as the cities of Basel and Zurich were bombed by B-24s of the U.S. Army Air Force on 4 March 1945, killing five civilians.²⁰⁴ After this incident, U.S. Army chief of staff General George C. Marshall ordered a reluctant Lt. General Carl A. Spaatz, commander of the U.S. Strategic Air Forces in Europe, to travel to Switzerland and apologize in person.²⁰⁵ As a result of political pressure, the U.S. Army Air Force pilot and navigator who led the squadron that bombed Zurich were charged by courts-martial in May 1945, although both were eventually acquitted.²⁰⁶ By the end of the war, one estimate placed the number of Allied bombs dropped on Switzerland at nearly 5,000, a total of approximately 165 to 185 tons. Nearly 100 Swiss villages were hit, destroying about 150 buildings and

²⁰² Memo from U.S. Military Attaché in Switzerland to U.S. War Department, Number 1793, dated 27 September 1944, NARA, RG 319, E57.

²⁰³ Neal H. Petersen, ed., *From Hitler's Doorstep: the Wartime Intelligence Reports of Allen Dulles, 1942-1945* (University Park, PA: Penn State Press, 1996), 398.

²⁰⁴ See Jackson Granholm, *The Day We Bombed Switzerland: Flying with the US Eighth Army Air Force in World War II* (Shrewsbury, UK: Airlife Publications, 2000), 140, and Meier, *Friendship under Stress*, 315.

²⁰⁵ Helmreich, "The Diplomacy of Apology," 40.

²⁰⁶ Granholm, *The Day We Bombed Switzerland*, 151-52, 227.

damaging thousands more. In the course of the bombings eighty-four Swiss citizens were killed, and another 260 were wounded.²⁰⁷

General Legge made it clear that these violations of Swiss neutrality hurt the ongoing U.S. diplomacy over internment issues and noted that the incidents placed him in a “difficult position,” particularly since he was trying to negotiate the repatriation of the interned airmen before the end of the war. Legge complained to General Arnold in late November 1944 that yet another series of attacks needed to be explained and apologized for, and asked “shall responsibility be accepted with regret but without excuse?” He also reminded Arnold that “attacks render our position and that of interned airmen more difficult.”²⁰⁸ Any American complaint over the Swiss application of international law governing internment could be rebutted by the fact that America was persistently violating the international law that guaranteed Swiss neutrality, perhaps a more serious charge when considering the deadly implications.

American diplomacy in Switzerland was also heavily influenced by the value of the intelligence apparatus that the Allies established and maintained in the country. In 1942, the U.S. Legation in Switzerland was supplemented by agents of the newly organized Office of Strategic Services (OSS), a secret organization that specialized in espionage.²⁰⁹ Switzerland, described by the OSS as “the main European listening post of both the Allied and enemy war fronts,” was selected as the OSS’s base for European operations due to its “geographic position,” as well as for the legal and operational cover

²⁰⁷ Kamber, *Schüsse auf die Befreier*, 261-2.

²⁰⁸ Memos from U.S. Military Attaché in Switzerland to U.S. War Department, Numbers 1729 and 1940, dated 8 September and 27 November 1944, NARA, RG 319, E57.

²⁰⁹ Józef Garliński, *The Swiss Corridor: Espionage Networks in Switzerland during World War II* (London: J.M. Dent & Sons, 1981), 119.

that neutrality provided for espionage activities. Under the diplomatic cover of the Special Legal Assistant to the U.S. Minister, Allen W. Dulles was selected to head the OSS in Switzerland.²¹⁰

Through its base in Switzerland, the OSS coordinated with and assisted nearly every resistance movement in Europe, including those in France, Italy, Austria, Germany, and Poland.²¹¹ The personal connections that Dulles established with Swiss Intelligence also provided critical information, as the Swiss had contact with both the German and Italian intelligence services.²¹² OSS Switzerland provided early warning of the Axis rocket-bomb factory at Peenemunde, the movements of German warships, the scuttling of the French fleet at Toulon, and the capitulation of the German Army in Northern Italy.²¹³ The OSS also coordinated an “underground railway” network throughout Europe that assisted over 4,000 downed aviators to return to Allied lines, including many Swiss internees.²¹⁴ This apparatus was critical to Allied operations in Europe and certainly influenced the conduct of U.S. diplomacy, since too much political pressure against Switzerland might jeopardize intelligence collection.

On November 3, 1944, Dulles informed his superiors that General Henri Guisan had personally expressed to him that the U.S. bombings of Switzerland were “seriously affecting [the] attitude [of the] Swiss people toward [the] USA.” Dulles agreed with

²¹⁰ Memo, “OSS – Switzerland,” dated 31 October 1944, NARA, RG 226, Entry 210, Box 76, p.1.

²¹¹ *Ibid.*, 2.

²¹² Garliński, *The Swiss Corridor*, 121.

²¹³ Memo, “OSS – Switzerland,” dated 31 October 1944, NARA, RG 226, Entry 210, Box 76, p. 4, and Garliński, *The Swiss Corridor*, 122.

²¹⁴ “OSS ‘Underground Railway’ Plan Saved U.S. Fliers in Axis Areas,” *New York Times*, 17 Sep 1945, 5.

Guisan, and stated “Personally I believe [the] situation created by [the] attacks makes it more difficult to get Swiss cooperation in our present task of penetrating Germany.”²¹⁵ The potential political fallout over Allied bombings of Switzerland in the fall of 1944 had so concerned the head of the OSS, Brigadier General William Donovan, that he personally asked General Arnold to approve the Swiss request to allow observers in a U.S. Army command in Europe.²¹⁶ Thus competing interests influenced U.S. diplomatic decisions in Switzerland, only one of which was the welfare of interned American airmen.

Swiss government policies during the first several years of the war were also heavily influenced by the threat of German invasion, a prospect that inspired widespread fear among the Swiss population. In 1940, the German invasion of France spilled over the Swiss border, testing Switzerland’s policy of armed neutrality and resulting in the Swiss Air Force shooting down eleven Luftwaffe fighters. An enraged Hitler responded by ordering a clandestine raid against Swiss airfields, but the operation was thwarted when Swiss authorities intercepted the German saboteurs and their explosives. After the fall of France, Swiss intelligence learned that the Germans were formulating plans to invade Switzerland. The attack did not come, despite detailed planning by the German Army. This was attributed in part to the Swiss mobilization of 850,000 soldiers, nearly a quarter of its population, which ostensibly would resist in National Réduit strongholds in the Alps for years.²¹⁷ Another factor was the German belief that an invasion would

²¹⁵ Quoted in Petersen, *From Hitler's Doorstep*, 394.

²¹⁶ Prince, *Shot from the Sky*, 172.

²¹⁷ Halbrook, *The Swiss & The Nazis*, 110, 113, 115, 304.

prompt the Swiss to destroy the Saint Gotthard and Simplon rail tunnels that linked Germany to Italy, thus nullifying much of its strategic value in transporting German coal that was vital to the Italian war effort.²¹⁸ Despite the fact that Switzerland was not invaded, it was still surrounded completely by the Axis from the summer of 1940 to the fall of 1944, a reality that arguably made economic accommodation with Germany inevitable.²¹⁹

Trade between neutrals and belligerents was permissible under international law during World War II. However, the 1907 Hague Convention provided that any “measure of restriction or prohibition” of any such trade must be “impartially applied” to all of the warring parties.²²⁰ Although the Swiss initially sold weapons such as Oerlikon anti-aircraft guns to France and Britain in 1939, the blockade after the fall of France forced an accommodation with Germany.²²¹ The Allies put significant pressure on the Swiss to reduce exports of “objectionable items” to the Germans, such as “listing” and boycotting Swiss companies that collaborated with Germany, as well as freezing Swiss assets.²²² According to the U.S. Secretary of State, the listing campaign of Swiss companies was the “most effective initial weapon in achieving new ceilings on Swiss exports of arms and machinery.”²²³ The Independent Commission of Experts (ICE),

²¹⁸ Wilson, *Switzerland*, 50.

²¹⁹ Vagts, “Switzerland, International Law and World War II,” 469.

²²⁰ See Articles 7, 8, and 9 of *The 1907 Hague Convention (V)*.

²²¹ Vagts, “Switzerland, International Law and World War II,” 469.

²²² *Britain, Switzerland, and the Second World War*, 95, 41.

²²³ Telegram from the U.S. Secretary of State to the Ambassador in the United Kingdom, Number 5852, dated 26 July 1944, in United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1944: Europe*, Volume IV (Washington: U.S. Government Printing Office, 1966), 751.

formed by the Swiss Government in the late 1990s to produce an impartial record of Swiss wartime practices, concluded that export of war material to Germany did occur under the auspices of the Swiss Federal Government, and therefore “constitute a violation of neutrality.”²²⁴ However, the earlier exports to the Allied nations were equivalent violations. It is also important to note that Switzerland, with a massive new influx of refugees, was short of food, and had no coal or fuel resources.²²⁵ Swiss economic cooperation with the Axis must be viewed in this light, as Switzerland lacked many of the basic commodities necessary for subsistence. Complete encirclement by the axis left the nation with no viable alternatives. According to the ICE, “doing business with the enemy” was justified by the need to “supply the population with food and purchasing power.”²²⁶

Even in late 1944 and early 1945 when the end of the war was in sight, the Allies still believed that the type and quantity of Swiss exports to Germany were aiding the enemy. In December 1944, U.S. Foreign Economic Administrator Leo Crowley, informed Secretary of State Joseph Grew that he was “greatly disturbed about the lack of progress in economic warfare negotiations with Switzerland,” and recommended “immediate measures” to force the Swiss “to terminate at once their aid to our enemies.”²²⁷ In response, Grew rejected Crowley’s suggestion and conveyed that “For political reasons and for reasons arising out of the benefits to us of Switzerland’s neutral

²²⁴ ICE, *Switzerland, National Socialism*, 401.

²²⁵ Halbrot, *The Swiss & The Nazis*, 132.

²²⁶ ICE, *Switzerland, National Socialism*, 178-9.

²²⁷ Letter from the U.S. Foreign Economic Administrator to the U.S. Secretary of State, dated 29 December 1944, in United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1945: Europe*, Volume V (Washington: U.S. Government Printing Office, 1967), 765-6.

position and future potential usefulness in the economy of Europe it is inadvisable to place too great pressure upon the Swiss government at this time in order to attain pure economic warfare objectives.”²²⁸ Grew’s stance demonstrated that Washington afforded the Swiss special diplomatic considerations because Switzerland filled humanitarian mandates, among other services. Former Secretary of State Cordell Hull wrote in his memoirs:

“Toward Switzerland . . . our policy differed somewhat from that which we practiced toward other neutrals. We felt it essential, in presenting our demands and in exercising pressure to reduce Swiss exports of strategic manufactured goods to Germany, to avoid pushing Switzerland into a diplomatic rupture, or worse, with Germany. This was the reason that Switzerland, representing us diplomatically in enemy countries, was our sole link with them. We had to depend upon her representatives to ensure the welfare of American prisoners of war.”²²⁹

Hull’s remarks were intended to explain the lack of ultimatums in U.S. economic pressure against Switzerland, but they contextualized the diplomatic negotiations between the U.S. and Swiss governments. U.S. diplomats could not afford to present unconditional demands to their Swiss counterparts, whether the concern was economic accommodation with Germany or unfavorable treatment of U.S. internees.

Postwar Consequences

The issue of internment rights remained alive in post-war reconsiderations of international law. The gaps in international law for military internees in World War II led directly to the explicit codification of full POW rights to military internees under Article 4.B (2) of the 1949 Geneva Convention (III) Relative to the Treatment of

²²⁸ Telegram from the U.S. Secretary of State to the U.S. Foreign Economic Administrator, dated 15 January 1945, in United States Department of State, *Foreign Relations of the United States Diplomatic Papers, 1945: Europe*, Volume V (Washington: U.S. Government Printing Office, 1967), 770.

²²⁹ Cordell Hull, *The Memoirs of Cordell Hull*, Vol. II (New York: Macmillan Co., 1948), 1348-9.

Prisoners of War.²³⁰ The 1947 Conference of Government Experts for the Study of the Conventions for the Protection of War Victims convened to revise the 1929 Geneva Convention expanded the list of persons protected by the Convention to include military internees, among other categories of combatants, because these personnel “should normally have been considered as [POWs], but who suffered hardship through the fact that they were not explicitly named in the Convention.”²³¹ The Conference considered this protection a minimum standard of treatment, “as military internees would as a rule be better off in a neutral country than in enemy territory.”²³² The drafters of earlier conventions simply never envisioned a scenario where a supposedly neutral country would treat internees worse than POWs, particularly a neutral protecting power charged with enforcing POW protection. This explains why it took until the 1949 Convention to explicitly codify the requirement that military internees receive the same rights as POWs. Despite the Swiss government’s stance in 1944 that internees should not receive protection under the 1929 Convention, at the time of signature they made no reservations to the revised 1949 Convention that included protection for internees.²³³ The treatment of military internees in Switzerland was certainly not the only example that convinced the ICRC to recommend that internees be explicitly guaranteed POW rights in the 1949 Convention. After the Italian Army capitulated in 1943, Germany threatened to classify

²³⁰ *The 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War; August 12, 1949* (Geneva: 1949), in *The Avalon Project*, available at: http://avalon.law.yale.edu/20th_century/geneva03.asp.

²³¹ ICRC, *Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva: ICRC, 1947), 106.

²³² *Ibid.*, 112.

²³³ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I (Berne: Federal Political Department, 1950), 342.

captured Italian soldiers as “interned military personnel” with the specific intent of denying them the legal protections of POWs. Only the intervention of the ICRC averted this threat.²³⁴

Although it is arguable that the 1929 Geneva Convention intended full POW protections for internees, the ICRC nevertheless seemed to accept the position of the Swiss government until the revision of the Geneva Conventions at the end of the war. An ICRC report prepared for the 1947 Conference of Government Experts determined that although “military internees and escaped [POWs] in neutral countries should enjoy the same treatment as [POWs],” the lack of this protection “did not, on the whole, give rise to difficulties during the war.”²³⁵ In the case of U.S. internees in Switzerland, the ICRC later judged that “only the disciplinary punishments for attempted escape were more severe” and that their overall treatment “was by no means less favourable than that laid down by the 1929 Conventions.”²³⁶ Based on the ICRC inspection reports, it is reasonable to conclude that the ICRC never received any alarming reports over conditions in camps such as Wauwilermoos. It is likely that the ICRC was more concerned with its mandate to protect POWs held in belligerent countries, since they would ostensibly be the most apt to suffer abuse.

In fairness, the Swiss government eventually did address misconduct at Wauwilermoos, although too late for U.S. internees in the camp. On February 20, 1946, Captain Andre Béguin was charged by a court-martial of thirteen violations of the Swiss Military Penal Code, including the suppression of a prisoner’s complaint. Although the

²³⁴ Schwarz, *The Eye of the Hurricane*, 137.

²³⁵ ICRC, *Conference of Government Experts*, 112.

²³⁶ ICRC, *Activities during the Second World War*, Vol. 1, 559.

court acquitted Béguin of the suppression charge, he was found guilty of multiple offenses reminiscent of his past history of financial mismanagement. Béguin was convicted of ten charges, including fraud, embezzlement, bribery, abuse of authority, forgery, and disobedience.²³⁷ According to a local newspaper, he had defrauded over 15,000 Swiss Francs from 20 individuals, including officers, noncommissioned officers, physicians, the head of the military bar, and internees under his charge. The newspaper called him a "humbug" and "bluffer" who "likes to live beyond his means."²³⁸ The court sentenced Béguin to three and a half years in prison, stripped him of his rank, expelled him from the Swiss Army, and terminated his civil rights for a period of five years.²³⁹

General Dollfus was relieved of his duties as the FCIH commissioner in November 1944, the day after the American internees were paroled from Wauwilermoos.²⁴⁰ Dollfus continued in his position as the Swiss Army adjutant general for the remainder of the war and was eventually promoted to Lieutenant General.²⁴¹ The FCIH was realigned under the Swiss Federal Military Department and administered by Colonel René Probst until the FCIH was liquidated in December 1945. He was apparently the *de facto* FCIH commissioner, as no official was formally appointed to this

²³⁷ *Schweizerische Eidgenossenschaft Urteil des Divisionsgericht 8 im Straffalle des Hptm. Andre Béguin*, dated 20 February 1946, SFA, Box E5330, Versement 1975/95, Vol. 1945/2518I, p. 110-12.

²³⁸ "Der Fall des Hptm. Beguin vor Divisionsgericht 8," *Neue Zürcher Zeitung*, 19 February 1946, Blatt 6.

²³⁹ *Schweizerische Eidgenossenschaft Urteil des Divisionsgericht 8 im Straffalle des Hptm. Andre Béguin*, dated 20 February 1946, SFA, Box E5330, Versement 1975/95, Vol. 1945/2518I, p. 110-12.

²⁴⁰ Letter from Oberstdivisionär Ruggero Dollfus to Major W. Huber, dated 20 Nov 1944, SFA, Box E5791 1000/849 652.

²⁴¹ Oberstkörpskommandant Dollfus, *Bericht des Generaladjutanten der Armee*, in Beilage II zu: *General Henri Guisan, Bericht an die Bundesversammlung über den Aktivdienst 1939-1945*, SFA, p. 297, available at: [http://www.admin.ch/alexandria/Kdt% 20LW% 201939_1945.pdf](http://www.admin.ch/alexandria/Kdt%20LW%201939_1945.pdf).

position after Dollfus' departure.²⁴² Probst was tainted by another FCIH mishap in 1945, the so-called "internment commission scandal," which saw an FCIH intermediary embezzle a half million Swiss francs from the federal treasury. Minister Kobelt held Probst responsible, which elicited the bitter response by Probst that "we leave [wartime service] as defamed soldiers, vilified beyond our borders."²⁴³

American internees like Daniel Culler eventually returned to the United States wondering "why Switzerland, the headquarters of the International Red Cross, would not allow foreign military prisoners held in Swiss prisons to receive Red Cross food packages or to be visited by a Red Cross representative."²⁴⁴ Although few American airmen in Switzerland likely suffered comparable physical and emotional trauma to what Culler experienced, many nevertheless developed the same doubts about the Swiss commitment to neutrality and humanitarian principles. In 1995, the publication of Culler's memoirs prompted a statement from Kaspar Villiger, the President of Switzerland. Villiger expressed regret that Culler was sentenced to prison for an offense that "was not defamatory," and told him that "you and your comrades deserve the gratitude of the Swiss people" for helping to defeat fascism in Europe. However, he also invoked the same argument used to justify the internment policy during the war, informing Culler that his "sentence reflects the important pressure exercised by other countries on Switzerland... The Swiss authorities were afraid that a less severe attitude toward

²⁴² Probst, *Schlussbericht des Eidg. Kommissariates für Internierung und Hospitalisierung*, 9.

²⁴³ Grivat, *Internés en Suisse*, 69.

²⁴⁴ Culler, *Black Hole of Wauwilermoos*, 382.

attempts of interned military personnel to escape would be interpreted as preferential treatment by the other warring party.”²⁴⁵

Conclusion

The Swiss refusal to afford interned American airmen equivalent rights as POWs under the 1929 Geneva Convention was a questionable decision under international law at the time. Ironically, the Swiss followed this policy despite their extensive history of neutrality, association with the ICRC, and a position of moral authority that seemingly presented compelling incentives to adhere to the full spirit of international treaties governing prisoner treatment. Yet a decision to fully rescind the contested internment policy may also have produced consequences, which put the Swiss government in an untenable position. The government faced a choice between violating the spirit of the law and tarnishing Swiss neutrality, or following the spirit of the law and risking possible reprisals by the Nazis.

Swiss and U.S. diplomats clearly operated in a complex web of competing interests, all of which were interrelated. To claim that the Swiss legal policy over internment was pursued for its own sake and was divorced from exterior influences would be a mischaracterization, just as the U.S. response to this policy was also influenced by competing policy objectives. In the early stages of the war the Swiss government faced the prospect of German invasion if it adopted a seemingly over-benevolent stance toward the Allies, although one could argue that adjustment of Swiss internment policies was unlikely to disrupt this balance by 1944. Political retribution for perceived negligence and resulting damages from the Allied Strategic Bombing Campaign was almost certainly a stronger influence, as the Swiss sought leverage to curb

²⁴⁵ Ibid., 386.

accidental aerial attacks against Swiss targets. Conversely, U.S. diplomats limited the pressure they applied to solve the internment crisis, even near the end of the war when Allied victory was considered imminent. The U.S. diplomats feared using political ultimatums to enforce Swiss compliance with international law, being unwilling to risk sacrificing Switzerland's value as a communications hub, intelligence center, and protecting power for U.S. POWs in Europe.

Until late 1944, the Swiss chose to interpret the gray area of unenumerated POW rights in a manner that justified their recalcitrant internment policies. In doing so they tacitly enabled and condoned the resulting prisoner mistreatment. Many officials in the Swiss government were well aware of the shortcomings of the military justice system, which disproportionately sentenced internees who attempted escape to lengthy periods in Wauwilermoos. Their inaction seemed contrary to the Swiss commitment to humanitarian principles. However, the response to the treatment of internees was not monolithic; some Swiss citizens and military officers correctly recognized that confinement which disregarded humanitarian principles flew in the face of the Swiss mandate to uphold international law. Therefore, they contested the Swiss government's legal interpretation of internee status, hoping to prevent damage to Switzerland's standing as a guardian of humanitarian treaty law. Yet the policy was only moderated after the long term political ramifications became evident, in a manner that ameliorated internment conditions but ceded no ground in the debate over the negotiation of international law. Most American internees were paroled from Wauwilermoos, but the camp continued to operate under the same commander until he was prosecuted after the war ended.

The problems, politics, and consequences of Switzerland's internment policy remain relevant to contemporary armed conflict, even though internees of neutral countries are now explicitly guaranteed rights as POWs in the 1949 Geneva Conventions. Despite the changing face of warfare, in which combatants often lack clear labels such as “belligerent” or “internee,” or even clear mandates as combatants, the exploitation of gray areas in international law to deny prisoner rights still produces similar consequences today. The increasing frequency of conflict involving nonstate actors has promoted a reliance on customary international law over treaty law governing actions in war, since most treaty law only covers conventional conflict between recognized states. Despite ICRC efforts to enumerate standards of state practice in an attempt to define customary international law over intra-state or non-international conflict, proving and enforcing customary law remains extremely difficult.²⁴⁶ The lack of enumeration of humanitarian law for this type of emerging armed conflict makes it much more prone to subjective interpretation, particularly since state practice is inherently a fluid and evolving standard. As a result, the type of negotiation over international law that occurred in Switzerland during World War II is all the more likely to resurface during contemporary conflicts.

After the attacks of September 11, 2001, the U.S. government chose to deny Geneva Conventions protections for detainees at Guantanamo Bay and elsewhere, claiming that terrorists did not fall under the treaties. In doing so, as a minimum, it created "maneuver room" that allowed for the subsequent prisoner abuse perpetrated by

²⁴⁶ Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,” *International Review of the Red Cross*, Volume 87, No. 857 (March 2005), p. 179.

the military and the Central Intelligence Agency, and failed to internally police itself in the absence of impartial observers.²⁴⁷ This outcome demonstrates that the infinite possibilities of combat continue to produce legal loopholes, and states continue to exploit them into the present.

²⁴⁷ This policy was eventually reversed in *Hamdan v. Rumsfeld, Secretary of Defense, et al.* (2006), 69. The Supreme Court determined that Common Article 3 of the 1949 Geneva Conventions applied to nonsignatories to the Conventions, thus requiring the defendant- an al Qaeda affiliate- to be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

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