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## The Nuremberg Military Tribunals and the origins of International Criminal Law

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### INTRODUCTION

The previous chapter discussed the U.S.'s decision to forego a second IMT in favor of zonal trials. This chapter discusses the structure of the Nuremberg Military Tribunals, which conducted those trials. Section 1 examines Ordinance No. 7, the military directive that established the NMT and specified its evidentiary and procedural rules. Section 2 explores the structure and funding of the tribunals' prosecutorial wing, Telford Taylor's OCC. Section 3 focuses on the Military Tribunals themselves – their location; the structure and function of their administrative section, the Central Secretariat; and the selection of judges.

### I. ORDINANCE NO. 7

Article III of Law No. 10 authorized each zone commander, within his zone of occupation, to “cause all persons... arrested and charged” with violating Law No. 10 “to be brought to trial before an appropriate tribunal.”<sup>1</sup> Article III was silent, however, concerning what constituted “an appropriate tribunal.” The U.S. answer came in the form of Ordinance No. 7, which was enacted by General Clay in his role as Military Governor and commander of the U.S. zone on 18 October 1946. Ordinance No. 7's stated purpose was “to provide for the establishment of military tribunals which shall have the power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10.”<sup>2</sup>

The first draft of Ordinance No. 7 was written in July 1946 by Bessie Margolin, who had been seconded to the OCC by the Department of Labor, for whom she worked as an Assistant Solicitor. That draft was then reviewed and revised in August by Telford Taylor, other senior prosecutors in the OCC, and lawyers in OMGUS's Legal Division.<sup>3</sup> The final draft could have been completed sooner than October 18, but Taylor and the others believed that it was important to wait for the IMT to issue its judgment, in case any of the Tribunal's rulings affected the Ordinance.<sup>4</sup>

It is reasonable to suggest that it was inappropriate for the OCC to play such a critical role in drafting the evidentiary and procedural rules that governed their prosecutions. Modern tribunals normally entrust that responsibility to the judges, who – at least in theory – have no vested interest in the outcome of the trials over which they preside.<sup>5</sup> Indeed, Taylor acknowledged in his Final Report that there was “a certain amount of criticism of the set-up on the ground that the prosecution was in too powerful a position from an administrative standpoint,” and that he would not recommend such an arrangement for future tribunals.<sup>6</sup> As he pointed out, however, it would have been difficult to exclude the OCC from the drafting of Ordinance No. 7 – at the time the

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<sup>1</sup> Law No. 10, art. III(1)(d).

<sup>2</sup> Ordinance No. 7, art. I.

<sup>3</sup> TAYLOR, FINAL REPORT, 28 n. 73.

<sup>4</sup> Id. at 28.

<sup>5</sup> See, e.g., ICTY Statute, art. 15; STL Statute, art. 28.

<sup>6</sup> TAYLOR, FINAL REPORT, 106.

ordinance was drafted, no judges had been appointed and the Central Secretariat did not yet exist.<sup>7</sup>

## II. THE OCC

The OCC was divided into two basic sections, what Taylor called the “professional segment” and the “service segment,” respectively.<sup>8</sup> The professional segment was responsible for preparing cases for trial and presenting them in court; the service segment was responsible for the day-to-day administration of the OCC and for providing logistical support to the professional segment. Both sections were ultimately responsible to Taylor.

### A. Structure

#### 1. The Professional Segment

For the first few months of the OCC’s existence, Taylor’s Deputy to the Chief Counsel, Josiah M. DuBois, Jr., was in charge of the professional segment. In 1944, DuBois had written the famous “Report to the Secretary on the Acquiescence of This Government in the Murder of the Jews,” which led Henry Morgenthau, Jr., the Secretary of the Treasury, to establish the War Refugee Board. He joined the OCC as Deputy to Chief Counsel in January 1947<sup>9</sup> and briefly functioned, in Taylor’s absence, as Acting Chief of Counsel in April 1948.<sup>10</sup>

In early 1947, Taylor eliminated the Deputy to the Chief Counsel position<sup>11</sup> and assigned DuBois to be Deputy Chief Counsel – the title given to the individual in charge of a particular trial – in *Farben* (Case No. 6),<sup>12</sup> an experience that would ultimately lead DuBois to write *The Devil’s Chemists*, the seminal account of that trial. From that point on, the heads of the various divisions and trial teams in the professional segment reported directly to Taylor, although a new position, “Executive Counsel,” was created to coordinate their work and to oversee the assignment of personnel to them.<sup>13</sup> Four different individuals served as Executive Counsel during the life of the OCC, the most notable of whom was Benjamin B. Ferencz. Ferencz was one of the youngest members of OCC; he was only 23 when he served as the Chief Prosecutor in *Einsatzgruppen* (Case No. 9).<sup>14</sup>

The professional segment of the OCC initially consisted of seven different groups. Four were legal divisions: the Military Division, the Ministries Division, the SS Division, and the Economics Division. Their mission was “to secure, analyze, and prepare evidence to be used in the prosecution of major war criminals in certain related fields, usually constituting more than one case.”<sup>15</sup> Two were trial teams, one responsible for preparing *Farben*, the other responsible for preparing *Flick*. Finally,

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<sup>7</sup> Id. at 38.

<sup>8</sup> Id. at 39.

<sup>9</sup> Id. at 3.

<sup>10</sup> OCCWC General Order No. 6, 12 April 1948, NA-238-145-2-6.

<sup>11</sup> TAYLOR, FINAL REPORT, 39.

<sup>12</sup> Background Information for Correspondents, 3.

<sup>13</sup> TAYLOR, FINAL REPORT, 39.

<sup>14</sup> Id.

<sup>15</sup> OCCWC Organizational Memo, undated, NA-260-183a1-1-1, at 8.

an Evidence Division located suspects and witnesses and managed the evidence used by the legal divisions and the trial teams.<sup>16</sup>

#### **a. Military Division**

Taylor distributed an organizational memo to his staff on 17 May 1946 indicating that “[t]hree groups will concern themselves with the analysis and preparation of evidence against potential war criminals *other* than industrialists and financiers.”<sup>17</sup> The first group, the Military Division, had a dual mandate: preparing the “organizational cases” – those involving members of the organizations, such as the Gestapo, then being prosecuted by the IMT<sup>18</sup> – and developing “evidence concerning military and naval war criminals.”<sup>19</sup>

The Military Division spent the summer of 1946 interviewing IMT defendants, including Hermann Goering and Albert Speer, about other war-crimes suspects.<sup>20</sup> The Military Division then prepared both *Milch* (Case No. 2) and the *Hostage* case (Case No. 7), presenting the former in its entirety and presenting the latter until late 1947, when its chief was forced to resign because of illness. The Military Division then merged with the SS Division, and the resulting “Military & SS Division” completed the *Hostage* case and prepared and presented *High Command* (Case No. 12).<sup>21</sup>

#### **b. Ministries Division**

The Ministries Division was primarily concerned with preparing cases against “leading officials of the German Foreign Office,”<sup>22</sup> although it was also involved in investigating officials in a number of economic ministries.<sup>23</sup> The Division went through three different Directors, the most important – and to many Germans, the most infamous<sup>24</sup> – of whom was Robert M.W. Kempner, appointed in February 1947.<sup>25</sup> Kempner was a German Jew who had held a number of positions in the Prussian government before 1933, including serving as Chief Legal Advisor to the State Police Administration,<sup>26</sup> prior to being expelled from Germany because of his opposition to National Socialism.<sup>27</sup> Kempner emigrated to America in 1940 where, as a member of the Justice Department, he was involved in preparing trials against German agents involved in espionage, propaganda, and sabotage within the continental U.S.<sup>28</sup> His extensive knowledge of German law and politics led Justice Jackson to appoint him to the IMT staff after the war ended; in addition to being

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<sup>16</sup> TAYLOR, FINAL REPORT, 39-40.

<sup>17</sup> OCCWC Organizational Memo No. 1, 17 May 1946, NA-153-1018-1-85-2, at 2 (emphasis added).

<sup>18</sup> John Q. Barrett, *Henry T. King, Jr., at Case, and on the Nuremberg Case*, 60 CASE W. RES. L. REV. 1, 5 (2010).

<sup>19</sup> Organizational Memo No. 1, at 2.

<sup>20</sup> Barrett, 5.

<sup>21</sup> TAYLOR, FINAL REPORT, 39-40.

<sup>22</sup> Organizational Memo No. 1, at 2.

<sup>23</sup> TAYLOR, FINAL REPORT, 40.

<sup>24</sup> PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 149 (2001).

<sup>25</sup> OCCWC General Order No. 6, 25 Feb. 1947, NA-238-145-2-6.

<sup>26</sup> Background Information for Correspondents, 3.

<sup>27</sup> MAGUIRE, 149.

<sup>28</sup> Background Information for Correspondents, 3.

heavily involved in interrogations, he presented the prosecution's case against Frick, the "Protector" of Bohemia and Moravia.<sup>29</sup>

The Ministries Division prepared and presented the *Justice* case (Case No. 3), which ran from March to October 1947. The Division was then redesignated the "Political Ministries Division" and its personnel who were investigating the economic ministries were reassigned, along with the personnel of the Dresdner Bank Trial Team (discussed below), to a new "Economic Ministries Division."<sup>30</sup> The two divisions joined forces in 1948 to present the *Ministries* case.<sup>31</sup>

### c. SS Division

The SS Division was responsible for preparing cases involving "the leaders of the SS and the leaders of the German health and medical service."<sup>32</sup> The SS Division was the most active of the divisions, preparing and presenting the *Medical* case, *Pohl* (Case No. 4), *RuSHA* (Case No. 8), and *Einsatzgruppen*.<sup>33</sup> The SS Division was also involved, as noted above, in presenting *High Command* after it merged with the Military Division.

### d. Economics Division

The Economics Division was responsible for preparing cases "against Nazi economic leaders involved in preparations for aggressive war, slave labor, and spoliation of property in occupied countries."<sup>34</sup> Its Director was Drexel Sprecher, who had spent the war in the Army and working for the OSS.<sup>35</sup> Sprecher had joined the IMT in June 1945 and had helped present the cases against Schirach, the Nazi Youth Leader, and Fritzsche, the head of the Reich Propaganda Ministry's Radio Division.<sup>36</sup> He had also moonlighted with the SPD from February 1946 on, "concentrating on a future case against Nazi industrialists" at Taylor's direction.<sup>37</sup>

The Economics Division began work by sending teams throughout the European Theater to collect documents and conduct interrogations.<sup>38</sup> Based on its investigations, the Division decided to supplement the *Flick* and *Farben* cases – which had been planned from the inception of the OCC – by pursuing cases against the leading officials of the Krupp combine and the Dresdner Bank.<sup>39</sup> The Economics Division was then dissolved in May 1947, with its personnel distributed among the existing *Flick* and *Farben* teams and the newly created Krupp and Dresdner Bank teams.<sup>40</sup>

### e. Trial Teams

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<sup>29</sup> Id.

<sup>30</sup> TAYLOR, FINAL REPORT, 40.

<sup>31</sup> Undated Organizational Memo, 8.

<sup>32</sup> Organizational Memo No. 1, at 2.

<sup>33</sup> TAYLOR, FINAL REPORT, 39-40.

<sup>34</sup> OCCWC Memo, Economics Division, NA-238-165-7-7.

<sup>35</sup> DU BOIS, 53.

<sup>36</sup> Background Information for Correspondents, 4.

<sup>37</sup> Memorandum from Sprecher to Jackson, 14 Feb. 1946, TTP-20-1-3-34, at 1.

<sup>38</sup> OCCWC Memo, Economics Division, 1.

<sup>39</sup> Undated Organizational Memo, 8.

<sup>40</sup> OCCWC Memo, Dissolution of the Economics Division, 6 May 1947, NA-238-145-2-6.

As noted, Taylor created the Farben and Flick trial teams when the OCC began work. The Krupp team was not created until May 1947, even though the Americans had been committed to prosecuting Alfried Krupp since the Gustav/Alfried fiasco at the IMT. The OCC had nevertheless targeted the younger Krupp from the beginning: the Farben trial team had additionally been given responsibility for undertaking “the analysis and preparation for use of material concerning Alfried Krupp.”<sup>41</sup>

The Dresdner Bank team was also created in May 1947. The team was consistently plagued by staffing problems: the Economics Division had initially assigned only a “skeleton force” to the case in mid-December 1946,<sup>42</sup> and although those numbers had improved when the Economics Division dissolved – six attorneys and 14 research analysts spread out between Nuremberg and Berlin – most of the lawyers “had little experience and, excluding service in the armed forces, [were] fresh from the law schools,” while the research analysts were “with certain exceptions a mediocre group.”<sup>43</sup> All in all, “the Dresdner Bank team [was] much worse off than the other economic case teams.”<sup>44</sup>

#### **f. Evidence Division**

The Evidence Division, which was first established as part of the SPD,<sup>45</sup> was responsible for supporting the work of the legal divisions and the trial teams. The Division was divided into three branches. The most important was the Interrogation Branch, created in June 1946, which conducted interrogations of both witnesses and defendants.<sup>46</sup> 17 interrogators worked full-time in the Interrogation Branch in October 1946; that number grew to 24 by June 1947 and then decreased to 12 by June 1948, as the final NMT trial, *High Command*, was winding down.<sup>47</sup> All of the interrogators were highly skilled – requirements for the position included extensive interrogation experience; fluency in speaking, reading, and writing both German and English; a “broad background” in German social, economic, and political conditions at the time; and a “sound grounding” in the structure and activities of the Nazi government.<sup>48</sup> The Interrogation Branch conducted a staggering number of interrogations during its existence – 9,456 in all.<sup>49</sup> Indeed, from October 1946 to December 1947, the Branch’s interrogators averaged 370 interrogations per person.<sup>50</sup>

The Evidence Division also included an Apprehension and Locator Branch, which – as its name indicates – was initially responsible for locating individuals being investigated by the OCC and was later charged with ensuring that witnesses and defendants were apprehended, detained, and either transferred or (when located in a different occupation zone) extradited to Nuremberg for use by the prosecution.<sup>51</sup>

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<sup>41</sup> Organizational Memo No. 1, at 1.

<sup>42</sup> Memo from Ragland to Taylor, 15 Aug. 1947, TTP-5-1-2-20, at 2.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> *Id.*

<sup>45</sup> OCCWC, Interrogation Branch, Evidence Division, TTP-5-1-3-39, at 1.

<sup>46</sup> TAYLOR, FINAL REPORT, 40.

<sup>47</sup> OCCWC, Interrogation Branch, Evidence Division, 1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> TAYLOR, FINAL REPORT, 45.

<sup>51</sup> Undated Organizational Memo, 3.

The third branch of the Evidence Division was Document Control, which had two primary responsibilities: protecting and registering all of the documentary evidence brought to Nuremberg, and assembling that evidence into “document books” that the prosecutors could introduce at trial.<sup>52</sup>

### **g. Special Projects Division**

During the course of the NMT trials, German prosecutors frequently asked the OCC for evidence in its possession relating to defendants involved in the denazification program. In response to those requests, Taylor created – at Ben Ferencz’s urging<sup>53</sup> – a fifth division of the professional segment, Special Projects, in June 1947.<sup>54</sup> The Special Projects Division had a straightforward mission: “the delivery of evidence collected in Nurnberg to German Prosecution agencies.”<sup>55</sup> Despite its small size – a Director, a Deputy Director, a research analyst, an administrative assistant, and a secretary<sup>56</sup> – the Division was extremely successful: it not only “procured all requested evidence and screened and collected evidence on every individual which passed the Nurnberg jail,”<sup>57</sup> it transferred approximately 300 cases to German and Allied agencies and provided information in approximately 200 other cases to various U.S. agencies, such as the War Crimes Branch of OMGUS, the Decartelization Branch, and the the Restitution Branch.<sup>58</sup>

## **2. The Service Segment**

The service segment of the OCC, which was overseen by an Executive Officer, initially consisted of four divisions: the Adminstrative Division, the Reproduction Division, the Signal Division, and the Language Division. A fifth, the Publications Division, was created in 1948 as the OCC neared deactivation.

### **a. Administrative Division**

The Administrative Division provided basic administrative services to the OCC. It consisted of five branches: an Adjutant and Military Personnel Branch, which maintained personnel records for OCC employees who were in the military; a Finance Branch; a Civilian Personnel Branch, which maintained personnel records for civilian OCC employees; a Fiscal, Budget, and Personnel Control Branch, which prepared budgets for OMGUS; and a Liasion Branch, which dealt with all requests to the Nuremberg Military Post – the post office – for accommodations, transportation, and supplies.<sup>59</sup> The Director of the Administrative Division also oversaw the activities of a branch office in Frankfurt and a Liasion Officer in Berlin.<sup>60</sup>

### **b. Reproduction Division**

The Reproduction Division was responsible for photostating and mimeographing documents used by the OCC, including trial transcripts and documents offered into

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<sup>52</sup> Id. at 41.

<sup>53</sup> Lang Memo on History of Special Projects Division, 31 Aug. 1948, NA-260-186a1-99-14, at 1.

<sup>54</sup> Id.

<sup>55</sup> Lang Memo, 1.

<sup>56</sup> Id. at 2.

<sup>57</sup> Id. at 3.

<sup>58</sup> Id.

<sup>59</sup> TAYLOR, FINAL REPORT, 42.

<sup>60</sup> Undated Organizational Memo, 4.

evidence. It also prepared the various maps, charts, and displays the prosecutors used for demonstrative purposes at trial.<sup>61</sup> Not including the *Ministries* case, the Reproduction Division produced 2,296,958 photostats, 640,000 offset prints, and 950,000 stencils during its lifetime – a stack that, by the Public Information Office’s estimate, would have reached 13.4 miles high.<sup>62</sup>

### **c. Signal Division**

The Signal Division maintained the OCC’s communications equipment and installed the simultaneous-translation system that the tribunals used in the various courtrooms.<sup>63</sup>

### **d. Language Division**

The Language Division, the largest in the service segment, had what Taylor described as a “truly formidable” task: “the translation into German of all English documents and into English of all German documents... and the furnishing of all court interpreting services and of court reporting in both English and German.”<sup>64</sup> Given the complexity of the trials, translators were divided into groups and asked to translate related documents, allowing them to develop expertise with specific military, legal, and medical terminologies.<sup>65</sup> Although the Language Division reported to the Executive Officer on administrative matters, it reported directly to Taylor regarding all policy matters.<sup>66</sup>

### **e. Publications Division**

In late summer 1948, as the last of the trials were winding down, Taylor created a Publications Division. That division was responsible for preparing the indictments, important trial records, and judgments for later publication in English and German.<sup>67</sup> Publication issues are dealt with at greater length in Chapter 16.

## **3. Public Information Office**

In addition to the professional and service segments of the OCC, a Public Information Office was directly responsible to Taylor. The Public Information Office, which had a staff of six, provided journalists covering the NMTs with documents and evidentiary material and otherwise helped journalists understand the legal issues involved in the trials.<sup>68</sup>

## **4. Satellite Branches**

Although most of its work was conducted out of its office at Nuremberg, the OCC maintained four satellite branches in other cities. The primary satellite, established in summer 1946, was located in Berlin. The Berlin Branch was created to process the

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<sup>61</sup> TAYLOR, FINAL REPORT, 41-42.

<sup>62</sup> OCCWC, Statistics of the Nurnberg Trials, 7.

<sup>63</sup> TAYLOR, FINAL REPORT, 42.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id. at 41.

<sup>68</sup> Id. at 43.

vast number of captured German documents located in Berlin and to liaise with OMGUS Headquarters.<sup>69</sup> Another satellite branch was located in Frankfurt; it analyzed the locally-kept records of I.G. Farben. Finally, OCC representatives were stationed in Paris to liaise with the Supreme Headquarter of the Allied Expeditionary Forces and in Washington to deal with documents held in the Pentagon's German Military Documents Section.<sup>70</sup>

## **B. Staffing**

### **1. Prosecutors**

The OCC employed 94 prosecutors during its existence – less than 20% of its total staff. One prosecutor worked on eight cases, eight prosecutors worked on three cases, and 19 prosecutors worked on two cases.<sup>71</sup> The number of prosecutors varied significantly by trial. 34 attorneys were involved in the *Ministries* case, by far the largest staff. Only five attorneys, by contrast, were involved in the *Justice* case. After *Ministries*, the largest staffs were involved in the industrialist cases: 11 in *Flick*, 13 in *Farben*, and 12 in *Krupp*.<sup>72</sup> Notably, other than Taylor, all of the prosecutors were civilians during the trials.<sup>73</sup>

Taylor never publicly discussed whether he was satisfied with the prosecutors that worked in the OCC. On the eve of the OCC's creation, however, he wrote to Howard C. Petersen, the Assistant Secretary of War, to express his disappointment with the attorneys recruited by OMGUS's War Crimes Branch. Taylor didn't pull any punches. What he needed, he said, were "a lot of bright young boys and... two or three really outstanding trial men." Instead, with a few notable exceptions, the War Crimes Branch had given him either "utterly vacuous political hacks" or "the middle-aged in-between variety who cannot be given dirty work and are not good enough to trust with solo flights."<sup>74</sup>

### **2. Foreign Delegations**

A number of countries sent delegations to Nuremberg to assist the OCC. Delegations from France, Poland, Czechoslovakia, and the Netherlands remained in Nuremberg throughout the trials; delegations from Norway, Greece, Yugoslavia, and Belgium watched one or more trials. The delegations varied significantly in size: France sent 72 people, while Czechoslovakia, the Netherlands, and Greece each sent eight.<sup>75</sup> According to Taylor, "[b]oth the permanent and the temporary foreign delegations were of great assistance to the prosecution in ascertaining the facts concerning crimes and atrocities alleged to have been committed in countries which they represented and in procuring documents and witnesses for the court proceedings."<sup>76</sup>

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<sup>69</sup> JOHN MENDELSON, TRIAL BY DOCUMENT: THE USE OF SEIZED RECORDS IN THE UNITED STATES PROCEEDINGS AT NURNBERG 58 (1988).

<sup>70</sup> *Id.*

<sup>71</sup> Background Information for Correspondents, 1.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> TAYLOR, FINAL REPORT, 43.

<sup>74</sup> Letter from Taylor to Petersen, 30 Sept. 1946, TTP-20-1-3-34, at 3.

<sup>75</sup> BLOXHAM, 41.

<sup>76</sup> TAYLOR, FINAL REPORT, 46.

In addition to sending the largest delegation, France was also the most interested in becoming formally involved in the trials. In October 1946, the Ministry of Justice asked the OCC to permit it to designate two French attorneys to join the prosecution staff in the *Medical* case. Although there is no evidence that the French attorneys ever participated in that trial, M. Charles Gerthoffer, who had been France's assistant prosecutor at the IMT, later addressed the Tribunal and questioned a witness in *Ministries*.<sup>77</sup>

Britain also briefly sent a delegation to the OCC. In an attempt to spur British interest in the NMT trials, Taylor had originally proposed having a British prosecutor participate in *Krupp*, perhaps alongside a French and Soviet prosecutor. The Foreign Office was lukewarm at best about the idea; instead, as a "palliative to OMGUS," it dispatched an official observer, Gordon Hilton, to the OCC for a renewable period of three months.<sup>78</sup> Hilton was "dubious about the utility of his own position, and equivocal about the trials themselves"; less than two weeks after his arrival, he said he would rather return to Britain on unpaid leave than remain in Nuremberg.<sup>79</sup> Nevertheless, he did not leave the OCC until he had witnessed the three industrialist trials.<sup>80</sup>

### 3. Female Prosecutors

Taylor was clearly ahead of his time when it came to recruiting female prosecutors. No woman ever spoke at the IMT, either for the U.S. or for one of the other Allies. By contrast, Taylor's prosecution staff included nearly a dozen women, and most of those women appeared as counsel in one of the trials.<sup>81</sup> Indeed, only five trials – *Pohl*, *Flick*, *Hostage*, *Einstazgruppen*, and *High Command* – did not include a female prosecutor. Esther J. Johnson appeared at the *Medical* trial and in the *RuSHA* case; Dorothy M. Hunt appeared in *Milch*; Sadie B. Arbuthnot appeared in the *Justice* case; Mary Kaufman, who had worked for the National Labor Relations Board, and Belle Mayer, who had represented the Treasury Department at the London Conference, appeared in *Farben*; Cecelia H. Goetz appeared at the *Krupp* trial; and Dorothea G. Minskoff appeared in *Ministries*. Women also dominated the Economics Division, which figured prominently in the OCC's early planning: when the division was dissolved and its personnel reassigned, three of the four attorneys – Sadi Mase, Mary Bakshian, and Cecelia Goetz – and five of the 14 research analysts were women.<sup>82</sup>

Cecelia Goetz's role in the OCC was particularly notable. Goetz had stellar credentials: she had graduated second in her class from NYU Law School, had been Editor-in-Chief of the law review – a first in American legal education, at least among the major law reviews – and had worked during the war as an attorney in the Civil Division of the Department of Justice.<sup>83</sup> The War Department initially resisted Taylor's desire to hire her to work as a prosecutor, a senior-level position in the OCC,

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<sup>77</sup> Id. at 29 n. 80.

<sup>78</sup> BLOXHAM, 40.

<sup>79</sup> Id. at 41.

<sup>80</sup> Id.

<sup>81</sup> Drexel A. Sprecher, *The Central Role of Telford Taylor as U.S. Chief of Counsel in The Subsequent Proceedings*, 37 COLUM. J. TRANSNAT'L L. 673, 674 (1999).

<sup>82</sup> OCCWC Memo, Dissolution of the Economics Division.

<sup>83</sup> Diane Marie Amann, *Portraits of Women at Nuremberg*, in PROCEEDINGS OF THE THIRD INT'L HUMANITARIAN L. DIALOGS 31, 44 (Elizabeth Andersen & David M. Crane eds., 2010)

but Taylor ultimately prevailed – as he did on a number of occasions when he wanted to hire female prosecutors.<sup>84</sup> Goetz turned down a supervisory role in the Justice Department to join Taylor’s staff, which would have been the first such role ever offered to a woman.<sup>85</sup> Her gamble paid off: she not only appeared regularly in the *Krupp* trial, she was an Associate Counsel, a position that placed her above six male prosecutors.

#### 4. Jews and Communists

The presence of female prosecutors was not the only aspect of the OCC’s staff that caused controversy. Many of Taylor’s prosecutors were Jewish, and many of those, such as Robert Kempner, were German-speaking refugees.<sup>86</sup> As the fear of the Soviets undermined U.S. support for the NMT trials – particularly those involving the industrialists – it became increasingly common to explain the trials as being primarily motivated by Jewish “vindictiveness.”<sup>87</sup> The following statement by Congressman John Rankin, a Democrat from Mississippi, on the floor of the House in November 1947, was typical:

What is taking place in Nuremberg, Germany, is a disgrace to the United States. Every other country has now washed its hands and withdrawn from this Saturnalia of persecution. But a racial minority, two and half years after the war closed, are in Nuremberg not only hanging German soldiers but trying German businessmen in the name of the United States.<sup>88</sup>

Similar sentiments were expressed in December 1948 by two Representatives who believed that rebuilding the German economy was being hindered by the industrialist trials. According to John Taber, a Republican from New York, “the trouble is that they” – OMGUS – “have too many of these people who are not American citizens mixed up in those trials, and they are very hostile to the Germans.” Harold Knutson, a Republican from Minnesota (who, ironically, had emigrated to the U.S. from Norway), agreed and suggested, “[i]s it not just possible that these aliens who are employed by the Government to prosecute these cases do not want to let go of a good thing?”<sup>89</sup> “There is no question about that,” Taber responded. “On top of that, they do not have the right kind of disposition to create good will and get rid of the attitude that some of these people have had.”<sup>90</sup>

Not even General Clay, otherwise a strong supporter of the American war-crimes program, was immune from believing that the supposed excesses of the program were attributable to Jews’ desire for revenge against the Nazis. As he said years later:

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<sup>84</sup> Cecelia Goetz, *Impressions of Telford Taylor at Nuremberg*, 37 COLUM. J. TRANSNAT’L L. 669, 669 (1999).

<sup>85</sup> Amann, 44.

<sup>86</sup> HAGAN, 27; MAGUIRE, 172.

<sup>87</sup> That allegation, it should be pointed out, was not directed only at the Jewish prosecutors. During the *Farben* trial, Drexel Sprecher was accused of being “anti-German” by an assistant to one of the judges. BOWER, 358.

<sup>88</sup> Quoted in *id.* at 351.

<sup>89</sup> MAGUIRE, 174.

<sup>90</sup> *Id.*

The British and French didn't have the same feelings towards the Nazis that we did. Neither one had a huge Jewish population that had developed a hatred you could well understand, which was true in this country. I'm not critical of it at all because I can understand how it developed.... Well, they went too far in their demands for denazification.<sup>91</sup>

Another common – and related – criticism of the OCC was that it had been infiltrated by Communists. On 9 July 1947, for example, Congressman George A. Dondero, a Republican from Michigan, attacked John Patterson, the Secretary of War, for failing to prevent “Communist sympathizers” from infiltrating the Army.<sup>92</sup> Dondero specifically alleged that ten members of the prosecution staff in the *Farben* trial were such sympathizers, including Belle Mayer and Josiah DuBois, whom he described as “a known left-winger from the Treasury Department who had been a close student of the Communist party line.”<sup>93</sup> Incensed, DuBois publicly challenged Dondero to repeat the accusation outside of the House of Representatives, where he would not be immune from a libel claim. Not surprisingly, Dondero refused.<sup>94</sup>

### C. Funding

Very little information exists about the OCC's budget. It is clear, however, that funding problems caused serious harm to the OCC's overall planning. Indeed, one of Taylor's prosecutors, Abraham Pomerantz – a “prize catch” for the OCC, because he was an experienced litigator who had sued German shipping companies as a commercial litigator before the war<sup>95</sup> – eventually quit because he had become convinced, with ample justification, that OMGUS was intentionally underfunding the organization.<sup>96</sup>

Budget discussions first took place in February 1946 at a meeting between Taylor and fiscal officers of the United States Forces European Theater (USFET). The budget proposed at that meeting called for the OCC – then still the SPD – to employ a total of 491 personnel at an overall cost of \$2,953,797. This figure, according to Taylor, did not include the costs of any personnel involved in the IMT trial, which had started a few months earlier, nor did it include the payment of judges, their staff, or employees of the Central Secretariat.<sup>97</sup>

Taylor then traveled to Washington to discuss the OCC's budget with the Assistant Secretary of War and the head of the War Department's Civil Affairs Division. The three men agreed that the NMT trials should involve 200-400 defendants and that the trials should begin as soon as possible after the IMT ended using as many zonal courts

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<sup>91</sup> Quoted in MAGUIRE, 172. During the *Farben* trial, one of the judges also reportedly complained that “[t]here are too many Jews on the prosecution.” JOSIAH E. DUBOIS, *GENERALS IN GREY SUITS* 182 (1953).

<sup>92</sup> JEFFREYS, 318.

<sup>93</sup> Quoted in BOWER, 351.

<sup>94</sup> JEFFREYS, 318.

<sup>95</sup> Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1149 (2009).

<sup>96</sup> *Id.* at 1171-72.

<sup>97</sup> Memo from Taylor to Deputy Military Governor, 27 Aug. 1946, NA-260-183a1-2-11, at 3.

as necessary. They also determined that the OCC would require a “very substantial increase” in the 491 personnel previously discussed with USFET.<sup>98</sup>

After returning to Nuremberg, Taylor submitted a request to USFET to fund 982 positions in the OCC. USFET not only refused to allocate the requested amount, it did not even allocate sufficient funds for the originally-contemplated 491 positions. Instead, in late August, it arbitrarily set the OCC’s budget for fiscal 1947 at \$1,000,000.<sup>99</sup> Even worse, contrary to Taylor’s initial agreement with USFET, that budget was supposed to cover the more than 200 IMT personnel who were expected to continue working on the IMT case well into the new fiscal year, costs that Taylor estimated at a minimum of \$100,000 per quarter.<sup>100</sup>

Taylor immediately fired off an angry memo to Frank Keating, the Deputy Military Governor of OMGUS. Noting that the \$1,000,000 was “far out of line” with what had been discussed previously, Taylor observed that “[t]he result of the budget is that the zonal trial program as outlined in this memorandum, and as generally approved by the War Department, will be delayed unless steps are taken to obtain additional appropriations.”<sup>101</sup> He thus asked OMGUS to approve a revised appropriation of \$3,222,275 – the amount the OCC estimated it needed to finance the six trials it planned to begin in 1947 and to cover the remaining expenses of the IMT trial.<sup>102</sup>

To some extent, the War Department was sympathetic to Taylor and the OCC’s plight. General Clay wrote to Taylor on September 13 to inform him that the War Department was submitting a request for \$3,500,000 “to cover all war crimes trials with major portions for Germany” and was making immediately available to the OCC an additional \$1,000,000, bringing its allocation at the time to \$2,000,000. The latter figure, Clay asserted, “will permit you to instigate immediate action to carry out your program for balance of fiscal year 1947 as submitted to this office.”<sup>103</sup>

Although the \$3,500,000 was a considerable improvement over USFET’s initial \$1,000,000, it still fell short of the OCC’s needs. Taylor’s budget request covered only fiscal 1947; he had also requested an additional \$2,200,000 to cover the first six months of fiscal 1948 – funds that he believed that the OCC would require following the planned completion of the trials by 31 December 1947.<sup>104</sup> The OCC never received the 1948 funds: in mid-1947, Keating told Taylor in no uncertain terms that no additional funding would be forthcoming.<sup>105</sup> The resulting budgetary shortfall, combined with the shortage of available judges and the fact that the trials were progressing much more slowly than had been anticipated – seven would carry over into 1948, and *Ministries* would not end until November 18 – forced Taylor to scale back the OCC’s trial schedule considerably, reducing the number of defendants from his initial estimate of “at least 266” to 185 and the number of trials from 36 to 12.

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<sup>98</sup> Id. at 4.

<sup>99</sup> Id.

<sup>100</sup> Id. at 5.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Memo from Clay to Office of U.S. Chief of Counsel, War Crimes Commission, 13 Sept. 1946, NA-260-183a1-2-11, at 1.

<sup>104</sup> Memo from Taylor to Deputy Military Governor, 27 Aug. 1946, 3.

<sup>105</sup> BLOXHAM, 50.

There is little question that – as Pomerantz insisted – the War Department deliberately underfunded the OCC. Keating later admitted to Clay that he had told Taylor there would be “no exceptions” made to the existing budget because Taylor’s trial schedule was “getting a bit out of hand.”<sup>106</sup> Clay clearly agreed with Keating’s assessment: having described Taylor’s manpower requests as “excessive” as early as September 1946,<sup>107</sup> Clay never pressed the War Department for additional funds for the OCC. According to Bloxham, their reluctance to support Taylor’s more ambitious program came from a familiar source: “the dictates of the Cold War.”<sup>108</sup>

### III. THE MILITARY TRIBUNALS

#### A. The Court

Ordinance No. 7 was silent concerning the location of the tribunals themselves. The NMTs ultimately replaced the IMT in the Palace of Justice in Nuremberg, but that decision was not made until late 1946, when it became clear that a second IMT would not be held. Prior to that time, “[c]onsiderable time and energy” was spent considering alternative locations in Nuremberg and other cities in the American zone, such as Regensburg, Straubing, and Lendshut.<sup>109</sup>

Once the decision was made, the Palace of Justice had to be renovated to accommodate the possibility that six tribunals – Taylor’s initial estimate – might function simultaneously. The IMT courtroom was left untouched, and five new courtrooms were constructed: one that held 24 defendants, like the IMT courtroom, and four that held 14 defendants.<sup>110</sup> IBM then installed the same kind of simultaneous-interpretation equipment in the new courtrooms that had proven so successful in the IMT trial.<sup>111</sup>

#### B. The Secretariat

Article XII of Ordinance No. 7 provided that “[a] Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable.” The Secretary General was selected by and administratively subordinate to OMGUS,<sup>112</sup> but it was “subject to the supervision of the members of the tribunals,” instead of to General Clay.<sup>113</sup> OMGUS formally created the Central Secretariat on 25 October 1946.

Like the Registry at a modern tribunal, the Central Secretariat served as the “administrative and executive arm of the tribunals.”<sup>114</sup> Pursuant to Article XIV of Ordinance No. 7, it was responsible for receiving documents submitted by the prosecution and defense, preparing records of the trial proceedings, and providing

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<sup>106</sup> Id.

<sup>107</sup> Letter from Clay to Heubner, 9 Sept. 1946, quoted in Mark E. Spicka, *The Devil’s Chemists on Trial*, 61 THE HISTORIAN 865, 873 (1999).

<sup>108</sup> BLOXHAM, 51.

<sup>109</sup> Memo from OCCWC to War Dept., 17 Aug. 1946, NA-153-1018-5-85-1, at 1.

<sup>110</sup> TAYLOR, FINAL REPORT, 77. The effect the size of the courtrooms had on the OCC’s case planning is discussed in Chapter 3.

<sup>111</sup> Id. at 20.

<sup>112</sup> Id. at 33.

<sup>113</sup> Ordinance No. 7, art. 13.

<sup>114</sup> Id. at 31.

clerical services to the tribunals. It was also tasked with providing a range of services to defense counsel through the Defense Information Center, which the Secretary General created not long after his appointment.<sup>115</sup> The Defense Center – as it was renamed in early 1947 – served as a liaison between the prosecution and the defense; procured defense witnesses and documents; provided the defense with the prosecution’s evidence and motions; arranged for offices, equipment, billeting, and food; and issued travel order for defense counsel to travel throughout the occupied zone of Germany.<sup>116</sup>

By the time OMGUS created the Central Secretariat, the OCC had been in existence for nearly 10 months. As a result, the OCC “was obliged to undertake numerous functions which, under other circumstances, might more logically have been discharged by the Central Secretariat.”<sup>117</sup> Those functions included procuring court reporters and interpreters, reproducing and distributing documents, and handling the tribunal’s day-to-day administrative matters.

### C. The Tribunals

Article II(b) of Ordinance No. 7 provided that each tribunal “shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor.” Assigning judges to a specific tribunal was actually the second step in the appointment process; the judges themselves were selected by the President in his role as Commander-in-Chief.<sup>118</sup> The tribunals were administratively subordinate to OMGUS, but remained “independent and responsible only to themselves in their judicial actions.”<sup>119</sup>

The OCC had no official role in the selection or designation of judges. Taylor later admitted, however, that General Clay would consult with him when he decided whether to renew a judge’s appointment – a not infrequent occurrence, given that eight of the 32 judges who served on the NMT heard more than one case.<sup>120</sup> In fact, the one judge who served on three cases, Michael Musmanno, actually met with Taylor to address Taylor’s concerns about his “extravagant and often ill-advised displays of feeling” on the bench. According to Taylor, Judge Musmanno “did, indeed, confess error and promised to keep better control of himself. It was on this basis that he remained in Nuremberg; the entire *Milch* tribunal remained on the *Pohl* case, and thereafter Musmanno stayed on as presiding judge in the *Einsatzgruppen* case.”<sup>121</sup> There is no question that Musmanno was a colorful figure – as described in Chapter 4 – and Taylor’s concerns might well have been warranted. But it should go without saying that conditioning a judge’s appointment on the Chief of Counsel’s approval is irreconcilable with judicial independence.

Although the tribunals were military, all of the judges except Musmanno, who was a Naval officer, were civilians. According to Taylor, a number of factors counseled

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<sup>115</sup> Final Report of the Defense Center, XV TWC 187.

<sup>116</sup> Id. at 188.

<sup>117</sup> TAYLOR, FINAL REPORT, 38.

<sup>118</sup> Letter from Young to Sutton, 31 Dec. 1947, NA-153-1018-8-86-2-1.

<sup>119</sup> Id. at 33.

<sup>120</sup> See OCCWC Background Information, Judges of the Six Military Tribunals, undated, TTP-5-1-1-10 (“Background Information on Judges”).

<sup>121</sup> Letter from Taylor to Irving, 9 Mar. 1972, TTP-14-6-10-13, at 3.

making use of civilian lawyers instead of lay military officers – a decision that separated the NMT from other American military tribunals, such as those that were hearing cases at Dachau:

Firstly, while the usual type of issues under the laws and customs of war (such as military courts martial are accustomed to deal with) would undoubtedly arise, the trials under Law No. 10 would also involve numerous other complicated issues of law and fact which could best be dealt with by professional jurists. Secondly, in trials of the scope and importance such as those under Law No. 10, it seemed to me desirable that the reasons for the Tribunals' decisions should be fully set forth in judicial opinions; military courts martial do not customarily render opinions. Thirdly, excellent as the work of military courts-martial usually is, it seemed to me that judgments by professional, civilian judges would command more prestige both within Germany and abroad, in the legal profession and with the general public alike. Fourthly, in any event it would have been extremely difficult to procure enough senior military officers to furnish the necessary number of judges for the Nuernberg tribunal.<sup>122</sup>

Taylor's preference for civilian judges was reflected in Article II(b) of Ordinance No. 7, which provided that "all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court."

The decision to use civilian judges at the NMT has always been criticized. In May 1948, for example, Bishop Theophil Wurm, the chairman of Germany's Protestant Church Council – and one of the most strident and persistent critics of the war-crimes program, as we will see in Chapter 15 – wrote to General Clay to complain that the NMT is "to-day, after the other victor nations have withdrawn, a purely American Tribunal which no longer possesses the prerequisites of a Military Tribunal. By the appointment of civilians as judges for a trial of prisoners of war of officer's rank the Nürnberg Tribunal has departed from the up to now customary practice laid down in the statutes of international law."<sup>123</sup> Wurm's view was echoed nearly 40 years later by Hans Laternser, Field Marshal List's primary attorney in the *Hostage* case, who wrote that "[t]hese courts did not at all fulfil the characteristics of a military court. A court does not become a military court by being so called; a court becomes a military court only by its staffing with officers whose ranks correspond to that of the defendants."<sup>124</sup> Neither man, however, provided any legal support for the claim that a military tribunal had to use military officers as judges. Nor could they – after all, the IMT had itself made use of civilian judges, as General Clay reminded Bishop Wurm in his response to his letter.<sup>125</sup>

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<sup>122</sup> TAYLOR, FINAL REPORT, 28-29.

<sup>123</sup> Letter from Bishop Wurm to Clay, 20 May 1948, in THEOPHIL WURM ET AL., MEMORANDUM BY THE EVANGELICAL CHURCH IN GERMANY ON THE QUESTION OF WAR CRIMES TRIALS BEFORE AMERICAN MILITARY COURTS 25 (1949), NA-238-213-4 ("WURM MEMORANDUM").

<sup>124</sup> Dr. Hans Laternser, *Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders*, in METTRAUX, 483.

<sup>125</sup> Letter from Clay to Bishop Wurm, 19 June 1948, in WURM MEMORANDUM, 33.

Once OMGUS decided to use civilian judges, it had to recruit them. As noted above, Ordinance No. 7 required only five years of practice; no judicial experience was required. Taylor, the War Department, and OMGUS all agreed, however, that it was critically important for the NMT judges to be of the same “standing and prestige”<sup>126</sup> as the judges who served at the IMT, because the “calibre of this tribunal and the history of this trial would lose some of its significance for the future if... individuals in somewhat comparable positions were conducted before tribunals significantly less competent or less carefully selected.”<sup>127</sup> They also believed that the very best judges should be assigned to the industrialist cases, given their complexity and notoriety.<sup>128</sup>

The War Department’s initial planning reflected this desire to recruit prominent judges, but implicitly acknowledged that it would be difficult to do so. A 7 August 1946 memo stated that the War Department wanted to recruit judges in the mold of Jerome Frank, Learned Hand, and, Roscoe Pound.<sup>129</sup> It nevertheless suggested that they staff the tribunals not only with federal trial and appellate judges, but also with “[p]ersons of high standing in the recognized law schools”; state court judges, “including retired judges”; and “members of the Bar of high standing.” Regarding the latter, the memo emphasized that no tribunal should consist solely of practicing attorneys – at a minimum, the presiding judge needed to have judicial experience.<sup>130</sup>

A number of federal judges expressed interest in serving at Nuremberg, including William Denman, a judge on the Ninth Circuit who had been a professor at Hastings College of Law, and Lloyd L. Black, a judge in the Eastern District of Washington who had presided over the trial of Gordon K. Hirabayashi, a Japanese-American who had defied a removal order.<sup>131</sup> In early November, however, the Chief Justice of the Supreme Court, Fred Vinson, refused to make federal judges available to the NMTs. The problem was not that a federal judge could not sit on a military tribunal: Francis Biddle, the Attorney General, had already upheld the legality of Jackson and John J. Parker, a Fourth Circuit judge, serving on the IMT.<sup>132</sup> Instead, Vinson simply believed that the federal judiciary’s increasing backlog of cases in federal court made it impossible to spare any judges.<sup>133</sup>

The War Department was thus left with state judges and members of state Bar associations. Recruitment was initially slowed by OMGUS’s policy of not permitting wives to accompany their husbands to Nuremberg – just as it had delayed Taylor’s acceptance of the Chief of Counsel position – but accelerated when the policy was reversed. 32 judges were ultimately recruited, the first of whom, Walter Beals, a Justice of the Supreme Court of Washington, was appointed by the President on 24 October 1946. 25 of the 32 were state court judges, including 11 who, like Beals, sat on their state’s highest court. The other seven included a law school dean and practicing attorneys.

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<sup>126</sup> Memo from Bontecou to Gunn, 7 Aug. 1946, NA-153-1018-8-84-1, at 1.

<sup>127</sup> Memo from Fahy to Secretary of State, 24 July 1946, NA-153-1018-8-84-1, at 3.

<sup>128</sup> Letter from Taylor to Petersen, 30 Sept. 1946, 2.

<sup>129</sup> Memo from Bontecou to Gunn, 7 Aug 1946, 2.

<sup>130</sup> *Id.* at 1.

<sup>131</sup> Cable from WDSCA to OCCWC, 8 Oct. 1946, NA-153-1018-13-87-2.

<sup>132</sup> Letter from Gunn to Hall, 10 Oct. 1946, NA-153-1018-8-84-1.

<sup>133</sup> Letter from Gunn to Denman, 15 Nov. 1946, NA-153-1018-8-84-1.

The first 24 judges that arrived in Nuremberg were divided into six tribunals, designated Tribunals I-VI. Each consisted of three members and an alternate. Only one alternate judge ever replaced a member of a tribunal: after Carrington T. Marshall, the former Chief Justice of the Ohio Supreme Court, was forced to resign from the *Justice* case because of illness, Justin W. Harding took over for him.<sup>134</sup> The initial six tribunals, which were created between 25 October 1946 and 8 August 1947, heard the first seven NMT cases. Tribunals I-V then heard the final five cases, although they were staffed either solely with new judges or with a combination of old and new judges.

Article XIII of Ordinance No. 7 permitted the tribunals to create a Committee of Presiding Judges “when at least three tribunals [were] functioning.” That Committee – which was responsible for overseeing the Central Secretariat and the day-to-day functioning of the tribunals – was created on 17 February 1947, once Tribunal III was formed to try the *Justice* case. The Committee reached its peak strength between November 1947 and February 1948, when seven tribunals were functioning at once,<sup>135</sup> and held its final meeting on 11 August 1948, after Tribunal II filed its supplemental judgment in *Pohl* and disbanded, reducing the the number of active tribunals to two.<sup>136</sup>

Chapter 4, which contains synopses of the 12 NMT trials, provides information on the judges themselves. It is clear from their overall profile, though, that the War Department failed to recruit judges equivalent to those that served on the IMT. As Sprecher later recalled: “Some of them were very good... On the other hand, there were some judges that weren't. The War Department didn't have any real means of checking them out... It was difficult to recruit top level judges, the Nuremberg Trials were not front page stuff after the first trial.”<sup>137</sup>

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<sup>134</sup> XV TWC 1040.

<sup>135</sup> Id. at 1049.

<sup>136</sup> Id. at 1062.

<sup>137</sup> Quoted in MAGUIRE, 153.