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The Nuremberg Military Tribunals and the origins of International Criminal Law

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CHAPTER 3: The Evolution of the Trial Program

INTRODUCTION

As noted in the previous chapter, although Taylor's initial forecast called for at least 36 trials involving at least 266 defendants, the OCC ultimately managed to hold only 12 trials involving 185 defendants. This chapter explains that dramatic reduction. Section 1 focuses on the OCC's early planning, describing how the OCC determined which of the nearly 100,000 war-crimes suspects detained pursuant to JCS 1023/10 were eligible to be prosecuted in the zonal trials and examining the general principles the OCC used to group those potential defendants into particular cases. Section 2 then traces the gradual evolution of the OCC's actual trial program, explaining how the OCC selected the twelve trials and explaining why, for various reasons, it decided to abandon a number of other cases.

I. PRINCIPLES OF SELECTION

A. Early Planning

The OCC – then still known as the SPD – began to determine who would be tried in the zonal trials in May 1946, not long after Taylor returned from his recruiting trip to Washington.¹ Some progress had already been made: as Acting Chief of Counsel in Taylor's absence, Drexel Sprecher had created a section within the SPD dedicated to examining the evidence against industrialists and financiers.² Nevertheless, the SPD was faced with the daunting task of finding a way to examine the individual criminal responsibility of the nearly 100,000 Germans who had been detained in the American zone as suspected war criminals pursuant to JCS 1023/10.

Taylor began by establishing a working group “for the purpose of making an over-all study of Germany's political, military, economic, and social organization so that the principal channels of responsibility and authority in the Reich government and industry could be determined, and the most responsible individuals in each field of enterprise or government activity identified.”³ The group, which was overseen by Werner Peiser, a German scholar who had been dismissed from the Prussian civil service in 1933 and who had served as an interrogator for the IMT, had to work quickly: pressure was mounting on OMGUS to release the civilian detainees, and Clay thought that, in terms of stabilizing Germany, it was psychologically important for there to be no delay between the end of the IMT trial and the beginning of the NMT trials.⁴ Indeed, although he knew that the timeline was optimistic, Clay wanted all of the trials to be concluded by the end of 1947.⁵

¹ TAYLOR, FINAL REPORT, 159.

² EARL, 42.

³ TAYLOR, FINAL REPORT, 55.

⁴ Cable from Clay to War Department, 4 Sept. 1946, NA-153-1018-5-85-1, at 1.

⁵ Id.

By August 1946, Peiser's group had identified approximately 2,500 "major war criminals."⁶ The SPD then began the even more difficult process of reducing the 2,500 to a number that it could actually prosecute. Despite his concerns about the SPD's budget, Taylor's initial planning was extremely ambitious. In his August 27 memo to Keating requesting additional funding, Taylor stated that "it is planned to select from this group 200 to 400 of the worst offenders," leaving the others to be prosecuted by the denazification tribunals.⁷ Those 200 to 400 suspects would be tried in six zonal courts, each of which Taylor expected would be able to conduct at least six trials per year – a total of 36 trials. The number of defendants at each trial would vary, but the SPD was assuming an average of seven defendants for planning purposes. 252 defendants could thus be tried each year.⁸

Taylor's timetable for completing the SPD's work was equally ambitious. He anticipated that two zonal courts would begin trials in November 1946, two would begin in December 1946, and the final two would begin in January 1947. If all went according to plan, Taylor believed that his office would be able to meet Clay's 31 December 1947 deadline.⁹

B. Selecting Defendants

Narrowing the list of 2,500 suspects to 200-400 required the OCC – as it soon became – to further refine its selection criteria. Sprecher, now the Director of the Economics Division, had already drafted a list of criteria for industrialists and financiers. That list identified a number of activities that were indicative of criminality, such as making "substantial financial contributions" to the Nazis and profiting from plunder or slave labor.¹⁰ The Ministries Division adopted similar criteria, including "participation in the Nazi regime" and "preparation for aggressive war."¹¹

Once a Division settled on selection criteria, it then determined which suspects it would actually indict. The basic requirement for indictment, according to Taylor, was narrowly legal: whether "there appeared to be substantial evidence of criminal conduct under accepted principles of international penal law."¹² Indeed, Taylor later insisted – with justification – that the NMT trials were "carried out for the punishment of crime, not for the punishment of political or other beliefs, however mistaken or vicious."¹³

To be sure, it was easier for the OCC to articulate the "substantial evidence" requirement than to apply it. Taylor openly acknowledged that he and his staff could not simply select defendants on the basis of "what the evidence showed," because the

⁶ Memo from Taylor to Deputy Military Governor, 27 Aug. 1946, 2. In his Final Report, Taylor put the number at just less than 5,000. See TAYLOR, FINAL REPORT, 55. It is unclear which figure is correct.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ OCCWC, Points of Information and Evidence Relevant to the Investigation of Leading German Industrialists, 3 June 1946, NA-238-159-4-12, at 1-2.

¹¹ Ministries Group, Criteria of Criminality for Prospective Defendants, undated, NA-238-20401-7, at 1-2.

¹² Preliminary Report to the Secretary of the Army by the Chief of Counsel for War Crimes, 12 May 1948, reprinted in TAYLOR, FINAL REPORT, 114 (Appendix A).

¹³ Id. at 2.

available evidence “was infinitely vast and varied, and we could not possibly scan more than a small fraction of it.”¹⁴ Two questions are thus critically important: how reliable was the limited evidence that was available to the OCC, and how reliable was the process that the OCC used to determine whether that evidence qualified as substantial?

1. Evidence

There are significant questions about the reliability of the evidence that the OCC used to select defendants. For example, although interrogations were a critical source of inculpatory evidence, Taylor himself admitted that those conducted prior to the establishment of the Interrogation Branch by IMT interrogators – a significant percentage of the total number of interrogations – were invariably worthless, because very few of the interrogators spoke German.¹⁵ The Interrogation Branch’s procedures were far better, as discussed above, yet the quality of its interrogations was still uneven.¹⁶

Captured German documents, the OCC’s primary source of evidence, also posed difficulties. Nearly 90% of the documents introduced at the NMT trials were not used by the IMT and thus had to be screened and analyzed by the OCC.¹⁷ Most of the OCC’s research analysts were highly qualified; the Ministries Division, for example, required not only fluency in German and knowledge of French, but also knowledge of Nazi history, “legal experience plus a knowledge of international law,” and “acquaintance with criminal investigation techniques.”¹⁸ Those qualifications, however, could only partially offset the fact that the OCC had neither the time nor the resources to thoroughly screen the mass of captured documents.¹⁹ As Ferencz noted in a September 1946 memo to Taylor, the Berlin Branch’s investigations were undermined by its “shortage of skilled personnel.”²⁰ Only five analysts from the Ministries Division were analyzing documents from the Ministry of Foreign Affairs, even though “the size of the job to be done is overwhelming.”²¹ The SS Division had nine analysts, but the group was faced with “an almost inexhaustible amount of material.”²² And the Economics Division was making good progress, but did not have the capacity to investigate any newly-identified defendants and needed a replacement for one of its analysts who had been loaned to the Ministries Division.²³

2. Analysis

There is also reason to believe that the OCC’s lack of time and resources negatively affected its ability to apply its “substantial evidence” criterion, leading it to indict suspects against whom the evidence was weak and to ignore suspects potentially more

¹⁴ TAYLOR, FINAL REPORT, 75.

¹⁵ *Id.* at 60.

¹⁶ FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955, 354 (1989).

¹⁷ MENDELSON, 61.

¹⁸ *Id.* at 88.

¹⁹ *Id.*

²⁰ Memo from Ferencz to Taylor, 21 Sept. 1946, NA-238-159-4-28, at 1.

²¹ *Id.* at 3.

²² *Id.* at 6.

²³ *Id.* at 8.

deserving of prosecution. That is Michael Marrus's explanation, for example, of the *Medical* case's "haphazard, hastily improvised character"²⁴:

As Taylor later admitted, he and his colleagues were swamped with evidence, and had real difficulty digesting what had been gathered for them. One result was that important perpetrators slipped through the Americans' net (the most notorious of whom was Josef Mengele, the "Angel of Death" of Auschwitz), while others were charged on the basis of insufficient evidence. Evidence of overly hasty prosecution abounds in the cases of the seven accused who were acquitted – the average number of acquittals in the subsequent proceedings being three.²⁵

Cecelia Goetz's personal experience with the OCC suggests that such problems were not unique to the *Medical* case. When she arrived in Nuremberg, she was struck by "what appeared to be a lack of systematic organization."²⁶ After being assigned to work on *Flick*, for example, she was told to collect evidence "[w]ithout any guidance" whatsoever. Even worse, when she complained about the "vagueness" of her assignment to Charles Lyon, she was quickly transferred to *Krupp*.²⁷

Ben Ferencz's September 1946 memo to Taylor concerning the Berlin Branch is equally troubling. Ferencz noted that none of the analysts were gathering evidence against members of the Gestapo or officials in the Ministries of Propaganda, Education, and Finance, even though "[a]ll of these are at least as worthy of prosecution as some of the objectives now being pursued."²⁸ The problem, according to Ferencz, was that "no attorney in Nurnberg is assigned to the preparation of the prosecution, and hence there has been no 'push' from Nurnberg on these matters... the analysts here are already busy with the problems at hand, and [do not have] time to search for evidence against persons in whom no interest has been expressed."²⁹

C. Trial Groups

As the selection of defendants progressed, it became increasingly obvious that the number of suspects who satisfied the OCC's selection criteria far exceeded the number of suspects that the OCC could realistically indict.³⁰ The question thus arose "as to how the defendants should be grouped for purposes of trial."³¹

Taylor's solution was to group defendants into cases "according to the sphere of activity in which they were primarily engaged" – suspects who had conducted medical experiments would be tried together; suspects who were involved in a particular branch of the SS would be prosecuted in a case limited to that branch's

²⁴ *Id.*

²⁵ Michael R. Marrus, *The Nuremberg Doctors' Trial in Historical Context*, 73 BULL. HIST. MED. 106, 110-11 (1999).

²⁶ Goetz, 670.

²⁷ *Id.*

²⁸ Memo from Ferencz to Taylor, 21 Sept. 1946, 1.

²⁹ *Id.* at 2.

³⁰ TAYLOR, FINAL REPORT, 73. Indeed, Taylor would later claim that, with sufficient time and resources, the OCC could have convicted between 2,000 and 20,000 defendants. BOWER, 352-53.

³¹ TAYLOR, FINAL REPORT, at 76.

activities; industrialists and financiers who had supported the Nazis would be tried in a case that focused on the particular combine or bank with which they were associated; and so on.³² Such an approach, Taylor believed, would not only “narrow the factual scope of the trials,”³³ it would also create a “balanced program, covering representatives of all the important segments of the Third Reich.”³⁴ The “balanced program” was considered particularly important, because the prosecution staff believed that it would dispel the illusion “now being zealously fostered in Germany and elsewhere that the Third Reich was solely a tyranny of Hitler and his personal henchmen.”³⁵

In retrospect, it may well have been a mistake for the OCC to construct cases solely on the basis of the defendants’ occupations. Consider, for example, the OCC lack of success at obtaining convictions for crimes against peace: although four different trials involved such crimes – *Farben*, *Krupp*, *Ministries*, and *High Command* – only five defendants in *Ministries* were ever convicted,³⁶ and two of those defendants later had their convictions overturned.³⁷ As we will see in Chapter 8, the charges failed against the military defendants in *High Command* because the prosecution was unable to prove failed to prove that defendants had been in a position to influence Hitler’s plans for aggressive war, while the charges against the industrialist defendants in *Krupp* and *Farben* failed because the prosecutors failed to prove that the defendants had knowledge of those plans. It seems reasonable to suggest that the evidence might have been much stronger if, instead of relegating those charges to four trials involving a variety of different crimes, the OCC had dedicated a case to crimes against peace and included all of the most important defendants within it. An aggression-specific trial – one that centralized all of the evidence of aggression that was introduced piecemeal at the four trials – would have greatly increased the OCC’s ability to explain Hitler’s aggressive plans and the defendants’ various roles within them. Such a trial would also have made logistical sense, given that the complexity of the crimes against peace charges required Taylor to largely defer trials involving them until later in the OCC’s program – *Krupp*, *Ministries*, and *High Command* were cases No. 10, 11, and 12, respectively.

Interestingly, on 22 August 1946, Abe Pomerantz, the OCC prosecutor who had sued German shipping companies before the war, sent a long memo to Taylor urging him to consider joining all of the industrialist defendants suspected of committing crimes against peace into one case. Such a trial, Pomerantz argued, was “[i]n the interest of painting a whole picture” of the role the industrialists had played in supporting the Nazis’ wars of aggression.³⁸ Sprecher rejected Pomerantz’s suggestion two weeks later, contending that a trial involving industrialists from a number of different corporations would be too complex and time-consuming.³⁹ That was a surprising response, given that just three months later, on November 30, Sprecher suggested to

³² Id. at 76-77.

³³ Id. at 160.

³⁴ Memo from Taylor to Jackson, 30 Oct. 1946, NA-153-1018-8-1-54-2, at 1.

³⁵ Transcript of radio recording, Elwyn Jones, “The American Trials at Nuremberg,” 20 Oct. 1947 TTP-14-3-1-17, at 3.

³⁶ TAYLOR, FINAL REPORT, 214.

³⁷ See Chapter 8.

³⁸ Memo from Pomerantz to Taylor, 22 Aug. 1946, NA-238-202-6-4, at 8.

³⁹ Cited in Bush, *Conspiracy*, 1156 n. 215.

Taylor that the industrialist cases should be followed up by “one big case of from 12 to 24 of the leaders in the slave labor program” and by other thematic cases, such as one that focused on plunder.⁴⁰ Taylor never acted on Sprecher’s proposal.

Wise or not, having decided on occupation-centered cases, the OCC then had to determine which suspects within the targeted occupations it would include in them. In each case, that decision involved three steps. The OCC began by determining a minimum level of responsibility for inclusion in a particular case. It then identified in which of the Palace of Justice’s six courtrooms the trial would be held. Finally, it indicted the number of suspects who satisfied the responsibility criterion as long as that number could be accommodated in the selected courtroom.⁴¹

According to Taylor, courtroom size played a role in the construction of “several” cases.⁴² One of those was *Ministries* – as discussed in more detail below, Taylor specifically refused a request from the World Jewish Council to expand the trial on the ground that no additional space was available. The others appear to be *Flick*, *Farben*, *RuSHA*, *Einsatzgruppen*, and *High Command*. An OCC memo concerning arrestees indicates that Joseph Gebhardt, Chief of Tax Control in the Reich Ministry of Finance, was not included in *Flick* solely for space reasons.⁴³ *Farben* and *Einsatzgruppen* each involved 24 defendants – the maximum the two largest courtrooms could hold – but the OCC’s first trial program identified 35 suspects in the former⁴⁴ and 27 in the latter.⁴⁵ There were 14 defendants in *RuSHA* and *High Command* – the maximum the four smaller courtrooms could comfortably accommodate – but *RuSHA* included 23 defendants in the OCC’s second trial program⁴⁶ and there were 25 suspects in *High Command* in its first.⁴⁷ The arrestee memo, moreover, indicates that General Johannes Friessner, who commanded the Army Group North and Army Group Southeast, was not included in *High Command* because the dock was already full.⁴⁸

II. CREATION OF THE TRIAL PROGRAM

As noted earlier, Taylor initially anticipated that the OCC would hold 36 trials. Three trial programs later – dated March 14, May 20, and September 4, 1947 – that number had been reluctantly reduced to 12. This section traces the gradual erosion of the OCC’s ambitions, explaining why some trials were included in the final trial program while others were abandoned.

A. The Initial Cases

⁴⁰ Memorandum from Sprecher to Taylor, 30 Nov. 1946, Gantt Collection in Towson University Archives, box 00.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Arrests by Request of OCCWC, undated, TTP-5-1-3-41, at 2.

⁴⁴ Memo from Taylor to Clay, 14 Mar. 1947, NA-153-1018-13-87-0-1, at 14 (“First Trial Program”).

⁴⁵ *Id.* at 8.

⁴⁶ Memo from Taylor to Clay, 20 May 1947, NA-260-183a1-2-17, at 5 (“Second Trial Program”).

⁴⁷ First Trial Program, 14.

⁴⁸ Arrests by Request of OCCWC, 2.

Taylor's earliest attempt to forecast the OCC's trial program came in a memo to Petersen, then the Secretary of War, on 30 September 1946,⁴⁹ not long after Werner Peiser's group had completed its overall study. At this point, the OCC had begun planning seven of the 36 trials that Taylor envisioned. The first trial, which was slated to begin in late 1946, would involve "a large group of defendants (between 20 and 24) who are responsible for initiating and guiding the German program of medical experimentation on human beings."⁵⁰ The *Medical* case would then be followed by cases centered on Oswald Pohl, the Chief of the SS Economic and Administrative Main Office (WVHA), and Otto Thierack, the Nazi Minister of Justice – the *Justice* case.⁵¹

Taylor hoped to begin the *Medical*, *Pohl*, and *Justice* cases by the end of 1946. The OCC would then initiate in mid-January its ambitious slate of four industrialist cases, involving Krupp, Farben, the Dresdner Bank, and a combination of the Flick Concern and the Vereinigte Stahlwerke, a coal, iron and steel conglomerate whose Chairman was Fritz Thyssen. Taylor believed that the first three would "probably" be *Krupp*, *Farben* and *Dresdner Bank*, although he noted that *Flick-Vereinigte Stahlwerke* might be moved up, because planning for the case was "progressing very well."⁵²

Around this time, the OCC also decided to drop one of the cases it had been planning. On October 4, William Caming, one of Taylor's prosecutors, informed an analyst in the Berlin Branch that "the decision has been made to suspend the case against members of the Ministry for Church Affairs," which meant that "further investigation of documents pertaining to Dr. Herman Muhs, Ludwig Müller, and Dr. Friedrich Werner [wa]s not required."⁵³ Werner had been the president of the German Protestant Church; Müller had been the Reich Bishop and an advisor to Hitler on Protestant affairs; and Muhs had succeeded Hans Kerrl as the head of the Ministry. Interestingly, Muhs would not be ruled out as a potential defendant until Taylor's second trial program; as discussed below, the March 14 program lists Muhs as a potential defendant in what was initially called the *Propaganda and Education* case.⁵⁴

1. The Medical Case (Case No. 1)

As Taylor anticipated, the *Medical* case became the first NMT trial. The indictment was filed on 25 October 1946, one day after the SPD formally became the OCC, and the trial began on December 9.

Despite its early start, the OCC did not begin to plan the *Medical* trial until June 1946.⁵⁵ Much of what the Allies knew at the time about the Nazis' medical experiments had been uncovered by British, French, and American FIAT (Field Information Agencies Technical) groups, which had spent the second half of 1945 interrogating leading German doctors about the experiments.⁵⁶ On 11 May 1946, OMGUS contacted the War Department to suggest that it convene a meeting "to

⁴⁹ Letter from Taylor to Petersen, 30 Sept. 1946, 2.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Letter from Caming to Flechtheim, 4 Oct. 1946, NA-238-204-1-7.

⁵⁴ First Trial Program, 20.

⁵⁵ Weindling, *Zonal Trials*, 376.

⁵⁶ Id. at 373.

examine evidence collected by FIAT and discuss possible international action re scientific and medical experiments on live human being[s].”⁵⁷ Four days later, 15 FIAT officers – four American, nine British, and two French – met to consider how to proceed. The OCC declined to participate in the meeting, which Weindling interprets a “lack of interest in medical war crimes at the time.”⁵⁸

Despite the OCC’s absence, the FIAT officers debated whether medical experiments should be prosecuted in quadripartite or zonal trials.⁵⁹ Col. Clio Straight, a member of the U.S. War Crimes Office’s Legal Branch, suggested that “under agreement between war crimes agencies of the various nations, each country might take up one case, follow it up and arrange for a trial in the zone of the country concerned.”⁶⁰ As Weindling notes, “[t]he meeting indicates that the U.S. was now committed to a zonal trials program.”⁶¹

In late June, the OCC began to consider whether one or more of the NMT trials should focus on the Nazis’ medical experiments. According to Andrew Ivy, a University of Illinois physiology professor who would later give pejured testimony for the prosecution in the *Medical* trial – a story told in the next chapter – “a plan of responsibility, procedure, and strategy for the Medical trials was discussed” at the meeting, and it was “tentatively suggested that General Taylor’s group would try the medical cases.”⁶²

At that point, the OCC began to identify potential defendants. Alexander Hardy, one of the OCC’s prosecutors, instructed the Berlin Branch to investigate Karl Brandt, Hitler’s personal physician and the Reich Commissioner for Health and Sanitation, who was “by far the highest-placed of the medical suspects.”⁶³ Around the same time, Taylor convinced the British to allow the OCC to prosecute the so-called “Hohenlychen Group,” a group of seven doctors and nurses associated with the SS’s Hohenlychen sanitarium who were believed to be responsible for the appalling medical experiments conducted on women prisoners in the Ravensbruck concentration camp.⁶⁴

On September 2, Taylor announced that 15 suspects had been identified. The most important were Brandt; Karl Gebhardt, Himmler’s personal physician and the director of the Hohenlychen sanitarium; Wolfram Sievers, the managing director of the *Ahenenerbe*-SS who had been involved in the murder of 112 Jews in Auschwitz “for the purpose of completing a skeleton collection for the Reich University of Strasbourg”⁶⁵; Victor Brack, the Chief Administrative Officer in the Chancellery of the Fuhrer, who had organized the T4 euthanasia program; and Field Marshal Milch, whom the OCC believed was connected to the high-altitude and freezing experiments

⁵⁷ Id. at 374.

⁵⁸ Id. at 375.

⁵⁹ Id.

⁶⁰ Id. at 375-76.

⁶¹ Id.

⁶² Id. at 376.

⁶³ Id. at 378.

⁶⁴ Ulf Schmidt, *The Scars of Ravensbrück: Medical Experiments and British War Crimes Policy, 1945-1950*, 23 GERMAN HIST. 20, 21 (2005).

⁶⁵ Medical, Indictment, para. 7, I TWC 14.

conducted at Dachau. Eight of those fifteen would eventually be named as defendants in the *Medical* case.⁶⁶

A week later, Taylor released a revised list of 23 suspects. The September 9 list differed considerably from the September 2 list, indicating how quickly the OCC was working. Six of the 15 suspects on the original list had been removed, most notably Milch.⁶⁷ A number of others had been added, including Siegfried Handloser, the Chief of the Medical Services of the Armed Forces, and Gerhard Rose, a Brigadier General in the Luftwaffe Medical Service who had personally conducted typhus and malaria experiments at Dachau and Buchenwald. As Weindling points out, the revised list indicates “that the prosecution’s strategy was to demonstrate the links among the medical vivisectioners in the camps, the SS administration, and the bureaucracy involved in the campaign of ‘euthanasia’.”⁶⁸

A number of scholars have argued that Taylor decided to open the NMT trials with the *Medical* case instead of *Krupp* or *Farben* because the U.S. government was ambivalent toward prosecuting industrialists and financiers. Paul Weindling, for example, claims that “[b]y August 1946 the requirement was for a U.S. military trial in Nuremberg to prosecute a group *other* than financiers and industrialists. The U.S. war-crimes department postponed the pending Flick/Krupp trial as politically too sensitive, and looked for an alternative trial that could rapidly and conclusively demonstrate Nazi guilt for atrocities.”⁶⁹

It is true that, by mid-1946, the U.S. government had begun to doubt the wisdom of prosecuting industrialists.⁷⁰ Nevertheless, it is highly unlikely that Taylor decided to begin with the *Medical* case for political, not legal, reasons. Most importantly, that idea is inconsistent with Taylor’s own explanation of his decision: that the *Medical* case was simply far easier to prepare than any of the industrialist cases. As Taylor told Petersen in his September 30 memo, although “[d]ocumentary evidence for the [*Medical*] case is very plentiful and quite sensational in spots,” making it “a rather easy case to try and to decide, and therefore I think a good one to start with,” the industrialist cases were “far more difficult to prepare” and could not realistically begin before the middle of January 1947.⁷¹ Moreover, Taylor later specifically insisted that “neither General Clay nor Washington gave me any instructions, or at any time got in touch with me about when to begin the trials.”⁷²

It is also clear that Taylor himself was committed to prosecuting industrialists and financiers as early as possible. When Taylor realized that the U.S. intended to hold zonal trials instead of a second IMT trial focused on economic defendants, he immediately wrote Jackson to insist that it “be made absolutely clear that the zonal trial program will include industrialists and financiers,” because “an announcement that there will be no international trial is likely to be taken as an indication that we will not try” them.⁷³ That insistence is difficult to reconcile with the idea that Taylor

⁶⁶ Karl Brandt, Sievers, Mrugowsky, Brack, Rudolf Brandt, Gebhardt, Fischer, and Oberheuser.

⁶⁷ The others were Oberhauser, Treite, Rosenthal, Haagen, and Bouhler.

⁶⁸ Weindling, *Zonal Trials*, 381.

⁶⁹ Id. at 370 (emphasis in original).

⁷⁰ See Chapter 1.

⁷¹ Letter from Taylor to Petersen, 30 Sept. 1946, 2.

⁷² Letter from Taylor to Irving, 22 Nov 1971, TTP-14-6-10-13, at 1.

⁷³ Letter from Taylor to Jackson, 30 Oct. 1946, 1

wanted to avoid beginning with one of the industrialist cases because they were “politically too sensitive.”

To be sure, it is possible that – as Weindling implies – OMGUS simply ordered Taylor to open the NMT with a case that was not politically sensitive. Such an order, however, would have directly contradicted Article III(a) of Ordinance No. 7, which gave Taylor complete prosecutorial discretion to “determine the persons to be tried by the tribunals.” Taylor openly admitted in his Final Report that, despite Article III(a), General Clay had refused to allow him to include Field Marshals von Rundstedt, von Manstein, and von Brauchitsch in *High Command*⁷⁴ – a story told in more detail below. It thus seems unlikely that he would have failed to mention a similar order not to begin with one of the industrialist cases.

Scholars who defend the political interpretation often point out that Sprecher began to research industrialists in February 1946, nearly five months before the OCC decided to hold a medical trial, and that the SS Division, which was in charge of preparing the case, “had no special medical expertise” and made use of “only one full-time medical consultant.”⁷⁵ The implication is that the *Medical* trial’s “haphazard, hastily improvised character” reflected the fact that it was originally intended to begin *after* the industrialist trials.

There are a number of problems with that argument. To begin with, although Sprecher did begin investigating industrialists as early as February, there is little evidence that substantial progress had been made by mid-May, when the first cadre of attorneys arrived from the U.S. and Taylor divided the OCC into divisions and trial teams. Sprecher himself acknowledged that he had not yet been formally assigned to the SPD in February and thus was still devoting most of his attention to the IMT.⁷⁶ By the time Taylor decided to open the trials with the *Medical* case, therefore, the industrialists had only been investigated for an additional six weeks.

Had the industrialist cases and the *Medical* case been equally difficult to prepare, those six weeks might indicate that the decision to begin with the *Medical* case was based on political considerations. But that was not the situation. First, the *Medical* case was less factually complicated than *Flick*, *Farben*, or *Krupp*. The Nazis’ medical experiments might have involved numerous doctors working in a variety of institutions, but the industrialist cases involved massive corporations accused of a wide variety of different crimes – everything from slave labor to Aryanization to extermination. The *Medical* case also did not involve crimes against peace, which were scheduled to be included in all of the industrialist cases.⁷⁷ That was a critical difference, because Taylor believed that the *mens rea* requirement of such crimes – that the defendant acted with the “guilty intent to initiate an aggressive war”⁷⁸ – meant that cases involving crimes against peace “took much longer to prepare than

⁷⁴ TAYLOR, FINAL REPORT, 82-83.

⁷⁵ Marrus, 110.

⁷⁶ Letter from Sprecher to Jackson, 14 Feb. 1946, TTP-20-1-3-34, at 1.

⁷⁷ The OCC ultimately decided not to bring crimes against peace charges in *Flick*.

⁷⁸ Chapter 8 discusses the elements of crimes against peace.

those solely concerned with war crimes and atrocities.”⁷⁹ Sprecher, the head of the Economics Division, agreed.⁸⁰

Second, the industrialist cases were much more legally complicated. The primary issues in the *Medical* case were factual, not legal – whether the OCC could prove that the defendants either personally committed the experiments or were in a position to stop them and did nothing. The industrialist cases, by contrast, raised a number of exceptionally difficult legal questions: whether the corporations should be charged as juristic persons or the charges should be limited to individual corporate directors; whether the indictments should allege conspiracies to commit crimes against peace, crimes against humanity, and war crimes or simply the underlying substantive crimes; and so on.⁸¹ The OCC debated those questions well into December 1946, as Jonathan Bush has shown,⁸² making it nearly impossible for Taylor to open the NMT with an industrialist trial.

2. Milch (Case No. 2)

The Military Division prepared and presented the *Milch* case.⁸³ The indictment was filed on 13 November 1947, and the trial began on 2 January 1947. *Milch* was the only case that did not involve multiple defendants.

As noted above, Milch was originally scheduled to be tried in the *Medical* case, because the OCC believed that he had been involved in the Dachau high-altitude and freezing experiments. The OCC never abandoned that belief, but it became increasingly clear to the prosecutors investigating Milch that it would be very difficult, if not impossible, to prove that he was criminally responsible for those experiments. Henry King, one of the prosecutors assigned the Military Division, identified four major evidentiary problems in a September 5 memo to Clark Denney, the director of the division. First, Milch was not “a medical man” and the “human experiments, at best constituted a comparatively minor phase” of his career in the Luftwaffe.” Second, there was little evidence connecting Milch to Sigmund Rascher, the SS doctor who had conducted the experiments (and who was now dead, having been executed by the SS at Dachau shortly before liberation). Third, although Erich Hippke, the Luftwaffe’s Chief Medical Officer, could potentially tie Milch to Rascher, Hippke had yet to be apprehended. Fourth, and finally, although Milch had made a number of damaging statements concerning his involvement in the use of slave labor while being interrogated, “he has denied absolutely any knowledge of human experiments.”⁸⁴

Henry Heymann, a research analyst, seconded King in a memo to James Conway, one of the prosecutors, written around the same time. Heymann pointed out that the only evidence against Milch regarding the Dachau experiments were letters that he had signed authorizing the experiments but now denied ever reading. That defense could not “be lightly brushed aside,” according to Heymann, because “[i]n a large

⁷⁹ TAYLOR, FINAL REPORT, 67.

⁸⁰ Memo from Sprecher to Mercer, undated, TTP-5-1-2-22, at 1.

⁸¹ See generally Bush, *Conspiracy*, 1130-73.

⁸² Id. at 1170-72.

⁸³ TAYLOR, FINAL REPORT, 39-40.

⁸⁴ Memo from King to Denney, 5 Sept. 1947, NA-238-188-1-1, at 1.

organization, it frequently happens that letters (even of great importance) are prepared by subordinates, and are signed by executives who do not know their contents.”⁸⁵ Heymann thus bluntly concluded that “[t]his phase of the Milch case, at the present stage of preparation, is such that a verdict of not guilty must result.”⁸⁶

Because of their concerns, both King and Heymann urged Taylor to sever Milch from the *Medical* case. King was particularly insistent, because he believed that including Milch “would necessarily relegate the ‘forced labour’ and ‘aggressive war’ phases of the *Milch* case to a secondary position,” thereby depriving the OCC of “the opportunity to write a broad historical record of a particularly criminal phase of the German economic war effort, as well as of a vital phase of Germany’s preparations for aggressive war.”⁸⁷

King prevailed on the severance issue, but Taylor ultimately decided not to charge Milch with crimes against peace, even though he believed that “there was substantial evidence at hand on the basis of which the charge of war-making could properly have been made”⁸⁸ – a decision he later regretted.⁸⁹ According to Taylor, given that *Milch* was scheduled to become Case No. 2, there simply was not enough time to prepare the crimes against peace charges.⁹⁰

That explanation, however, begs an important question. If the evidence against Milch for crimes against peace was strong, and if King was right that those charges would have helped the OCC document Nazi aggression, why not simply delay the trial until the necessary preparations had been completed – perhaps including Milch, who was a Field Marshal, in the *High Command* case, which was slated to include crimes against peace?

Taylor would have preferred to do exactly that, because he believed that “there was no legal necessity for trying Milch by himself.” The problem was that Tribunal II had just arrived in Nuremberg “and no other case was far enough advanced for trial at that time (December 1946).”⁹¹ Taylor thus decided to begin Milch “a little sooner than anticipated,” because “it seemed unwise” for the Tribunal “to be sitting around with nothing to do.”⁹²

3. The Justice Case (Case No. 3)

As noted earlier, the *Justice* case was one of the eight cases that Taylor identified in his September 30 memo to Petersen. The case was planned by a trial team that had been created in mid-1947 within the Ministries Division under the direction of Charles H. LaFollette,⁹³ who had served two terms as a Republican congressman from Indiana and had been offered a position as an NMT judge⁹⁴ before joining the OCC in

⁸⁵ Memo from Heymann to Conway, undated, 3.

⁸⁶ *Id.* at 2.

⁸⁷ Memo from King to Denney, 5 Sept. 1947, at 1-2.

⁸⁸ TAYLOR, FINAL REPORT, 67.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 78. Note that the statement reinforces the idea that Taylor did not open the trials with one of the industrialist cases for legal, not political reasons.

⁹² Letter from Taylor to Irving, 22 Nov. 1971, 2.

⁹³ OCCWC General Order No. 6, 25 Feb. 1947.

⁹⁴ Memo from Marcus to McCabe, 18 Nov. 1946, NA-153-1018-8-84.

1946.⁹⁵ 16 defendants were indicted on 4 January 1947, but Carl Westaphal, a Ministerial Counsellor in the Reich Ministry of Justice, committed suicide after being served the indictment.⁹⁶ When trial began on March 5, therefore, there were only 15 defendants in the dock.

The *Justice* case is one of the best-known NMT trials, because it inspired the 1961 movie *Judgment at Nuremberg*, which won numerous Academy Awards. At the time, however, the *Justice* case “received scant attention in the press or professional literature.”⁹⁷ The problem, according to Taylor, was that the three members of the Nazi government who should have been the principal defendants in the case were all dead: Franz Guertner, the Reich Minister of Justice from 1933-1941, had died in early 1941; his successor, Georg Thierack, had committed suicide in a British internment camp in October 1946 after hearing that his trial was imminent; and Roland Frieser, who was the President of the infamous “People’s Court” and who had represented the Justice Ministry at the Wannsee Conference, had been killed in an air-raid near the end of the war.⁹⁸ The OCC was thus left to indict lower-level (though certainly important) suspects, such as Schlegelberger, Rothaug, and Herbert Klemm, the State Secretary in the Ministry of Justice.

In his memo to Petersen, Taylor predicted that the “Thierack case” – he was still alive when Taylor wrote the memo – would be “one of the most interesting and constructive of all.”⁹⁹ He made a similar comment in his Final Report, describing the case as “to jurists possibly the most interesting of all the Nuremberg trials.”¹⁰⁰ To some extent, however, Taylor’s later enthusiasm appears to have been designed for public consumption: according to Robert King, one of the prosecutors involved in the *Justice* case, Taylor lost interest in the trial after Thierack committed suicide.¹⁰¹

4. Pohl (Case No. 4)

Pohl was prepared and presented by the SS Division. Taylor, who believed that the case would be “easy and probably effective,” hoped that the OCC would be able to begin the trial by the end of 1946.¹⁰² In fact, the indictment was not filed until 13 January 1947 and the trial did not begin until April 8.

The 18 defendants that stood trial in *Pohl* were all officials in the WVHA. The OCC originally intended to include three additional high-ranking WVHA officials: Fritz Lechler, the manager of TexLed, an SS garment factory; Wilhelm Burger, an SS Colonel who had overseen the provision of supplies to the concentration camps, including Auschwitz and Dachau; and Gerhard Maurer, also an SS Colonel, who had been responsible for allocating prisoner labor to German industry. Unfortunately, Lechler injured himself too severely in a suicide attempt to stand trial, and Burger and

⁹⁵ Background Information for Correspondents, 3.

⁹⁶ First Trial Program, 18.

⁹⁷ TAYLOR, FINAL REPORT, 169.

⁹⁸ Id. at 168-69.

⁹⁹ Letter from Taylor to Petersen, 30 Sept. 1946, 2.

¹⁰⁰ TAYLOR, FINAL REPORT, 169.

¹⁰¹ BRUCE M. STAVE ET AL., WITNESSES TO NUREMBERG: AN ORAL HISTORY OF AMERICAN PARTICIPANTS AT THE WAR CRIMES TRIALS 163-4 (1998).

¹⁰² Letter from Taylor to Petersen, 30 Sept. 1946, 2.

Maurer were not apprehended until after the other defendants were arraigned.¹⁰³ (Burger was actually arrested while watching the arraignment from the gallery!¹⁰⁴) The OCC thus recommended that they should be detained pending the outcome of the *Pohl* trial and that, thereafter, “suitable machinery should be developed for their trial on similar charges.”¹⁰⁵ No subsequent trial ever materialized, although Maurer was later executed by Poland in 1953 and Burger was sentenced to eight years imprisonment by a German court in 1966 for supplying Zyklon-B to the concentration camps.

The most interesting absence from *Pohl* was Karl Wolff, Himmler’s Chief of Staff until 1943 and then the Supreme SS and Police Leader in Italy. The French and Soviet prosecutors had wanted to include Wolff in the IMT trial, but Jackson (with British support) vetoed the suggestion at the request of the OSS’s Allen Dulles, who had promised to protect Wolff from prosecution because of the critical role he had played in Operation Sunrise, the secret March 1945 negotiations between the Nazis and the Allies that had led to the surrender of German forces in Italy.¹⁰⁶ Wolff had led the negotiations on behalf of the surrendering forces.

Wolff’s near-miss at the IMT meant that he would almost certainly be prosecuted by the OCC, especially as he was in U.S. custody when the OCC was created. Indeed, Taylor acknowledged in 1978 that when he replaced Jackson, he was “under the impression that we would surely indict him in one of our ‘subsequent’ trials,”¹⁰⁷ *Pohl* being the most obvious choice. The OCC even requested information from Army intelligence in July 1946 concerning “Wolff or forced labor program or anti-partisan activities by Germans in Italy.”¹⁰⁸

Despite the OCC’s apparent interest, Taylor never indicted Wolff. The rationale was the same one that had led Jackson to oppose including Wolff in the IMT Trial: Dulles had promised him immunity from prosecution. As Taylor later wrote to David Irving, he believed – correctly, as we know – that “there was some basis” for Wolff’s claim that the promise existed.¹⁰⁹

Taylor was under no legal obligation, of course, to honor Dulles’ promise. But it is clear that he felt informal pressure to do so. At some point in late 1947 –when the OCC was finalizing its last two cases – Dulles’ senior aide, Gerd von Gavernitz, wrote to Robert Kempner, who had worked with the OSS during the war, to ask him to intervene with Taylor on Wolff’s behalf. Gavernitz specifically cited the “outstanding support” that Wolff had rendered during Operation Sunrise “at great personal risk.”¹¹⁰ Kempner inquired about Taylor’s plans for Wolff and informed Gavernitz of what he learned.¹¹¹ Not long thereafter, the British War Crimes

¹⁰³ First Trial Program, 6.

¹⁰⁴ OCCWC, Press Review No. 99, 20 Mar. 1947, Gantt Collection in Towson University Archives, box GG.

¹⁰⁵ *Id.*

¹⁰⁶ MICHAEL SALTER, NAZI WAR CRIMES, U.S. INTELLIGENCE AND SELECTIVE PROSECUTION AT NUREMBERG 128-30 (2007).

¹⁰⁷ Letter from Taylor to Smith, 1 June 1978, TTP-14-6-15-325, at 1.

¹⁰⁸ SALTER, 132.

¹⁰⁹ Letter from Taylor to Irving, 9 Mar. 1972, TTP-14-6-10-13, at 2.

¹¹⁰ Quoted in SALTER, 133.

¹¹¹ *Id.*

Executive asked the OCC to extradite Wolff to Britain. Taylor agreed in November 1947 – and later admitted that, given the complicated politics that had surrounded Wolff from the beginning, he was “not a bit sorry” to see him go.¹¹²

5. Flick (Case No. 5)

Flick, the first of the industrialist cases, was prepared and presented by the Flick Trial Team, one of the OCC’s six original divisions. The initial indictment was filed on 8 February 1947; an amended indictment was filed on March 17.¹¹³ Trial began on April 19.

Only six defendants stood trial in *Flick*, making it – after *Milch* – the second smallest of the 12 trials. A January 17 memorandum written by Charles Lyon indicates that the Flick team considered four different approaches to selecting defendants, each more expansive than the last.¹¹⁴ The first was the “hard punch” approach, which involved indicting only the two suspects whose convictions were, according to Lyons, “100% assured”: Friedrich Flick himself and Otto Steinbrinck, Flick’s principal assistant until 1940 and then a leading official in Verinigte Stahlwerke. The second was the “ownership and front office” approach, which expanded the list to include four of Flick’s “chief lieutenants” who served on the *Aufsichsrat* (Supervisory Board) of numerous companies affiliated with the Flick Concern, such as Odilo Burkhart, who was in charge of Flick’s steel and soft coal enterprises, and Konrad Kaletsch, who handled all of Flick’s financial matters. The third was the “total concern” approach, which added seven leading officials in the various Flick companies who had been responsible for the use of slave labor. And the fourth was the “bad man” approach, which included four additional “lesser officials” who were connected to Flick’s slave-labor program.¹¹⁵

The February 8 indictment adopted the “ownership and front office” approach, bringing charges against Flick, Steinbrinck, Burkhart, and Kaletsch.¹¹⁶ The list would also have included Otto Ernst, Flick’s son and minority partner, but Lyon had concluded that indicting multiple members of the Flick family might be seen as “jungle justice.”¹¹⁷ Hermann Terberger, a leading official in Eisenwerk Gesellschaft Maxhilmilianshuetten, a Flick company, was indicted instead.¹¹⁸ The March 17 indictment was substantially the same, but added Burkhart – who, after being protected by the Russians, was “suddenly and inexplicably” found in the French zone and turned over to the OCC.¹¹⁹

As noted earlier, the *Flick* trial was originally scheduled to include officials from Verinigte Stahlwerke as well as from the Krupp Concern. In the end, the OCC only indicted Otto Steinbrinck, who had spent most of his career with Flick. The most

¹¹² Letter from Taylor to Smith, 1 June 1978.

¹¹³ The amended indictment was repeatedly revised at the request of the prosecution during trial. Those changes are discussed in Chapter 6.

¹¹⁴ Memo from Lyon to Ervin, 17 Jan. 1947, Gantt Collection in Towson University Archives, box FF.

¹¹⁵ *Id.*

¹¹⁶ Bush, *Conspiracy*, 1194.

¹¹⁷ Memo from Lyon to Ervin, 17 Jan. 1947.

¹¹⁸ *Id.*

¹¹⁹ Bush, *Conspiracy*, 1194.

surprising omission – at least to the reporters covering the trial – was Fritz Thyssen, the Chairman of Vereinigte Stahlwerke, who had played a major role in Hitler’s rise to power. In fact, Taylor had always been ambivalent about prosecuting Thyssen, who had fled Germany when war broke out, had voted (by telegraph) against war with Poland as a member of the Reichstag, and who had spent a number of years in a concentration camp after being arrested in France.¹²⁰ Taylor informed OMGUS in May 1946 that he did not have enough information about Thyssen to justify a decision,¹²¹ and he later became convinced that the evidence against Thyssen was so weak that “his indictment would have been a serious mistake, and his selection as a defendant from among others against whom the evidence was far stronger, a preposterous error.”¹²²

That said, Taylor did regret the limited number of defendants in the case and its narrow focus on the Flick Concern. In his view, “a much more telling and significant proceeding would have resulted had the more important defendants in the ‘Flick’ and ‘Krupp’ cases been grouped in a single case, together with other Ruhr iron-masters from the largest of the combines (such as Ernst Poensgen of the Vereinigte Stahlwerke) and other large concerns (such as Gutehoffnungshuette and Mannesmann).”¹²³

Taylor decided against a larger case for two reasons. First, the location of the Ruhr meant that a trial involving industrialists based there would have been more properly tried in the British occupation zone. When the *Flick* case was prepared – in late 1946 and early 1947 – it was still possible that the British would either prosecute Krupp and other Ruhr industrialists itself or would participate with the OCC in such a trial. Taylor thus thought it inadvisable to pre-empt that possibility by expanding the case beyond the Flick Concern and the one Vereinigte Stahlwerke official who had been Flick’s personal assistant.¹²⁴

Second, a larger trial would simply have taken too long to prepare. Once again, crimes against peace were the culprit: although the OCC had decided not to bring such charges against the Flick officials because the records that were necessary to prove their guilt were scattered across Germany and too difficult to obtain,¹²⁵ there was no question that crimes against peace were going to be at the heart of *Krupp* trial. A combined trial would thus have substantially delayed the first industrialist case.¹²⁶

B. The March 14 Program

Taylor submitted his first complete trial program to OMGUS on 14 March 1946. At that point, the *Medical*, *Milch*, and *Justice* trials were underway and the indictments had been filed in *Pohl* and *Flick*. Erich Hippke, the Luftwaffe’s Chief Medical Officer – and the ostensible link between Milch and Rascher – had been apprehended

¹²⁰ TAYLOR, FINAL REPORT, 83.

¹²¹ Summary of OCC-OMGUS Meeting, 28 May 1946, NA-238-159-1-2, at 2.

¹²² TAYLOR, FINAL REPORT, 83.

¹²³ *Id.* at 79.

¹²⁴ *Id.*

¹²⁵ Economics Division Press Release, U.S. Will Try Nazi Capitalists, undated, NA-238-202-3-1, at 2.

¹²⁶ TAYLOR, FINAL REPORT, 79.

since the beginning of the *Medical* trial; he and other important Nazi doctors were being detained for possible prosecution in a second medical case.¹²⁷

Taylor's trial program now called for 18 trials, including the five that were already underway. Taylor considered 10 of the 13 pending trials "practically necessary, if the Nurnberg war crimes program is to achieve its announced purposes," while the other three were "perhaps less necessary and could be sacrificed if considerations of time and economy so require."¹²⁸ Holding all 18 trials would result in 225 total defendants; holding only the necessary 15 would result in 180.¹²⁹ Either way, Taylor believed that all of the trials would be substantially completed by 1947.¹³⁰

1. The Necessary Ten

a. RuSHA

The *RuSHA* case focused on the SS Main Race and Resettlement Office, which had conducted racial examinations for a number of SS offices involved in the Germanization program. The primary defendant was intended to be Richard Hildebrandt, the head of RuSHA from April 1943 until the end of the war. Hildebrandt was in Polish custody at the time, but the Poles had agreed to extradite him to the American zone to stand trial.¹³¹

In addition to ten additional defendants from RuSHA itself – including Herbert Heubner, the head of RuSHA's office in Poland – the March 14 program also identified five certain defendants from "other divisions of the SS which dealt primarily with the execution of Nazi racial theories." The Lebensborn Society, which the prosecution believed had been involved in kidnapping Polish children for Germanization, would be represented by Max Sollman, the Chief of the Lebensborn, and Guenther Tesch, the head of its Main Legal Department. The Main Staff Office of the Reich Commissioner for the Strengthening of Germanism (RKFDV), which had overseen the Germanization program, would be represented by Ulrich Greifelt, the head of the RKFDV, and Rudolf Creutz, his chief deputy. Finally, the Main Office for Repatriation of Racial Germans (VOMI), which had been responsible for transferring "racial Germans" from their native countries into Germany, would be represented by Werner Lorenz, VOMI's Chief.¹³²

b. Prisoner of War Case

The *Prisoner of War* case included nine defendants from the SS and Wehrmacht who were involved in POW affairs. The lead defendants were scheduled to be Gottlob Berger, the Chief of the SS's Central Office; General Adolf Westhoff, the Wehrmacht's Inspector General for POW affairs; and General Hermann Reinecke, the head of the Wehrmacht's General Office.¹³³

¹²⁷ First Trial Program, 9.

¹²⁸ Id. at 1.

¹²⁹ Id. at 5.

¹³⁰ Id.

¹³¹ Id. at 7.

¹³² Id.

¹³³ Id. at 10.

c. *Field Commander Case*

The *Field Commander* case, which later became the *Hostage* case, focused on war crimes committed by German field commanders in the Balkans, Norway, and Greece. The March 14 program identified three primary defendants: Field Marshal Wilhelm List, the Commander-in-Chief of the 12th Army in Greece and Yugoslavia and then the Commander-in-Chief of Army Group A; Field Marshal Maximilian von Weichs, the Commander-in-Chief of the 2nd Army during the Balkans Campaign and later the Supreme Commander Southeast; and General Lothar Rendulic, the Commander-in-Chief of the 2nd Panzer Army in Yugoslavia and then Commander-in-Chief of the 20th Mountain Army in Norway. The program also mentioned 11 possible defendants, such as General Franz Boehme, Rendulic's successor in Norway.¹³⁴

d. *Principal Military Case*

The *Principal Military* case, which eventually became *High Command*, included military leaders "selected so as to represent not only the Army (OKH) but also the Navy, Air Force, and the Supreme Command of the Wehrmacht (OKW)."¹³⁵ The charges against most of the defendants were intended to parallel the war-crimes charges against Jodl and Keitel at the IMT: "to wit, the preparation, distribution, and enforcement of criminal orders, such as the order for the murder of all Commandoes [sic] even after they had surrendered."¹³⁶ Some of the defendants would also be charged with waging aggressive war.¹³⁷ Interestingly, despite Doenitz's conviction at the IMT for waging aggressive war,¹³⁸ Taylor did not intend to bring crimes against peace charges against defendants who "merely participated in carrying out the attack, but against whom there is no evidence of advance planning or instigation."¹³⁹

The March 14 program identified 25 possible defendants, although Taylor made it clear that "[f]urther examination of documents and other evidence... will be necessary before a final list of the defendants can be made."¹⁴⁰ The list included the three Field Marshals – Walter von Brauchitsch, Erich von Manstein, and Gerd von Rundstedt – whom Clay would later order Taylor not to prosecute.

e. *Farben*

The March 14 program identified 35 possible defendants from the Farben corporation, including Carl Krauch, the Chairman of the Aufsichtsrat; Hermann Schmitz, the Chairman of the Vorstand, whom Jackson had wanted to try at the IMT¹⁴¹; and Georg von Schnitzler, a member of the Vorstand's Central Committee and the chief of the committee that oversaw Farben's domestic and foreign sales. Taylor estimated that

¹³⁴ Id. at 11.

¹³⁵ Id. at 3.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ See IMT JUDGMENT, 107-08.

¹³⁹ First Trial Program, 3.

¹⁴⁰ Id. at 12.

¹⁴¹ Bush, *Conspiracy*, 1113. Jackson later wanted to include Schmitz in the potential second IMT trial. Id. at 1116.

the indictment would include between 20 and 24 of the defendants and would be filed within three weeks.¹⁴²

f. *Krupp*

Not surprisingly, the March 14 program listed Alfried Krupp as the primary defendant in the *Krupp* case. It also identified five other certain defendants, including Erich Mueller, a member of Krupp's Vorstand and Direktorium who had been the head of armament production, and Friedrich von Buelow, a deputy member of the Vorstand who had been Krupp's counterintelligence chief. Finally, the program mentioned six other possible defendants, from which "one or two" might be selected.¹⁴³ That list included Karl Eberhardt, the head of Krupp's war materials department, and Hans Kupke, the head of Krupp's camps for foreign workers.

g. *Dresdner Bank*

Although the *Dresdner Bank* case had been planned from the beginning, the March 14 program exhibited increasing uncertainty about its prospects. Taylor stated that "[i]n all probability, the case will comprise eight or a dozen defendants" drawn from a list of bank officials that included Carl Goetz, the Chairman of the Aufsichtsrat, and Karl Rasche, a leading member of the Vorstand. The most interesting potential defendant in *Dresdner Bank* was, in fact, not on the March 14 list: Kurt von Schroeder, the German banker who had raised a significant amount of money for the Nazis as a member of Himmler's notorious Circle of Friends. The OCC had considered indicting von Schroeder in *Flick*, but Foster Adams felt that *Dresdner Bank* was a more appropriate home. That appears to have been the dominant sentiment among the prosecutors, although it is important to note that Sprecher – who was, as Jonathan Bush has pointed out, "usually not a voice of caution"¹⁴⁴ – questioned whether the available evidence justified including von Schroeder in *Dresdner Bank*.

The OCC also faced an additional problem regarding von Schroeder: he was in British custody, and by early 1947 the British had lost all interest in prosecuting or extraditing him, even though they had originally proposed that he be included in a second IMT trial.¹⁴⁵ That seemed to end the matter – until the OCC requested that von Schroeder testify for the prosecution in *Flick*. Adams suggested that "the Americans should let Schroeder come to Nuremberg, while working behind the scenes to add Schroeder as a defendant" in *Dresdner Bank*. "If the addition could be made, prosecutors might persuade or embarrass the British into allowing his status to change from witness to defendant."¹⁴⁶ It was a bold if somewhat underhanded plan, but it never came to fruition. In fact, von Schroeder ultimately testified for the defense in *Flick* and the prosecution in *Krupp*.

h. *Food and Agriculture/Hermann Goering Works*

¹⁴² First Trial Program, 14.

¹⁴³ Id. at 15.

¹⁴⁴ Bush, *Conspiracy*, 1192 n. 362.

¹⁴⁵ Id. at 1190-91.

¹⁴⁶ Id. at 1191-92.

According to the March 14 program, “[t]he common denominator of the defendants in this case is that they are all leading government officials in the economic field.”¹⁴⁷ The program mentioned twelve certain defendants, including Walther Darre and Herbert Backe, successive Ministers of Food and Agriculture; Paul Koerner, Goering’s Deputy in the Four-Year Plan; and Wilhelm Keppler, Secretary of State and one of Hitler’s economic advisers. It also identified seven other suspects “from whom a few defendants might be selected.” They included Emil Puhl, Vice-President of the Reichsbank.¹⁴⁸

In addition to the government officials, Taylor proposed to include officials of the Hermann Goering Works (HGW) in the case, because the company, “although an enormous concern, was primarily governmental rather than private in character.”¹⁴⁹ Potential defendants included Paul Pleiger, the head of HGW,¹⁵⁰ who had been included on Jackson’s list of defendants for a second IMT trial.¹⁵¹

i. Government Administration

The *Government Administration* case focused on “Hans Lammers, Otto Meissner, and other principal officials who constituted Hitler’s immediate entourage in his capacity as Reichschancellor.”¹⁵² Lammers had been the head of the Reich Chancellery; Meissner had been chief of the Presidential Chancellery. The March 14 program also considered seven other suspects to be “certain” defendants, including Friedrich Kritzinger, the Reich Chancellery’s State Secretary, and Wilhelm Stuckart, the Undersecretary of the Interior.¹⁵³

J. Foreign Office

The *Foreign Office* case, which would later become *Ministries*, was originally limited – as the name implied – to officials from the Reich Foreign Office. The two leading defendants, according to the March 14 program, would be Baron Gustav Steengracht von Moyland, Ernst von Weizsaecker’s successor as Secretary of State in the Foreign Office, and Ernst Bohle, the chief of the *Ausland*, the Foreign Organization. Other defendants would be selected from a list of 17 suspects, including von Weizsaecker himself; Franz Six, the head of the Cultural Division; and Ernst Woermann, the Ambassador to China.¹⁵⁴

2. The Optional Three

a. SD-Gestapo-RSHA

The March 14 program’s first “optional” case – which eventually became *Einsatzgruppen* – focused on “Otto Ohlendorf and other principal officials of the Sicherheitsdienst, the Gestapo, and the Main Security Office (RSHA) of the SS.”¹⁵⁵

¹⁴⁷ First Trial Program, 17.

¹⁴⁸ Id.

¹⁴⁹ Id. at 4.

¹⁵⁰ Id. at 17.

¹⁵¹ Bush, *Conspiracy*, 1116.

¹⁵² First Trial Program, 4.

¹⁵³ Id. at 18.

¹⁵⁴ Id. at 19.

¹⁵⁵ Id. at 2.

Ohlendorf had testified at the IMT that Einsatzgruppe D, which he commanded, killed more than 90,000 Jews in the Crimea and Southern Ukraine during the war. Indeed, his testimony – which was both extensive and remarkably forthright¹⁵⁶ – was the primary reason that Taylor thought the case was optional: “[t]he evidence against Ohlendorf and the other defendants who would be involved in such a case was so thoroughly developed by the International Military Tribunal that it may be unnecessary for the Office of Chief of Counsel to handle this case, provided that other suitable judicial machinery is available or can be created.”¹⁵⁷

Taylor insisted, however, on the latter condition. In his view, denazification was an unacceptable option for the other potential defendants, “inasmuch as ten years’ imprisonment is the maximum sentence which can be imposed by the Spruchkammers.”¹⁵⁸ Taylor’s position was sound – a number of the suspects identified in the March 14 program as potential defendants would ultimately be sentenced to death in the *Einsatzgruppen* trial, such as Walter Blume, the commanding officer of Einsatzgruppe B’s Sonderkommando 7a of, and Willi Seibert, Ohlendorf’s Deputy Chief in Einsatzgruppe D.

b. Warsaw Destruction

The second “optional” case was scheduled to include “the military and SS leaders who were responsible for the destruction of Warsaw, and other atrocities committed there.”¹⁵⁹ The March 14 program identified two principal defendants: Colonel-General Heinz Guderian, who had commanded the XIX Corps during the invasion of Poland, and General Nikolaus von Vormann, the Commander of the 9th Army during the Warsaw Uprising. It also listed 12 possible defendants, including Oskar Dirlewanger, an SS *Obersturmführer* whose vicious – even by Nazi standards – “Dirlewanger Brigade,” which was composed entirely of convicted German criminals, had killed more than 40,000 civilians during the Warsaw Uprising. Taylor believed that the case was important, but he acknowledged in the memo that “[i]n view of the primarily Polish interest in the case, it may well be unnecessary for the Office of Chief of Counsel to handle it.”¹⁶⁰

a. Propaganda and Education

The final “optional” case was intended to include “Otto Dietrich, Max Amann, Arthur Axmann, and other leading officials in the field of propaganda and education.”¹⁶¹ Dietrich had been Chief of the Press Division in the Reich Ministry of Propaganda; Amann had been President of the Reich Press Chamber; and Axmann had succeeded von Schirach as Reich Youth Leader. Other potential defendants included Gustav Schulz, Reich Leader of Students and Lecturers; Bernard Rust, Minister of Education; and Carl Schmitt, “University professor and propagandist.”¹⁶²

¹⁵⁶ EARL, 72-73.

¹⁵⁷ First Trial Program, 2.

¹⁵⁸ Id.

¹⁵⁹ Id. at 3.

¹⁶⁰ Id.

¹⁶¹ Id. at 5.

¹⁶² Id.

Taylor insisted that the *Propaganda and Education* case was important “from the standpoint of the purposes of the Office of Chief of Counsel.”¹⁶³ Nevertheless, he acknowledged in the memo that the IMT judgment made it unclear whether the case would succeed. The IMT had convicted both Streicher, the publisher of *Der Sturmer*, and von Schirach, the *Gauleiter* of Vienna,¹⁶⁴ which Taylor thought was “distinctly helpful.”¹⁶⁵ But it had acquitted Fritzsche, the head of the Propaganda Ministry’s Radio Division, because the prosecution had failed to prove that he intended “to incite the German peoples to commit atrocities on conquered peoples.”¹⁶⁶ His acquittal, Taylor believed, “somewhat obstructed” the case.¹⁶⁷

C. Cases 6 & 7

Taylor submitted his second trial program to OMGUS on 20 May 1947. In the interim, the OCC had filed indictments in two cases: *Farben* and *Hostage*.

1. *Farben* (Case No. 6)

Farben was prepared and presented by the Farben Trial Team, one of the OCC’s original divisions. The indictment was filed on 3 May 1947, although the trial did not begin until August 27, nearly four months later.

From the beginning, the Farben team found it extremely difficult to prepare the case. The most significant problem was that the documentary evidence needed for trial was so vast and so scattered that it took nearly two years to collect and analyze.¹⁶⁸ All three of the OCC’s satellite offices – in Berlin, Frankfurt, and Washington – were involved in processing evidence against Farben,¹⁶⁹ and the Farben team had to send field teams into a number of countries, including France, Poland, Yugoslavia, and Belgium, in order to obtain critical documents.¹⁷⁰ Even worse, much of the documentary evidence was in far from usable form. When two representatives of OMGUS’s Cartels Section arrived in Frankfurt in April 1945, for example, they discovered that “four hundred tons of IG’s documents which had been carefully filed over the years were being unceremoniously tipped out of the windows and burnt in the courtyard,” because SHAEF commander needed the building “cleared of refuse” so they could use it as their headquarters. Liberated slave laborers were using the rest for bedding.¹⁷¹

The trial team also had to deal with Farben’s repeated attempts to destroy documents that it knew were inculpatory:

Huge bonfires of IG documents had been burning for some days before the Americans captured Frankfurt. Other documents had been hidden in forests, mines and farmyard barns, stored in cupboards and

¹⁶³ Id. at 5.

¹⁶⁴ IMT JUDGMENT, 101-02, 113-14.

¹⁶⁵ First Trial Program, 5.

¹⁶⁶ IMT Judgment, 127-28.

¹⁶⁷ First Trial Program, 5.

¹⁶⁸ BOWER, 311.

¹⁶⁹ Undated Organizational Memo, 6.

¹⁷⁰ Id.

¹⁷¹ BOWER, 310-11.

even sewn into clothes. IG had rented a monastery's refectory to store "personal effects of bombed out employees." The sixty-eight packing cases were crammed with agreements between IG and French, British, and American companies.¹⁷²

Other key documents were found in a bathroom cupboard, where they had been hidden by the defendant Otto Ambros, who was a member of the Farben Vorstand and had managed Farben's plant at Auschwitz. "Ambros had methodically destroyed bundles of incriminating files, but had hidden just a handful whose destruction even he could not contemplated. It was a fatal, but isolated, mistake. Their discovery, as in most cases, resulted from chance information from an informer."¹⁷³

As Taylor anticipated, 24 Farben officials ultimately stood trial, including Krauch, Schmitz, von Schnitzler, and Ambros. Other important defendants included August von Knieriem, Farben's Chief Counsel; Fritz ter Meer, a member of the Vorstand's Central Committee and the chief of the committee that planned and directed all of Farben's production; and Walter Duerrfeld, who was the director and construction manager of Farben's Auschwitz and Monowitz plants.

2. The Hostage Case (Case No. 7)

The *Hostage* case was prepared by the Military Division. The indictment was filed on 10 May 1947 and trial began on July 15. The final list of defendants was nearly the same as the March 14 list; the most important difference was the removal of Franz Boehme, who had committed suicide prior to arraignment.

Hostage's relatively early placement in the trial program was the product of two factors. The first was evidentiary: "documentary proof" that the systematic murder of hostages in Yugoslavia, Albania, and Greece was "carried out pursuant to orders emanating from the highest levels of the Wehrmacht came readily to hand."¹⁷⁴ The second was logistical: the three primary defendants in the case – List, von Weichs, and Rendulic – were already in U.S. custody.¹⁷⁵

D. The May 20 Program

Taylor described his 20 May 1946 memo to OMGUS as a "more precise schedule of war crimes cases."¹⁷⁶ The new program called for 16 trials instead of 18, involving approximately 220 defendants¹⁷⁷ – only five fewer than the 225 Taylor had estimated would be tried in all 18 cases. Taylor hoped that the OCC would file the remaining nine indictments within two months, and he still believed that the "bulk" of the trials would be completed prior to 1 January 1948, as General Clay had requested. He acknowledged, though, that "several trials will still be in process at the end of 1947

¹⁷² Id. at 312.

¹⁷³ Id. at 353.

¹⁷⁴ TAYLOR, FINAL REPORT, 80.

¹⁷⁵ Id.

¹⁷⁶ Second Trial Program, 2.

¹⁷⁷ Id.

which may continue two or three months into 1948.”¹⁷⁸ Clay approved the May 20 program on June 9.¹⁷⁹

With the exception of *Dresdner Bank*, all of the remaining cases had evolved since the March 14 program. The May 20 program’s elimination of two cases, however, was obviously the most significant development in the trial schedule. Moreover, between the two programs, the OCC had also decided not to pursue cases against a variety of industrial and financial defendants, including the Deutsche Bank.

1. Cases Eliminated from the March 14 Program

The first casualty was the *Warsaw Destruction* case, which Taylor had decided would be more appropriately prosecuted by the Polish government. That might have been a mistake: it appears that the Poles prosecuted only one of the suspects on the March 14 list – Paul Otto Geibel, the head of the SS and police in Warsaw during the Uprising, who was sentenced to life imprisonment in 1954. Neither General Guderian nor General von Vormann ever stood trial for their crimes, although Guderian remained in U.S. custody until June 1948. Dirlewanger also avoided trial, though for a more understandable reason: it was later learned that he had been beaten to death by Polish prison guards in June 1945.

Taylor eliminated a second case by combining *Government Administration and Propaganda and Education* into a more general case that included “the principal ministerial officials in departments other than the Foreign Office and the Economic Department.”¹⁸⁰ Hans Lammers, Arthur Axmann, and Otto Dietrich remained principal defendants, but the May 20 program demoted Max Amann, the President of the Reich Press Chamber, and Otto Meissner, the chief of the Presidential Chancellery, to the list of possible defendants. That six-person list included two previously-identified defendants, Gustav Schulz and Friedrich Kritzinger.¹⁸¹

Combining the two cases resulted in a net loss of ten defendants, although Wilhelm Stuckart would later be tried in *Ministries*. The most notable absence from the new list was Carl Schmitt. After Schmitt joined the Nazi Party in 1933, he had been appointed the director of the University Teachers Group of the National Socialist League of German Jurists and had written a number of pro-Nazi and anti-Semitic articles for the self-published *German Jurists’ Newspaper*. Schmitt had resigned his position as Reich Professional Group Leader after a falling-out with the SS in 1937, but he had been able to keep his professorship at the University of Berlin because Goering protected him.¹⁸²

Taylor never explained why Schmitt was included on the March 14 list of defendants but was left off the May 20 list. Joseph Bendersky has convincingly argued, however, that although the OCC considered Schmitt to be National Socialism’s *Kronjurist*,

¹⁷⁸ Id.

¹⁷⁹ Memo from Taylor to Deputy Military Governor, 4 Sept. 1947, NA-549-2236-1, summary, para. 3 (“Third Trial Program”).

¹⁸⁰ Id. at 15.

¹⁸¹ Id. at 18.

¹⁸² Joseph W. Bendersky, *The Expendable Kronjurist: Carl Schmitt and National Socialism, 1933-1936*, 14 J. CONTEMP. HIST. 309, 323 (1979).

Robert Kempner's four "amateurish and ill-prepared"¹⁸³ interrogations of Schmitt simply failed to uncover anything particularly incriminating.¹⁸⁴ By contrast, Helmut Quaritsch has claimed that Kempner interrogated Schmitt multiple times not because he thought Schmitt was a war criminal, but because he wanted Schmitt to testify for the prosecution in the *Ministries* case.¹⁸⁵ That is something of an overstatement, given Schmitt's inclusion as a possible defendant in the *Propaganda and Education* case. Moreover, Bendersky's account of the interrogations makes clear that, at least at first, Kempner genuinely believed Schmitt could be prosecuted for his role as the "theorist" of Nazi aggression.

That said, the OCC clearly did view Schmitt as a potential witness in *Ministries*, although he never actually testified at the trial and was released less than three months after he was detained. During the third interrogation, Kempner asked Schmitt to write an essay for the OCC about the role of the Reich Chancellery in a totalitarian state.¹⁸⁶ (Schmitt obliged.) Even more revealingly, a confidential OCC memo written no earlier than August 1948 notes that the Ministries Division ordered Schmitt's arrest on 23 March 1947 because he was considered a "material witness for the Ministries Case."¹⁸⁷ That description is important, because the memo lists a number of suspects whom the OCC considered "potential defendants" – including potential defendants in *Ministries*.

2. Other Eliminated Cases

In addition to eliminating two cases from the March 14 schedule, May 20's "more precise" trial program also marked the end of OCC efforts to pursue charges against a variety of other industrialists and financiers. The OCC had spent much of 1946 identifying potential defendants, efforts that had culminated in an August 1 list of 72 "leading industrialists, financiers, and economic figures in Nazi Germany who may be subject to prosecution under Control Council No. 10,"¹⁸⁸ and a proposal by Sprecher in late July to ask the British to extradite Otto Steinbrinck of Vereinigte Stahlwerke and the heads of Mannesmann, the Deutsche Bank, and Degussa.¹⁸⁹ There were a number of notable absences from the list, such as any of Daimler-Benz's officials other than Max Wolf.¹⁹⁰ Daimler-Benz had committed numerous crimes during the war, ranging from the use of slave labor to forcing women to work in company-run brothels.¹⁹¹

In the end, though, the August 1 list's lack of comprehensiveness proved academic. On 3 June 1947, Sprecher informed the Chief of the OCC's Apprehension and Locator Branch that the prosecutors no longer required a number of individuals whose

¹⁸³ Joseph W. Bendersky, *Carl Schmitt's Path to Nuremberg: A Sixty-Year Reassessment*, 139 TELOS 6, 8 (2007).

¹⁸⁴ Id. at 30.

¹⁸⁵ Id. at 8.

¹⁸⁶ Id. at 31-32.

¹⁸⁷ Arrests by Request of OCCWC, 3.

¹⁸⁸ List of Leading Industrialists, Financiers, and Economic Figures in Nazi Germany Who May Be Subject to Prosecution Under Control Council No. 10, 1 Aug. 1946, Gantt Collection in Towson University Archives, box 00.

¹⁸⁹ Bush, *Conspiracy*, at 1131.

¹⁹⁰ Id. at 1133.

¹⁹¹ Id. at 1132.

apprehension had been requested by the former Economics Division.¹⁹² In addition to Fritz Thyssen and Koppenberg, the list included the banker Karl Blessing; Hermann Roechling, the Saar industrialist who would later be convicted by the French of deportation and plunder; Hermann von Siemens, a director of Siemens, which had made liberal use of slave labor at Auschwitz¹⁹³; and Rudolf Walz, the managing technical director of Bosch, whom Taylor had specifically told Clay he hoped to prosecute.¹⁹⁴

The OCC's most difficult decision involved a possible case against the Deutsche Bank, the largest in Germany, whose clients included numerous companies that had utilized slave labor, including Siemens, Mannesmann, BMW, and Farben. The Deutsche Bank had experienced "sudden and phenomenal growth" during the war, largely as a result of its acquisition of Jewish-owned German banks and companies through Aryanization and its plunder of banks in occupied countries, such as Creditanstalt Wiener Bankverein, one of Austria's largest.¹⁹⁵ The OCC was particularly interested in Hermann Abs, a member of the *Vorstand* who had sat on Farben's *Aufsichtsrat* and whom Elwyn-Jones had targeted for prosecution in a second IMT.¹⁹⁶

In early May, Taylor called a special OCC meeting to determine whether to bring charges against the bank. A 324-page report prepared by OMGUS's Finance Division on both the Deutsche Bank and the Dresdner Bank had concluded that there was enough evidence to convict Abs and other members of the Deutsche Bank's *Vorstand*. According to Bowers, however, "Sprecher and Taylor had to disagree. All the report proved was how well the bank's directors had concealed their own activities." Taylor thus "reluctantly" decided not to indict anyone associated with the bank.¹⁹⁷

3. RuSHA

The May 20 program added seven defendants to the *RuSHA* case. The *RuSHA* list now included Otto Hofmann, Hildebrandt's predecessor, and Fritz Schwalm, Hofmann's Chief of Staff. The *Lebensborn* list now included Inge Viermetz, Sollman's deputy, and Gregor Ebner, the head of the Health Department. The *RKFVD* list now included Konrad Meyer-Hetling and Otto Schwarzenberger, the Chief of the Planning Office and the Chief of Finance, respectively. And the *VOMI* list now included Heinz Bruckner, one of the office heads. The additions brought the total number of defendants to 23.¹⁹⁸

4. SD-Gestapo-RSHA

The most significant change in the *SD-Gestapo-RSHA* case was that its increasing focus on the activities of the *Einsatzgruppen* – discussed below – meant that Taylor no longer considered it to be optional. The March 14 list had identified Ohlendorf and 26 "tentative" defendants; the May 20 list contained 31. New additions included

¹⁹² Memo from Sprecher to Martin, 3 June 1947, NA-238-165-1-8, at 1.

¹⁹³ BOWER, 17.

¹⁹⁴ *Id.* at 355.

¹⁹⁵ *Id.* at 16.

¹⁹⁶ *Id.* at 346.

¹⁹⁷ *Id.* at 354-55.

¹⁹⁸ Second Trial Program, 5

Otto Rasch, the commander of Einsatzgruppe C, which had killed more than 118,000 in the Ukraine, and three of Rasch's subcommanders: Erwin Schulz, Paul Blobel, and Ernst Biberstein.¹⁹⁹

5. *Prisoner of War Case*

The only change to the *Prisoner of War* case was the addition of one potential defendant whose name, unfortunately, is not readable on the May 20 program.²⁰⁰

6. *Principal Military Case*

The May 20 program reduced the number of potential defendants in the *Principal Military* case from 25 to 6, although Taylor reiterated that the list could not be finalized until additional documents had been analyzed. Three of the defendants were Field Marshals: George von Kuechler, who had commanded Army Group North during the siege of Leningrad; Wilhelm von Leeb, von Kuechler's predecessor with Army Group North; and Hugo Sperrle, the head of the *Luftwaffe*. One was a General Admiral in the *Kriegsmarine*, Otto Schniewind. And two were Generals: Georg-Hans Reinhardt, von Kuechler's successor with Army Group North; and Walter Warlimont, Deputy Chief of the Wehrmacht's Operations Staff.²⁰¹ Field Marshals von Brauchitsch, von Manstein, and von Rundstedt were no longer included in the list, reflecting Taylor's growing recognition that it was unlikely he would be able to prosecute them.

7. *Krupp*

The only change in *Krupp* was that the OCC had decided to "probably" prosecute all six of the potential defendants in the March 14 program, instead of simply "one or two." The May 20 program, therefore, included 12 likely defendants.²⁰²

8. *Food and Agriculture-Hermann Goering Works*

The May 20 program removed two certain defendants and one possible defendant from the March 14 list.²⁰³ Franz Seldte, who had been Reich Minister of Labor, was removed because he had died of natural causes on April 1. Herbert Backe was removed because he had committed suicide five days after Seldte's death. And Hans Riecke, Backe's Deputy in the Four-Year Plan, had been denazified after the OCC determined that he was not sufficiently important to prosecute.

9. *Foreign Office*

The only change in the *Foreign Office* case was that Paul Schmidt, the head of the Foreign Office's news and press division, had been dropped as a suspect.²⁰⁴ Schmidt would later testify for the prosecution at the *Ministries* trial.

D. Cases 8-10

¹⁹⁹ Id. at 6.

²⁰⁰ Id. at 7.

²⁰¹ Id. at 10.

²⁰² Id. at 12.

²⁰³ Id. at 13.

²⁰⁴ Id. at 14.

Taylor submitted his final trial program to OMGUS on 4 September 1947. In the interim, the OCC had filed indictments in three cases – *RuSHA*, *Einsatzgruppen*, and *Krupp* – and decided to abandon the possibility of holding a second medical trial.

1. *RuSHA* (Case No. 8)

The *RuSHA* case was prepared and presented by the SS Division. According to Sprecher, the case was one of the easiest to prepare – requiring less than six months – because “the groundwork had been laid in the preparation and trial of other cases.”²⁰⁵ The indictment was filed on July 7, and the trial began on October 20.

14 people were ultimately indicted. All of the defendants added by the May 20 program were included in the final trial, as were all of the March 14 defendants from the Lebensborn, RKFDV, and VOMI. Of the 11 original *RuSHA* defendants, only Richard Hildebrandt and Herbert Huebner were indicted. Dropped defendants included Kurt Mayer, the head of the Reich Office for Genealogy Research, and Herbert Aust, one of *RuSHA*’s leading – and most eugenics-oriented – racial examiners. The OCC wanted to include Fritz Bartels, the head of the Reich Central Office of Health Leadership, in the trial, but he was not apprehended and transferred to Nuremberg until after the indictment had already been filed.²⁰⁶

2. *Einsatzgruppen* (Case No. 9)

Einsatzgruppen, which was also planned and prepared by the SS Division, was one of the last cases to be approved for trial. Taylor had not initially anticipated prosecuting Ohlendorf with other *Einsatzgruppen* leaders; as indicated by the March 14 program, he intended to include Ohlendorf in a more general SS case.²⁰⁷ Indeed, a number of OCC investigators were initially opposed to an *Einsatzgruppen*-centered trial, because – notwithstanding Ohlendorf’s testimony at the IMT – they did not yet fully grasp the enormity of the crimes committed by the mobile killing squads.²⁰⁸

Two developments reoriented the OCC’s planning. To begin with, although most of the high-ranking SD, Gestapo, and RSHA officials that the OCC wanted to prosecute were either missing (most notably Eichmann²⁰⁹) or known to be dead,²¹⁰ the Apprehension and Locator Branch was able to find a number of *Einsatzgruppen* commanders and subordinate officers.²¹¹ Availability alone thus dictated limiting the case to the *Einsatzgruppen*. More importantly, though, the Berlin Branch began to analyze the *Einsatzgruppen* Reports, a massive collection of eight to nine million documents that detailed the *Einsatzgruppen*’s crimes with chilling precision.²¹² The reports had been seized by the Allies in September 1945, but the Berlin Branch did

²⁰⁵ Memo from Sprecher to Mercer, undated, 1.

²⁰⁶ Arrests by Request of OCCWC, 1.

²⁰⁷ First Trial Program, 2.

²⁰⁸ EARL, 73.

²⁰⁹ At the time, military authorities wrongly believed that Eichmann had committed suicide. Id. at 48.

²¹⁰ TAYOR, FINAL REPORT, 203 n. 80.

²¹¹ Id. at 80.

²¹² EARL, 77-79.

not “discover” them until March 1947 because of its limited investigative resources.²¹³

Once the OCC prosecutor in charge of the Berlin Branch, Ben Ferencz, recognized the importance of the Einsatzgruppen Reports, he returned to Nuremberg to lobby Taylor to dedicate a case to Ohlendorf and the other leaders of the Einsatzgruppen.²¹⁴ That was a significant request, given that Taylor not only expected the case to be much broader, but considered even the broader case to be “optional” – and indeed Taylor initially rejected it, insisting that the OCC simply lacked the time and resources to try another case.²¹⁵ Nevertheless, at some point between the May 20 program and July 3, when the initial indictment was filed in the case, Taylor changed his mind.²¹⁶

Ferencz, whom Taylor named chief prosecutor of the *Einsatzgruppen* case,²¹⁷ then began to prepare for trial. The first issue was how to deal with the Soviets, on whose soil many of the worst atrocities had been committed. Ferencz sent Frederic Burin, one of the Berlin Branch’s research analysts, to discuss the possibility of a joint prosecution of the Einsatzgruppen commanders with the Soviet Military Administration. The Soviet representative was initially “intrigued” by the idea, but later in the meeting took the position that the Soviets would want to prosecute the suspects in their custody on their own. That was the last time the OCC communicated with the Soviets about the case.²¹⁸

Once Ferencz realized that the OCC was on its own, his team – which included an alcoholic prosecutor named James Heath and two “cast-offs” from other prosecution teams²¹⁹ – began identifying which of the 2,000-3,000 members of the Einsatzgruppen to indict. At least one of the team’s key suspects, Heinz Schubert, Ohlendorf’s adjutant in Einsatzgruppe D, had been released from confinement for lack of evidence that he had committed or witnessed the commission of any war crimes.²²⁰ He was detained again and included in the trial. Another suspect, Franz Six, was scheduled to be tried as part of the *Foreign Office* case because he had been the head of the Foreign Office’s Cultural Division before being appointed commander of Einsatzgruppe B’s Vorkommando Moscow. Taylor decided to transfer Six to *Einsatzgruppen*.

The OCC filed the first indictment in the case on July 3. That indictment contained 18 names, all but one of whom – Erich Naumann, the commander of Einsatzgruppe B – had been included on the May 20 list. The July 3 indictment was then amended on July 29 to include six additional defendants. Four of those had been on the May 20

²¹³ Id. at 77.

²¹⁴ Id. at 79.

²¹⁵ Id.

²¹⁶ Earl claims that Taylor made this decision in late March, but the May 20 program, which continued to list the broader case, indicates that the final decision was actually made considerably later.

²¹⁷ Memorandum from Walton to Sachs, 22 Mar. 1947, cited in EARL, 79.

²¹⁸ Id. at 80-81.

²¹⁹ Id. at 204. Heath would ultimately be listed only as a “consultant” in the *Einsatzgruppen* case. Id. at 204 n. 115.

²²⁰ Id. at 78.

list,²²¹ but two had been identified subsequent to the second trial program: Waldemar Klingelhofer, Six's successor as commander of Vorkommando Moscow; and Waldemar von Radetzky, Deputy Chief of Sonderkommando 4a of Einsatzgruppe C. Trial began on September 29 with 23 defendants instead of 24, because Emil Haussmann, an officer in Einsatzkommando 12 of Einsatzgruppe D, committed suicide two days after being arraigned.²²²

3. Krupp (Case No. 10)

Krupp – which would be the last of the industrialist cases – was prepared and presented by the Krupp Trial Team, which was established when the Economics Division was dissolved. The indictment was filed on August 16 and trial began on December 8.

The 12 defendants at the *Krupp* trial included Alfried Krupp and all of the defendants that both the March 14 and May 20 programs had considered “certain.”²²³ It also included two of the defendants identified as possible by the two programs, Eberhardt and Kupke, as well as four members of Krupp's *Vorstand* that had not been previously identified: Eduard Houdremont, Karl Pfirsch, Heinrich Korsch, and Ewald Loeser. Loeser's inclusion incensed the British, who insisted that he had been cleared of wrongdoing by their intelligence services and had only been extradited to the U.S. by mistake. Britain also insisted – providing still more evidence that it had no interest in punishing industrialists – that the charges against him be dropped on the ground that he was “an essential man in the administration of the North German Iron and Steel Control, and in the economic rehabilitation of the British Zone.”²²⁴

4. The Second Medical Case

As noted earlier, because Erich Hippke, the Chief Medical Officer of the Luftwaffe, had been captured too late to be included in the first medical trial, the March 14 program had recommended that he “and certain others in the same category should be retained in confinement until the conclusion of the case and thereafter should be tried in some appropriate proceeding.”²²⁵ Those others had been identified in an August 15 memo from Alexander Hardy to Taylor; the list of 15 suspects included Karl Clauberg, “the most reprehensible of all the remaining medical men not tried,” who had been involved in the Auschwitz sterilization experiments; Otto Bickenbach, who had been involved in the phosgene gas experiments at Fort Ney in France; and E. Gildemeister, who had conducted typhus experiments at Buchenwald.²²⁶

Toward the end of August, Taylor finally abandoned the possibility of a second Medical trial. The OCC's limited resources and the rapidly-approaching end of the war-crimes program were almost certainly the most important factors. It is likely, though, that two other considerations played a role in Taylor's decision. First, Milch had been acquitted on the medical experimentation charge, which made it unlikely that any of the suspects on Hardy's list that had not been personally involved in the

²²¹ Braune, Haensch, Steimle, and Strauch. Second Trial Program, 6.

²²² Einsatzgruppen, IV TWC 411.

²²³ Mueller, Janssen, Ihn, von Buelow, and Lehmann.

²²⁴ Quoted in Bush, *Conspiracy*, 1192.

²²⁵ Second Trial Program, 8.

²²⁶ Memo from Hardy to Taylor, 15 Aug. 1947, NA-260-186a1-102-11, at 1-2.

experiments – such as Karl Gutzeit, who had been aware of the experiments connected to the racial hygiene program as a member of Handloser’s staff²²⁷ – could be successfully prosecuted.²²⁸ Second, most of the most important suspects on the list were either still at large (such as Clauberg), rumoured to be dead (such as Gildemeister), or scheduled to be tried by another Ally (such as Bickenbach, who was in French custody).

E. The September 4 Program

By the time Taylor submitted his final trial program on 4 September 1946, the OCC had initiated 10 of the 16 cases that Clay had approved. Two had been completed: *Medical* and *Milch*. Taylor estimated that six of the eight cases that were still in progress would be completed by the end of 1947, while *Krupp* and *Farben* would continue until April or May 1948.²²⁹

The other six cases were more problematic. Taylor reiterated in the September 4 memo that “the program recommended on 14 March, amended on 20 May, and approved as amended on 9 June, is sufficiently comprehensive and well-balanced... that it should be executed appropriately as it stands.”²³⁰ He acknowledged, however, that funding, time, and personnel problems meant that the program had to be scaled back.²³¹

Funding. Taylor pointed out that the budget approved by OMGUS provided trial-related expenses only through the end of fiscal year 1947. As a result, the budget simply did not allow the OCC to prosecute all six of the remaining cases. Taylor remained confident, however, that the budget did not require more than “moderate curtailment” of the May 20 program.²³²

Time. When General Clay approved the May 20 program on June 9, he insisted that no trial should begin after 1947 and that all trials should end by June 1948.²³³ According to Taylor, although the remaining cases were “in a fairly advanced state of preparation,” it would not be possible to prosecute all six within those parameters. The OCC would have to run all of the trials simultaneously to meet Clay’s deadline, and it simply lacked sufficient clerical staff to “cope with so many cases at once.”²³⁴

The problem, according to Taylor, was that the earlier cases had taken much longer to begin and complete than he had expected. One reason was simply logistical: Tribunals V and VI had arrived late in Nuremberg, delaying the start of the *Hostage* and *Farben* trials. Another reflected the OCC’s poor planning: in a number of cases, the OCC had simply filed indictments that, in retrospect, appeared “unnecessarily broad” – an error for which Taylor was “quite prepared to take the blame.”²³⁵

²²⁷ Id. at 2.

²²⁸ Weindling, *Zonal Trials*, 383.

²²⁹ Third Trial Program, 1-2.

²³⁰ Id. at 2.

²³¹ Id. at 3.

²³² Id.

²³³ Id.

²³⁴ Id.

²³⁵ Id. at 4.

Taylor's other reasons are particularly interesting. First, Taylor observed that it was particularly difficult to prove the guilt of high-ranking military, governmental, and economic officials. The NMT trials were not like the Dachau trials, in which "most of the defendants [could] be shown to have committed murders or other atrocities with their own hands."²³⁶ On the contrary, the OCC could only convict its defendants by introducing "extensive documentation and testimony showing that they were responsible for the acts of subordinates, that they know of those acts, and that they approved, planned, or encouraged" them.²³⁷

Second, Taylor argued that the German defense counsel availed themselves of every opportunity to slow down the trials, because they had realized that "delaying tactics, if successful, [would] tend to work a contraction of the overall scope of the program." The OCC was doing everything in its power to avoid such delays, but the "substantial shift in the attitude toward the trials on the part of the public... and the judges" meant that their protests were increasingly falling on deaf ears.²³⁸

Third, Taylor noted that it simply took a very long time to prosecute large groups of defendants who were facing the possibility of a death sentence. The *Medical* case was an example: although the case lasted 139 trial days, which "superficially appears like a very long time," that averaged out to only six trial days per defendant.²³⁹ Moreover, most of those days were dedicated to the defense's case-in-chief, because the judges had "quite properly insisted that the defense be given every possible opportunity to deny or explain away the crimes."²⁴⁰ Indeed, in two trials – *Medical* and *Pohl* – the defense had taken more than four times as long as the prosecution to present its case.²⁴¹

Personnel. Although the funding and time limitations were important, "the single most serious limitation on the execution of the remainder of the war crimes program" was the absence of judges to hear the remaining cases.²⁴² Only two or three of the current judges intended to remain in Nuremberg after their trials concluded, and they would be needed for the *Krupp* trial. The OCC's ability to begin the six remaining trials on the May 20 thus depended on the War Department's ability to recruit new judges with the "utmost expedition"²⁴³ – and Taylor was fully aware that recruiting 18 new judges in time to meet the July 1948 deadline was "clearly beyond the realm of actual possibility."²⁴⁴

The question, then, was not *whether* the May 20 program should be curtailed, but by *how much*. Taylor considered three options: abandoning the remaining six cases; eliminating one or more cases; or consolidating the six cases into four or less.

1. Abandonment

²³⁶ Id.

²³⁷ Id.

²³⁸ Id.

²³⁹ Id. at 5.

²⁴⁰ Id. at 4.

²⁴¹ Id. at 5.

²⁴² Id.

²⁴³ Id.

²⁴⁴ Id. at 3.

Taylor was adamantly opposed to abandoning the remainder of the war crimes program, because he believed that failing to prosecute so many high-ranking Nazi officials would – despite eroding support for the trials – “distort and amputate the program to a point where serious criticism might be aroused within Germany, the United States, and within the countries formerly occupied by the Germans.”²⁴⁵ Taylor pointed to three shortcomings in the 10 cases that had been initiated to date. First, and most importantly, only the *Justice* case had focused on “the field of government and politics” – and that case, though “exceptionally interesting legally,” was not “a major case within the framework of the Third Reich as a whole.”²⁴⁶ Government defendants in the remaining cases were far more important, such as Walter Darre, Hans Lammers, and Otto Dietrich.²⁴⁷

Second, only the *Hostage* case was primarily concerned with the German military, and it was “relatively narrow” in scope.²⁴⁸ The *Principal Military* case was thus particularly important, because it included numerous high-ranking officers, such as von Rundstedt, von Manstein, and von Brauchitsch – whom Taylor obviously had still not completely abandoned as possible defendants – as well as Field Marshals von Leeb and von Kuchler.²⁴⁹

Third, none of the ten cases focused on financiers. The *Dresdner Bank* case was intended to fill that gap.²⁵⁰

2. Elimination

Taylor was ambivalent about this option. He acknowledged that *Prisoner of War* and *Food and Agriculture-Hermann Goering Works* could be dropped from the trial program “without serious damage,” although he insisted that Darre, the principal defendant in the latter, would have to be included in one of the remaining cases.²⁵¹ But he drew the line at eliminating any of the other four, which he considered “so important that their complete abandonment is out of the question.”²⁵²

3. Contraction

Taylor’s preferred option, therefore, was to consolidate the six remaining cases into four or less. He pointed out that he had already instructed his staff to consolidate *Prisoner of War* and *Principal Military*, trying the two most important defendants in the former – Gottlob Berger and General Reinecke – together with the military defendants in the latter. An additional case could be eliminated, he believed, by consolidating *Foreign Office* with (the already consolidated) *Government Administration-Propaganda and Education* case.²⁵³ That would mean four cases would be left to try: *Prisoner of War-Principal Military*; *Foreign Office-Government*

²⁴⁵ Id. at 6.

²⁴⁶ Id. at 5.

²⁴⁷ Id. at 5-6.

²⁴⁸ Id. at 6.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Id. at 7.

²⁵² Id.

²⁵³ Id.

Administration-Propaganda and Education; Food and Agriculture-Hermann Goering Works; and Dresdner Bank.

Taylor was optimistic that the OCC's budget and personnel would be sufficient to complete the four cases by the end of June 1948. He recognized, though, that the War Department might find it "extremely difficult" to recruit the 12 new judges that the four cases would require. He thus suggested, as a fall-back position, even more significant consolidation, reducing the number of defendants in *Foreign Office-Government Administration-Propaganda and Education* and adding the most important defendants from *Dresdner Bank* and/or *Food and Agriculture-Hermann Goering Works*: Carl Goetz and Karl Rasche from the former; Walter Darre, Paul Koerner, and Paul Pleiger from the latter. Taylor's preference was to not include the *Dresdner Bank* defendants, because "although 'the merger of Pleiger, Koerner, and Darre with the other ministers can be defended with some show of logic... the merger of Rasche and Goetz has only a tenuous logical basis, and should not be resorted to except as a last extremity.'"²⁵⁴

F. Final Planning

General Clay's response to the September 4 program – reflected in a memo to Kenneth Royall, the current Secretary of War, on September 8 – was generally positive. He continued to maintain that it was essential for all of the NMT trials to be concluded by the end of fiscal year 1947, but he also recognized that the success of the war-crimes program depended on completing as many of the six remaining trials as possible. In his view, three cases were particularly important: *Principal Military, Foreign Office*, and *Dresdner Bank*.²⁵⁵ Indeed, he believed that those cases were more important than *RuSHA*, *Einsatzgruppen*, and *Krupp* – although he knew that it was too late to drop the indictments in those cases.²⁵⁶ Clay thus asked Secretary Royall to obtain nine new judges for the OCC.

Four days later, Royall informed Clay that the War Department would only be able to obtain six new judges. Royall agreed with Clay that the *Principal Military* and *Foreign Office* cases were essential, but he questioned the desirability of trying *Dresdner Bank*.²⁵⁷ Clay replied on September 19 that two new tribunals would be "sufficient to complete the Nurnberg War Crimes program," which would then encompass 12 trials.²⁵⁸ *Prisoner of War* and *Principal Military* would be (and already had been) consolidated into one case; *Foreign Office* would be combined with *Government Administration-Propaganda and Education; Food and Agriculture-Hermann Goering Works* and *Dresdner Bank* would be dropped entirely. Taylor would decide later whether to include defendants from the dropped cases in *Foreign Office*.²⁵⁹

On October 13, despite a "flurry of memos" from OCC personnel defending the cases,²⁶⁰ Taylor informed the War Department that – as expected – it had decided to

²⁵⁴ Id. at 8.

²⁵⁵ Cable from Clay to AGWAR, 8 Sept. 1947, NA-153-1018-1-84-1, at 2.

²⁵⁶ Id. at 2-3.

²⁵⁷ Cable from AGWAR to Clay, 12 Sept. 1947, NA-153-1018-1-84-1.

²⁵⁸ Cable from Clay to AGWAR, 19 Sept. 1947, NA-153-1018-1-84-1, at 1.

²⁵⁹ Id.

²⁶⁰ Bush, *Conspiracy*, 1217.

abandon *Food and Agriculture-Hermann Goering Works* and *Dresdner Bank*. Four defendants in those cases would be moved to *Foreign Office*: Paul Koerner, Paul Pleiger, and Emil Puhl from the former; Karl Rasche from the latter.²⁶¹ Including Puhl and Rasche, Taylor pointed out, would “increase Banking representation” in the overall war-crimes program.²⁶²

Taylor regretted dropping *Dresdner Bank*. Rawlings Ragland – by then the Chief of the *Dresdner Bank* trial team – had concluded in mid-August that “[t]he work done to date suggests that on the basis of really adequate preparation a fairly persuasive case of criminal activity on the part of leading *Dresdner Bank* officials could be made out,”²⁶³ particularly in terms of their knowing support for the SS’s use of slave labor and acts of plunder.²⁶⁴ Rawlings had also reminded Taylor that, in light of OMGUS’s well-publicized report on the *Dresdner Bank*’s activities, it might “prove difficult or embarrassing to drop the case.”²⁶⁵

The problem, once again, was time. By mid-August, Ragland had “serious doubts” that “any really adequate indictment could be drawn up before the first of next year” and was convinced that “adequate preparation for trial could not be completed until a somewhat later date.”²⁶⁶ The decision to pursue the *Dresdner Bank* had been motivated, in large part, by the OMGUS report: the OCC had assumed that “preparation of a case charging *Dresdner Bank* officials with war crimes would consist largely of supplementing and buttressing materials already gathered together in preparation of the Report.”²⁶⁷ In fact, the report was of “little aid” to the case – “the real job not only of screening the documentary materials, but also of locating much of the material, remains to be done.”²⁶⁸ That additional work, Rawlings knew, was simply far beyond the resources of the understaffed and underskilled *Dresdner Bank* team.²⁶⁹

G. Cases 11 & 12

1. Ministries (Case No. 11)

The Ministries Division prepared the *Foreign Office-Government Administration-Propaganda and Education* case, which was now being called simply *Ministries*. In late 1947, after Taylor finalized the trial program, the Ministries Division was renamed the “Political Ministries Division” and a new division, “Economic Ministries,” was formed by combining the members of the now-defunct *Dresdner Bank* team with the members of the Ministries Division who were investigating the economic ministries.²⁷⁰

²⁶¹ Cable from OCCWC to Army War Crimes Branch, 13 Oct. 1947, NA-153-1018-1-84-1, at 1.

²⁶² *Id.*

²⁶³ Memo from Ragland to Taylor, 15 Aug. 1947, 3.

²⁶⁴ *Id.* at 11.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 19.

²⁶⁷ *Id.* at 2.

²⁶⁸ *Id.* at 1.

²⁶⁹ *Id.* at 3.

²⁷⁰ TAYLOR, FINAL REPORT, 40.

The *Ministries* indictment was filed on November 18, and the trial began on 6 January 1948. No case had evolved as much over time. Only five of the 18 suspects in the original *Foreign Office* case ultimately stood trial in *Ministries*: Gustav Steengracht von Moyland, Ernst Bohle, Karl Ritter, Ernst von Weizsaecker, and Ernst Woermann. 12 others had been identified as major war-criminals by the March 14 program. Six came from the original *Food and Agriculture-Hermann Goering Works* case: Walther Darre, Paul Koerner, Paul Pleiger, Hans Kehrl, Wilhelm Keppler, and Emil Puhl. Three came from the original *Government Administration* case: Hans Lammers, Otto Meissner, and Wilhelm Stuckart. Otto Dietrich came from the original *Propaganda and Education* case. Gottlob Berger came from the original *Prisoner of War* case. And Karl Rasche came from the original *Dresdner Bank* case.

Four of the 21 final defendants in *Ministries*, by contrast, had never previously been identified as suspects by the OCC. They were added between October 13, when Taylor finalized the trial program, and November 18, when the indictment was filed. Otto von Erdsmannsdorf had been the Minister to Hungary until 1941 and then Woermann's deputy in the Foreign Office's Political Division. Edmund Veesenmayer had been the Reich's Plenipotentiary in Hungary. Walter Schellenberg had been the head of the SS's foreign intelligence division and had personally staged the "Velo Incident" that provided the pretext for Hitler's invasion of the Netherlands. And Lutz Schwering von Krosigk had been the Reich Minister of Finance until 1945 and Reich Minister for Foreign Affairs thereafter.

Ministries could have been even larger. On November 19, the World Jewish Congress (WJC) sent a memorandum to Royall – now the Secretary of the Army, the War Department having been abolished – urging him to include six additional defendants in the case.²⁷¹ Four had been involved in the infamous Wannsee Conference, during which the Nazis planned the "final solution of the Jewish question": Erich Neumann, an Undersecretary in the Four-Year Plan; Georg Leibbrandt, the head of the Political Department in the Ministry for the Eastern Occupied Territories; Otto Hofmann, the head of RuSHA; and Friedrich Kritzinger, the Reich Chancellery's State Secretary. The final two, Hermann Krumei and Ernst Girzik, were high-ranking SS officers who had worked closely with Heinrich Muller, the head of the Gestapo, and Adolf Eichmann.²⁷²

As the memo made clear, the WJC would have preferred the OCC to hold a "special Jewish trial" involving (at least) those six suspects. In its view, the NMT trials had simply not focused enough on the architects of Holocaust:

Trials by American military courts on the basis of [Law No. 10] have brought to justice a number of Germans responsible for crimes against Jews... none of those trials, because of the persons involved and the character of the cases prosecuted, concerned those who were at the top of the Nazi hierarchy, who actually planned the destruction of the European Jewish communities, and under whose direction and supervision the extirpation of these millions was carried out.²⁷³

²⁷¹ Letter from Wise to Royall, 19 Dec. 1947, NA-153-1018-8-84-1.

²⁷² Memo from World Jewish Congress, 19 Nov. 1947, NA-153-1018-8-84-1, at 3.

²⁷³ Id. at 3.

The WJC recognized that it was likely too late for the OCC to hold another trial. But it argued that there was “no legal or practical impediment” to including the suspects in *Ministries*. Indeed, the WJC claimed that doing so was necessary to fulfill the “sacred duty of the Allies, who have repeatedly and solemnly proclaimed that the crimes against the Jewish people will not be condoned, to do their utmost to bring the culprits to justice.”²⁷⁴

A week later, on November 26, Taylor informed the Army that he did not intend to include any of the WJC’s suggested defendants in the *Ministries* case. Hoffman was being tried in *RuSHA*. Kritzing, who had been scheduled to be a defendant in *Government Administration*, had recently died. Krumey was not in U.S. custody. That left Neumann, Liebbrandt, and Girzik, all of whom were currently in Nuremberg. Taylor acknowledged that a “prima facie case” existed against Neumann and Liebbrandt, but insisted – implicitly blaming Clay for his inability to accommodate the WJC’s request – that he could not indict them “because of acceleration in war crimes program and desire to terminate by July 1948.”²⁷⁵ Preparing their cases would simply take too long.²⁷⁶

Taylor’s rejection of the WJC’s plea to expand *Ministries* – which he did not communicate to the WJC itself for another month, “an eternity for so punctual a correspondent”²⁷⁷ – was not the first time that he had failed to act on a request to focus the NMT trials more directly on the Holocaust. On 6 February 1947, Taylor had informed Tom Ervin, his close friend and then Executive Counsel, that someone (it is not clear who) had suggested to him that “it would be desirable to have an entire case which would concern itself *only* with the charge that the Nazis exterminated approximately 6,000,000 Jews,” because the Holocaust was “by far the most important and sinister item in the entire Nazi history.”²⁷⁸ Taylor told Ervin that he had “come to no conclusion on the wisdom of this proposal,” but asked him to consider it. Taylor also noted that he believed it would be difficult to select defendants for such a Holocaust-centered trial, because the OCC was prosecuting “central planners and organizers,” not “people in the concentration camp or camp commandant level,” and “most of the people who played an important role in ordering and planning the Jewish extermination probably committed many other crimes as well.”²⁷⁹

Although it is unwise to read too much into a single memo, Taylor’s gut reaction to the possibility of a trial focused solely on the Holocaust is troubling. First, the suggestion predated even the March 14 trial program, so Taylor’s later rationale for not expanding *Ministries* – that there was not enough time – did not apply. There *was* time to create a Holocaust-centered trial in February 1947.

²⁷⁴ Id. at 4.

²⁷⁵ Teleconference with Taylor, 26 Nov. 1947, NA-153-1018-8-84-1.

²⁷⁶ Taylor also cited the size of the courtroom, but he could have included three additional defendants without exceeding the maximum number – 24 – that the larger courtrooms could accommodate.

²⁷⁷ Bush, *Conspiracy*, 1187.

²⁷⁸ Memorandum from Taylor to Ervin, 6 Feb. 1947, Gantt Collection in Towson University Archives, box FF, at 1.

²⁷⁹ Id.

Second, although aspects of the Holocaust played an important role in a number of the OCC's cases – slave labor in *Krupp* and *Farben*; the concentration camps in *Pohl*; Germanization in *RuSHA*; deportation in *Ministries* – none of them were functionally equivalent to a Holocaust-centered trial. Indeed, the February suggestion came long before Taylor approved transforming *SD-Gestapo-RSHA* into *Einsatzgruppen*, the trial that focused most specifically on the extermination of the Jews. It is thus difficult to argue that a Holocaust-centered trial was somehow duplicative or unnecessary.

Third, and finally, Taylor's suggestion that "most of the people who played an important role in ordering and planning the Jewish extermination probably committed many other crimes as well" seems to misunderstand why individuals wanted a trial focused specifically on the Holocaust. The February request did not deny that the architects of the Holocaust had committed atrocities against non-Jews; it claimed that the atrocities committed against Jews were of a magnitude and gravity that justified at least one trial dedicated to them. It is thus difficult to avoid the conclusion that Taylor's response trivialized the crimes committed against the Jews – implying that the "many other crimes" were just as important, if not more so.

2. High Command (Case No. 12)

The *High Command* case was prepared and presented by the Military & SS Division, which had been created in late 1947 after illness forced Clark Denney to resign as the head of the Ministries Division. Ten of the 14 defendants in the *High Command* trial had been identified in the March 14 program. The other four were General Reinecke, who was the only defendant in *Prisoner of War* who had been moved to *High Command* after Taylor's decision to combine the two; General Karl von Roques, who had commanded the rear areas of Army Group South and Army Group A; General Otto Woehler, who had been the Commander in Chief of the 8th Army and Army Group South; and Rudolf Lehmann, who had been the Chief of the Wehrmacht's Legal Division. The latter three also did not appear in either the May 20 or September 4 programs, indicating that they were last-minute additions to the trial.

Conspicuously missing from the dock were, of course, Field Marshals von Brauchitsch, von Manstein, and von Rundstedt. Unlike the other defendants, the three men were in British custody when the OCC was making final decisions about whom to indict.²⁸⁰ Taylor originally proposed prosecuting all of the high-ranking military officers in a joint U.S.-British tribunal, as permitted by Article II(c) of Ordinance No. 7. The British, however, preferred to simply extradite von Brauchitsch, von Manstein, and von Rundstedt to the U.S.²⁸¹ Taylor then decided to include the Field Marshals in the *Principal Military* case, as reflected by the March 14 trial program.

Despite Article 3 of Ordinance No. 7, which provided that "[t]he Chief of Counsel for War Crimes shall determine the persons to be tried by the tribunals," General Clay refused to allow Taylor to ask the British to extradite von Brauchitsch, von Manstein, and von Rundstedt. Instead, Clay ordered Taylor "to try only the field marshals and other officers already in American custody, and to transmit (in August 1947) the evidence which appeared to incriminate Rundstedt, Mannstein, and Brauchitsch to the

²⁸⁰ Memo from OCCWC to Army War Crimes Branch, 13 Oct. 1947, 2.

²⁸¹ BLOXHAM, 44.

British authorities.”²⁸² Taylor complied, informing his staff on November 17, ten days before the *High Command* indictment was filed, to drop further research on the Field Marshals.²⁸³

This was, according to Taylor, “the only occasion upon which my plans as to the inclusion of particular defendants were disapproved by General Clay.”²⁸⁴ But it was a particularly bitter occasion. As reflected in an October 13 OCC memo, captured German documents indicated that von Brauchitsch, von Manstein, and von Rundstedt were clearly responsible for the widespread killing of hostages, for supporting and protecting the Einsatzgruppen, and for participating in the slave-labor program.²⁸⁵ Taylor was also convinced that the OCC would have little trouble convicting the three Field Marshals. The October 13 memo stated that the “[c]ases against Rundstedt and Mannstein are strongest of all and evidence assembled in Washington is overwhelming,” and claimed that von Brauchitsch’s conviction was “as certain as the outcome of a lawsuit ever can be.”²⁸⁶

Finally, Taylor believed that the legitimacy of the *High Command* trial depended, at least in part, on the inclusion of the three Field Marshals. The October 13 memo noted that the “very nature” of the evidence in the case was “such that trial of Leeb and Kuechler without Rundstedt and others held in England will certainly raise pointed inquiries as to why they were not made defendants.”²⁸⁷ The comparison with von Leeb was particularly apt: unlike von Brauchitsch, von Manstein, and von Rundstedt, who were in active service throughout the war, von Leeb had resigned as the commander of Army Group north in January 1942 and never saw active duty again.²⁸⁸ Indeed, at least one scholar has suggested that von Leeb was the primary defendant in *High Command* not because he was more culpable than his co-defendants – he clearly wasn’t – but because the absence of von Brauchitsch, von Manstein, and von Rundstedt meant that he was the best known of the Field Marshals available for trial.²⁸⁹

²⁸² TAYLOR, FINAL REPORT, 82-83.

²⁸³ Cable from Taylor to Young & Olbeter, 17 Nov 1947, NA-153-1018-8-84-1.

²⁸⁴ TAYLOR, FINAL REPORT, 82.

²⁸⁵ Memo from OCCWC to War Crimes Washington, 13 Oct 1947, 3.

²⁸⁶ Id. at 3-4.

²⁸⁷ Id. at 4.

²⁸⁸ John J. Douglass, *High Command Case: A Study in Staff and Command Responsibility*, 6 INT’L LAWYER 686, 690 (1972).

²⁸⁹ Id. Bloxham also notes that Taylor considered von Rundstedt and von Brauchitsch to be of “far greater significance to the German people” than the other defendants. BLOXHAM, 43.