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

Heller, K.J.

# CHAPTER 6: Evidence

## INTRODUCTION

The NMTs derived their rules of evidence from three sources. The most important was Article VII of Ordinance No. 7, which read in relevant part:

> The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value…. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

The tribunals also applied the evidentiary provisions of the Uniform Rules of Procedure (URP),[1] which Tribunal I drafted and adopted in the *Medical* case pursuant to Article V(f) of Ordinance No. 7. Article V(f) authorized the tribunals to adopt whatever procedural rules they felt were necessary for the orderly and expeditious conduct of the trials, subject to the proviso that they be "not inconsistent with this Ordinance." The URP were amended a number of times during the life of the NMTs.

Finally, the tribunals derived rules of evidence from the "fundamental principles of justice which have been accepted and adopted by civilized nations generally."[2] As Tribunal V noted in the *Hostage* case, if "most nations in their municipal law" included a particular principle, "its declaration as a rule of international law would seem to be fully justified."[3] Such fundamental principles, according to the tribunals, included the presumption of innocence and proof beyond a reasonable doubt.[4]

This chapter discusses the evidentiary issues that the tribunals addressed. Section 1 discusses two threshold issues, admissibility and the standard of proof. Section 2 deals with testimonial evidence, including the tribunals' controversial practice of taking evidence via commissioners. Section 3 focuses on documentary evidence, particularly the widespread use of affidavits in lieu of live testimony. Section 4 examines how the tribunals applied the doctrines of *res judicata* and judicial notice and dealt with the decisions of their predecessors.

## I. ADMISSIBILITY AND THE STANDARD OF PROOF

The tribunals took an exceptionally liberal approach to admissibility. To some extent, that was the natural consequence of Article VII, which reflected the "free proof" approach to admissibility that is normally associated with the civil-law tradition.[5] But it also reflected the tribunals' desire to give the defendants every opportunity to prove their innocence, because the judges even admitted evidence offered by the defense that had no probative value whatsoever. In *Einsatzgruppen*, for example, the defendants wanted to introduce statements made during the war by the Kremlin, articles from a Russian encyclopedia, and various

---

[1] See Appendix E.
[2] Hostage, XI TWC 1235.
[3] Id.
[4] See, e.g., Flick, VI TWC 1188; Krupp, IX TWC 1331.
[5] See generally Mirjan Damaska, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343-57 (1995).

speeches given by Stalin. Tribunal II acknowledged that all of the exhibits were "strictly irrelevant and might well be regarded as a red herring drawn across the trial." It nevertheless admitted them on the ground that "the Tribunal's policy throughout the trial has been to admit everything which might conceivably elucidate the reasoning of the defense."[6] Indeed, Judge Musmanno, the presiding judge in *Einsatzgruppen*, once remarked in open court that he would admit evidence of the social life of an Antarctic penguin if helped establish the defendants' innocence. The defense attorneys were so pleased by what came to be known as the "Penguin Rule" that they presented Musmanno with a three-foot bronze statue of a penguin when the trial was over.[7]

The tribunals also attempted to give the benefit of the doubt to the defendants in terms of the standard of proof. Relying on Wharton, the *Krupp* tribunal stated the rule thus: "[t]he defense is not required to take up any burden until the prosecution has established every essential element of crime charged beyond a reasonable doubt. When the prosecution has finished its case, the defendant is entitled to an acquittal if the case of the prosecution is not made out beyond a reasonable doubt."[8] The tribunals agreed that proof beyond a reasonable doubt did not require "mathematical demonstration or proof beyond fanciful or factious doubt"[9]; such doubt existed, they said, when an "unbiased, unprejudiced, reflective person… could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge."[10]

These were not mere words. Time and again, the tribunals relied on the exacting nature of proof beyond a reasonable doubt to acquit defendants whom they believed might well be guilty of the crime charged. In the *Medical* case, for example, Tribunal I held that Ruff, Romberg, and Weltz were not criminally responsible for the horrific experiments conducted at Dachau even though "[i]t cannot be denied that there is much in the record to create at least a grave suspicion that the defendants" were involved in them. The problem, according to the tribunal, was that the evidence of their involvement was purely circumstantial, and circumstantial evidence only satisfied the standard of proof if it manifested "such a well-connected and unbroken chain of circumstances as to exclude all other reasonable hypotheses but that of… guilt."[11] Similarly, the *Ministries* tribunal acquitted Dietrich, the Nazi propaganda chief, of crimes against peace, on the ground that the prosecution had not proved his knowledge of the Nazis' aggressive plans beyond a reasonable doubt. The Tribunal admitted that it was "entirely likely that he had at least a strong inkling of what was about to take place," but it insisted that "suspicion, no matter how well founded, does not take the place of proof."[12] The Tribunal went even further when it acquitted Steengracht von Moyland of similar charges, insisting that the prosecution had not satisfied its burden to prove that he "had the requisite knowledge," even though it was "of the opinion that in all likelihood he did."[13]

## II. TESTIMONIAL EVIDENCE

[6] Einsatzgruppen, IV TWC 465.
[7] EARL, 88.
[8] Krupp, IX TWC 1329; see also High Command, XI TWC 484.
[9] Ministries, Motion for Correction, XIV TWC 949.
[10] Medical, II TWC 184.
[11] Quoted in TAYLOR, FINAL REPORT, 166.
[12] Ministries, XIV TWC 417.
[13] Id. at 961, Motion for Correction.

The tribunals dealt with three sets of issues involving testimonial evidence: (1) witness testimony; (2) taking evidence via commissioners; and (3) testimony by defendants.

## A. Witness Testimony

### 1. Rules Governing Witness Testimony

Ordinance No. 7 and the URP were largely silent concerning the testimony of witnesses. Article XI of Ordinance No. 7 provided that both the prosecution and the defense "shall produce its evidence subject to the cross examination of its witnesses," making it clear that the trials were based on the common-law system of adversarial trials. And Rule 9 of the URP provided that witnesses were required to testify under oath or affirmation, could not be present in the courtroom when not testifying, and could not consult with other witnesses.

### 2. Calling Witnesses

Neither the prosecution nor the defense was ever required to call a witness – although, as we will see, the failure to call a witness could affect the admissibility of his affidavit. In the *Medical* case, for example, the defense questioned why the prosecution did not call two available witnesses instead of relying on their written correspondence. The prosecution explained that the witnesses were themselves potential defendants in a later case and would be hostile to the prosecution. Tribunal I then held that "[n]either the prosecution nor the defense are obligated to call witnesses save those that they desire to put on the stand."[14]

In contrast to typical common-law practice, the tribunals reserved the right to call their own witnesses. Indeed, four tribunals called a total of nine tribunal witnesses during the trials: one in the *Medical* case, one in *Milch*, two in *Pohl*, and five in *Einsatzgruppen*. The most unusual situation concerned the testimony of Dr. Walter Neff, Rascher's assistant at Dachau, who was being held on suspicion of involvement in Rascher's medical experiments. The prosecution suggested to Tribunal I that it call Neff as a Tribunal witness, so that the prosecution could avoid the unseemly spectacle of eliciting self-incriminating testimony from one of its own witnesses. It also recommended that the Tribunal advise Neff that his testimony could be used against him at a later trial. The Tribunal agreed, and Neff testified as a tribunal witness after being warned against self-incrimination.[15]

### 3. Self-Incrimination

The potential for a witness to incriminate himself was a problem throughout the trials. When that potential became evident prior to trial, the tribunals required the witness to be informed of his privilege against self-incrimination. Such warnings were given to Field Marshals von Manstein and von Rundstedt when the defense sought to call them as witnesses in *High Command*, for example, because Tribunal V had been made aware that the British were actively preparing cases against them.[16] Both Field Marshals asserted the privilege and did not testify.[17] Similarly, when the tribunals recognized that a testifying witness had been asked a question that might incriminate him, they immediately informed the witness of his right not to answer the question. In the *Hostage* case, for example, Tribunal V warned

[14] XV TWC 688.
[15] Id. at 691, extract from Medical transcript, 17 Dec. 1946.
[16] Id. at 381, extract from High Command transcript, 26 July 1948.
[17] Id. at 366.

General Hans Felber that he answered a question concerning reprisal measures at his peril. General Felber nevertheless answered the question.[18]

### 4. Questioning by Defendants

Examinations were normally conducted by prosecutors, defense attorneys, and judges. During the *Farben* and *Medical* trials, however, the tribunals held that the complexity of expert testimony justified permitting one or more of the defendants – themselves experts in the field – to personally conduct cross-examination. Those decisions represented a rejection of the IMT's position, which had ruled that a defendant represented by counsel was not entitled to question witnesses.[19]

Over prosecution objection, two defendants in the *Medical* case, Ruff and Rose, were permitted to cross-examine Dr. Andrew Ivy, the prosecution's most important expert witness. According to Freyhofer, the cross-examinations were extremely effective. Most dramatically, Rose – an expert in tropical medicine – was able to completely discredit Ivy's claims that "American researchers, unlike the defendants, had not maltreated, tortured, or killed human subjects" and that all of the subjects had volunteered for the American experiments knowing what awaited them.[20] Indeed, as Freyhofer notes, "apparently suspecting problems, the tribunal limited examination time to thirty minutes when Rose started his questioning of Ivy," and "[m]ore than once a prosecutor, and sometimes a judge, interfered and redirected the examination in Ivy's favor."[21]

Defendants also cross-examined expert witnesses on two separate occasions in *Farben*, in each case with the prosecution's blessing. First, because of his experience as the chief of Farben's Technical Committee, Fritz ter Meer cross-examined Brigadier General J. H. Morgan concerning Allied efforts after World War I to prevent Germany from rearming in the chemical field. Later, three defendants – ter Meer again, Buetefisch, and Ambros – each cross-examined Dr. Nathaniel Ellis, a prosecution chemical expert.[22]

### 5. Scope of Examination

Because Ordinance No. 7 simply guaranteed the right to call witnesses, the tribunals had complete discretion to determine the scope of examination on direct, cross, and re-direct. In general, those issues were uncontroversial and followed normal American trial practice. The most significant controversy concerned limits that some of the tribunals imposed on defense and prosecution examination. One troubling example was mentioned above: limiting Rose's cross-examination of Ivy to 30 minutes, a decision that can only be explained as a deliberate attempt by the *Medical* tribunal to blunt Rose's effectiveness. More often, however, tribunals limited prosecution questioning. In *RuSHA*, the prosecution reluctantly agreed prior to trial that it would cross-examine defendants for no more than 30 minutes and defenses witnesses for no more than 10 minutes[23] – neither of which seems adequate. Even more problematically, the *Farben* tribunal announced in the middle of trial that the prosecution's cross-examination of defendants and defense witnesses would be limited to 20% of the time the defense spent on direct examination. That limit had a significant effect on the

[18] Id. at 709, extract from Hostage transcript, 11 Aug. 1947.
[19] Id. at 342.
[20] FREYHOFER, 98.
[21] Id. at 97.
[22] XV TWC 342.
[23] Id. at 686.

prosecution: the judges twice cut off questioning before prosecutors had completed cross-examination, once when a defendant was on the stand, and once when a critical defense witness – the most important non-defendant Farben official involved in the use of slave labor from Auschwitz – was testifying.[24]

**B. Taking Evidence Via Commissioners**

Perhaps sensitive to the optics of cutting off the prosecution during cross-examination, the *Farben* tribunal later suggested that, if the prosecution needed more time, it could continue its cross-examination before commissioners.[25] Such out-of-court questioning was permitted by Article V(e) of Ordinance No. 7, which authorized the tribunals "to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission." Article V(e) was itself based on – and identical with – Article 17(e) of the London Charter.

During the IMT trial, commissioners had heard more than 100 witnesses and received more than 1,800 affidavits concerning the "Accused Organisations."[26] The NMTs used commissions in five cases: *Justice*, *Flick*, *Farben*, *Krupp*, and *Ministries*. In each case, the tribunal appointed commissioners (as few as one, as many as three); representatives appeared for the prosecution and the defense; and examination proceeded as it would at trial. The transcript of the proceedings was then "considered by the Tribunal in all respects as if the proceedings had been had, the interrogations made, and the testimony given before the full Tribunal."[27]

Commissions were used sparingly in *Justice* and *Flick*. In the *Justice* case, three members of Tribunal III – two regular members and the alternate – served as commissioners, so the commission sat only when the court itself was not in session. The commissioners heard the testimony of thirteen prosecution witnesses.[28] In *Flick*, a commission heard the testimony of only one witness – Albert Speer. Tribunal IV appointed John H.E. Fried to serve as the commissioner, because Speer was serving his sentence in Spandau Prison in Berlin and the OCC was unable to arrange for him to be temporarily transferred to Nuremberg.[29] Commissioners were used much more extensively in *Farben*, in most cases to hear the cross-examination of prosecution and defense witnesses who had submitted affidavits in lieu of direct testimony. Two commissioners heard the testimony of nearly 50 witnesses.

The use of commissioners led to significant controversy in *Krupp*. Toward the end of the prosecution's case-in-chief, Tribunal III appointed a commissioner, Carl I. Dietz, to hear cross-examination of a number of prosecution witnesses who had submitted affidavits in lieu of direct examination. To save time, the Tribunal instructed Dietz to hold the hearings while court was in session. The defense objected vociferously to the simultaneous proceedings, arguing that they deprived the defendants of their right under Ordinance No. 7 to be present at trial. The Tribunal overruled the objection, holding that the right to be present did not apply to commissions and that there were more than enough defense attorneys to cover both the trial and the commission hearings.[30] The defense continued to object until the Tribunal

[24] Id. at 702-07, extract from Farben transcript, 14 Apr. 1948.
[25] Id. at 706.
[26] IMT JUDGMENT, 2.
[27] Justice, Order, 12 June 1947, XV TWC 595.
[28] Id. at 587.
[29] Id. at 588.
[30] Id. at 614, extract from Krupp transcript, 16 Jan. 1948.

insisted that it would hear no further argument. At that point, the defense attorneys stormed out of the courtroom *en masse*,[31] the remarkable event discussed in Chapter 4.

Tribunal IV increasingly relied on commissioners as the *Ministries* trial progressed. During the prosecution's case-in-chief, commissioners heard the testimony of a number of the prosecution's witnesses. The Tribunal then ordered that all documentary evidence would be taken by commission and appointed two members of the Tribunal, Judges Powers and Maguire, to hear evidence on behalf defendants Otto Meissner and Friedrich Gaus. Finally, after 10 of the 21 defendants had completed their cases-in-chief, the Tribunal ruled that commissioners would hear the testimony of all defense witnesses until the defendants had finished testifying and would hear all rebuttal and surrebuttal testimony until the trial was completed.[32] The defense immediately objected, arguing – not without reason – that the ruling introduced "a fundamental deviation from and challenge to the principle of direct presentation of evidence before the ruling Tribunal itself," and that the 11 defendants who had not completed their cases-in-chief were "going to be prejudiced compared with the cases in chief already presented and also compared with the case in chief of the prosecution, which has already taken place."[33] The Tribunal rejected both arguments, noting with regard to the latter that it would not be able to remember the massive amount of live testimony it had heard and would thus have to rely on the same kind of transcripts that were generated by the commissions.[34]

### C. Testimony by Defendants

Following IMT precedent, NMT defendants were allowed to testify under oath during their case-in-chief and to give an unsworn statement to the tribunal after their counsel's closing argument. In almost every case, defendants availed themselves of both opportunities. The primary exception was *Krupp*, in which none of the defendants testified and only two – Alfried Krupp and Ewald Loeser – gave unsworn final statements. Seven of the 12 defendants did take the stand, however, to challenge the voluntariness of their pre-trial statements,[35] an issue discussed in the next chapter. No adverse inference could be drawn from a defendant's failure to testify under oath.[36]

Upon the conclusion of a defendant's direct testimony, counsel for his co-defendants were required to cross-examine him – the same practice the IMT followed.[37] The judge would occasionally question the defendant, as well, and in at least one case – *Pohl* – the judges even recalled a defendant during rebuttal to question him a second time.[38] Judge Musmanno was particularly notorious for his active questioning; as Earl notes, "when he felt that a defendant was being less than frank in his responses to the court… he would relentlessly question a defendant until he either recanted his testimony or admitted to his actions."[39]

## III. DOCUMENTARY EVIDENCE

[31] Id. at 589.
[32] Id. at 620, Ministries, Order, 23 July 1948.
[33] Id. at 621-22, extract from Ministries transcript, 29 July 1948.
[34] Id. at 623.
[35] Krupp, IX TWC 2.
[36] Letter from Brand to Young, 18 Oct. 1948, 6.
[37] Id. at 716.
[38] Id. at 682.
[39] Earl, 242.

Many scholars have noted that the IMT trial was primarily document-driven.[40] Witness testimony played a much more significant role in the NMT trials, yet nearly every trial still involved hundreds if not thousands of documents – captured German records, pre-trial statements by the defendants, witness affidavits, and so on. The fewest documents, 171, were introduced in *Milch*. The most, 3712, were introduced in *Ministries*.[41] In all but three cases – *Milch*, *Pohl*, and *Flick* – the defense relied more heavily on documents than the prosecution, sometimes introducing more than twice as many into evidence.

The admissibility of documentary evidence was, therefore, a critical issue at the NMT. The general rule, cited earlier, was straightforward: the tribunals were required to admit any document that had probative value, including "affidavits, depositions, interrogations and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations." Tribunal practice, however, was far messier. As this section demonstrates, the tribunals excluded a wide variety of documentary evidence that satisfied the literal requirements of Article VII.

## A. Affidavits, Depositions, Interrogations, and Other Statements

### 1. Statements In Lieu Of Oath

The tribunals rarely distinguished between affidavits, depositions, interrogations, and other statements, normally referring to all four simply as "affidavits." There were, however, three important differences between "affidavits, depositions, and interrogations" and "other statements." First, unlike affidavits, depositions, and interrogations, "other statements" were not sworn. Second, because "other statements" were not sworn, they were admissible only if they satisfied Rule 21 of the URP, which required statements made "in lieu of oath" to be signed by the witness and certified by a defense attorney, a notary, a *burgermeister* (Mayor), or a competent prison-camp authority. The certification requirement was designed to ensure that the person making the statement was aware that there could be consequences for testifying falsely.[42] Third, at least one tribunal – Tribunal III in the *Justice* case – suggested that, as a general matter, sworn statements had greater probative value than unsworn statements.[43]

The tribunals almost always excluded "other statements" that did not satisfy Rule 21, even though Rule 22 permitted them to admit such statements if it was impossible or unduly burdensome for the defense to comply with Rule 21's requirements.[44] They also tended to apply Rule 21 literally, as demonstrated by the *Medical* tribunal's refusal to admit an unsworn witness statement that was made in front of a German prosecutor.[45]

### 2. Affidavits by Available Witnesses

The prosecution and the defense each made liberal use of affidavits in lieu of live testimony, although – as with documents generally – the defense tended to rely on them far more

[40] See, e.g., JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 92 (2000).
[41] NMT Trial Statistics, TTP-5-1-2-25, at 1.
[42] OCCWC, Memo on Review of Rulings on Points of Procedure and Law, TTP-5-1-1-9, at 16 (Case 1, 2/12/47, 2922-3).
[43] Id. at 23 (Case 3, 3/24/47, 958-965).
[44] XV TWC 777.
[45] Memo on Review of Rulings, 15-16 (Case 1, 1/16/47, 1809-11).

heavily. In *Pohl*, for example, the prosecution called 21 witnesses and introduced 95 affidavits, while the defense called 27 witnesses and introduced 416 affidavits.[46] Similarly, in *Farben*, the prosecution called 87 witnesses and introduced 419 affidavits, while the defense called 102 witnesses and introduced 2,394 affidavits.[47]

When an affiant was available and the opposing party sought to cross-examine him on the contents of the affidavit, the tribunals were uniformly willing to order the witness be produced for cross-examination by the tribunal or a commissioner.[48] The prosecution routinely waived cross-examination for all but the most important defense affiants,[49] as did the defense in some trials, such as in the *Medical* case.[50] In others trials, however, the defense insisted on cross-examining a significant percentage of the prosecution's affiants. In the *Justice* case, for example, the prosecution was required to produce nearly 50 affiants, an administrative burden that Zeck estimates delayed the trial by nearly six weeks.[51] The tribunals often went to great lengths to secure cross-examination, as illustrated by the *Milch* tribunal's willingness to send a commissioner to Spandau Prison in Berlin to examine Albert Speer.

Although the tribunals were normally able to arrange for the cross-examination of available affiants, there were a number of situations in which such affiants nevertheless refused to appear. Such situations posed a difficult legal dilemma for the tribunals, because Ordinance No. 7 was unclear concerning whether the defense had a right to cross-examine witnesses who submitted affidavits in lieu of testifying. The defense insisted that it did, citing Article IV(e) of the Ordinance, which provided that a defendant "shall have the right through his counsel… to cross-examine any witness called by the prosecution."[52] The prosecution disagreed, pointing out that Article VII did not condition the admissibility of affidavits on the ability of the opposing party to cross-examine the affiant.[53]

Perhaps not surprisingly, the tribunals reached different conclusions concerning the admissibility of affidavits by available witnesses who refused to testify. Of the nine tribunals that specifically considered the issue, five – two early, three late – held that such affidavits were admissible even in the absence of cross-examination: *Medical*, *Milch*, *Einsatzgruppen*, *Ministries*, and *High Command*. Tribunal V's statement in *High Command* was typical: although it informed the defense that it could submit written interrogatories to the available witness in question – an American officer who had certified the authenticity of the film "The Nazi Plan" – it reminded them that "these affidavits, under the basic authority, are admissible, and that would be true… whether or not the affiants are available for cross-examination."[54]

Four other tribunals, by contrast, refused to admit affidavits given by available witnesses who refused to appear. In *Krupp*, for example, Tribunal III announced at the beginning of trial that, "exercising its right to construe" Ordinance No. 7, "it would not consider any affidavit unless the affiant was made available for cross-examination or unless the

---

[46] Pohl, V TWC 195.
[47] Farben, VII TWC 3.
[48] Extract from RuSHA transcript, 10 Nov. 1947, XV TWC 827.
[49] TAYLOR, FINAL REPORT, 99.
[50] Medical, II TWC 780.
[51] William Allen Zeck, *Nuremberg: Proceedings Subsequent to Goering et al*., 26 N.C. L. REV. 350, 370 (1948).
[52] See, e.g., extract from High Command transcript, 10 Nov. 1947, XV TWC 838.
[53] See, e.g., id. at 886, extract from Farben transcript, 4 Nov. 1947.
[54] Id.

presentation of the affiant for cross-examination had been waived."[55] Tribunal II held likewise in *Pohl*, justifying its categorical rule on the ground that the issue "involves a rather fundamental principle of American jurisprudence; that is, a right to be confronted by your witness and to cross-examine him if he is available."[56] The *Hostage* and *Farben* tribunals reached similar conclusions,[57] the latter over the impassioned dissents of Judge Hebert[58] and the alternate, Judge Merrell.[59]

### 3. Affidavits by Unavailable Witnesses

The tribunals also faced a number of situations in which the prosecution or the defense offered an affidavit of a witness who was not available to testify, either because of logistical problems or because the affiant had died in the interim. As with affidavits by available witnesses, the tribunals took different positions regarding the admissibility of such affidavits.

#### a. Living Affiants

Not surprisingly, all of the tribunals that admitted affidavits of available witnesses also admitted the affidavits of unavailable witnesses. In the *Medical* case, for example, Tribunal I admitted the defense affidavit of Dr. Hans Jaedicke even though he was being held in an English internment camp and the Tribunal could not make arrangements for him to be brought to Nuremberg.[60] Before admitting such affidavits, however, the tribunals normally used their "utmost endeavors" to procure cross-examination via written interrogatories prepared by the opposing party.[61]

The *Pohl* tribunal, it is worth noting, was more flexible concerning affidavits of unavailable witnesses than affidavits of available ones. The Tribunal was unwilling to admit the affidavits of two prosecution witnesses being held in Dachau, because it believed that the prosecution could obtain their live testimony. But it was willing to admit the prosecution affidavit of Rudolf Hoess, the notorious commandant of Auschwitz, who was on trial in Poland. As for cross-examination, Judge Toms told the defense that it would have to be satisfied with introducing the transcript of Hoess's testimony at the IMT, because "[t]hat is the best that can be done. We cannot produce this man."[62]

Three tribunals, by contrast, categorically refused to admit affidavits of unavailable witnesses. The *Farben* tribunal, for example, stated in its judgment that "[i]n instances where the witnesses could not be cross-examined, counter affidavits procured, or answers to interrogatories obtained, the Tribunal, on motion, struck the affidavits from the evidence."[63] The *Hostage* and *Krupp* tribunals did likewise.[64] Interestingly, Judge Wilkins, one of the judges in *Krupp*, later acknowledged that Tribunal III specifically relied on U.S. law to reject prosecution affidavits of six Polish witnesses who could not testify concerning Krupp's use of slave labor because they were trapped in East Berlin by the Russians. "Although these

---

[55] Krupp, IX TWC 1328.
[56] Extract from Pohl transcript, 9 Apr. 1947, XV TWC 818.
[57] Hostage, XI TWC 1259; Farben, VIII TWC 1084.
[58] Extract from Farben transcript, 11 May 1948, XV TWC 865.
[59] Id. at 1045, statement of Judge Merrell.
[60] Id. at 792, extract from Medical transcript, 25 Feb. 1947.
[61] See, e.g., id. at 840, extract from High Command transcript, 9 Mar. 1948.
[62] Id. at 818, extract from Pohl transcript, 9 Apr. 1947.
[63] Farben, VIII TWC 1084.
[64] Hostage, XI TWC 1259; Krupp, IX TWC 830.

affidavits were admissible under international law," he wrote, "under the rules by which we were operating, we sustained the defense's objections to the admission as we felt to admit them would be contrary to our training and our American system of justice."[65]

### b. Deceased Affiants

In almost every trial, either the prosecution or the defense attempted to introduce the affidavits of witnesses who had either committed suicide or been executed prior to trial. The first five tribunals – *Medical*, *Milch*, *Justice*, *Pohl*, and *Flick* – all admitted such affidavits, including the transcript of Hermann Goering's interrogation prior the IMT trial, which was introduced by the prosecution in *Milch* and by the defense in *Flick*.[66] The final three tribunals – *Einsatzgruppen*, *Ministries*, and *High Command* – took the same approach.[67]

The *Farben* tribunal, by contrast, refused to distinguish between affidavits of deceased witnesses and affidavits by unavailable witnesses. For example, it excluded the pre-IMT interrogation of Fritz Sauckel, executed at Nuremberg, even though – as Drexel Sprecher pointed out in oral argument – both the *Milch* and *Flick* tribunals had admitted it.[68] Both Judge Herbert and the alternate, Judge Merrell, dissented from the majority's decision.[69] The *Krupp* tribunal followed the *Farben* approach.[70]

## 4. Probative Value of Non-Examined Witness Statements

Although the majority of tribunals admitted affidavits given by witnesses who could not be cross-examined, they agreed that the absence of cross-examination significantly diminished their probative value.[71] In *Einsatzgruppen*, for example, Tribunal II admitted an affidavit by an unlocated German soldier that identified the defendant Ruehl as the leader of a Kommando unit, but held that "the Tribunal cannot ascribe to this lone piece of evidence the strength needed to sustain so momentous a weight as the leadership of a Kommando with its concomitant responsibility for executions."[72] Indeed, the tribunals generally took the position that an affidavit that was not tested by cross-examination could not, by itself, prove a disputed issue beyond reasonable doubt. Two rulings in *Ministries* illustrate the point. The first concerned a series of affidavits given by Karl J. Burckhardt, the International Commissioner for Danzig, that incriminated the defendant von Weizsaecker regarding the invasion of Poland. Tribunal IV admitted the affidavits, but refused to rely upon them "except insofar as they are corroborated from other sources," because the judges found it "difficult to reconcile a willingness, personal or governmental, to permit an ex parte statement to be given and an unwillingness to permit inquiry as to the accuracy of the statement."[73] By contrast, the Tribunal gave far more weight to an affidavit submitted by an executed witness – Gabor Vanja, the Szalasi

---

[65] WILKINS, 217.
[66] Farben, Prosecution Motion for Reconsideration, 29 Nov. 1947, XV TWC 893.
[67] Id. at 880.
[68] Id. at 887, extract from Farben transcript, 4 Nov. 1947.
[69] Id. at 866, extract from Farben transcript, 11 May 1948; id. at 1045, statement of Judge Merrell.
[70] Id. at 880.
[71] Available witnesses: see, e.g., Ministries, XIV TWC 445. Unavailable witnesses: see, e.g., Einsatzgruppen, IV TWC 579. Deceased witnesses: see XV TWC 880.
[72] Einsatzgruppen, IV TWC 579.
[73] Ministries, XIV TWC 357.

government's Minister of the Interior – that connected the defendant Gottlob Berger to the deportation of Hungarian Jews. The Tribunal noted that although it would not have convicted Berger if the case against him "rested upon the affidavit alone," in this case Vanja's affidavit was "corroborated by evidence given by Berger himself, and which already establishes that he was an active party in the program of the persecution, enslavement, and murder of the Jews."[74]

### 5. Pre-Trial Statements by Defendants

In each of the twelve cases, the prosecution introduced into evidence statements made by the defendants prior to trial. Some of those statements were transcripts of pre-trial interrogations; others were affidavits prepared by interrogators describing an interrogation that the defendants had reviewed and signed. The tribunals did not distinguish between the two kinds of statements, referring to both simply as "affidavits."

The defendants first challenged the admissibility of such affidavits in the *Medical* case, when one of the defendants objected that he had not been warned about the possibility of self-incrimination prior to interrogation. Tribunal I overruled the objection on the ground that the defendant was free to explain the circumstances of his statement when he took the stand.[75] The *Justice* tribunal rejected a similar claim, holding that the prosecution was not required to warn a suspect that incriminating statements could be used against him until he had been formally indicted.[76]

The defendants mounted their most concerted attack on the admissibility of pre-trial affidavits in *Farben*. Initially, following in the footsteps of their brethren in the *Medical* and *Justice* trials, they objected that "Anglo-Saxon trial procedure" did not permit the prosecution to use incriminating affidavits against them.[77] Tribunal VI overruled the objection, pointing out that such affidavits were admissible as statements against interest. The Tribunal noted, however, that it would exclude any pre-trial statement made by a defendant that was obtained under duress[78] – a ruling that would ultimately lead the Tribunal to exclude incriminating statements made by the defendant Schmitz, as discussed in the next chapter.

Having lost the self-incrimination argument, the *Farben* defendants then focused on the fact that many of the pre-trial affidavits incriminated not only the affiant, but also one or more of the affiant's co-defendants. Citing both Article IV(e) of Ordinance No. 7 and the U.S. Constitution, they argued that unless the defendant who made the statement chose to testify – thereby opening himself to cross-examination – his affidavit was only admissible against the defendant himself. The Tribunal agreed.[79]

That ruling had a significant effect on the prosecution's case. For example, the prosecution's claim that Farben's *Vorstand* was aware that Hitler intended to invade Poland depended heavily on a series of pre-trial admissions to that effect made by the defendant von Schnitzler. Because von Schnitzler elected not to testify at trial, the

---

[74] Id. at 541.
[75] Memo on Review of Rulings, 14 (Case 1: 1/3/47, 1078-9, 2094).
[76] Id. at 19 (Case 3, 3/27/47, 1171-2).
[77] Extract from Farben transcript, 28 Aug. 1947, XV TWC 855.
[78] Farben, VIII TWC 1084.
[79] Id. at 1084.

Tribunal held that "his statements are evidence only as to the maker and are excluded from consideration in determining the guilt or innocence of other defendants."[80] The Tribunal later dismissed the crimes against peace charges on the ground that the prosecution's had offered "mere conjecture" concerning the defendant's knowledge of the Nazis' intent to wage aggressive war.[81]

Judge Hebert and Judge Merrell dissented from the majority's approach to pre-trial affidavits given by defendants – as they had from the majority's approach to affidavits generally. Both pointed out that the majority had provided the defendants with a perverse incentive not to testify. Regarding von Schnitzler, for example, Judge Hebert noted that "[t]he ruling of the Tribunal in this regard was tantamount to an open invitation to him to exercise his privilege of not testifying in the interest of his co-defendants. Its result was to deprive the Tribunal of the opportunity through the examination of von Schnitzler in open court to determine his credibility and to judge more intelligently what weight should be attached to these pretrial statements."[82]

Unfortunately, Hebert and Merrell's criticisms went unheeded. Tribunal III took the same approach to pre-trial affidavits in *Krupp*[83] – a fact that, according to Appelman, at least partially explains why none of the Krupp defendants chose to testify in the case.[84]

## B. Captured Documents

Although affidavits were important, captured German documents – diaries, reports, orders, records, etc. – were the prosecution's primary source of evidence during the trials. Very few of those documents would have been admissible under common-law rules of evidence; as Tribunal V pointed out in the *Hostage* case, "the record is replete with testimony and exhibits which have been offered and received in evidence without foundation as to their authenticity and, in many cases where it is secondary in character, without proof of the usual conditions precedent to the admission of such evidence."[85] Article VII, however, provided that captured documents were automatically admissible, subject only to the proviso that a tribunal "afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require."

Although Article VII placed the burden of challenging the authenticity of a captured document on the party opposing its admission, the prosecution began all of the trials by using two affidavits to establish the general authenticity of the captured documents it intended to introduce in evidence. The first affidavit had been prepared by Major William Coogan, the Chief of the Documentation Division in Justice Jackson's office. It explained how Coogan's Field Branch had collected, stored, recorded, and processed all of the documents captured in the European Theater that the prosecution had used during the IMT trial.[86] The second affidavit was prepared by Fred Niebergall, the Chief of the OCC's Document Control Branch. It described how his organization had processed all of the captured German

[80] Id. at 1120.
[81] Id. at 1115.
[82] Farben, Hebert Concurrence, VIII TWC 1232. For Judge Merrell's position, see Statement of Judge Merrell, XV TWC 1048.
[83] Krupp, IX TWC 1328.
[84] APPLEMAN, 209-10.
[85] Hostage, XI TWC 1257.
[86] Coogan Affidavit, XV TWC 124-25.

documents that the OCC intended to use during the NMT trials that had not been introduced at the IMT.[87]

The prosecution also submitted a certificate of authenticity with each captured document it introduced at trial.[88] The certificates themselves, which were prepared by employees in the OCC's Evidence Division, described the document in question and attested that it was either the original or true copy of "a document found in German archives, records and files captured by military forces under the command of the Supreme Commander, Allied Expeditionary Forces."[89] The defendants rarely provided certificates of authenticity for the captured documents on which they relied, and the prosecution rarely challenged those documents' authenticity. When it did, however, the tribunal would admit the document subject to the defense later providing the necessary certification.[90]

The tribunals relied on Article VII to admit – usually over defense objection – a wide variety of potentially unreliable captured documents. In the *Justice* case, for example, Tribunal III admitted a document whose author and addressee were unknown[91] and a letter allegedly written by a defendant that was a copy, unsigned, and did not indicate that the defendant had ever sent the letter.[92] Similarly, in *Pohl*, Tribunal II admitted a document that was unsigned, undated, and did not identify the office from which it originated, although the Tribunal indicated that it did not believe the document had much probative value.[93] The tribunals even occasionally admitted documents that did not technically qualify as captured, ruling that those documents nevertheless bore similar indicia of reliability. Tribunal III used that argument in the *Justice* case, for example, to admit unsworn statements taken by German authorities that were later reduced to writing and included in a case-file.[94]

Many of the captured documents relied on by the prosecution were extremely long. In some of the trials, the prosecution introduced such documents into evidence in their entirety. That practice was uncontroversial, although the defense in *Einsatzgruppen* challenged one of the prosecution's documents on the ground that it was not complete. The prosecution acknowledged its error and procured the missing pages from the archives in D.C.[95] In other trials, the prosecution introduced only certified extracts of a long document into evidence. In such situations, the tribunals uniformly granted defense requests to introduce into evidence other parts of the document that the defense believed were relevant.[96] That process was normally unproblematic, although there were cases in which the prosecution did not always have the entire document in its possession. In the *Hostage* case, for example, the defense objected to the prosecution's attempt to introduce extracts of reports made to the Wehrmacht Commander Southeast. The prosecution admitted that it did not have the remaining pages, but insisted that the D.C. archives had forward all of the pages that had "a substantial bearing on the case." Tribunal V did not consider that representation to be adequate and ordered the

[87] Id. at 128, Niebergall Affidavit.
[88] See, e.g., Memo on Review of Rulings, 28 (Case 1, 3/12/47, 4807-9).
[89] See, e.g., Krupp, XV TWC 646. Mendelsohn questions the reliability of the prosecution's certification process, pointing out that the same employee often certified hundreds of captured documents per day. MENDELSOHN, 159 & 168 n. 5.
[90] See, e.g., excerpt from the Medical case, 28 Feb. 1947, XV TWC 650.
[91] Memo on Review of Rulings, 30 (Case 3, 3/11/47, 432).
[92] Id. (Case 3, 3/27/47, 1183).
[93] Id. at 36 (Case 4, 4/9/47, 104-8).
[94] Id. at 24 (Case 3, 3/24/47, 993-1005).
[95] XV TWC 637.
[96] Memo on Review of Rulings, 10 (Case 1: 3/10/47, 3990).

prosecution to either have the documents transferred to Nuremberg or permit the defense to examine the documents in D.C. If it did not, the Tribunal warned, "it will be presumed that the evidence withheld which could have been produced or made available to the defendants, would be unfavorable to the prosecution."[97] The prosecution arranged to have all of the documents shipped by air to Nuremberg.

## IV. JUDICIAL NOTICE, RES JUDICATA, AND PRECEDENT

### A. Judicial Notice

Article IX of Ordinance No. 7 required the tribunals to take judicial notice of three kinds of evidence: (1) "facts of common knowledge"; (2) "official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes"; and (3) "the records and findings of military or of other tribunals of any of the United Nations." Judicial notice of "facts of common knowledge" never aroused controversy during the trials, and the defense challenged judicial notice of "official government documents" only in the *Medical* case, with regard to a report prepared by the Dutch War Crimes Investigation Bureau. Tribunal I overruled the objection on the ground that the Netherlands qualified as an Ally.[98]

By contrast, the defense often challenged judicial notice of the "records and findings" of other tribunals. When those challenges concerned documents that were part of the IMT record, the tribunals nearly always rejected them. In the *Medical* case, for example, the defense argued that affidavits contained in a report prepared by a commission investigating atrocities committed at Dachau were not admissible under Article IX, even if the report itself was. Tribunal I admitted the affidavits on the ground that they had been received by the IMT and thus qualified as IMT "records."[99] Indeed, the only time a tribunal accepted a defense challenge was in the *Justice* case, when the prosecution offered the startling argument that Tribunal III was entitled to take judicial notice of *any* item of evidence in the IMT record – any affidavit, document, or pre-trial statement – regardless of whether the IMT relied on that evidence in its judgment. The Tribunal rejected the prosecution's argument, noting that, taken to its logical conclusion, it would require the judges to take notice of documents that the IMT had received into evidence but ultimately found "to be incorrect or untrue." It thus held that the term "record" in Article IX was limited to evidence that was specifically approved in the IMT judgment.[100]

The defendants were more successful when they challenged the admissibility of "records and findings" of other NMTs. In the *Farben* case, for example, the defense objected when the prosecution attempted to introduce an extract of testimony given by Karl Lindemann, a member of Himmler's Circle of Friends, in *Flick*. Although that testimony was clearly admissible under Article IX, Tribunal VI nevertheless held that – as with affidavits generally – it would admit the extract only if the prosecution produced Lindemann for cross-examination.[101]

### B. Res Judicata

[97] Hostage, Tribunal Order on the Defense Motion, 14 Aug. 1947, XV TWC 411.
[98] Memo on Review of Rulings, 53 (Case 1, 1/10/47, 1496).
[99] Id. (Case 1, 12/13/46, 413).
[100] Extract from Justice transcript, 29 Apr. 1947, XV TWC 580-85.
[101] Id. at 906, extract from Farben transcript, 21 Nov. 1947.

Article X of Ordinance No. 7 made certain aspects of the IMT judgment binding on the NMTs. It read:

> The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

Four tribunals relied on Article X to find a determination in the IMT judgment *res judicata*. The *Einsatzgruppen* tribunal recognized the IMT's finding that the invasion of Poland was an act of aggression[102]; the *Milch*, *Pohl*, and *Farben* tribunals recognized the IMT's findings concerning the deportation and use of slave labor[103]; and the *Pohl* tribunal recognized the IMT's finding that the Nazis had systematically pillaged occupied countries.[104]

It is unclear why the tribunals did not rely more heavily on Article X. The best explanation seems to be that they believed it was unfair to the defendants to recognize an IMT determination that a particular crime had been committed, even though such recognition did not relieve the prosecution of proving the defendant's individual responsibility for that crime. That explanation is consistent with the tribunals' general willingness to allow defendants to challenge IMT determinations on the ground that "substantial new evidence" contradicted them – challenges that, read literally, Article X were only permissible with regard to IMT "statements." The *Ministries* tribunal, for example, made no apology for allowing the defendants to challenge the IMT's determinations concerning crimes against peace:

> Notwithstanding the provisions in Article X of Ordinance No. 7… we have permitted the defense to offer evidence upon all these matters. In so doing we have not considered this article to be a limitation on the right of the Tribunal to consider any evidence which may lead to a just determination of the facts. If in this we have erred, it is an error which we do not regret, as we are firmly convinced that courts of justice must always remain open to the ascertainment of the truth and that every defendant must be accorded an opportunity to present the facts.[105]

Even tribunals that did rely on Article X permitted such challenges. In *Milch*, Tribunal II noted with regard to the deportation and slave-labor program that "[a]ny new evidence which was presented was in no way contradictory of the findings of the [IMT] but, on the contrary, ratified and affirmed them."[106] And in *Farben*, Tribunal VI pointed out that the defense had not even bothered to question those findings.[107]

### C. Precedent

[102] Einsatzgruppen, IV TWC 457.
[103] Milch, II TWC 785; Pohl, V TWC 970; Farben, VIII TWC 1172.
[104] Pohl, V TWC 976.
[105] Ministries, XIV TWC 317.
[106] Milch, II TWC 785.
[107] Farben, VIII TWC 1172.

Although Article IX required a tribunal to take judicial notice of previous tribunals' "records and findings," it did not specifically require a tribunal to treat such records and findings as *res judicata*. The tribunals thus uniformly held they were free to reject the legal and factual findings of their predecessors. As Tribunal IV said in *Flick* regarding Article X's provisions concerning the IMT, "[t]here is no similar mandate either as to findings of fact or conclusions of law contained in judgments of coordinate Tribunals. The Tribunal will take judicial notice of the judgments but will treat them as advisory only."[108] The prosecution agreed with that position, although it urged the tribunals to give previous legal and factual findings "great weight."[109] Ironically, that position came back to haunt the prosecution in *Farben*, when Judge Hebert relied on the acquittals in *Krupp* to justify his decision to concur in the majority's decision to acquit the defendants of crimes against peace. "I am concurring," he wrote, "though realizing that on the vast volume of credible evidence presented to the Tribunal, if the issues here involved were truly questions of first impression, a contrary result might as easily be reached by other triers of the facts more inclined to draw inferences of the character usually warranted in ordinary criminal cases."[110]

## CONCLUSION

Modern international tribunals have often been criticized for admitting evidence – particularly hearsay – that the common law views as unreliable.[111] On the surface, the NMT's appear to be no different: Ordinance No. 7 required the tribunals to admit "admit any evidence which they deem to have probative value," including documents that lacked even the most basic indicia of authenticity. In practice, however, the tribunals did everything they could to ensure that their "free proof" approach to admissibility did not deprive defendants of a fair trial. They took the burden of proof seriously, acquitting defendants even when there was significant evidence of their guilt. They were willing to innovate procedurally, such as allowing defendants to conduct cross-examinations, when they believed that doing so would improve the quality of the trial. They went to great lengths to ensure that defendants were able to cross-examine the witnesses against them, even though nothing in the Ordinance No. 7 required them to do so. They refused to convict solely on the basis of hearsay. And they allowed defendants to challenge the findings and conclusions of the IMT, despite the fact that they were technically *res judicata*.

[108] Flick, VI TWC 1190.
[109] See, e.g., Ministries, Oral Argument of the Prosecution on the Defense Motion to Dismiss Count Four, 2 Mar. 1948, XIII TWC 83.
[110] Farben, Hebert Concurrence, VIII TWC 1212.
[111] See, e.g., Peter Murphy, *No Free Lunch, No Free Proof*, 8 J. INT'L CRIM. JUST. 539, 563-64 (2010).