The Nuremberg Military Tribunals and the origins of International Criminal Law

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CHAPTER 7: Procedure

INTRODUCTION

The procedural rules applied by the NMTs were based on the same three sources of law as the rules of evidence: Ordinance No. 7, the Uniform Rules of Procedure, and the "fundamental principles of justice which have been accepted and adopted by civilized nations generally." There was, however, an important difference between the two regimes: whereas the rules of evidence deviated substantially from the common-law tradition, "[a]ll of the tribunals… conducted their courts as nearly as possible in conformance with American trial practices." [1] Tribunal II specifically highlighted that distinction in *Pohl*, noting on the second page of its judgment that "[t]he trial was conducted generally along the lines usually followed by the trial courts of the various states of the United States, except as to the rules of evidence," and this practice has prevailed throughout."[2]

This chapter focuses on three sets of procedural issues that were particularly controversial during the trials. Section 1 examines how the tribunals interpreted and applied the fair-trial rights guaranteed by Ordinance No. 7. Section 2 asks whether the defense had adequate resources during the trials. And Section 3 discusses the absence of appellate review and its substitute, joint sessions of the tribunals.

I. FAIR TRIAL RIGHTS

Article IV of Ordinance No. 7 guaranteed NMT defendants a range of fair trial rights, such as the right to counsel and the right to produce witnesses and documents. Paul Hebert, one of the judges in *Farben*, believed that the tribunals went to great lengths to ensure that the defendants received fair trials; indeed, he claimed after the trials were over that "in some of the cases, out of a desire to be so fair that the proceedings could not be subjected to any possible censure or criticism, there was a tendency to err in the direction of according a degree of latitude to the defense which would go far beyond anything we would consider permissible in criminal law proceedings under Anglo-American law."[3] Judge Hebert's assessment was generally accurate, as the following survey of how the tribunals interpreted Article IV demonstrates.

A. Indictment

As noted earlier, Article III of Ordinance No. 7 made the OCC solely responsible for deciding what charges to include in an indictment. A number of scholars have criticized the OCC's unreviewable authority. Douglass, for example, argued in the early 1970s that "[i]f there can be any criticism of a violation of due process in the trials under the Anglo-American concept of justice, it can be directed to the method of indictment of specific defendants for there were not even the rudimentary safeguards

[1] Zeck, 368.
[2] Pohl, V TWC 959.
[3] Hebert, *Nurnberg Subsequent Trials*, 231.

of the grand jury or other limitations on the prosecutorial authority."[4] Such criticism, however, is overstated: although the tribunals could not prevent the OCC from bringing specific charges against the defendants, they could – and often did – dismiss counts in an indictment on legal or evidentiary grounds. Tribunal IV's rejection of the pre-war crimes against humanity count in *Ministries* is an example of the former[5]; Tribunal III's decision to dismiss the crimes against peace counts in *Krupp*[6] is an example of the latter. Both decisions are discussed in later chapters.

Moreover, although no substitute for formal oversight, it is important to acknowledge that the OCC voluntarily dismissed allegations in an indictment whenever it concluded that it could not prove a defendant's guilt beyond a reasonable doubt. In *Flick*, the prosecution asked Tribunal IV to amend the indictment five separate times. Three of the changes significantly narrowed the slave-labor charges against Burkart, Terberger, and Weiss,[7] while the other two made clear that Flick was not responsible for the slave-labor and spoliation charges involving the Siemag Company.[8] In *Farben*, the prosecution informed Tribunal VI at the end of its case-in-chief that, in order to assist Hoerlein prepare his defense, it was willing to stipulate with regard to Count 1 (crimes against peace) that "the evidence which it has presented has not established its burden of proof" concerning his involvement in Farben efforts to prevent the United States from developing atabrine and sulphur drugs.[9] And in *Ministries*, the prosecution not only formally withdrew the crimes against peace charges against Meissner because it concluded it couldn't prove them,[10] it also voluntarily dismissed the plunder and spoliation charges against the same defendant when the defense pointed out that it had not introduced "a single document to show [his] participation… in the offenses referred to in count six."[11]

Ministries also involved the most unusual situation in which the prosecution voluntarily dismissed charges. Immediately after the prosecution rested, the defendant Bohle shocked the journalists present in the courtroom by asking Tribunal IV to allow him to plead guilty to persecuting and forcibly transferring civilians (Count 5) and to membership in the SS (Count 8).[12] Bohle's explanation was even more surprising: he told the media that "it would be irresponsible on my part to plead not guilty and thereby shift to others the burden of responsibility and its consequences," because "the Nurnberg courts and the courts in the American and British zones have already handed down verdicts of guilty for… subordinates of mine."[13]

Bohle's request to change his plea might well have been sincere; he later called upon his fellow Nazis to "frankly admit the atrocities that have been committed… and

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[4] Douglass, 689.
[5] See Chapter 12.
[6] See Chapter 8.
[7] Flick, Indictment, VI TWC 14-15.
[8] Id. at 16, 19.
[9] Farben, Prosecution Statement, 29 Jan. 1948, XV TWC 230.
[10] Id. at 232, Ministries, Prosecution Closing Statement, 9 Nov. 1948.
[11] Id., Ministries, Order of 23 June 1948.
[12] Id. at 264-65, Ministries, Motion by Defendant Bohle, 27 Mar. 1948.
[13] Press release from Deane, 29 Mar. 1948, TTP-5-1-4-63.

remove from the name of Germany the blot which the deeds of criminal brains have cast upon it."[14] But he also had a more practical reason: representatives of the OCC, headed by Robert Kempner, had promised to dismiss the crimes against peace charges (Counts 1 and 2) and the plunder charge (Count 6) in exchange for his guilty plea.

Unfortunately, Kempner had not bothered to discuss the deal with Taylor before meeting with Bohle – and Taylor was livid when he found out about it. Kempner defended the plea bargain by arguing that the prosecution's case against Bohle was not particularly strong, that Bohle's plea would strengthen the case against the Foreign Office defendants, and – perhaps most interesting of all – that a guilty plea by a "well-known defendant" would "acknowledge the jurisdiction of the Nurnberg Courts before the U.S. and the German people."[15] Taylor, however, was "not impressed" with Kempner's defense. He rejected Kempner's jurisdiction argument, replying that "Bohle is not an expert on legal jurisdiction, and his opinion will be given weight by no one." He also did not understand how dismissing the crimes against peace charges against Bohle would strengthen the prosecution's case against the other "professional warmakers." Most importantly, though, he rejected the very idea of entering into a plea bargain with Bohle, insisting that "everyone will regard it as a 'deal', which in fact it obviously is," and that "[t]he whole business of making 'deals' has no place in the type of proceedings we are conducting here."[16]

Despite his opposition to the plea bargain, Taylor knew that the OCC's credibility depended on honoring it. He thus instructed the prosecution team "to draw up a stipulation in the nature of a bill of particulars setting out the specific acts to which the defendant would plead guilty and the charges which the prosecution would withdraw." When those negotiations broke down, Taylor decided to oppose Bohle's change of plea but nevertheless withdraw the charges the prosecution had agreed to drop. The prosecution's answer to Bohle's motion, however, did not hide his dissatisfaction with what had transpired:

> It has never been the policy of the prosecution before any of the Nuernberg Tribunals to agree to dismiss charges appearing to the prosecution to be well founded in return for a plea of guilty in response to other charges. However, it appears that during the conferences referred to above certain representations were made by members of the prosecution staff on the basis of which counsel for the defendant Bohle may have been led to assume that the prosecution would agree to dismiss counts one, two and six of the indictment, and may have filed his plea of guilty on the basis of that assumption. Solely for that reason… the prosecution herewith respectfully moves that the name of the defendant Bohle be withdrawn from counts one, two, and six of the indictment.[17]

[14] Press release from Deane, 24 July 1948, 1, TTP-5-1-4-63.
[15] Memo from Kempner to Taylor, 25 May 1948, 1., TTP-5-1-4-63
[16] Memo from Taylor to Kempner, 25 May 1948, 1, TTP-5-1-4-63.
[17] Ministries, Answer of the Prosecution, 27 May 1948, XV TWC 266.

Bohle replied by asking the Tribunal to accept his change of plea regarding his membership in the SS (Count 8) but allow him to withdraw his plea of guilty on the persecution and forcible transfer charges (Count 5).[18] The Tribunal then dismissed Counts 1, 2, and 6; set aside Bohle's request to plead guilty to Count 5; and entered a plea of guilty to Count 8[19] – the first and only time during the NMT trials that a defendant pleaded guilty to one of the charges against him.

B. Right to Counsel

Article IV(c) of Ordinance No. 7 provided that "[a] defendant shall have the right to be represented by counsel of his own selection, provided such counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country, or any other person who may be specially authorized by the tribunal." Even if Article IV(c) had not guaranteed the right to counsel, however, the tribunal would have recognized it; as the *Krupp* tribunal pointed out, that right was a fundamental principle of justice and implicit in the very idea of a fair trial.[20]

Article IV(c) differed in one critical respect from the right-to-counsel provision in the London Charter, Article 16(d): whereas Article IV(c) required a defendant to be represented by counsel, Article 16(d) also gave a defendant "the right to conduct his own defense before the Tribunal." Nothing in the history of Ordinance No. 7 sheds light on whether the drafters intended to remove the right of self-representation, and the difference became moot when the judges adopted the Uniform Rules of Procedure. Unlike Article IV(c), Rule 7(a) of the URP returned to the Charter approach by providing that "[a] defendant shall have the right to conduct his own defense, or to be represented by counsel of his own selection."

No defendant ever chose to represent himself during the NMT trials. All of the defendants hired at least one main counsel, and many also employed one or more assistant counsel. More than 200 attorneys represented defendants during the trials.[21] A few represented multiple defendants in the same trial. Alfred Seidl, for example, was main counsel to Fischer, Gebhardt, and Oberhauser in the *Medical* case. Others represented defendants in different trials, such as Carl Haensel, who was main counsel to Joel in *Justice*, Loerner in *Pohl*, Greifelt in *RuSHA*, and Steengracht von Moyland in *Ministries*.

1. German Attorneys

With the exception of two Americans and one Swiss, all of the attorneys who represented NMT defendants were German. The vast majority of the German attorneys had been associated with the Nazis either before or during the war: most had belonged to the Nazi Bar Association, and 136 had been members of either the National Socialist Party or one of its branches, including 10 members of the SS and

[18] Id. at 267, Ministries, Reply of Defendant Bohle, 1 June 1948.
[19] Id. at 268, Ministries, Order of 4 June 1948.
[20] Krupp, IX TWC 1331.
[21] 207 individuals appeared as counsel. In *High Command*, Schniewind's Main Counsel was a German Naval officer who was not an attorney. A few other assistant counsel did not have legal training. TAYLOR, FINAL REPORT, 47 n. 148.

22 members of the SA.[22] Nevertheless, the Central Secretariat – which was responsible for securing counsel through its Defense Center – decided prior to the first trial that Nazi affiliation, no matter how serious, would not disqualify an attorney from being appointed counsel to one of the defendants. The Secretary-General had thus negotiated an "informal understanding" with Bavarian authorities that the denazification tribunals would not initiate proceedings against any of the lawyers as long as an NMT defendant continued to retain them.[23]

Despite this general rule, an attorney's Nazi affiliation created problems for the tribunals on two occasions. The first concerned Ernst von Weizsaecker's request to have Hellmut Becker appointed as one of his counsel. When the Defense Center processed the questionnaire (*Fragenbogen*) that Becker filled out concerning his qualifications and political affiliations – a requirement for all NMT attorneys – it discovered that he had lied about not being a member of the Nazi Party, a serious violation of OMGUS policy. Von Weizsaecker was reluctant to hire a different attorney, because Becker had already spent considerable time preparing for the case. The Committee of Presiding Judges thus decided that Becker would be allowed to represent von Weizsaecker, but with the proviso that OMGUS would be free to bring charges against him after the *Ministries* trial was over.[24]

A more serious situation arose during the defense case in *Farben*. While Gajewski's main counsel, Ernst Achenbach, was away from Nuremberg on a tribunal-authorized trip, Bavarian authorities attempted to serve an arrest warrant on him issued by the Nuremberg *Spruchkammer*, the local denazification board. According to the warrant, Achenbach had failed to submit the questionnaire required by the Liberation Law to the *Spruchkammer* and was believed – based on considerable evidence – to have played an important role in the extermination of French Jews while he was an official in the German Embassy in Paris.[25] Achenbach refused to return to Nuremberg when he learned of the warrant and asked Tribunal VI to intervene on his behalf. Recognizing that it had no legal authority to interfere with the *Spruchkammer* but was obligated to protect Gajewski's right to counsel, the *Farben* tribunal instructed the Secretary General to ask the Bavarian authorities to delay the arrest warrant until the end of the trial. Unfortunately, the President of the Bavarian *Landesgericht* refused the request.[26] The Tribunal thus had no choice but to permit Achenbach to resign as Gajewski's main counsel and replace him with Gajewski's assistant.[27]

2. Non-German Attorneys

The presence of three non-German attorneys at the NMT distinguished it from the IMT, at which all of the defense attorneys were German.[28] The first non-German

[22] Id. at 48.
[23] XV TWC 304-05.
[24] Id. at 313, Extract from Minutes of the Committee of Presiding Judges, 2 Dec. 1947.
[25] Id. at 318-19, Letter from the President of the Landesgericht, 10 Feb. 1948.
[26] Id. at 317, Certificate of Secretary General Withholding Service of Warrant, 16 Feb. 1948.
[27] Id. at 305.
[28] That was not an accident. In October 1945, senior British QCs, led by then-Attorney General Hartley Shawcross, had passed a controversial resolution condemning such representation as

attorney appointed was Walter Vinassa, a Swiss attorney hired by Haefliger – a Swiss citizen who had acquired German citizenship during the war but renounced it afterward – in the *Farben* case. The second was Warren Magee, an American attorney hired by von Weizsaecker to serve as co-counsel for the *Ministries* trial. Hellmut Becker's motion seeking Magee's appointment argued that a "proper defense" for von Weisaecker required American as well as German counsel, because the tribunal was American, the judges and prosecutors were American, and the rules of procedure invoked both American and international law. Tribunal IV granted the motion on December 29, noting that it believed that, "as far as practicable, a defendant should be represented by counsel of his own choice." The judges emphasized, however, that the tribunal was international, not American, and that they considered the nationality of the judges and prosecutors "immaterial."[29]

The final non-German attorney was Joseph Robinson, an American attorney who represented von Buelow during the *Krupp* trial. Robinson had served during the war in the Judge Advocate General's office in D.C. and on General MacArthur's Board of Review in the Pacific Theater, an appellate military court that reviewed court-martial convictions. Tribunal III appointed Robinson as co-counsel to von Buelow's main counsel, Wolfgang Pohle, on 26 February 1948, and Robinson participated actively in the trial until April 5, when the Tribunal found all the defendants not guilty on the crimes against peace charges.[30]

The tribunals also rejected the applications of two non-German attorneys. In *Farben*, the defendant von Schnitzler requested that an American attorney, Thomas Allegretti, be appointed co-counsel. Allegretti was in Germany at the time as an official with the Army's European Exchange Service, but had been ordered to leave Germany by American authorities. The *Farben* tribunal informed Allegretti that his application did not adequately establish that he was still a member of the bar in good standing, and it then rejected the application when he "wholly failed" to amend it.[31]

The more dramatic rejection came in *Krupp*, when Alfried Krupp sought to hire an American attorney, Earl Carroll, to replace his original counsel, the legendary Otto Kranzbuehler. On 8 December 1947, the first day of trial, Krupp applied to the court to have the law firm "Foley and Carroll" of Hollywood, California, entered as his counsel of record. That application was accompanied by a letter signed by Earl Carroll stating only that "[a] competent associate to undertake the trial representation can be expected in Nuernberg within thirty days of the receipt." Tribunal III denied the motion the next day on the ground that, by not identifying the specific counsel who would represent Krupp, the application failed to comply with Rule 7 of the URP.[32]

"contrary to the public interest." KIRSTEN SELLARS, THE RISE AND RISE OF HUMAN RIGHTS 25-26 (2002).

[29] Id. at 326, Farben, Order, 29 Dec. 1947.

[30] Taylor, *Krupp Trial*, 198.

[31] Farben, Order, 28 Jan. 1948, XV TWC 326-27.

[32] Ruling of Military Tribunal III, 5 Jan. 1948, NA-153-1018-9, at 2-3.

On December 15, Krupp filed a second application for new counsel. This application stated that a member of Foley and Carroll was now present in Germany and ready to replace Kranzbuehler, but it still did not identify the attorney. Finally, when questioned in open court, Kranzbuehler informed the Tribunal that the attorney was Earl Carroll himself. The application was then amended to reflect that fact.[33]

Four days later, the Tribunal denied the second application in open court. In the interim, the judges had learned that Carroll – whom Judge Anderson called an "ambulance chaser"[34] – had willfully violated the conditions of his entry permit into Germany. Carroll had been allowed to enter the U.S. zone to defend five American soldiers who were being court-martialed, and General Clay had informed him by letter in May 1947 – nearly seven months before Krupp's first application – that he had to leave Germany after the courts-martial were concluded and could not engage in any additional legal activity while in the country.[35] In "flagrant defiance" of Clay's order, Carroll had nevertheless "appeared in other Courts Martial cases, represented a foreign liquor concern in a commercial matter, and appeared in a Military Government Court."[36] He had also attempted to file a notice of appearance with the Secretary General on December 17, even though Krupp had filed the second application two days earlier and the Tribunal had yet to rule on it – itself a blatant violation of the URP.[37]

When the *Farben* tribunal announced its decision, Kranzbuehler attempted to resign from the case, informing the judges that Krupp "has told me that he is interested only in being represented by Mr. Earl J. Carroll, and that if this representation were denied to him he was not interested in being represented by anyone, not by me either." When the Tribunal denied his request to withdraw, Kranzbuehler argued that Rule 7 permitted the Tribunal to appoint counsel for Krupp only if he had not selected his own counsel – and Krupp had selected Earl Carroll. Unmoved, the Tribunal cut him off and told him that he was free to ask the Committee of Presiding Judges for a joint session of the tribunals on that issue.[38] Kranzbuehler did so, but the Committee held that representation issues were outside of its jurisdiction.[39]

Carroll, it should be noted, revealed his true colors not long thereafter. At the end of March 1948, he wrote to President Truman to complain about the NMT trials. Carroll assured Truman "from personal experiences and investigation" that the trials were "a disgrace to the people of the United States," were "destroying German capitalism and discrediting American justice," and represented "one of the most effective communist infiltrations into American administration of Occupied Germany." He also insisted that some of the native German prosecutors in the OCC "were active communists in

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[33] Id. at 4.
[34] WILKINS, 222.
[35] Ruling of Military Tribunal III, 5 Jan. 1948, at 4.
[36] Letter from Clay to Carroll, 30 Apr. 1947, TTP-5-1-1-4.
[37] Ruling of Military Tribunal III, 5 Jan. 1948, 2-3.
[38] Extract from Krupp transcript, 19 Dec. 1947, XV TWC 335-36.
[39] Id. at 1131-32, Order of the Committee, 12 Jan. 1948. Joint sessions are discussed in more detail in Section IV below.

Germany at the outset of the Nazi regime"[40] – a claim he had first made two months earlier in an equally-incendiary letter to General Clay.[41]

C. Self-Incrimination

1. Unwarned Statements

In late November 1946, less than three weeks before the *Medical* trial began, Tribunal I ordered the OCC to warn any indicted war-crimes suspect that he had a right to remain silent during interrogation and that any statements he made could be used against him in a criminal prosecution.[42] That was a significant procedural innovation: neither the London Charter, Law No. 10, nor Ordinance No. 7 required such warnings, and prior to the *Medical* tribunal's ruling no IMT or NMT interrogator had ever given them. The OCC's Interrogations Branch immediately complied with the order, instructing its interrogators to give the warnings at "such time as the defendant or his counsel have [sic] received the indictment papers through the Secretary of the Tribunal."[43]

As noted in the previous chapter, no tribunal ever excluded an incriminating pre-trial statement made prior to November 1946 on the ground that it violated the defendant's right to silence. NMT critics regularly denounced that practice,[44] but their vitriol was misplaced. There is no question that U.S. war-crimes officials specifically designed the interrogation process to maximize the likelihood that a defendant would make incriminating statements. The War Department, for example, initially prohibited POW camps from segregating suspects from regular detainees precisely to avoid alerting them that they were under suspicion,[45] and IMT interrogators routinely misled suspects into believing that they were only viewed as witnesses.[46] The tribunals' approach to unwarned statements was, however, no different than the approach taken by American courts – after all, the Supreme Court did not decide *Miranda v. Arizona*, requiring all suspects to be warned of their right to silence upon arrest, until 1966.[47]

NMT critics also denounced Taylor's deliberate refusal to provide suspects with defense counsel until they were formally indicted – the same position Jackson had taken at the IMT, because he "loathed the obstructionism practiced by criminal attorneys in the U.S."[48] Taylor justified his policy on two grounds, neither of which is persuasive. The first was logistical: until late August 1946, the OCC was investigating nearly 2,500 suspects and conducting literally hundreds of interrogations per month, making it impossible to provide every suspect with counsel during every

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[40] Letter from Carroll to President Truman, 25 Mar. 1948, NA-153-1018-9-86-2-2-, at 1-2.
[41] Letter from Carroll to Clay, 12 Jan. 1948, TTP-5-1-1-4, at 4-5.
[42] Memo from Rapp to All Interrogators, 21 Nov. 1946, TTP-5-1-3-42, at 1.
[43] Id.
[44] See, e.g., WURM MEMOS, 85; VON KNIERIEM, 144.
[45] Clio Edwin Straight, Report of Deputy Judge Advocate Straight for War Crimes: June 1944-July 1948, 26-7 (1949).
[46] See, e.g., EARL, 83.
[47] 384 U.S. 436 (1966). Taylor himself participated in *Miranda* as amicus curiae on behalf of the State of New York. He argued against the existence of the constitutional right. EARL, 84 n.163.
[48] EARL, 86.

interrogation.[49] That may have been true in the early stages of the OCC's planning, but the OCC certainly could have provided suspects with attorneys once it had reduced Peiser's list of 2,500 suspects to a more manageable 400.

Taylor's second rationale was even more problematic:

> I quite agree that in normal circumstances, anyone confined should be promptly given the right of counsel. The difficulty is, of course, that information provided by people in custody is a very important source to us of determining what people should be charged with war crimes and what people can be safely released….This process would be much impaired if all persons in confinement were to be given immediate right to counsel. [50]

There is no question that suspects provide better information when they are not represented, but that does not justify denying them counsel – particularly when any incriminating statements they make can be used against them at trial. That said, Taylor's policy was consistent with American practice. Just as the Supreme Court did not require Miranda warnings until 1966, it did not hold that suspects had a right to counsel during interrogations until 1964, when it decided *Escobedo v. Illinois*.[51]

2. Duress

In early July 1946, less than a month after the Interrogation Branch was created, Walter Rapp, the chief of the Branch, distributed an "Interrogator's Guide." Paragraph 9 of the Guide made clear that interrogators were not permitted to use coercive methods to obtain incriminating statements:

> These are not wartime operational interrogations where any means that served to get the information were all right. You are now connected with a legal trial where you must let yourself be guided by professional, ethical standards. If you don't, you degrade yourself to shyster status. Any form of duress is out. Equally out are any loose promises to any prisoner for supplying you with evidence…. You cannot force a man to sign anything. He must sign voluntarily. Anything else would be indefensible in court.[52]

NMT critics and defendants regularly alleged that OCC interrogators violated these guidelines. Bishop Wurm, for example, claimed in June 1948 that "[r]eports have been increasing that statements have been made during the preliminary investigations under the influence of the after-effects of inadmissible methods of treatment, under the influence of inadmissible pressure and under the threat of long imprisonment, hanging or extradition to foreign powers."[53]

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[49] Id. at 85.
[50] Letter from Taylor to Rockwell, 12 Mar. 1947, cited in id. at 86.
[51] 378 U.S. 478 (1964).
[52] Rapp, Interrogator's Guide, 8 July 1946, TTP-5-1-3-42, at 2.
[53] Letter from Wurm to Kempner, 5 June 1948, in WURM MEMORANDUM, 31.

There is no evidence that interrogators regularly made use of coercive techniques. The tribunals consistently rejected such claims,[54] and even Fritz Sauter, who represented defendants in three different trials, stated that "I am bound to say that during the time I have been active in Nurnberg I did not see anything of such methods; nor did I hear anything like that either from defendants or witnesses. I do not know of a single case in which a defendant or witness was maltreated or 'tormented' during the conduct of a trial in Nurnberg."[55] Defendants also often labeled even the most innocuous interrogation techniques as "duress." When a German journalist asked one defendant claiming duress what had happened to him, the defendant responded, "[h]e offered me a cigarette, therefore leading me to believe that he was my friend."[56]

That said, Taylor's claim in his Final Report that "[t]hroughout the existence of the Subsequent Proceedings Division and OCCWC, it never came to my attention that any member of the Interrogation Branch departed from these instructions"[57] is clearly an overstatement. Taylor himself sent a memo to Kempner in August 1947 that acknowledged "various attorneys and research analysts" permitted to conduct interrogations "had violated the Interrogation Guide by "making promises to inmates of the jail to the effect that they were to be released at such and such a time and date or were 'definitely not defendants'."[58] Moreover, there is no question that – as alleged by Bishop Wurm[59] – Kempner himself coerced a witness, Friedrich Gaus, into testifying for the prosecution by threatening to turn him over to the Soviets, whom Gaus knew would almost certainly execute him. Frei points out that "Kempner's colleagues were horrified by this fiasco," particularly his superior, Charles LaFollette, who later told Clay that Kempner's "foolish, unlawyer-like methods of interrogation… [were] protested by those of us who anticipated the arising of a day, just such as we now have, when the Germans would attempt to make martyrs out of the common criminals on trial in Nuernberg."[60]

The tribunals were also occasionally sympathetic to claims of coercion. In *RuSHA*, for example, Tribunal I excluded a number of affidavits, including ones provided by the defendants, because the affiants testified at trial "that they were threatened, and that duress of a very improper nature was practiced by an interrogator."[61] It is not clear, however, whether the Tribunal believed the affiant's claims or simply erred on the side of caution.

No such ambiguity exists concerning the *Farben* tribunal's decision to exclude pre-trial statements made by the defendant Schmitz, although the statements in question were made to an IMT interrogator in 1945, not one employed by the Interrogation Branch. When the War Department lifted its policy prohibiting the segregation of war-crimes suspects, OMGUS enacted Military Government Ordinance No. 1, which

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[54] See, e.g., Farben, VIII TWC 1119; EARL, 87.
[55] Interview by Dr. Sauter, 1 July 1948, NA-260-199a1-162-4, at 3.
[56] Forum Discussion, "Are the Nurnberg Trials Just and Fair?", NA-260-199a1-162-4, at 25.
[57] TAYLOR, FINAL REPORT, 62.
[58] Memo from Taylor to Kempner, 20 Aug. 1947, TTP-5-1-3-42.
[59] WURM MEMORANDUM, 31.
[60] NORBERT FREI, ADENAUER'S GERMANY AND THE NAZI PAST 108 (Joel Golb trans., 2002).
[61] RuSHA, V TWC 871.

provided, *inter alia*, that "refusing to give information required by Military Government" was an offense punishable by up to life imprisonment.[62] Schmitz claimed – and the prosecution stipulated – that the IMT interrogator had told him he would be sentenced to 20 years imprisonment under Ordinance No. 1 if he refused to cooperate with the interrogator. The *Farben* tribunal excluded the statements, pointing out that "[i]t would be difficult, if not impossible, to conceive of a more effective means of coercing one into giving evidence against himself than to advise him that he would be subject to life imprisonment for failure to do so, especially when the implied threat is accompanied by the showing of an official directive providing for such liability."[63]

D. Production of Witnesses and Documents

Article 4(f) of Ordinance No. 7 provided defendants with a right to obtain witnesses and documents:

> A defendant may apply in writing to the tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located and shall also state the facts to be proved by the witness or the document and the relevancy of such facts to the defense. If the tribunal grants the application, the defendant shall be given such aid in obtaining production of evidence as the tribunal may order.

How defense requests were processed depended on the location of the particular witness or document. If it was located in the American zone, the Secretary General "promptly" issued a summons for the attendance of the witness or the production of the document.[64] If it was located outside of the American zone – in another zone, or outside of Germany – the Tribunal itself would "request through proper channels that the Allied Control Council arrange for the production of any such witness or document as the Tribunal may deem necessary to the proper presentation of the defense."[65]

1. Witnesses

The defense made liberal use of Article 4(f) with regard to witnesses. In *Milch*, the smallest of the 12 trials, the defense submitted 47 requests. In *High Command*, one of the larger trials, there were 165. The tribunals went to great lengths to honor those requests. In *Milch*, for example, Tribunal II granted 34 of the 47 requests without condition; granted four of the requests pending approval of the Control Council, because the witnesses were outside the American zone; granted three of the requests for deposition only; and denied six of the requests. All of the witnesses outside of the American zone – Constantin von Neurath, Erich Raeder, Albert Speer, and Karl

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[62] Military Government Ordinance No. 1, art. 2, sec. 33.
[63] Farben, Order, 25 May 1948, XV TWC 868.
[64] URP 12(c).
[65] URP 12(d).

Wolff – ultimately testified during the trial.[66] In most cases the Defense Administrator made arrangements for the witness to be brought to Nuremberg. That was the case in *Ministries* when Bishop Berggrav of Norway testified for von Weizsaecker, and in *High Command* when a British naval officer, Captain Russell Grenfell, testified on behalf of Schniewind.[67]

When a tribunal authorized a deposition or a witness was unable or unwilling to come to Nuremberg, the Defense Administrator tried to arrange for a representative of the defense to travel to the witness's location. "Extensive assistance" was given to the defense regarding travel within Germany, including arranging for counsel to travel by air lift to Berlin during the blockade. It was much more difficult for German counsel to travel outside of Germany, because most states still classified Germans as enemy aliens, but the Defense Administrator managed in the later trials to arrange trips to Austria, Czechoslovakia, England, Norway, and Switzerland.[68] When defense counsel could not travel to a witness's location, the Defense Center did its best to arrange for the witness to be served with interrogatories prepared by the defense.[69]

Despite these efforts, there is no question that the prosecution found it much easier to obtain witnesses than the defense. As von Knieriem rightly pointed out, "[t]he prosecution… had for years sought out and interrogated witnesses with a staff of officials in all countries formerly occupied by Germany. It could search for witnesses or evidence in foreign countries and have the witnesses interrogated and brought to Nuremberg as soon as a person or an event was mentioned in the proceedings."[70] Two interrelated advantages were particularly glaring: the prosecution could locate witnesses, most of whom were detained in Allied POW camps, more easily than the defense; and unlike German counsel, the prosecution could – and did – travel freely outside of Germany to escort witnesses to Nuremberg or take depositions.[71]

Defense frustrations boiled over in *Farben*, when Drexel Sprecher admitted to Tribunal VI that no German lawyer had ever been allowed to travel outside of Germany. (Travel restrictions had not yet been eased.) The defense immediately moved the Tribunal to strike "all affidavits and testimony of such prosecution witnesses as the prosecution secured during the trips abroad of its members," arguing that the "utterly unequal" position of the prosecution and the defense "seriously endanger[ed] the finding of the full truth about the events which constitute the basis for this trial."[72] The prosecution replied that, if relative advantages determined whether certain types of evidence were admissible, it would move to strike the more

[66] Milch, Table Concerning Defense Requests, XV TWC 370. Because the Control Council later changed its mind about von Neurath, Raeder, and Speer testifying in public, they testified via commissioner.
[67] Id. at 365.
[68] Id. at 366-67.
[69] Defense Memorandum No. 1, undated, NA-260-199a1-161-21, at 2.
[70] VON KNIERIEM, 179.
[71] Id. at 177-78.
[72] Farben, Defense Motion, 11 May 1948, XV TWC 384-85.

than 2,000 affidavits introduced by the defense that the prosecution had a limited ability to cross-examine.[73] The Tribunal denied the motion.

The "utterly unequal" position of the defense and prosecution is indeed troubling, and there is at least some evidence that the tribunals did not do everything they could to obtain witnesses for the defense. In June 1947, for example, the Defense Administrator complained to the head of the OCC's Administrative Division that he believed the defense was being discriminated against by the "[r]efusal to send Military personnel after Defense witnesses who are in prison in other Zones or Countries" and the "[r]efusal of travel orders by OCC to personnel of the Office of the Secretary General to secure and return witnesses in custody."[74]

That said, the limits on the defense resulted far more often from the tribunals' own dependence on the willingness of the Control Council and Allied governments to cooperate with requests for witnesses. As the *Farben* tribunal noted, it was simply "not in a position to issue directives that are binding or forceful with reference to military authorities or foreign governments."[75] That was an accurate statement: France refused a defense request for a French expert in the *Medical* case[76]; Poland refused to allow important witnesses to testify in *RuSHA* because they were on trial at the time[77]; and the Soviets never honored defense requests.[78]

2. Documents

In general, defense requests for documents created fewer problems than requests for witnesses. OMGUS limited German access to captured documents for security reasons,[79] but both the OCC and the tribunals invested considerable time and energy ensuring that the defendants received the documents they needed to prepare their defense. In all of the cases, for example, the OCC provided the defense with significant numbers of documents in advance of trial, sometimes – as in *Farben* – even before judges had been assigned to the case.[80] The OCC also voluntarily complied with numerous defense requests for documents. In *Flick*, for example, the prosecution not only provided the defense with all of its files concerning the Reich Association Coal, it told the defense where it could find additional Association documents.[81]

For their part, the tribunals routinely granted defense requests under Article IV(f) for access to particular documents and document collections. In *Farben*, Tribunal VI permitted both ter Meer and his counsel to examine company documents stored in

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[73] Id. at 386, Answer of the Prosecution, 13 May 1948.
[74] Memo from Wartena to Director of the Administrative Division, 10 June 1947, NA-260-194a1-134-14, at 2.
[75] Excerpt from Farben transcript, 17 Dec. 1947, 4686, 4688/89.
[76] FREYHOFER, 97.
[77] WURM MEMORANDUM, 114.
[78] Id.
[79] XV TWC 393.
[80] Id. at 395.
[81] Id. at 404, Flick, Answer of the Prosecution, 18 June 1947.

Frankfurt.[82] It also ordered the OCC to give the defense access to all of the Farben documents in its files that it did not intend to use for the first time on cross-examination, despite the prosecution's vehement objection that the request was nothing more than a "fishing expedition."[83] In *Ministries*, Tribunal IV not only gave the defense access to copies of German Foreign Office documents that were in the prosecution's files, it also permitted a representative of the defense to travel to the Berlin Documentation Center to examine the originals.[84] In *High Command*, Tribunal V arranged for the Secretary General to have 1,503 document folders – enough to fill 37 footlockers – shipped by air to Nuremberg for defense inspection.[85] And as noted earlier, the *Hostage* tribunal ordered the prosecution to either permit defense representatives to examine War Department archives in D.C. or arrange to have the documents requested by the defense shipped to Nuremberg.

II. DEFENSE RESOURCES

In his book on the NMT trials, Von Knieriem claimed that "the weapons of prosecution and defense" could only have been equalized by providing the defense with more time to prepare and vastly greater resources.[86] Ben Ferencz, by contrast, has argued that "the assistance given the Nurnberg defendants for the preparation and presentation of their defense" was more than sufficient to guarantee the defendants a fair trial and was, in fact, "greater than that available to the average impecunious defendant in America."[87] Ferencz seems to have the better of the argument.

A. Time

NMT critics often claimed that defendants did not have sufficient time to prepare for trial. First, they pointed out that the defendants were not able to begin preparations until they were formally indicted, because only at that point were they entitled to counsel.[88] Second, they emphasized that the prosecution was under no such limitation and had begun to prepare some of its cases more than two years before trial.[89]

The second objection has a superficial attraction, but is in no way unique to the NMT trials: domestic and international prosecutors always devote considerable time and resources to building a case against a suspect before they formally indict him. And although the first objection is literally true, the question is not whether the defendants could have had more time, but whether the time they did have was sufficient to prepare an effective defense. It seems clear that it was. Rule 4 of the URP required a minimum of 30 days between service of the indictment and the beginning of trial, which Ferencz claims was "greater than that required by German or American

[82] Id. at 400, Defense Center Memorandum, 20 June 1947.
[83] Id. at 430, Farben, Order, 22 Apr. 1948.
[84] Id. at 419, Ministries, Order, 29 Mar. 1948.
[85] High Command, XI TWC 466.
[86] VON KNIERIEM, 185.
[87] Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. CRIM. L. & CRIMINOLOGY 144, 147 (1948).
[88] See, e.g., VON KNIERIEM, 176.
[89] Id. at 177.

criminal or military law."[90] Indeed, the contrast with Nazi law was particularly stark, as illustrated by a colloquy between Tribunal III and Franz Schlegelberger in the *Justice* case. After being read the indictment at the arraignment, Schlegelberger asked the Tribunal, "[b]efore you sentence us, could I please say just a word in behalf of myself and my associates?" Schlegelberger thought the trial would begin immediately – standard practice under the Nazis – and was "amazed" to find out that he had 30 days to consult with his attorney.[91]

In practice, moreover, most of the defendants had far more than 30 days to prepare. Although the *Medical* and *Flick* trials started one month after the indictment was served, the average period between indictment and trial was nine weeks, including 14 weeks in *RuSHA* and 15 weeks in *Farben* and *Krupp*. It was also standard practice for the tribunal to recess the trial for three to four weeks at the close of the prosecution's case-in-chief to give the defense additional time to prepare,[92] although Musmanno deviated from that practice in *Einsatzgruppen*, calling it a "delaying tactic."[93] Finally, the tribunals liberally granted shorter recesses when a particular defendant needed a few extra days to prepare his case.[94]

B. Resources

NMT critics also argued that the defendants did not have sufficient human and material resources to prepare an effective defense. Although there is no question that additional resources would have been helpful, the defendants were relatively privileged even by modern standards.

1. Counsel and Staff

Every defendant was entitled to hire two attorneys, one main counsel and one assistant counsel, as well as a secretary.[95] Nearly all hired both, although some defendants, such as Friedrich Flick, relied solely on main counsel. The tribunals also occasionally permitted defendants to hire three attorneys. In *Ministries*, for example, Paul Koerner had two assistant counsel and Otto Stuckart had an additional co-counsel. Overall, defense attorneys significantly outnumbered prosecutors: more than 200 defense attorneys represented clients during the trials, while the number of prosecutors never exceeded 100. And with the exception of *Milch*, in which there were two defense attorneys and six prosecutors, defense attorneys outnumbered than prosecutors in every trial. In *Einsatzgruppen*, for example, there were more than 40 defense attorneys and only six prosecutors.[96]

In three cases, the tribunals also appointed additional counsel and staff to assist the defendants. In *Krupp*, Tribunal III appointed the head of Krupp's legal division as

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[90] Ferencz, 148.
[91] Wilkins, 201.
[92] See, e.g., Hebert, *High Command*, 181.
[93] EARL, 240.
[94] See, e.g., APPLEMAN, 153.
[95] Memo from Wartena to Secretary General for Military Tribunals, 13 June 1947, NA-260-199a1-162-7, at 1.
[96] See TAYLOR, FINAL REPORT, Appendix Q.

"special counsel" for all of the defendants. In *Ministries*, Tribunal IV appointed a senior counselor in the German Foreign Office and three assistants (a scientific assistant, a historian, and an interpreter) to help the seven Foreign Office defendants prepare for trial. And in *Farben*, Tribunal VI not only appointed 12 "general staff" to assist the defendants – four main counsel, four assistant counsel, and four secretaries – it appointed three "special counsel," as well: a professor of international law at Heidelberg, the professor's assistant, and a member of Farben's legal division.[97]

Finally, the Defense Center made an American legal consultant available to the defendants at all times. Three men held that position, including John H.E. Fried, who also served as a legal consultant to the tribunals themselves.[98]

2. Material Resources

The defendants also had significant material resources at their disposal. Financially, each main defense counsel was paid 3,500 marks per month by OMGUS, 7,000 marks per month if he represented multiple defendants.[99] Bishop Wurm complained that the monthly payment did not permit a defendant's main counsel to pay "the necessary assistant personnel,"[100] but Ferencz notes that the 3,500 marks per month was a veritable fortune compared to the 200 marks per month that the average skilled worker in Germany received at the time.[101] OMGUS also offset many of the living expenses that would normally have been incurred by defense counsel and their staff. It provided free housing for all of the defense counsel and secretaries who lived outside of Nuremberg[102]; paid for the gasoline they used to drive private vehicles to the Palace of Justice or on official defense business[103]; established a separate mess hall where, for 50 pfennigs per meal, they could get three meals a day – 3900 calories daily, more than the number of calories provided to American soldiers and three times as many as average Germans managed – as well as coffee[104]; and gave one carton of free cigarettes per week to defense counsel (which not even OMGUS employees received) and one free bar of soap to counsel and their secretaries.[105]

Providing defense teams with sufficient space proved more difficult. Space was at a premium until mid-April 1947, when renovations to the Palace of Justice allowed the Defense Center to allocate 29 rooms to the teams – "ample space for present and future needs," according to the Defense Administrator.[106] The Defense Center also provided each defense team with desks, chairs, bookshelves, filing cabinets, lamps, typewriters, and stationary, although one of the Krupp attorneys complained that his team did not have what they needed – particularly light-bulbs, which were scarce

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[97] Id.
[98] Final Report of the Defense Center, XV TWC 190.
[99] Ferencz, 147.
[100] Ltr from Bishop Wurm to Clay, 20 May 1948, in WURM MEMORANDUM, 25.
[101] Id.
[102] Final Report of the Defense Center, XV TWC 190.
[103] Ferencz, 147.
[104] Id.
[105] Final Report of the Defense Center, XV TWC 189.
[106] Memo from Wartena to Secretary General for Military Tribunals, 13 June 1947, 1.

because they were necessary for working after dark – until the trial began in December 1947.[107]

Finally, the Defense Center provided the defense teams with a number of important litigation services. Attorneys were allowed to make unlimited local and long distance calls within Germany at no charge – though they complained about the number of phones throughout the trials[108] – and to send as many official cables as they wanted outside of Germany.[109] The defense teams also had the same access as prosecutors to the OCC's facilities for translation, photocopying, and mimeographing.[110]

III. APPEAL

Article XV of Ordinance No. 7 provided that "[t]he judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review." The inability of defendants to appeal their convictions is perhaps the most controversial aspect of the trials; Bishop Wurm spoke for nearly all of the NMT critics when he wrote to Robert Kempner in June 1948 that "[i]n view of all these circumstances it seems very discouraging that no opportunity to appeal against the Nuremberg Judgments exists. When taking into consideration the importance of the findings for international law and their serious consequences for the inflicted persons, such an appeal becomes an imperative demand."[111]

The critics' position has considerable merit, even if Ordinance No. 7 was simply following in the London Charter's footsteps.[112] Justice Jackson defended the absence of appellate review on the ground that it would simply take too long.[113] That may well have been the case, but such pragmatic concerns do not outweigh the importance of such review, which was almost certainly a "fundamental principle of criminal law accepted by nations generally" by 1946.[114] Moreover, nothing in Law No. 10 *prohibited* the U.S. from providing appellate review; as noted earlier, each Ally had the discretion under Law No. 10 to adopt its own procedural rules. In fact, France not only permitted defendants convicted in a zonal trial to appeal their convictions, such an appeal led a higher military court to reverse Hermann Roechling's conviction for waging aggressive war.[115]

In addition to not permitting defendants to appeal their conviction, Ordinance No. 7 also initially prohibited defendants from seeking interlocutory review of tribunal decisions on points of law. That changed on 17 February 1947, when – at Telford

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[107] Quoted in VON KNIERIEM, 181.
[108] See, e.g., Letter from Bishop Wurm to Clay, 20 May 1948, in WURM MEMORANDUM, 25.
[109] Final Report of the Defense Center, XV TWC 190.
[110] Ferencz, 147.
[111] Letter from Bishop Wurm to Kempner, 5 June 1948, in WURM MEMORANDUM, 25.
[112] Letter from Clay to Bishop Wurm, 19 June 1948, in id. at 33.
[113] See, e.g., Letter from Jackson to Petersen, 12 Sept. 1946,NA-153-1018-2-84-1, at 2.
[114] Unlike most common-law countries, however, there was no right to appeal a conviction in the United States until 1956. See Griffin v. Illinois, 315 U.S. 12, 18 (1956).
[115] Jonas Nilsson, *Rochling and Others*, in THE OXFORD COMPANION TO CRIMINAL JUSTICE 887 (Antonio Cassese ed., 2009).

Taylor's urging – OMGUS promulgated Ordinance No. 11, which amended Ordinance No. 7 to provide that the prosecution or defense could request a "joint session" of the tribunals then operating "to hear argument upon and to review conflicting or inconsistent final rulings contained in the decision or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural." Defendants filed numerous requests for joint sessions during the trials, but the tribunals rejected all of them.[116] Many of those requests did not involve challenges to inconsistent rulings, such as a *Farben* defendant's claim that Law No. 10 was invalid.[117] Other requests did challenge inconsistent rulings but were clearly without merit, such as a *Hostage* defendant's claim that Tribunal V's unwillingness to recognize his necessity defense was inconsistent with Tribunal IV's acquittal of a defendant in *Flick* on necessity grounds. The Committee of Presiding Judges simply – and rightly –pointed out that "[t]he basic and controlling facts of each are materially different."[118]

Although the tribunals rejected all of the defense requests, in July 1947 the Committee of Presiding Judges called a joint session of Tribunals I-V to consider whether Law No. 10 recognized conspiracy to commit a war crime or crime against humanity as a separate substantive offense. The tribunals had not yet issued conflicting rulings on that issue, making Ordinance No. 11 technically inapplicable, but defendants had challenged such charges in the *Medical*, *Justice*, and *Pohl* cases. The Committee thus justified convening a joint session *sua sponte* on the ground that it was "desirable that there be a uniform determination on the issue presented by such motions."[119] The five tribunals did not issue a ruling after hearing argument from representatives of the prosecution and defense – discussed in more detail in Chapter 12 – but a few days later each tribunal dismissed the conspiracy charges.[120]

Unique problems concerning joint sessions arose after Tribunal V pronounced sentence in *High Command* on 27 October 1948 and adjourned *sine die*. Two weeks later, the defendants filed a request for joint session alleging that the Tribunal's judgment conflicted with previous judgments on a number of issues, including the *tu quoque* defense and the status of hostages. The *Ministries* tribunal denied the request on November 16 on the ground that a joint session was not possible, because there was now only one tribunal still functioning in Nuremberg. The Tribunal nevertheless considered the merits of the request and concluded that it did not allege an inconsistency that would have justified a joint session.[121]

A similar problem arose at the close of the *Ministries* trial. Aware that it could not call a joint session because it was the final tribunal, Tribunal IV decided to permit the defendants to file memorandums with the Secretary General "calling to the attention of the Tribunal any matters of fact or law which it is believed are in error."[122] As

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[116] XV TWC 1061.
[117] Id. at 1133, Order of the Committee of Presiding Judges, 17 Mar. 1948.
[118] Id. at 1105, Order of the Committee of Presiding Judges, 3 Mar. 1948.
[119] Id. at 1065, Order of the Committee of Presiding Judges, 7 July 1947.
[120] Id. at 1061.
[121] Id. at 1126.
[122] Id. at 1213, Ministries, Order, 7 Apr. 1949.

discussed in Chapter 4, the 19 convicted defendants each filed such a memorandum, three of which – those filed by von Weizsaecker, Woermann, and Steengracht von Moyland – were granted, at least in part. That solution was no doubt fair to the *Ministries* defendants, but it is difficult to reconcile with the absence of appellate review in the eleven other trials, even if the Tribunal was reviewing its own judgment. No other defendant ever received *de novo* review of the evidence supporting their convictions.

CONCLUSION

The NMTs did everything they could to provide defendants with fair trials. The tribunals ensured that defendants could choose their own attorneys, even ones who were themselves war-crimes suspects. They required the OCC to inform suspects of their right not incriminate themselves. They excluded inculpatory statements made under even a hint of duress. They went to great lengths to bring witnesses and documents to Nuremberg – and helped the defense travel outside of the American zone when they failed. And they ensured that the defendants enjoyed sufficient resources to prepare their defense, readily granting continuances and appointing extra counsel in particularly complicated cases.

That said, there were important procedural problems in the trials. The order to inform suspects about self-incrimination came far too late; by that time, most of the defendants had already given incriminating statements. The defendants were intentionally denied counsel by the OCC until after they were indicted, even though it would have been possible to make counsel available earlier. There is no question that the prosecution found it much easier than the defendants to obtain witnesses and documents. And, of course, the defendants had no right to appeal their convictions.

Some of those problems, such as the problems defense counsel faced obtaining witnesses and conducting investigations outside of the American zone, were unavoidable. Others, such as the failure to provide counsel prior to indictment, could have been avoided. Overall, though, the trials were impressively fair – an assessment shared by the defendants themselves, as indicated by a statement made by Fritz Sauter, who represented five different defendants in three different cases, in a July 1948 interview:

> I have often put my view to a test and asked several defendants in Nurnberg whether they would prefer being tried by a German or perhaps a French court, not to mention the courts in the Eastern countries. But everyone told me: if at all, then rather before a US Tribunal… judgments have been passed which we could not regard just, but which, in our opinion, were misjudgments. This, however, has nothing to do with the question of the fairness of the trials, nor with the question of the judges' endeavors to find a just verdict.[123]

That is a remarkable statement – and a testament to the dedication of the judges who served on the NMTs.

[123] Interview by Sauter on the Fairness of the Nurnberg Trials, 1 July 1948, 3-4.