The Nuremberg Military Tribunals and the origins of International Criminal Law

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CHAPTER 14: Sentencing

INTRODUCTION

Law No. 10 provided little guidance to the tribunals concerning sentencing. Article II(3) simply specified that any defendant found guilty of a crime should be "punished as shall be determined by [a] tribunal to be just" and provided that such punishment could consist of "one or more" of six penalties:

> (a) Death.
> (b) Imprisonment for life or a term of years, with or without hard labor.
> (c) Fine, and imprisonment with or without hard labour, in lieu thereof.
> (d) Forfeiture of property.
> (e) Restitution of property wrongfully acquired.
> (f) Deprivation of some or all civil rights.

The NMT trials resulted in 142 convictions. 24 defendants were sentenced to death, all in three trials: *Medical*, *Pohl*, and *Einsatzgruppen*. 20 defendants were sentenced to life imprisonment. 97 defendants were sentenced to imprisonment for a term of years. One defendant sentenced to a term of years – Alfried Krupp – was also required to forfeit his property. No defendant was ever fined, imprisoned in lieu of a fine, or deprived of his or her civil rights.[1]

This chapter explores the sentencing practices of the twelve tribunals. Section 1 discusses the failure of the tribunals to develop general sentencing principles. Section 2 compares sentences *within* cases, assessing the consistency of the sentences that the defendants received. Sections 3 and 4 discuss aggravating and mitigating sentencing factors. Finally, Section 5 draws on the previous sections to compare sentences *between* cases, questioning the accepted wisdom that the sentences became increasingly lenient over time.

I. GENERAL PRINCIPLES

Mark Drumbl has criticized the IMT for imposing sentences without "providing a framework or heuristic to account for the exercise of discretion."[2] The NMTs were no different. The tribunals never explained how they determined the sentences they imposed – even when the sentence was death. In *Einsatzgruppen*, for example, Tribunal II simply informed Otto Ohlendorf that, "on the counts of the indictment on which you have been convicted the Tribunal sentences you to death by hanging."[3] The judges then repeated the same statement 14 more times over the next few minutes for the other condemned defendants.

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[1] Review of Sentences by Military Governor and U.S. High Commissioner for Germany, XV TWC 1141-42.
[2] MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 50 (2007).
[3] Einsatzgruppen, IV TWC 587.

Two tribunals did comment on the general sentencing principles they applied. Unfortunately, those principles directly contradicted each other. In its supplemental judgment, the *Pohl* tribunal held that the seven modes of participation in Article II(2) were enumerated "in a descending order of culpability" – principals being more culpable than orderers, orderers being more culpable than individuals who had taken a consenting part in a crime, and so on.[4] The *RuSHA* tribunal, by contrast, reversed the relationship between principals and orderers, specifically holding with regard to defendants who ordered illegal deportations that "[w]hile in such a case the defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the action is more pronounced than that of those who actually performed the deed."[5] The existence of such dramatically different approaches to culpability raises serious questions about the ability of the tribunals to sentence defendants consistently across cases, an issue discussed in more detail below.

II. WITHIN-CASE COMPARISONS

Although the process was anything but transparent, there is no reason to believe that the judges did not do their best to impose sentences that were both fair and consistent. On the contrary, Judge Wilkins' description of the *Krupp* tribunal's efforts – which involved a bitter dissent on sentencing issues from Judge Anderson – likely applied to all of the tribunals:

> We three judges spent days carefully reviewing the evidence against all defendants and the extent of their personal guilt. We gave much thought to what would be appropriate sentences to impose upon the 11 defendants who were found guilty. Coming from widely separated areas in America (Judge Daly from Connecticut, Judge Anderson from Tennessee and I from Washington State), we sought not only to impose a sentence that would fit the guilt of the individual defendant but also bring about uniformity in the sentences which we judges strive to obtain throughout this country.[6]

This section attempts to explain the tribunals' sentencing decisions in the eleven trials that involved multiple defendants. (*Milch*, of course, involved only one.) As we will see, although many of the sentences were consistent, some were either too lenient or too punitive relative to the sentences imposed on similarly-situated co-defendants.

A. The *Medical* Case

Sixteen of the 23 defendants in the *Medical* case were convicted. Seven were sentenced to death, five were sentenced to life, and four were sentenced to terms of imprisonment longer than 10 years. All 16 were convicted of both war crimes and crimes against humanity; nine of those 16 were additionally convicted of membership in the SS.

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[4] Pohl, Supplemental Judgment, V TWC 1229.
[5] RuSHA, V TWC 153.
[6] WILKINS, 215.

Two factors seem to have determined whether a defendant was sentenced to death: membership in the SS, and responsibility for at least one type of medical experiment (typhus, high-altitude, etc.) that involved fatalities. Six out the seven condemned defendants satisfied those criteria, and the one defendant who did not – Brack, who had been involved only in sterilization experiments – had played a central role in the Nazi's murderous "euthanasia" program, which did not even pretend to have a medical purpose.[7]

The Tribunal did not, however, mechanistically determine sentences. Two of the five defendants sentenced to life imprisonment, Fischer and Genzken, satisfied the two death criteria: both were members of the SS, and both had been involved in lethal experiments. Fischer seems to have received life instead of death because the Tribunal accepted his claim that Gebhardt, his superior (sentenced to death), had ordered him to conduct the sulfanilamide experiments[8] – a striking example of superior orders as a mitigating factor. By contrast, Genzken appears to have avoided the gallows because he had not been directly involved in the typhus experiments; his conviction was based on command responsibility instead.[9]

The idea that the Tribunal viewed direct involvement in experiments as more culpable than responsibility as a superior is reinforced by a comparison between Genzken and Rose's life sentences. Both were held responsible for only one type of experiment, itself the same (typhus), but only Genzken was a member of the SS. Why, then, did Rose not receive a lesser sentence? The answer seems to be that Rose, unlike Genzken, had personally directed that the typhus experiments at Buchenwald be conducted.[10]

B. *Justice*

Of the 14 defendants in the *Justice* case, 10 were convicted. Four were sentenced to life (Schlegelberger, Klemm, Oeschey, and Rothaug), four to ten years of imprisonment (von Ammon, Mettgenberg, Lautz, and Joel), and two to between five and seven years imprisonment. Seven of the eight defendants who received either life or a ten-year sentence were convicted of both war crimes and crimes against humanity; Rothaug was convicted solely of crimes against humanity. Two of the eight were also convicted of criminal membership: Joel for membership in the SS; Oeschey for membership in the Leadership Corps of the Nazi Party.

The differences between the sentences appear to reflect two primary factors: the defendant's position in the Nazi hierarchy; and whether he was convicted of criminal membership. Two of the life sentences were given to the most important defendants in the case: Schlegelberger, who had been the acting Reich Minister of Justice; and Klemm, the Ministry's State Secretary. A third was given to Oeschey, who was not as high-ranking – he was the presiding judge of the infamous Special Court in Nuremberg during the war – but unlike Schlegelberger and Klemm was also

[7] Medical, II TWC 281.
[8] Id. at 296.
[9] Id. at 222.
[10] Id. at 269.

convicted of criminal membership. The final life sentence is more difficult to understand: Rothaug held the least important position of the four (he was a public prosecutor at the People's Court in Berlin) and had been acquitted of membership in the Leadership Corps. He seems to have received a life sentence because he was "a sadistic and evil man" who "gave himself utterly" to carrying out the Final Solution.[11] Indeed, he was one only only two defendants in the trials specifically convicted of genocide.

Given the *Justice* tribunal's emphasis on position and criminal membership, it is understandable why Von Ammon and Mettgenberg were sentenced to 10 years instead of to life imprisonment: although they were deeply involved in administering the Night and Fog program, they were both primarily legal advisers in the Ministry of Justice and neither was convicted of membership in a criminal organization. The other ten-year sentences, however, are more difficult to explain. A strong case can be made that Lautz deserved the same sentence as Rothaug, given that he was Rothaug's superior in the Berlin People's Court and was the other defendant convicted of genocide. His lesser sentence, therefore, must reflect the fact that, as discussed below, the Tribunal found "much to be said in mitigation of punishment" for him.[12] An even stronger case can be made that Joel's 10-year sentence was too lenient: he had served as the Ministry of Justice's liaison to the SS, SD, and Gestapo until 1943 and as a chief prosecutor in two Special Courts after that; he was convicted of membership in the SS; and the Tribunal found no mitigating factors that justified reducing his sentence.

C. *Pohl*

Fifteen of the 18 defendants in *Pohl* were convicted. Three were sentenced to death (Pohl, Eirenshmalz, and Sommer); three were sentenced to life (Loerner, Frank, and Mummenthey); and nine were sentenced to 10 or 15 years imprisonment. Thirteen of the convicted defendants were also convicted of membership in the SS (Volk was acquitted and Hohberg was not charged).

As officials in the WVHA, all of the defendants had been intimately involved in the administration of the concentration camps. Whether a defendant was sentenced to death instead of to a lesser sentence appears to have been determined by the degree of his connection to the extermination program in the camps. Pohl oversaw the camps even though he knew that many of them were executing prisoners in gas chambers and crematoria[13]; Eirenshmalz was responsible for building the crematoria at Dachau, Buchenwald, and other camps and knew that they were being used to carry out the Final Solution[14]; and Sommer's Amt D "played an important part in the commission of these atrocities and murders."[15] By contrast, although both Frank and Mummenthey were aware of the extermination program, neither was involved in its creation. Indeed, the *Pohl* tribunal noted in its supplemental judgment that it

[11] Justice, III TWC 1156.
[12] Id. at 1127.
[13] Pohl, V TWC 984.
[14] Id. at 1030.
[15] Id. at 1034.

sentenced Mummenthey to life instead of death because he was "too lacking in imagination to conjure up the planning of murder and equivalent enormities."[16]

Loerner's life sentence is more difficult to understand. He was initially sentenced to death, but the Tribunal reduced his sentence to life on the ground that there were no relevant differences between him and Frank.[17] Even that sentence, however, seems unduly harsh. Unlike Frank and Mummenthey, Loerner was not aware of the extermination program[18]; unlike Frank, he was not convicted of participating in Action Reinhardt[19]; and unlike Mummenthey, he participated in the slave labor program but was not responsible for (and might not have even known about) the mistreatment of slaves.[20] Loerner thus seems little different from Fanslau, who received a 15-year sentence for his role in the slave-labor program and who was, in fact, a higher-ranking SS officer.

D. *Flick*

Three of the six defendants were convicted in *Flick*. Flick himself was sentenced to seven years imprisonment; Steinbrinck was sentenced to five years; and Weiss was sentenced to 2.5 years. Those sentences were actually relatively harsh, given the acts for which the defendants were held responsible. (The real problem with the case, as discussed in previous chapters, was the *Flick* tribunal's unwillingness to convict the defendants of various crimes in the first place.) Friedrich Flick, for example, was convicted of slave labor and plunder, but the Tribunal found that he had voluntarily used slave labor only in the company's Linke-Hofman Works,[21] had not mistreated the company's slaves,[22] and had engaged in only one act of plunder that was not connected to the Nazi's larger program.[23] Flick was also entitled to some mitigation based on his fear of reprisal by the Nazis and his misunderstanding of French property law, as discussed below.

E. The *Hostage* Case

Of the 10 defendants in the *Hostage* case, eight were convicted. Two were sentenced to life imprisonment (List and Kuntze); the other sentences ranged from twenty years (Rendulic and Speidel) to seven years (Dehner). List's sentence reflected both his rank – he was the fifth ranking Field Marshal in the German Army – and his acts, particularly his distribution of illegal orders calling for the execution of civilian hostages pursuant to fixed ratios[24] and his failure to prevent or even condemn the thousands of such executions committed by his subordinates.[25] Kuntze was only a Lt. General, but he replaced List for nearly a year while List was ill and equally failed to

[16] Id. at 1239, Supplemental Judgment.
[17] Id. at 1183, Supplemental Judgment.
[18] Pohl, V TWC 1007.
[19] Id. at 1010.
[20] Id. at 1007.
[21] Flick, VI TWC 1202.
[22] Id. at 1199.
[23] Id. at 1207.
[24] Hostage, XI TWC 1265.
[25] Id. at 1272.

prevent his subordinates from illegally executing civilian hostages.[26] Kuntze was also convicted of deporting Jews to slave labor,[27] unlike List – which perhaps offset the fact that he was acquitted of distributing illegal orders.[28]

It is difficult to explain why Rendulic was sentenced to 20 years instead of to life. He was higher-ranking than Kuntze and was, like List, convicted of both distributing illegal orders and failing to prevent illegal executions.[29] The *Hostage* tribunal also did not find any mitigating factors for Rendulic, in contrast to List and Kuntze. The only reasonable inference is that the Tribunal did not feel a life sentence for Rendulic was warranted given that he was responsible for a much smaller area of occupied territory and fewer soldiers than either List or Kuntze.

These factors also explain why Dehner received the shortest sentence, despite being convicted of permitting the same illegal executions as Rendulic.[30] Dehner was Rendulic's subordinate, he was acquitted of distributing illegal orders and participating in deportation to slave labor, and – likely most important – the Tribunal found in mitigation that he had consistently attempted "to correctly apply the rules of warfare as they apply to guerrilla warfare in occupied territory," even in the face of orders to the contrary.[31]

F. *Farben*

Eleven of the 21 defendants in *Farben* were convicted. The longest sentences, for slave labor, were eight years (Ambros and Duerrfeld); the shortest sentences, all for plunder, were two years or less (Oster, Buergin, Haefliger, Jaehne). The only interesting question is why ter Meer was given a shorter sentence (seven years) than Ambros and Duerrfeld, given that he was convicted of both slave labor and plunder and played a leading role in the latter.[32] The answer seems to be that ter Meer was much less involved in the construction of Auschwitz III than Ambros and Duerrfeld,[33] was convicted for slave labor solely on the basis of command responsibility,[34] and had not known that Farben had mistreated the workers it used to build the plant.[35]

G. *Einsatzgruppen*

All of the defendants in *Einsatzgruppen* were convicted of war crimes, crimes against humanity, and membership in the SS. 15 were sentenced to death; two were sentenced to life (Nosske and Jost); and six were sentenced to between time served and 20 years. Those were by far the most severe sentences in the trials.

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[26] Id. at 1275.
[27] Id. at 1280.
[28] Id. at 1276-77.
[29] Id. at 1290.
[30] Id. at 1297.
[31] Id. at 1300.
[32] Farben, VIII TWC 1160.
[33] Id. at 1180.
[34] Id. at 1190.
[35] Id. at 1192.

Two factors appear to have determined whether a defendant was sentenced to life instead of to death: rank in the SS and direct involvement in executions. Most satisfied both criteria: all but two of the condemned defendants were high-ranking members of the SS – Lt. Colonel and higher – and all of those defendants either ordered[36] or supervised[37] executions. The two lower-ranking members of the SS, Schubert (a 1st Lieutenant) and Klingelhofer (a Major), were each directly involved in executions: Schubert supervised the murder of 700-800 Jews and Russians at Simferopol[38]; and Klingelhofer, the opera singer, personally executed 30 Jews for leaving a ghetto without permission.[39] By contrast, although Nosske was a high-ranking member of the SS – a Lt. Colonel – he had not been directly involved in executions; his conviction was based on command responsibility.[40] Two other factors also pointed toward life instead of death: his Kommando unit was responsible for a comparatively small number of executions, and he had refused to carry out at least one order that he considered illegal.[41]

Jost's life sentence is more difficult to understand, given that he was a Brigadier General in the SS and was the only commander of an Einsatzgruppen who was not sentenced to death. The explanation appears to be that he was convicted on the basis of command responsibility and that most of Einsatzgruppen A's executions had been committed before he took control of it.[42] Earl additionally notes that, unlike all of the other condemned defendants, Jost never admitted to the crime of murder[43] – an important consideration for Judge Musmanno, whose personal opposition to the death penalty was based on concerns that the defendant might be innocent.[44]

Rank and direct involvement also explain why Fendler received the lightest sentence – 10 years – despite the fact that he was convicted on all three counts and that the Subkommando he commanded was responsible for a significant number of executions. Fendler was a Major in the SS, the second-lowest rank in the trial, and had not been involved in planning, ordering, or committing executions.[45] In fact, he was not even convicted on the basis of command responsibility; the Tribunal found that he had taken a consenting part in the executions instead, indicating that it considered TCP a less serious form of participation in a crime.[46]

H. *RuSHA*

All but one of the 14 defendants were convicted in *RuSHA*. The five defendants convicted solely of membership in the SS were all sentenced to time served; the eight defendants convicted of war crimes and crimes against humanity as well were

[36] See, e.g., Einsatzgruppen, IV TWC 560 (Ott).
[37] See, e.g., id. at 585 (Biberstein).
[38] Id. at 582.
[39] Id. at 569.
[40] Id. at 556 (Nosske).
[41] Id. at 558.
[42] Id. at 513.
[43] Earl, 263.
[44] Id.
[45] Einsatzgruppen, IV TWC 570.
[46] Id. at 572.

sentenced to life (Greifelt), 25 years (Hofmann and Hildebrandt), or between 10 and 20 years.

The defendant's sentences generally correlated with the position they held in the various SS organizations and the number of criminal enterprises in which they had participated (kidnapping alien children, forced Germanization, slave labor, etc.). Greifelt, for example, was the head of the RKFDV and convicted of six of the nine enterprises.[47] By contrast, the second lowest sentence – 15 years – was given to Heubner, who was chief of an RKFDV branch office and convicted of just two enterprises.[48]

That said, it is not easy to explain why Hoffman and Hildebrandt were sentenced to 25 years instead of life. Both served as the head of RuSHA, and both were convicted of all of the criminal enterprises except plunder.[49] The difference between them and Greifelt seems to be that the RKFDV was (in the words of the indictment) the "driving force" of the Germanization program as whole, while RuSHA was responsible for only a "portion" of the program.[50] Indeed, the *RuSHA* tribunal emphasized that, as head of the RKFDV, Greifelt was second only to Himmler regarding Germanization.[51]

I. *Krupp*

Eleven of the 12 *Krupp* defendants were convicted. Alfried Krupp, Mueller, and von Buelow received the longest sentences, 12 years; Lehmann and Korschan received the shortest sentences, six years. Alfried Krupp was also forced to forfeit his industrial empire – the only case in which a tribunal punished a defendant with forfeiture.

Two aspects of the case are particularly interesting. To begin with, despite days of conference, the judges disagreed bitterly about the appropriate sentences. Judge Anderson not only rejected the order of forfeiture, he also insisted that the Tribunal ignored mitigating factors that justified substantial reductions in most of the sentences.[52] He was particularly incensed by Loeser's seven-year sentence, because Loeser had resigned from Krupp in 1943 and had been part of the "underground movement to overthrow Hitler and the Nazi Party" since 1937.[53] Interestingly, Judge Wilkins later expressed regret that he did not agree to sentence Loeser to time served; because Krupp's lawyers did not file a clemency petition on Loeser's behalf with McCloy's Advisory Board[54] – the result of friction caused by his resignation from the company – Loeser remained in Landsberg prison longer than any of his co-defendants, despite his relatively short sentence.[55]

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[47] RuSHA, V TWC 154-55.
[48] Id. at 155.
[49] Id. at 160 (Hofmann); 161 (Hildebrandt).
[50] RuSHA, Indictment, para. 8, IV TWC 612.
[51] RuSHA, V TWC 154.
[52] He agreed with Krupp's prison sentence and Kupke's release for time served.
[53] Krupp, Anderson Dissent, IX TWC 1453.
[54] The Advisory Board is discussed at length in Chapter 15.
[55] WILKINS, 221.

The other interesting issue concerns the range of sentences imposed on defendants convicted solely of slave labor – 12 years for Von Buelow, nine for Ihn, and six for Korschan and Lehmann. The three shorter sentences correlate with the defendant's relatively low rank in Krupp: Ihn was a deputy member of both the Direktorium and Vorstand; Korschan was a deputy member of the Vorstand; and Lehmann was Ihn's assistant. Von Buelow, however, was not a member of either the Direktorium or Vorstand. His longer sentence seems to reflect the fact that, as head of Krupp's plant police, he was primarily responsible for the mistreatment of Eastern workers, which was second in severity only to the mistreatment of concentration-camp inmates.[56] Von Buelow was also Krupp's liaison to the Gestapo and the SS.[57]

J. *Ministries*

It is almost impossible to compare the sentences in *Ministries*, because the trial included defendants whom the OCC had originally intended to try in six different cases. Nineteen of the 21 defendants were convicted; the longest sentence was 25 years (Berger), while the shortest was time served (Stuckart).

Given the magnitude of their crimes, it is surprising that Berger and Lammers did not receive life sentences. Berger, for example, was a Lt. General in the SS; was directly involved in the cold-blooded murder of a French general, Mesny[58]; knew about the Final Solution[59]; personally organized the Dirlewanger Brigade, which was responsible for hundreds of thousands of illegal executions[60]; and conscripted children into slave labor.[61] The only explanation for his 25-year sentence is that the *Ministries* tribunal gave him substantial credit for risking his life at the end of the war to save Allied officers and soldiers.[62]

Lammers' 20-year sentence is even more difficult to understand. Lammers was "one of the most important figures in the Reich government"[63]; was convicted of aggression for his involvement in the invasions of Czechoslovakia, Poland, the Low Countries, Belgium, the Netherlands, Luxembourg, and Russia[64]; was involved in issuing the lynch law[65] and drafting many of the most anti-Semitic laws, such as the Law Against Poles and Jews[66]; was responsible for mass deportations[67]; knew about Final Solution[68]; and helped plan the slave-labor program.[69] The Tribunal also failed to identify any factors warranting mitigation of his sentence.

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[56] Krupp, IX TWC 1405.
[57] Id. at 1411.
[58] Ministries, XIV TWC 454.
[59] Id. at 535.
[60] Id. at 542.
[61] Id. at 817.
[62] Id. at 552.
[63] Id. at 589.
[64] Id. at 401-06.
[65] Id. at 462.
[66] Id. at 600.
[67] Id. at 599.
[68] Id. at 602.
[69] Id. at 806.

K. *High Command*

12 of the 14 defendants in *High Command* were convicted. Two were sentenced to life imprisonment (Warlimont and Reinecke); the others received sentences ranging from 22 years (von Roques) to time served (von Leeb). Rank had little impact on the sentences: all of the defendants were at least Lt. Generals, and the highest ranking convicted defendant, von Leeb, received the lightest sentence. Instead, the sentences reflected the number and gravity of the crimes the defendants committed. Warlimont, for example, helped draft the Commissar Order and the lynch law, contributed ideas to the Commando Order, was connected to the Barbarossa Jurisdiction Order and the Hostage Order, was involved in the deportation and enslavement of civilians, and knew about the extermination program.[70]

That said, some of the sentences do seem inconsistent. It is difficult to understand, for example, why Reinecke was sentenced to life imprisonment while von Kuechler was sentenced to only 20 years. Reinecke's crimes were clearly very serious: he was directly involved in the murder and mistreatment of POWs, forced POWs to engage in labor connected to the war effort, and was responsible for plunder.[71] But he does not seem more culpable than von Kuechler, who distributed the Commando and Barbarossa Jurisdiction Orders, approved the use of POWs and civilians in improper and dangerous work, failed to prevent the execution and mistreatment of POWs, and was responsible for the deportation of massive numbers of civilians to slave labor.[72] Von Kuechler was also a higher rank – a Field Marshal instead of a Lt. General. The difference seems to be that, as noted below, the Tribunal believed that Reinecke had precisely the kind of vicious character that justified a longer sentence.

III. AGGRAVATING FACTORS

The tribunals rarely mentioned factors that warranted an increase in a defendant's sentence, most likely because, as Bill Schabas has pointed out, "[g]iven the horror of the crimes over which such tribunals had jurisdiction, discussion of aggravating factors must have seemed superfluous."[73] They do, however, appear to have implicitly recognized four aggravating factors. The first, and perhaps the most important, was membership in the SS. No defendant who was not a member of the SS was ever sentenced to death, not even those who – like Berger in *Ministries* – were responsible for hundreds, if not thousands, of murders.

The tribunals also appear to have penalized defendants who had a particularly vicious character, even by Nazi standards. Rothaug, for example, seems to have been sentenced to life instead of a term of years primarily because he was a particularly enthusiastic proponent of the Final Solution. Similarly, in sentencing Reinecke to life imprisonment – one of only two such sentences in *High Command* – Tribunal V emphasized that he had been responsible for "the Nazification of the various services, particularly of the army" and had served as a lay judge during the trial of the German

[70] High Command, XI TWC 665-81.
[71] Id. at 659-61.
[72] Id. at 567-77.
[73] William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. OF COMP. & INT'L L. 461, 483 (1997).

officers who tried to assassinate Hitler in 1944, "perhaps the most infamous travesty on human justice ever so completely recorded in the annals of man."[74]

Conversely, the tribunals seem to have sentenced defendants more harshly who were particularly educated and cultured – the idea being that they should have known better than to collaborate with the Nazis. In *Einsatzgruppen*, for example, Tribunal II justified the severity of its sentences with the following statement:

> The defendants are not untutored aborigines incapable of appreciation of the finer values of life and living. Each man at the bar has had the benefit of considerable schooling. Eight are lawyers, one a university professor, another a dental physician, still another an expert on art. One, as an opera singer, gave concerts throughout Germany before he began his tour of Russia with the Einsatzkommandos. This group of educated and well-bred men does not even lack a former minister, self-unfrocked though he was.[75]

Finally, the tribunals appear to have treated a defendant's consistent evasiveness during trial as an aggravating factor. The *Pohl* tribunal, for example, specifically noted with regard to Eirenshmalz, one of the three defendants sentenced to death, that "[t]hroughout the entire trial he has endeavored to hide in every way possible his responsibility and participation in concentration camp construction-maintenance affairs."[76] Similarly, Judge Young complained in a letter home that Warlimont, one of two defendants sentenced to life in *High Command*, "is cagy, never could answer a question in precision, always go all the way around Robin-hood's barn, alibi – alibi – alibi."[77]

IV. MITIGATING FACTORS

Unlike aggravating factors, all of the tribunals specifically identified factors that warranted reducing a defendant's sentence. Analogizing to the defenses, those factors can be divided into two categories: justifications and excuses. The first category focused on actions that indicated that, despite his crimes, the defendant never completely lost his humanity during the war. The second category focused on aspects of a defendant's crimes that were not morally praiseworthy, but at least partially mitigated the defendant's culpability.

A. Justifications

Justifications for a reduced sentence clustered around two basic themes: (1) independence from the Nazis; and (2) active resistance to the Nazi regime.

1. Independence

A number of tribunals rewarded defendants for maintaining professional and ideological independence from the Nazis. The *Justice* tribunal cited as mitigating the

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[74] High Command, XI TWC 660-61.
[75] Einsatzgruppen, IV TWC 500.
[76] Pohl, V TWC 1030.
[77] Quoted in HEBERT, HITLER'S GENERALS, 135.

fact that Lautz "was not active in Party matters" and "resisted all efforts of Party officials to influence his conduct."[78] The *High Command* tribunal pointed out that von Leeb "was not a friend or follower of the Nazi party or its ideology,"[79] while the *Hostage* tribunal stated that the record supported Kuntze's claim that he "was not in high favor with Hitler and the Nazi Party."[80] And the *Flick* tribunal emphasized that although Flick and Steinbrinck both joined the Nazi Party, they "participated in no Party activities and did not believe in its ideologies," were not "pronouncedly anti-Jewish," and "did not approve nor… condone the atrocities of the SS." Indeed, the Tribunal said that it was "unthinkable that Steinbrinck, a U-boat commander who risked his life and those of his crew to save survivors of a ship which he had sunk, would willingly be a party to the slaughter of thousands of defenseless persons."[81]

2. Resistance

The tribunals also rewarded defendants who had actively resisted the Nazis. That resistance took four basic forms. First, three tribunals highlighted a defendant's opposition to Hitler himself: the *Pohl* tribunal credited Hohberg with playing "an active part" in the "underground movement working against the regime"[82]; the *Flick* tribunal pointed out that Flick himself "knew in advance of the plot on Hitler's life in July 1944, and sheltered one of the conspirators"[83]; and the *Ministries* tribunal accepted von Weizsaecker's claim that he remained in the Foreign Office so that "he might thereby continue to be at least a cohesive factor in the underground opposition to Hitler."[84]

Second, a number of tribunals focused on a defendant's efforts to prevent the issuance of illegal orders. The *Hostage* tribunal, for example, said that Kuntze was entitled to mitigation because he regularly protested the harshness of orders he received concerning the execution of hostages.[85] Similarly, the *High Command* tribunal gave von Leeb significant credit for his repeated attempts to prevent Hitler from issuing the Commissar Order, which he believed to be both "stupid" and "in violation of international law."[86]

Third, multiple tribunals acknowledged that defendants had either attempted to prevent the commission of crimes or had softened illegal orders and decrees. The *Flick* tribunal noted that Steinbrinck had prevented "several instances" of pillaging.[87] The *Hostage* tribunal found that Dehner's attempts to ensure that his soldiers complied with the laws of war "warrant[ed] mitigation of punishment."[88] The *Ministries* tribunal said that it would "not ignore" Kehrl's efforts "to alleviate the

[78] Justice, III TWC 1128.
[79] High Command, XI TWC 563.
[80] Hostage, XI TWC 1280.
[81] Flick, VI TWC 1222.
[82] Pohl, V TWC 1042.
[83] Flick, VI TWC 1222.
[84] Ministries, XIV TWC 497.
[85] Hostage, XI TWC 1280.
[86] High Command, XI TWC 555.
[87] Flick, VI TWC 1203.
[88] Hostage, XI TWC 1300.

harshness of the slave-labor program by a policy which would thus restrict deportations from the occupied territories into Germany."[89] And the *High Command* tribunal credited Reinhardt for partially countermanding the Commando Order in the area he controlled by issuing an order "that parachutists are lawful combatants and are to be treated as prisoners of war."[90]

Fourth, and finally, three tribunals credited defendants with saving individuals from the Nazis. The *Flick* tribunal noted that Steinbrinck and Flick had each helped Jewish friends emigrate from Germany and that Steinbrinck had twice interceded to prevent the internment of Pastor Niemoeller, of whose congregation he was a member.[91] The *Einsatzgruppen* tribunal concluded that von Radetzky had occasionally attempted "to assist potential victims of the Fuehrer Order and in one particular instance issued passes which allowed some persons to escape from the camp in which they were being held."[92] And the *Ministries* tribunal acknowledged that Berger had exposed himself to considerable danger in the final months of the war in order to save the lives "of American, British, and Allied officers and men whose safety was gravely imperiled by orders of Hitler that they be liquidated or held as hostages,"[93] while Schellenberg had rendered "actual and notable aid" to individuals suffering from "imprisonment, oppression, and persecution in the Third Reich."[94] Interestingly, the *Ministries* tribunal took a strictly utilitarian approach to Schellenberg's mitigation, insisting that it was irrelevant whether his actions "arose from true benevolence or from a desire to curry favor with the then imminent victors," because "[h]is motives made no difference to the beneficiaries of his acts."[95]

B. Excuses

The tribunals identified four different clusters of factors that helped excuse a defendant's crimes, thereby warranting a reduced sentence: (1) superior orders; (2) military considerations; (3) legal clarity; and (4) personal characteristics. The *Hostage* tribunal emphasized, however, that excuse-based mitigation did not "in any sense of the word reduce the degree of the crime," but was "more a matter of grace than of defense."[96]

1. Superior Orders

The first cluster of excuses centered on crimes that were committed by subordinates in hierarchical organizations. As noted in Chapter 12, Article II(4)(b) of Law No. 10 entitled the tribunals to reduce a defendant's sentence on the ground that he had committed his crimes pursuant to superior orders. A number did so, including the

[89] Ministries, XIV TWC 580.
[90] High Command, XI TWC 600.
[91] Flick, VI TWC 1222.
[92] Einsatzgruppen, IV TWC 578.
[93] Ministries, XIV TWC 522.
[94] Id. at 861.
[95] Id.
[96] Hostage, XI TWC 1317.

High Command, *Hostage*, and *Pohl* tribunals.[97] Superior orders was a mitigating factor even for defendants as high-ranking as von Leeb,[98] and the existence of such orders meant the difference between life and death for Mummenthey in *Pohl*.[99] Similarly, in the civilian context, the *Justice* tribunal reduced Lautz's sentence for participating in the Nazis' nationwide system of cruelty and injustice because he honestly believed that, as a prosecutor, he was ethically bound to apply all properly-enacted German laws, even those he considered unjust.[100]

2. Military Considerations

The second cluster of excuses focused on the military context in which a defendant committed a particular crime. The *High Command* tribunal identified three such factors. First, it held that although *tu quoque* was not a defense to a crime, it could be considered in mitigation. It thus reduced Woehler's sentence for forcing POWs to engage in work connected to the war because it was convinced that the Allies had used German POWs in a similar manner.[101] Second, it suggested that Hollidt was entitled to some degree of mitigation for forcing POWs to work in dangerous conditions because the "difficult and deplorable condition" in which his army found itself during its retreat from Russia had made such danger nearly impossible to avoid.[102] Third, it reduced von Leeb's sentence for the crimes committed by his subordinates pursuant to the Barbarossa Jurisdiction Order on the ground that no field commander "engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area," could ever completely prevent the commission of war crimes.[103]

3. Legal Clarity

The third, and related, cluster of excuses concerned the clarity of the law that governed a defendant's actions. Although the *Hostage* tribunal condemned the Nazis execution of civilians hostages and reprisal prisoners, it also criticized "[t]he failure of the nations of the world to deal specifically with the problem of hostages and reprisals by convention, treaty, or otherwise, after the close of World War I." The resulting legal uncertainty, according to the Tribunal, "mitigate[d] to some extent the seriousness of the offense."[104] The *Flick* tribunal, by contrast, focused on domestic law instead of international law. It held that although the maxim *ignorantia legis nihil excusat* applied to both international and domestic law, a defendant's failure to understand the domestic law of a state other than his own – in this case, Friedrich Flick's knowledge of French property law – could be considered in mitigation.[105]

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[97] High Command, XI TWC 567 (von Kuechler); Hostage, XI TWC 1280, 1299 (Kuntze, Dehner); Pohl, Supplemental Judgment, V TWC 129 (Mummenthey).
[98] High Command, XI TWC 563.
[99] Pohl, Supplemental Judgment, V TWC 1239.
[100] Justice, III TWC 1128.
[101] High Command, XI TWC 685.
[102] Id. at 627,
[103] Id. at 563.
[104] Hostage, XI TWC 1274.
[105] Flick, VI TWC 1208-09.

4. Personal Characteristics

The fourth and final cluster excuses focused on a defendant's personal characteristics. The *Flick* tribunal held that Friedrich Flick's fear that the Nazis would retaliate against him if he did not participate in the slave-labor program, though not rising to the level of necessity, nevertheless justified reducing his sentence.[106] And the *Ministries* tribunal relied on Stuckart's serious medical condition to sentence him to time served, noting that even a short period of imprisonment "would be equivalent to the death sentence," a penalty that his crimes – though serious – did not warrant.[107] Surprisingly, only one tribunal ever mentioned remorse as a mitigating factor: the *Pohl* tribunal gave Hohberg "generous credit" for repenting "the dynamic part he played in the operation of a machine which crushed human beings spiritually and physically."[108] By contrast, remorse is often considered mitigating by modern international tribunals.[109]

V. BETWEEN-CASE COMPARISONS

A. Are Comparisons Possible?

It is nearly impossible to compare sentences between cases. As the *Pohl* tribunal noted in its supplemental judgment:

> [T]he facts in no two cases are identical. Similarities may exist to a greater or lesser degree, but not absolute identity. Nor is it possible to assure entire unanimity in the findings of separate Tribunals. Disparity in conclusions, or findings of fact, may result from the disparity in emphasis which separate Tribunals may accord to the evidence. A single document may in the opinion of one Tribunal assume controlling force, and in the opinion of another Tribunal be given lesser weight. One Tribunal may find the testimony of one witness true, and another Tribunal may discredit it. In appraising the preponderance of the proof for and against the defendant, one Tribunal may find the scales to be tipped in one direction and another Tribunal in the other.[110]

The structure of the judgments further complicates productive comparison. First, most defendants were convicted of multiple crimes, making it difficult to generalize about specific crimes. It seems to be the case, for example, that the tribunals generally viewed plunder as the least serious war crime: no defendant convicted solely of plunder received a sentence longer than six years (Krauch in *Farben*), and many defendants convicted of both plunder and slave labor – clearly the more serious crime – received relatively short sentences, such as Friedrich Flick (seven years) and Loeser in *Krupp* (seven years). But *Farben* was the only case in which a defendant was convicted solely of plunder, and for every Flick and Loeser there is a defendant

[106] Id. at 1221.
[107] Ministries, XIV TWC 869-70.
[108] Pohl, Supplemental Judgment, V TWC 1225.
[109] See, e.g., Schabas, *Sentencing*, 496.
[110] Pohl, Supplemental Judgment, V TWC 1187-88.

sentenced to a much longer sentence for plunder and slave labor: Frank received life in *Pohl*; Pleiger received 15 years in *Ministries*; Alfried Krupp and Mueller each received 12 years in *Krupp*. The longer sentences likely reflect the defendants' greater participation in slave labor, not different conceptions of plunder's gravity, but that is nothing more than an educated guess.

Second, as noted in Chapter 11, the tribunals rarely identified the modes of participation they used to convict defendants of specific crimes. It is thus very difficult to determine whether the tribunals generally agreed with the *Pohl* tribunal's belief that personally committing a crime was more serious than ordering its commission or the *RuSHA* tribunal's insistence that the opposite was true – and even more difficult to generalize about the modes of participation as a whole. The one exception is command responsibility: it seems clear that the tribunals generally viewed failing to prevent crimes as less serious than personally committing them, ordering them, or being connected to a JCE involving them, given the lighter sentences imposed on Genzken in the *Medical* case, ter Meer in *Farben*, and Jost in *Einsatzgruppen*.

Third, and finally, although the tribunals identified a wide variety of mitigating factors, their failure to explain the connection between those factors and individual sentences complicates inter-tribunal comparison. The most that can be said is that, in general, the tribunals seem to have agreed that a justificatory mitigating factor warranted a significant reduction in a defendant's sentence. In at least six cases, defendants credited with such factors received very light sentences: Lautz's 10-year sentence was the lowest in the *Justice* case; Hohberg's 10-year sentence was the lowest in *Pohl*; Dehner's seven-year sentence was the lowest in the *Hostage* case; von Radetzky's 20-year sentence was the second lowest in *Einsatzgruppen*; Schellenberg's six-year sentence was the third lowest in *Ministries*; and von Leeb's sentence of time served was the lowest in *High Command*.

B. Did the Sentences Become More Lenient?

Telford Taylor argued in his Final Report that, "[o]n the whole, it was apparent to anyone connected with the entire series of trials under Law No. 10 that the sentences became progressively lighter as time went on." Taylor attributed that trend to a number of factors, including "waning interest on the part of the general public and the shift in the focus of public attention resulting from international events and circumstance."[111] The historian Peter Maguire agrees, writing that after February 1948 – when the *Hostage* tribunal delivered its judgment – "the sentences handed down at Nuremberg grew increasingly lenient… due to a combination of Cold War pressure and legitimate discomfort with the radical implications" of Law No. 10.[112]

Some of the sentences imposed in the later trials support these claims. It seems likely, for example, that earlier tribunals would have sentenced Lammers and von Kuechler to life imprisonment, not to the 20 years they received from the *Ministries* and *High Command* tribunals, respectively. Nevertheless, it seems more accurate to say that

[111] TAYLOR, FINAL REPORT, 92.
[112] MAGUIRE, 190.

individual tribunals were particularly lenient than that the sentences became increasingly lenient over time. Consider the cases decided after Maguire's February 1948 date: *RuSHA*, *Einsatzgruppen*, *Krupp*, *Ministries*, and *High Command*. The latter two tribunals were indeed lenient – but *Einsatzgruppen* and *Krupp* were not. More defendants were sentenced to death in *Einsatzgruppen* than in all of the other cases combined, and the defendants in *Krupp* received far longer sentences than their industrialist counterparts in *Flick* and *Farben*.

An analysis of specific crimes also calls into question the idea that the sentences became increasingly lenient. Consider, for example, the sentences that the tribunals imposed on defendants convicted solely of membership in a criminal organization – a crime that Taylor cited in defense of the leniency hypothesis[113]:

Case	**Trial End**	**Defendant**	**Sentence**
Medical	August 1947	Poppendick	10 years
Justice	December 1947	Alstoetter	5 years
Flick	December 1947	Steinbrinck	5 years
RuSHA	March 1948	Hetling	2.5 years
RuSHA	March 1948	Ebner	2.5 years
RuSHA	March 1948	Schwarzenberger	2.5 years
RuSHA	March 1948	Sollman	2.5 years
RuSHA	March 1948	Tesch	2.5 years
Einsatzgruppen	April 1948	Ruehl	10 years
Einsatzgruppen	April 1948	Graf	2.5 years
Ministries	April 1949	Bohle	5 years

These sentences do not indicate that sentences for criminal membership became increasingly lenient. Instead, they suggest that the *RuSHA* tribunal viewed the crime – for reasons it never explained – as less serious than the other tribunals. After all, Ruehl received the same sentence in Case No. 8 that Poppendick received in Case 1, while Bohle received the same sentence in Case No. 11 that Alstoetter and Steinbrinck received in Case 3 and Case 4, respectively. Moreover, the "lenient" later sentences given to Graf and Bohle would likely have been longer but for mitigating circumstances: the *Einsatzgruppen* tribunal found that Graf's membership in the SD "was not without compulsion and constraint,"[114] and Bohle pleaded guilty to membership in the SS.[115]

CONCLUSION

Reading the judgments with regard to sentencing is an exercise in frustration. The tribunals never adopted a consistent set of sentencing principles, and they rarely explained their sentencing decisions in any detail. A close reading of the judgments indicates, however, that individual sentences were significantly affected by the presence of aggravating or mitigating factors; that the sentences within cases were

[113] See TAYLOR, FINAL REPORT, 179 & 179 n. 145.
[114] Einsatzgruppen, IV TWC 587.
[115] Ministries, XIV TWC 856.

generally consistent; and that – contrary to the received wisdom – sentences did not become increasingly lenient over time.