

TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY
TRIBUNALS



VOLUME XV

*PROCEDURE, PRACTICE
AND ADMINISTRATION*

*Germany, (Territory under Allied
" occupation, 1945 - U.S. Zone) mili-
tary tribunals)*

TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY TRIBUNALS
UNDER
CONTROL COUNCIL LAW No. 10



VOLUME XV

NUERNBERG
OCTOBER 1946-APRIL 1949

PREFACE

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In April 1949, judgment was rendered in the last of the series of 12 Nuernberg war crimes trials which had begun in October 1946 and were held pursuant to Allied Control Council Law No. 10. Far from being of concern solely to lawyers, these trials are of especial interest to soldiers, historians, students of international affairs, and others. The defendants in these proceedings, charged with war crimes and other offenses against international penal law, were prominent figures in Hitler's Germany and included such outstanding diplomats and politicians as the State Secretary of the Foreign Office, von Weizsaecker, and cabinet ministers von Krosigk and Lammers; military leaders such as Field Marshals von Leeb, List, and von Kuechler; SS leaders such as Ohlendorf, Pohl, and Hildebrandt; industrialists such as Flick, Alfried Krupp, and the directors of I. G. Farben; and leading professional men such as the famous physician, Gerhard Rose, and the jurist and Acting Minister of Justice, Schlegelberger.

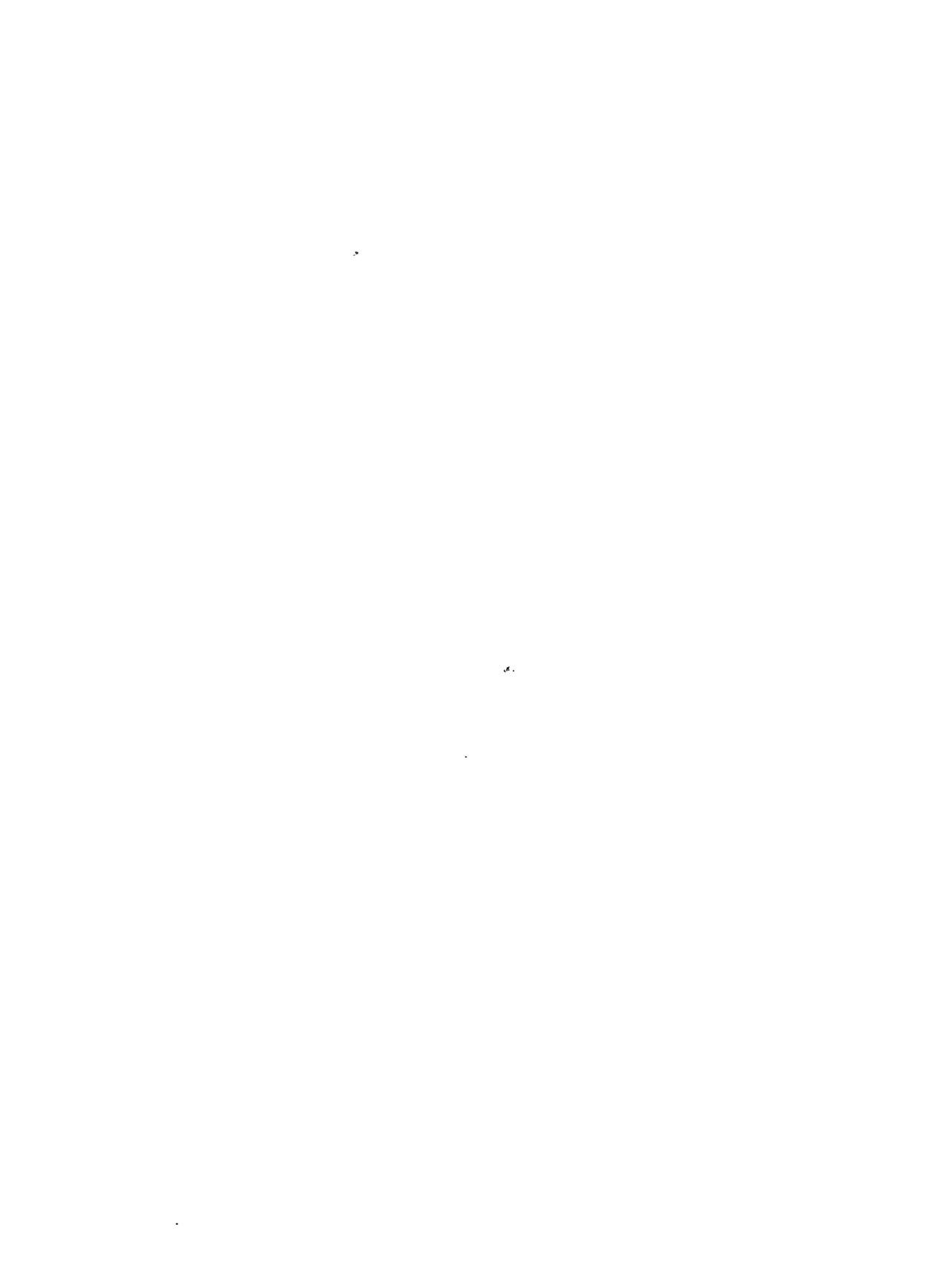
In view of the weight of the accusations and the far-flung activities of the defendants, and the extraordinary amount of official contemporaneous German documents introduced in evidence, the records of these trials constitute a major source of historical material covering many events of the fateful years 1933 (and even earlier) to 1945, in Germany and elsewhere in Europe. The procedure and practice developed during the trial of these 12 cases under international law afford an important basis of reference in the future development of international jurisprudence.

The proceedings in these trials were conducted throughout in the German and English languages, and were recorded in full by stenographic notes and by electrical sound recording of all oral proceedings. The 12 cases required over 1,200 days of court proceedings, and the transcript of these proceedings exceeds 330,000 pages, exclusive of hundreds of document books, briefs, etc. Publication of all of this material, accordingly, was quite unfeasible. This series, however, does contain important portions of the records of the 12 cases and the basic jurisdictional enactments and administrative documents common to all the trials. The first 14 volumes of this 15-volume series are devoted mainly to the trial of the individual cases, arranged by subject units for publication as indicated on page 6. These first 14 volumes of the series contain the indictments, judgments, and extensive selections from the evidence and argument in the respective trials. For the most part these volumes are not concerned with the general procedure or administration of the trials. Volume XV, on the



other hand, has been entitled "Procedure, Practice, and Administration." This last volume of the series contains many materials common to all the trials as well as selections from the record of each of the individual trials which bear directly upon the development of procedure, trial practice, the rules of evidence, and similar matters.

This 15-volume series was planned and published by the Department of the Army under the general direction of Col. Edward H. Young, Chief, War Crimes Division, Office of The Judge Advocate General.



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INTRODUCTION

The Nuernberg trials of war criminals are a landmark in the development of the procedure and practice of international law, quite apart from their role in the development of substantive international law. Thirteen trials were held in Nuernberg between November 1945 and April 1949. These trials brought into one forum lawyers of many nationalities, who were schooled in the legal practice of many different countries. The procedure and practice adopted necessarily drew upon both the Anglo-Saxon adversary system and the Continental accusatorial system of law.

The first Nuernberg trial was held before the International Military Tribunal (commonly referred to as the IMT). The judges and prosecutors in the IMT case were drawn from the legal profession of four great Powers, the United States of America, Great Britain, France, and the Union of Soviet Socialist Republics. Various liaison officers to the trial and a number of attorneys assisting the various prosecution staffs were lawyers from still other countries. The defense counsel and the defendants were all Germans. The IMT derived its direct authority to try war criminals from the London Agreement of 8 August 1945, and the Charter of the IMT annexed to that Agreement (sec. I). The Rules of Procedure adopted by the IMT before the beginning of the trial have been reproduced at the end of the first section of the volume (sec. I D). The official publication on the IMT case—*Trial of the Major War Criminals, volumes I–XLII, Nuremberg, 1947*—does not contain a separate volume on procedure, but most of the relevant materials can be found by reference to the exhaustive and excellent subject index in volume XXIII of the official English edition (see, for example, “Applications and Motions,” pp. 115–122; “Procedure,” pp. 572–575; “Tribunal Rulings,” pp. 686–690; and the various cross-references made under those subject headings).

The military tribunals which tried the 12 cases following the IMT trial derived their direct authority from Allied Control Council Law No. 10 and Ordinance No. 7 of the American Military Government for Germany (sec. II). The IMT trial greatly influenced the procedural law in the later 12 trials, partly because the entire judicial apparatus set up for the trial of German war criminals was intended to give the IMT case great force and effect in subsequent trials. This volume is basically devoted to the 12 trials before military tribunals established by order of the Military Governor of the American Zone of Occupation of Germany. However, the close relationship between the IMT trial and the later trials has affected considerably both the organization and the con-

tents of this volume. Various materials pertinent to the IMT case in the first instance have been reproduced herein, and the introductions to the individual sections of this volume, more frequently than not, make reference to the IMT case.

It should be emphasized that these trials were conducted before military tribunals established especially for the trial of policy makers and their chief assistants, that the crimes tried for the most part had no single geographical location, and that the authority and jurisdiction of these tribunals derived directly from international agreement. Hence, the Nuernberg military tribunals are to be distinguished from the military commissions or courts-martial of many nations which tried war criminals after the conclusion of World War II. These military commissions or courts-martial were established pursuant to national authority; they tried offenses which for the most part had a single geographical location; and they tended to follow the procedures and practice of the military courts of the respective nations which established them.

The task of selecting important procedural materials from the records of the 12 trials which followed the IMT case has imposed many difficult problems, as a summary of the bulk of the source materials will demonstrate. The principal records of these 12 trials (exclusive of the documentary exhibits and the briefs) total approximately 350,000 legal size pages. The records, maintained by the Court Archives Section of the Central Secretariat of the Tribunals, have been bound into 837 volumes. The volumes entitled "Official Court Files" have been particularly important in preparing the manuscript of this volume, since they contain the written motions and applications, the answers to these motions and applications, and official copies of the court orders thereon. These "Official Court Files" for the 12 cases alone run to more than 17,000 pages bound in 61 volumes. A very great deal of the pertinent procedural matters, however, is widely scattered throughout the transcript of the daily proceedings, a transcript, which for all cases, totals more than 330,000 pages. It has therefore been a most trying task to bring within the covers of one volume both the materials common to all of the trials and representative materials from the records of individual cases. Footnotes have been employed freely to indicate the volume and page of the "Official Court File" or the transcript for the items taken from those sources. In many instances where related materials have been omitted, footnotes or brackets in the text indicate the source and sometimes the nature of the materials omitted. For those who wish to go beyond the materials reproduced here, the organization of the official archives is graphically described in the "Court Archives History" and in the Introduction of the "Over-all Index"

to the Official Record, both of which are reproduced hereinafter in full (sec. VIII H). The official records are in the custody of the Departmental Records Branch, Office of The Adjutant General, Department of the Army, Washington, D. C. A report concerning the location of various records of the Nuernberg trials is contained in appendix C.

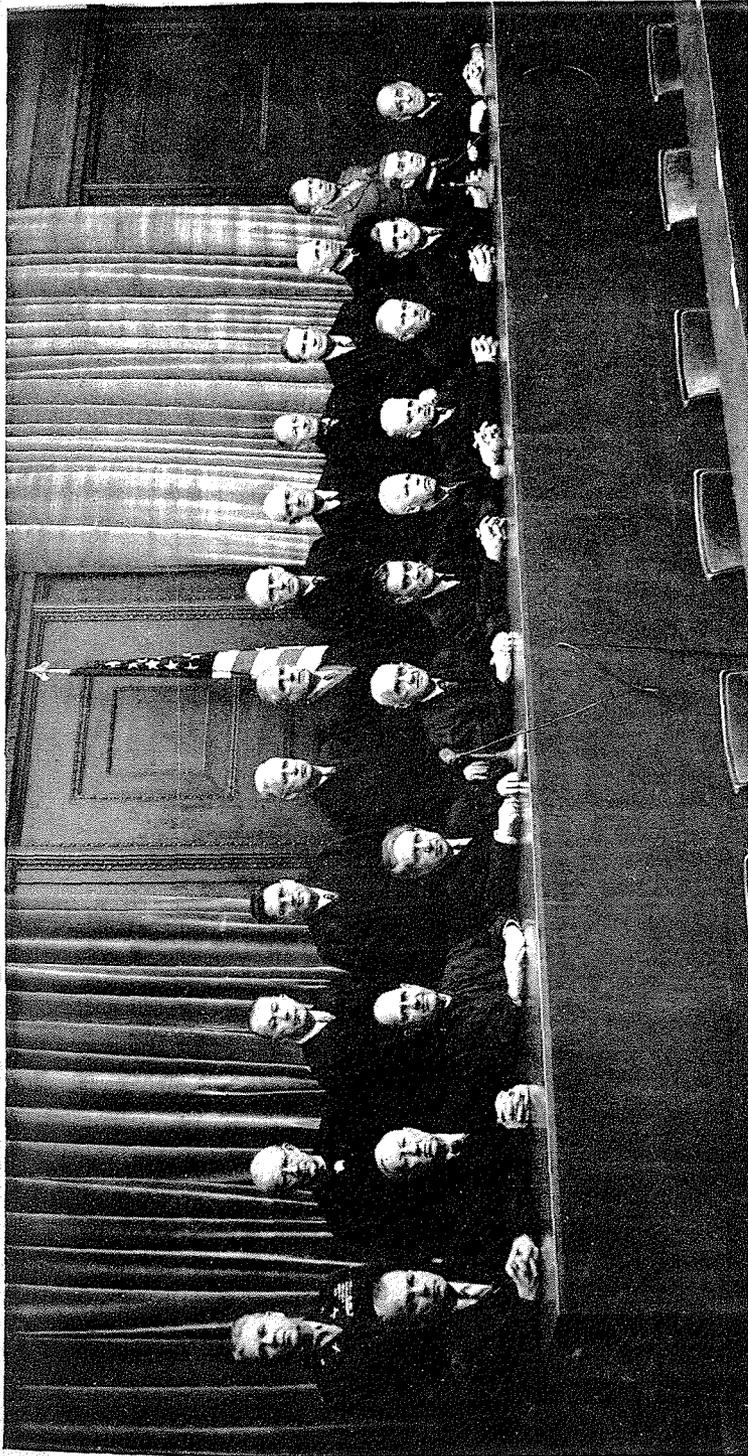
The "Contents" of this volume indicates the general organization of the materials reproduced herein. After reproducing the basic jurisdictional enactments of both the IMT and the later Military Tribunals (secs. I and II), it seemed appropriate to show the evolution of Uniform Rules of Procedures (secs. III-V). To do this it was necessary to begin with the rules adopted by Military Tribunal I in the Medical case. Next, there appear summary statements from the judgments of each of the Tribunals and from the concurring and dissenting opinions, concerning procedure, practice, and evidence (sec. VI). These statements give an over-all view of the general practice followed during the trials, which facilitates the study and understanding of the later sections on particular topics. An early section has also been devoted to the handling of the ever-present language problem and the novel system of simultaneous interpretation of the bilingual or multilingual proceedings (sec. VII), which has since been adopted by the United Nations Organization. Because of the unusual and novel problems of judicial administration an early section has been devoted to the "Central Secretariat of the Nuernberg Military Tribunals" (sec. VIII). This section includes a number of official reports made at the end or near the end of the trials which have not been published elsewhere.

Most of the remaining sections are devoted to topics relating to the subject matter of a particular article of Ordinance No. 7, or a subdivision thereof. However, the dichotomy is often imperfect because of the interrelated or overlapping nature of the materials, and because trials just do not develop in a way which makes it easy to select parts of the trial records for purposes of a compendium, such as this, on procedure and practice. This is one reason why it has been necessary to resort to narrative explanation and frequent cross-references in the introductions to the individual sections.

The number of items reproduced herein from some of the cases exceeds substantially the number included from others—a result attributable to a number of factors. For example, it was imperative to include a mathematically disproportionate number of items from the Medical case because it was the first trial before a tribunal established pursuant to Ordinance No. 7. Then the mere size of the cases affected the selection process. In the Medical,

Farben, and Ministries there were over 20 defendants, and sessions were held in each of these cases on more than 140 different days. On the other hand, in the Milch case there was but one defendant, and sessions were held on only 39 different days. Moreover, some of the cases were not at all affected by some of the principal topics treated hereinafter. For example, no evidence was taken on commission in six of the cases, and mistrials for inability to stand trial arose in only four cases. In some of the cases the tribunals devoted comparatively less time to procedural matters than did others. This came about for a number of reasons. The tribunals in some instances, for example, made it clear at an early stage that they intended to follow closely the rulings of tribunals in earlier cases, and in some trials counsel did not choose to raise procedural questions to the same extent as in others. In some instances earlier rulings have not been reproduced where the arguments, prior to a ruling in a later case, summarize the prior practice on the same or related questions. Still another factor has affected the selection of these materials—the limited staff and time which has been available for the task of compilation. It has been impossible to cull every part of the voluminous record on every point in each of the trials, particularly because the summaries and indices, previously made of the trials, emphasized substantive developments rather than adjective law. However, it is believed that the materials reproduced herein, particularly when read and viewed as a whole, are generally representative of the development of Nuernberg procedure and practice, and that all major features of this development have at least been illustrated.

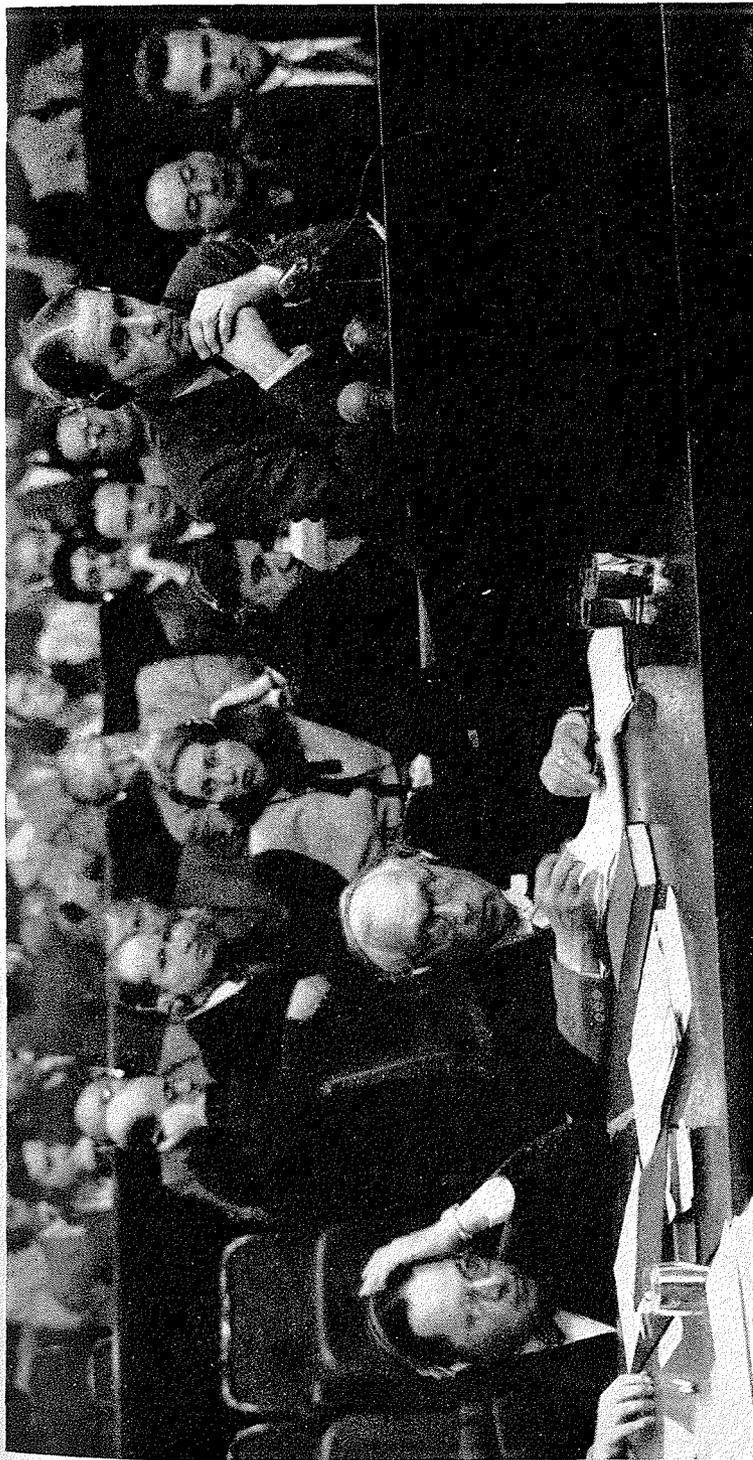
The special difficulties attending the conduct of these trials—such as the language problems, the creation of a “Defense Center” to assist defense counsel with their many problems, and the difficulties inherent in maintaining the elaborate machinery needed to sustain the trials as a going concern—created administrative tasks greater than, or at least different from, those involved in domestic trials. Consequently, materials concerning the general administration of the trials have been included herein, and indeed such materials could not realistically be separated from matters of procedure and practice under all the circumstances. Extensive materials on the review of sentences by the Military Governor and the United States High Commissioner for Germany have also been included herein, though in a limited sense these matters are not inherently a part of trial procedure and practice. However, the same ordinance which prescribed the procedures of the trial provided for review of sentence. Further, in editing this series, it was not feasible to reproduce these materials in the earlier volumes of this series.



Members of Military Tribunal in Nuremberg, early in April 1948: Front row, left to right: Edward F. Carter, Johnson T. Crawford, Lee B. Wyall, Michael A. Musmanno, Hu C. Anderson, Curtis G. Shaker, Charles F. Wennerstrom, William C. Christianson, John C. Young, William J. Wilkins, John J. Speight, and Daniel T. O'Connell. Back row, left to right: Colonel John E. Ray, Robert F. Maquire, Edward J. Daly, Paul M. Hebert, Clarence F. Merrell, Richard D. Dixon, James Morris, George J. Burke, Winfield B. Hale, Leon W. Powers, Justin W. Harding, and Colonel Samuel L. Metcalfe.



General view of the courtroom during cross-examination of a defense witness in the I. G. Farben case. A prosecutor at the podium (center) confronts the witness in the box (center background), and interpreters are seated in the glass enclosure (left background). The prisoners are ranged in the dock (left) facing the Tribunal (right). Tables for defense counsel are directly in front of the dock, and court reporters sit just in front of the bench. Prosecution attorneys are seated at the two tables in the left foreground; legal advisers and assistants to the members of the Tribunal are seated at the table in the right foreground.



Defendant Fritz ter Meer (at the podium) cross-examining a prosecution witness in the I. G. Farben case. In left foreground are Morris Amichan, associate prosecutor, and Dr. Erich Berndt, defense counsel. Miss Belle Mayer, associate prosecutor, is shown in the center, with Josiah DuBois, Jr., Deputy chief counsel for the prosecution, directly behind ter Meer. At the left of ter Meer are Jan Charnatz, associate prosecutor, and Drexel A. Sprecher, Chief of the I. G. Farben Trial Team (extreme right).

Special reference should be made to two publications which have been particularly helpful in assisting the editors in the selection of materials for this volume: "Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials," London, 1945, Department of State Publication 3080, U. S. Government Printing Office, Washington, D. C. (1949) and "Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission" (published in 15 vols. for the United Nations War Crimes Commission by His Majesty's Stationery Office, London, 1947-49). Parts of Mr. Justice Jackson's report are reproduced hereinafter with respect to the history leading up to certain of the procedural provisions of the Charter of the IMT. The "Law Reports" mentioned above often contain brief "Notes on the Case" which deal with matters of procedure and evidence. Volume XV of the "Law Reports," entitled "Digest of Laws and Cases," contains a short section on "The Procedure of the Courts." Reference should also be made to three mimeographed compilations on procedure, not generally available, which have been of substantial assistance in the selection of the materials in this volume: the digest on the procedure of the IMT case compiled by Lieutenant Roy A. Steyer, USNR, a member of Mr. Justice Jackson's staff during the IMT trial; a preliminary index of the rulings of the IMT made by Major Alfred G. Wurmser, in charge of documentation for the British prosecution staff during the IMT trial, and who later had charge of the final indexing of the 42-volume English edition of "Trial of the Major War Criminals"; and the digests on procedure, both of the IMT case and of several of the later trials, worked out by Walter J. Rockler, a member of the prosecution staff throughout the later trials.

Selection and arrangement of the materials in this volume were accomplished by Drexel A. Sprecher, formerly Deputy Chief Counsel and Director of Publications, Office U. S. Chief of Counsel for War Crimes, with the assistance of James M. Fitzpatrick, a Washington lawyer who was on the prosecution staff for over 2 years; Norbert G. Barr, research analyst; and Mrs. Erna E. Uiberall, administrative assistant and research analyst.

Final compilation and editing of the manuscript for printing was accomplished under the general supervision of Col. Edward H. Young, JAGC, Chief of the War Crimes Division in the Office of The Judge Advocate General, Department of the Army, with Amelia D. Rivers as Editor in Chief, and Ruth A. Phillips and John P. Banach as coeditors.

TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS

<i>Case No.</i>	<i>United States of America against</i>	<i>Popular Name</i>	<i>Volume No.</i>
1	Karl Brandt, et al.	Medical Case	I and II
2	Erhard Milch	Milch Case	II
3	Josef Altstoetter, et al.	Justice Case	III
4	Oswald Pohl, et al.	Pohl Case	V
5	Friedrich Flick, et al.	Flick Case	VI
6	Carl Krauch, et al.	I. G. Farben Case	VII and VIII
7	Wilhelm List, et al.	Hostage Case	XI
8	Ulrich Greifelt, et al.	RuSHA Case	IV and V
9	Otto Ohlendorf, et al.	Einsatzgruppen Case	IV
10	Alfried Krupp, et al.	Krupp Case	IX
11	Ernst von Weizsaecker, et al.	Ministries Case	XII, XIII, and XIV
12	Wilhelm von Leeb, et al. Procedure	High Command Case	X and XI XV

ARRANGEMENT BY SUBJECT UNITS FOR PUBLICATION*

<i>Case No.</i>	<i>United States of America against</i>	<i>Popular Name</i>	<i>Volume No.</i>
<i>Medical</i>			
1	Karl Brandt, et al.	Medical Case	I and II
2	Erhard Milch	Milch Case	II
<i>Legal</i>			
3	Josef Altstoetter, et al. Procedure	Justice Case	III XV
<i>Ethnological (Nazi Racial Policy)</i>			
9	Otto Ohlendorf, et al.	Einsatzgruppen Case	IV
8	Ulrich Greifelt, et al.	RuSHA Case	IV and V
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5	Friedrich Flick, et al.	Flick Case	VI
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12	Wilhelm von Leeb, et al.	High Command Case	X and XI
<i>Political and Government</i>			
11	Ernst von Weizsaecker, et al.	Ministries Case	XII, XIII, and XIV

*Although the subject material in many of the cases overlaps, it was believed that this arrangement of the cases would be most helpful to the reader and the most feasible for publication purposes.

I. JURISDICTIONAL BASIS OF THE FIRST WAR CRIMES TRIAL AT NUERNBERG BEFORE THE INTERNATIONAL MILITARY TRIBUNAL — RULES OF PROCEDURE ADOPTED BY THE IMT

A. Introduction

The first trial of major war criminals before any international tribunal was conducted in Nuernberg, Germany, before the International Military Tribunal (hereinafter frequently referred to as the IMT). This first Nuernberg trial influenced substantially the procedure and practice of the twelve later Nuernberg trials. The London Agreement and the Charter of the IMT (subsecs. B and C), provided the immediate jurisdictional basis for this first trial. Before the beginning of the IMT trial, the IMT adopted Rules of Procedure (subsec. D) which elaborated upon and supplemented the procedural provisions of the Charter of the IMT. The 12 later trials of war criminals in Nuernberg were held under Allied Control Council Law No. 10 before Military Tribunals established pursuant to Ordinance No. 7 of Military Government for Germany, United States Zone. Control Council Law No. 10 and Ordinance No. 7 are reproduced in section II.

B. London Agreement, 8 August 1945

LONDON AGREEMENT OF 8 AUGUST 1945

AGREEMENT by the Government of the UNITED STATES OF AMERICA, the Provisional Government of the FRENCH REPUBLIC, the Government of the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND and the Government of the UNION OF SOVIET SOCIALIST REPUBLICS for the Prosecution and Punishment of the MAJOR WAR CRIMINALS of the EUROPEAN AXIS

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German Officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.*

*The Charter of the IMT is reproduced in section I C.

Article 3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4. Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5. Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Article 7. This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

IN WITNESS WHEREOF the Undersigned have signed the present Agreement.

DONE in quadruplicate in London this 8th day of August 1945 each in English, French and Russian, and each text to have equal authenticity.

For the Government of the United States of America

ROBERT H. JACKSON

For the Provisional Government of the French Republic

ROBERT FALCO

For the Government of the United Kingdom of Great Britain and Northern Ireland

JOWITT, C.

For the Government of the Union of Soviet Socialist Republics

I. NIKITCHENKO

A. TRAININ

C. Charter of the International Military Tribunal, Annexed to the London Agreement¹

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1. In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics,² there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of

¹ For purposes of comparison and reference, the Charter of the International Military Tribunal for the Far East is reproduced herein as appendix A.

² The London Agreement is reproduced in section I B.

the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5. In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.*
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy

*See protocol, page 17, for correction to this paragraph.

to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.*

III. COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes:

- (a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
- (b) to settle the final designation of major war criminals to be tried by the Tribunal,
- (c) to approve the Indictment and the documents to be submitted therewith,
- (d) to lodge the Indictment and the accompanying documents with the Tribunal,
- (e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

- (a) investigation, collection, and production before or at the Trial of all necessary evidence,
- (b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
- (c) the preliminary examination of all necessary witnesses and of the Defendants,

*The basic Rules of Procedure of the IMT were adopted on 29 October 1945, and contain eleven separately numbered rules. These rules are reproduced in section I D. The Rules of Procedure of the International Military Tribunal of the Far East are reproduced in appendix B.

- (d) to act as prosecutor at the Trial,
- (e) to appoint representatives to carry out such duties as may be assigned to them,
- (f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. FAIR TRIAL FOR DEFENDANTS

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

- (a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.
- (b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.
- (c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
- (d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.
- (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17. The Tribunal shall have the power

- (a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,
- (b) to interrogate any Defendant,
- (c) to require the production of documents and other evidentiary material,
- (d) to administer oaths to witnesses,
- (e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18. The Tribunal shall

- (a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,
- (b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,
- (c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure,* and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24. The proceedings at the Trial shall take the following course:

*The Rules of Procedure, adopted by the International Military Tribunal on 29 October 1946 pursuant to this article of the Charter, are reproduced in section I D.

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty."
- (c) The Prosecution shall make an opening statement.
- (d) The Tribunal shall ask the Prosecution and the Defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.
- (f) The Tribunal may put any question to any witness and to any Defendant, at any time.
- (g) The Prosecution and the Defense shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
- (h) The Defense shall address the court.
- (i) The Prosecution shall address the court.
- (j) Each Defendant may make a statement to the Tribunal.
- (k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. JUDGMENT AND SENTENCE

Article 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27. The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences,

but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. EXPENSES

Article 30. The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

PROTOCOL

Whereas an Agreement and Charter regarding the Prosecution of War Criminals was signed in London on the 8th August 1945, in the English, French, and Russian languages.

And whereas a discrepancy has been found to exist between the originals of Article 6, paragraph (c), of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, to wit, the semi-colon in Article 6, paragraph (c), of the Charter between the words "war" and "or," as carried in the English and French texts, is a comma in the Russian text,

And whereas it is desired to rectify this discrepancy:

NOW, THEREFORE, the undersigned, signatories of the said Agreement on behalf of their respective Governments, duly authorized thereto, have agreed that Article 6, paragraph (c), of the Charter in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

(c) LES CRIMES CONTRE L'HUMANITÉ: c'est à dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont, été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.

IN WITNESS WHEREOF the Undersigned have signed the present Protocol.

DONE in quadruplicate in Berlin this 6th day of October, 1945,

each in English, French, and Russian, and each text to have equal authenticity.

For the Government of the United States of
America

ROBERT H. JACKSON

For the Provisional Government of the French
Republic

FRANÇOIS DE MENTON

For the Government of the United Kingdom of
Great Britain and Northern Ireland

HARTLEY SHAWCROSS

For the Government of the Union of Soviet
Socialist Republics

R. RUDENKO

D. Rules of Procedure of the International Military Tribunal (Adopted 29 October 1945)*

Rule 1. Authority to Promulgate Rules

The present Rules of Procedure of the International Military Tribunal for the trial of the major war criminals (hereinafter called "the Tribunal") as established by the Charter of the Tribunal dated 8 August 1945 (hereinafter called "the Charter") are hereby promulgated by the Tribunal in accordance with the provisions of Article 13 of the Charter.

Rule 2. Notice to Defendants and Right to Assistance of Counsel

(a) Each individual defendant in custody shall receive not less than 30 days before trial a copy, translated into a language which he understands, (1) of the indictment, (2) of the Charter, (3) of any other documents lodged with the indictment, and (4) of a statement of his right to the assistance of counsel as set forth in (d) of this Rule, together with a list of counsel. He shall also receive copies of such Rules of Procedure as may be adopted by the Tribunal from time to time.

(b) Any individual defendant not in custody shall be informed of the indictment against him and of his right to receive the documents specified in (a) above, by notice in such form and manner as the Tribunal may prescribe.

*Trial of the Major War Criminals, *op. cit.*, volume I, pages 19-23. The Rules of Procedure for the International Military Tribunal of the Far East are reproduced in appendix B.

(c) With respect to any group or organization as to which the prosecution indicates its intention to request a finding of criminality by the Tribunal, notice shall be given by publication in such form and manner as the Tribunal may prescribe and such publication shall include a declaration by the Tribunal that all members of the named groups or organizations are entitled to apply to the Tribunal for leave to be heard in accordance with the provisions of Article 9 of the Charter. Nothing herein contained shall be construed to confer immunity of any kind upon such members of said groups or organizations as may appear in answer to the said declaration.

(d) Each defendant has the right to conduct his own defense or to have the assistance of counsel. Application for particular counsel shall be filed at once with the General Secretary of the Tribunal at the Palace of Justice, Nuernberg, Germany. The Tribunal will designate counsel for any defendant who fails to apply for particular counsel or, where particular counsel requested is not within 10 days to be found or available, unless the defendant elects in writing to conduct his own defense. If a defendant has requested particular counsel who is not immediately to be found or available, such counsel or a counsel of substitute choice may, if found and available before trial, be associated with or substituted for counsel designated by the Tribunal, provided that (1) only one counsel shall be permitted to appear at the trial for any defendant, unless by special permission of the Tribunal, and (2) no delay of trial will be allowed for making such substitution or association.

Rule 3. Service of Additional Documents

If, before the trial, the chief prosecutors offer amendments or additions to the indictment, such amendments or additions, including any accompanying documents shall be lodged with the Tribunal and copies of the same, translated into a language which they each understand, shall be furnished to the defendants in custody as soon as practicable and notice given in accordance with Rule 2 (b) to those not in custody.

Rule 4. Production of Evidence for the Defense

(a) The defense may apply to the Tribunal for the production of witnesses or of documents by written application to the General Secretary of the Tribunal. The application shall state where the witness or document is thought to be located, together with a statement of their last known location. It shall also state the facts proposed to be proved by the witness or the document and the reasons why such facts are relevant to the defense.

(b) If the witness or the document is not within the area con-

trolled by the occupation authorities, the Tribunal may request the Signatory and adhering Governments to arrange for the production, if possible, of any such witnesses and any such documents as the Tribunal may deem necessary to proper presentation of the defense.

(c) If the witness or the document is within the area controlled by the occupation authorities, the General Secretary shall, if the Tribunal is not in session, communicate the application to the chief prosecutors and, if they make no objection, the General Secretary shall issue a summons for the attendance of such witness or the production of such documents, informing the Tribunal of the action taken. If any chief prosecutor objects to the issuance of a summons, or if the Tribunal is in session, the General Secretary shall submit the application to the Tribunal, which shall decide whether or not the summons shall issue.

(d) A summons shall be served in such manner as may be provided by the appropriate occupation authority to ensure its enforcement and the General Secretary shall inform the Tribunal of the steps taken.

(e) Upon application to the General Secretary of the Tribunal, a defendant shall be furnished with a copy, translated into a language which he understands, of all documents referred to in the indictment so far as they may be made available by the chief prosecutors and shall be allowed to inspect copies of any such documents as are not so available.

Rule 5. Order at the Trial

In conformity with the provisions of Article 18 of the Charter, and the disciplinary powers therein set out, the Tribunal, acting through its President, shall provide for the maintenance of order at the trial. Any defendant or any other person may be excluded from open sessions of the Tribunal for failure to observe and respect the directives and dignity of the Tribunal.

Rule 6. Oaths; Witnesses

(a) Before testifying before the Tribunal, each witness shall make such oath or declaration as is customary in his own country.

(b) Witnesses while not giving evidence shall not be present in court. The president of the Tribunal shall direct, as circumstances demand, that witnesses shall not confer among themselves before giving evidence.

Rule 7. Applications and Motions before Trial and Rulings during the Trial

(a) All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in

writing and filed with the General Secretary of the Tribunal at the Palace of Justice, Nuernberg, Germany.

(b) Any such motion, application, or other request shall be communicated by the General Secretary of the Tribunal to the chief prosecutors and, if they make no objection, the President of the Tribunal may make the appropriate order on behalf of the Tribunal. If any chief prosecutor objects, the President may call a special session of the Tribunal for the determination of the question raised.

(c) The Tribunal, acting through its President, will rule in court upon all questions arising during the trial, such as questions as to admissibility of evidence offered during the trial, recesses, and motions; and before so ruling the Tribunal may, when necessary, order the closing or clearing of the Tribunal or take any other steps which to the Tribunal seem just.

Rule 8. Secretariat of the Tribunal

(a) The Secretariat of the Tribunal shall be composed of a General Secretary, four secretaries and their assistants. The Tribunal shall appoint the General Secretary and each member shall appoint one secretary. The General Secretary shall appoint such clerks, interpreters, stenographers, ushers, and all such other persons as may be authorized by the Tribunal and each secretary may appoint such assistants as may be authorized by the member of the Tribunal by whom he was appointed.

(b) The General Secretary, in consultation with the secretaries, shall organize and direct the work of the Secretariat, subject to the approval of the Tribunal in the event of a disagreement by any secretary.

(c) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

(d) Communications addressed to the Tribunal shall be delivered to the General Secretary.

Rule 9. Record, Exhibits, and Documents

(a) A stenographic record shall be maintained of all oral proceedings. Exhibits will be suitably identified and marked with consecutive numbers. All exhibits and transcripts of the proceedings and all documents lodged with and produced to the Tribunal will be filed with the General Secretary of the Tribunal and will constitute part of the record.

(b) The term "official documents" as used in Article 25 of the Charter includes the indictment, rules, written motions, orders

that are reduced to writing, findings, and judgments of the Tribunal. These shall be in the English, French, Russian, and German languages. Documentary evidence or exhibits may be received in the language of the document, but a translation thereof into German shall be made available to the defendants.

(e) All exhibits and transcripts of proceedings, all documents lodged with and produced to the Tribunal and all official acts and documents of the Tribunal may be certified by the General Secretary of the Tribunal, to any government or to any other tribunal or wherever it is appropriate that copies of such documents or representations as to such acts should be supplied upon a proper request.

Rule 10. Withdrawal of Exhibits and Documents

In cases where original documents are submitted by the prosecution or the defense as evidence, and upon a showing (a) that because of historical interest or for any other reason one of the governments signatory to the Four Power Agreement of 8 August 1945, or any other government having received the consent of said four Signatory Powers, desires to withdraw from the records of the Tribunal and preserve any particular original documents and (b) that no substantial injustice will result, the Tribunal shall permit photostatic copies of said original documents, certified by the General Secretary of the Tribunal, to be substituted for the originals in the records of the court and shall deliver said original documents to the applicants.

Rule 11. Effective Date and Powers of Amendment and Addition

These rules shall take effect upon their approval by the Tribunal. Nothing herein contained shall be construed to prevent the Tribunal from, at any time, in the interest of fair and expeditious trials, departing from, amending, or adding to these Rules, either by general rules or special orders for particular cases, in such form and upon such notice as may appear just to the Tribunal.

II. JURISDICTIONAL BASIS OF THE TWELVE SUBSEQUENT WAR CRIMES TRIALS AT NUERNBERG

A. Introduction

Twelve war crimes trials were held in Nuernberg, subsequent to the trial before the International Military Tribunal. These trials were held under the authority of Allied Control Council Law No. 10 (subsec. B), which stated in its preamble that its purpose was "to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto, and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." Control Council Law No. 10 further provided that "Each occupying authority, within its Zone of occupation" should have the right to arrest and bring to trial persons suspected of having committed a crime, and that "The tribunal by which persons charged with offenses hereunder shall be tried and the rules of procedure thereof shall be determined or designated by each Zone Commander for his respective Zone."

In the United States Zone of Occupation, the Military Governor made provisions for the further trials of war criminals by Ordinance No. 7 of Military Government for Germany, United States Zone (subsec. C), and it was this ordinance which determined the basic procedure of the 12 Nuernberg trials under Control Council Law No. 10. Ordinance No. 7 was issued on 18 October 1946. Several of its articles were amended on 17 February 1947 by Ordinance No. 11 (subsec. D).

B. Allied Control Council Law No. 10, 20 December 1945

CONTROL COUNCIL LAW No. 10

PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945,¹ and the Charter issued pursuant thereto² and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt

¹ Reproduced in section I B.

² Reproduced in section I C.

with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

1. Each of the following acts is recognized as a crime:

(a) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) *War Crimes.* Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) *Crimes against Humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with

the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any person found guilty of any of the Crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labour.

(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.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

Article III

1. Each occupying authority, within its Zone of occupation,

(a) shall have the right to cause persons within such Zones suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

(b) shall report to the Legal Directorate the names of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and location of witnesses.

(c) shall take appropriate measures to see that witnesses and evidence will be available when required.

(d) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1 (b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.

5. The execution of death sentences may be deferred by not to exceed one month after the sentence has become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his Zone.

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant hereto, as he may deem proper in the interest of justice.

Article IV

1. When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone in which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted

by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.

2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its determination to be communicated to the Zone Commander.

(a) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence outside Germany, as the case may be, except upon approval of the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.

(b) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:

(1) If wanted for trial in the Zone in which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere;

(2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere;

(3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;

(4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;

(5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV 2 (b) (3) above, that which has the most serious charges against him, which are more-over supported by evidence, should have priority.

Article V

The delivery, under Article IV of this Law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of defeating or unnecessarily delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by

the Court of the zone or country to which he has been delivered, then such person shall be returned upon demand of the Commander of the Zone where the person was located prior to delivery. Done at Berlin, 20 December 1945.

JOSEPH T. MCNARNEY

General

B. L. MONTGOMERY

Field Marshal

L. KOELTZ

Général de Corps d'Armée

for P. KOENIG

Général d'Armée

G. ZHUKOV

Marshal of the Soviet Union

C. Military Government-Germany, United States Zone, Ordinance No. 7, 18 October 1946

MILITARY GOVERNMENT—GERMANY UNITED STATES ZONE ORDINANCE No. 7¹

ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS

Article I

The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10,² including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses.

Article II

(a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945³ certain tribunals to be known as "Military Tribunals" shall be established hereunder.

(b) Each such tribunal shall consist of three or more members

¹ For amendments to this ordinance, see Ordinance No. 11, reproduced in section II D.

² Reproduced in section II B.

³ Reproduced in section I B.

to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (c) of this article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

(c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

(d) The military Governor shall designate one of the members of the tribunal to serve as the presiding judge.

(e) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel.

(f) In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial. Members may be replaced for reasons of health or for other good reasons, except that no replacement of a member may take place, during a trial, other than by the alternate. If no alternate has been designated, the trial shall be continued to conclusion by the remaining members.

(g) The presence of three members of the tribunal or of two members when authorized pursuant to subsection (f) *supra* shall be necessary to constitute a quorum. In the case of tribunals designated under (c) above the agreement shall determine the requirements for a quorum.

(h) Decisions and judgments, including convictions and sentences shall be by majority vote of the members. If the votes of the members are equally divided the presiding member shall declare a mistrial.

Article III

(a) Charges against persons to be tried in the tribunals established hereunder shall originate in the Office of the Chief of Counsel for War Crimes, appointed by the Military Governor pursuant to paragraph 3 of the Executive Order Numbered 9679 of the President of the United States dated 16 January 1946. The Chief of Counsel for War Crimes shall determine the persons to be tried

by the Tribunals and he or his designated representative shall file the indictments with the Secretary General of the Tribunals (see Article XIV, *infra*) and shall conduct the prosecution.

(b) The Chief of Counsel for War Crimes, when in his judgment it is advisable, may invite one or more United Nations to designate representatives to participate in the prosecution of any case.

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

(a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

(b) The trial shall be conducted in, or translated into, a language which the defendant understands.

(c) 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 the defendant's country, or any other person who may be specially authorized by the tribunal. The tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.

(d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI (e). The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.

(e) A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.

(f) 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.

Article V

The Tribunals shall have the power

(a) to summon witnesses to the trial, to require their attendance and testimony and to put questions to them;

(b) to interrogate any defendant who takes the stand to testify in his own behalf, or who is called to testify regarding another defendant;

(c) to require the production of documents and other evidentiary material;

(d) to administer oaths;

(e) to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission;

(f) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunal or by the committee of presiding judges as provided in Article XIII.*

Article VI

The tribunals shall

(a) confine the trial strictly to an expeditious hearing of the issues raised by the charges;

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever;

(c) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article VII

The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

*By amendments contained in Ordinance No. 11 (sec. II D), a new subdivision, designated "(g)," was added to Article V, and an entirely new article, designated "Article V B," was also added.

Article VIII

The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof.

Article IX

The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and finding of military or other tribunals of any of the United Nations.

Article X

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

Article XI

The proceedings at the trial shall take the following course:

(a) the tribunal shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty."

(b) The prosecution may make an opening statement.

(c) The prosecution shall produce its evidence subject to the cross-examination of its witnesses.

(d) The defense may make an opening statement.

(e) The defense shall produce its evidence subject to the cross-examination of its witnesses.

(f) Such rebutting evidence as may be held by the Tribunal to be material may be produced by either the prosecution or the defense.

(g) The defense shall address the court.

(h) The prosecution shall address the court.*

(i) Each defendant may make a statement to the tribunal.

(j) The tribunal shall deliver judgment and pronounce sentence.

*Subdivisions (g) and (h) of Article XI were amended by Article III of Ordinance No. 11 (sec. II D) so as to make the order in which the prosecution and the defense addressed the court discretionary with the Tribunal.

Article XII

A Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable. The main office of the Secretariat shall be located in Nuernberg. The Secretariat shall consist of a Secretary General and such assistant secretaries, military officers, clerks, interpreters and other personnel as may be necessary.

Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

Article XIV

The Secretariat shall:

(a) Be responsible for the administrative and supply needs of the Secretariat and of the several tribunals.

(b) Receive all documents addressed to tribunals.

(c) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.

(d) Secure such information for the tribunals as may be needed for the approval or appointment of defense counsel.

(e) Serve as liaison between the prosecution and defense counsel.

(f) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the tribunals.

(g) Be responsible for the preparation of the records of the proceedings before the tribunals.

(h) Provide the necessary clerical, reporting and interpretative services to the tribunals and its members, and perform such other duties as may be required for the efficient conduct of the proceedings before the tribunals, or as may be requested by any of the tribunals.

Article XV

The 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 sentences imposed may be subject to review as provided in Article XVII, *infra*.

Article XVI

The tribunal shall have the right to impose upon the defendant, upon conviction, such punishment as shall be determined by the

tribunal to be just, which may consist of one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10.

Article XVII

(a) Except as provided in (b) *infra*, the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.*

(b) In cases tried before tribunals authorized by Article II (c), the sentence shall be reviewed jointly by the zone commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders.

Article XVIII

No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Article III, Section 5 of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes.

Article XIX

Upon the pronouncement of a death sentence by a tribunal established thereunder and pending confirmation thereof, the condemned will be remanded to the prison or place where he was confined and there be segregated from the other inmates, or be transferred to a more appropriate place of confinement.

Article XX

Upon the confirmation of a sentence of death the Military Governor will issue the necessary orders for carrying out the execution.

Article XXI

Where sentence of confinement for a term of years has been imposed the condemned shall be confined in the manner directed by the tribunal imposing sentence. The place of confinement may be changed from time to time by the Military Governor.

Article XXII

Any property declared to be forfeited or the restitution of which

*See Regulation No. 1 under Ordinance No. 7, issued by the Office of Military Government for Germany (US), 11 April 1947, for detailed procedures later established in connection with this provision reproduced in section XXV D.

is ordered by a tribunal shall be delivered to the Military Governor, for disposal in accordance with Control Council Law No. 10, Article II (3).

Article XXIII

Any of the duties and functions of the Military Governor provided for herein may be delegated to the Deputy Military Governor. Any of the duties and functions of the Zone Commander provided for herein may be exercised by and in the name of the Military Governor and may be delegated to the Deputy Military Governor.

This Ordinance becomes effective 18 October 1946.

BY ORDER OF MILITARY GOVERNMENT

D. Military Government-Germany, United States Zone, Ordinance No. 11, 17 February 1947

MILITARY GOVERNMENT—GERMANY ORDINANCE No. 11

AMENDING MILITARY GOVERNMENT ORDINANCE NO. 7 OF 18 OCTOBER 1946, ENTITLED "ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS"*

Article I

Article V of Ordinance No. 7 is amended by adding thereto a new subdivision to be designated "(g)," reading as follows:

"(g) The presiding judges, and, when established, the supervisory committee of presiding judges provided in Article XIII shall assign the cases brought by the Chief of Counsel for War Crimes to the various Military Tribunals for trial."

Article II

Ordinance No. 7 is amended by adding thereto a new article following Article V to be designated Article V-B, reading as follows:

"(a) A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals.

*Reproduced in section II C.

“(b) A joint session of the Military Tribunals may be called in the same manner as provided in subsection (a) of this Article to hear argument upon and to review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural. Any motion with respect to such final ruling shall be filed within ten (10) days following the issuance of decision or judgment.

“(c) Decisions by joint sessions of the Military Tribunals, unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.

“(d) The presence of a majority of the members of each Military Tribunal then constituted is required to constitute a quorum.

“(e) The members of the Military Tribunals shall, before any joint session begins, agree among themselves upon the selection from their number of a member to preside over the joint session.

“(f) Decisions shall be by majority vote of the members. If the votes of the members are equally divided, the vote of the member presiding over the session shall be decisive.”

Article III

Subdivisions (g) and (h) of Article XI of Ordinance No. 7 are deleted; subdivision (i) is relettered “(h)” ; subdivision (j) is relettered “(i)” ; and a new subdivision to be designated “(g),” is added, reading as follows:

“(g) The prosecution and defense shall address the court in such order as the Tribunal may determine.”

This Ordinance becomes effective 17 February 1947.

BY ORDER OF THE MILITARY GOVERNMENT

III. RULES OF PROCEDURE ADOPTED BY MILITARY TRIBUNAL I IN THE TRIAL OF THE MEDICAL CASE (Case I)

A. Introduction

The determination of the Rules of Procedures for the conduct of trials under Control Council Law No. 10 (sec. II B) was a function of the zone commander establishing tribunals for such trials in his respective zone of occupation. This was expressly stated in Article III, section 2, of Control Council Law No. 10. In the United States zone of occupation the general procedures to be followed in these trials were set forth in Ordinance No. 7 of Military Government for Germany, United States Zone (sec. II C), the ordinance dealing with organization and powers of the Nuernberg Military Tribunals. This ordinance, in Article V (f), stated that "The tribunals shall have the power * * * to adopt rules of procedure not inconsistent with this Ordinance." By a further provision, Article V (f) anticipated the importance of maintaining uniform rules of procedure after several tribunals were holding sessions, and of allowing appropriate revisions of the rules based upon trial experience: "Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunal or by the committee of presiding judges * * * ." Article VII, in dealing with the general nature of the rules of evidence and procedure, provided: "The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value * * *."

This section contains the Rules of Procedure adopted and revised from time to time by Military Tribunal I in the trial of the Medical case (*U. S. vs. Karl Brandt, et al.*). This was the first trial held under Control Council Law No. 10 by a military tribunal established pursuant to Ordinance No. 7. The initial "Rules of Procedure for Military Tribunal I," adopted on 2 November 1946 (subsec. B), became the keystone in the development of the rules of procedural law in the Nuernberg trials held subsequent to the trial before the IMT. Many of these first Rules of Procedure of

Military Tribunal I announced supplementary Rules of Procedure adopted by the IMT on 29 October 1945, for the first Nuernberg trial (sec. I D).

Military Tribunal I announced supplementary Rules of Procedure on 9 December 1946 (subsec. C) and later this Tribunal made two principal amendments to its rules (subsecs. D and E). These

various rules of procedure of Tribunal I in the Medical case, as thus adopted, supplemented, and revised, were then codified, renumbered as Rules 1 to 25 inclusive, and reissued on 18 February 1947 as "Rules of Procedure for Military Tribunal I" (subsec. F).

By the time Military Tribunal I codified and renumbered its rules of procedure on 18 February 1947, two other military tribunals (Tribunals II and III) had been established; and on 17 February 1947, these three Tribunals had organized the Committee of Presiding Judges (sec. XXIII). The next section of this volume, section IV, is devoted to the action of Military Tribunals II and III in adopting the same rules of procedure as Military Tribunal I, and to the later development of uniform rules of procedure after still other tribunals had been established to try further cases.

B. Rules of Procedure for Military Tribunal I, 2 November 1946

MINUTES OF MEETING OF MILITARY TRIBUNAL I * HELD AT THE PALACE OF JUSTICE, NUERNBERG, GERMANY

2 NOVEMBER 1946, AT 10:00 A.M.

Present:

Walter B. Beals, Presiding Judge
Harold L. Sebring, Judge
Johnson T. Crawford, Judge
Victor C. Swearingen, Alternate Judge
Charles E. Sands, Acting Secretary General

The following proceedings were had:

It was ordered that Military Tribunal I approve and adopt certain Rules of Procedure, not inconsistent with Ordinance No. 7, and that a certified copy of said Rules of Procedure be incorporated in the Order and Judgment Book of the Tribunal.

Whereupon Military Tribunal I recess until the further order of the Tribunal.

[Signed] WALTER B. BEALS
Presiding Judge

ATTEST:

[Signed] CHARLES E. SANDS
Acting Secretary General

*Official Record, Tribunal Records, volume I, page 9.

RULES OF PROCEDURE FOR MILITARY TRIBUNAL I

Rule 1. Authority to Promulgate Rules

The present rules of procedure of the Military Tribunal constituted by General Order No. 68 of the Office of Military Government for Germany (US) (hereinafter called "Military Tribunal I" or "the Tribunal") are hereby promulgated by the Tribunal in accordance with the provisions of Article V (f) of Military Government Ordinance No. 7 issued pursuant to the powers conferred by Control Council Law No. 10.

Rule 2. Languages in Which Pleadings, Documents, and Rules Shall Be Transcribed

When any rule of procedure adopted by Military Tribunal I directs or requires that a defendant in any prosecution before the Tribunal shall be furnished with a copy of any pleading, document, rule, or other instrument in writing, such rule shall be understood to mean that such defendant shall receive a true and correct copy of such pleading, document, rule, or other instrument, written in the English language, and also a written translation thereof in a language which the defendant understands.

Rule 3. Notice to Defendants

(a) The Marshal of Military Tribunals, or his duly authorized deputy, shall make service of the indictment upon a defendant in any prosecution before the Tribunal by delivering to and leaving with him (1) a true and correct copy of the indictment and of all documents lodged with the indictment, (2) a copy of Military Government Ordinance No. 7, (3) a copy of Control Council Law No. 10, and (4) a copy of these Rules of Procedure.

(b) When such service has been made as aforesaid, the Marshal shall make a written certificate of such fact, showing the day and place of service, and shall file the same with the Secretary General of Military Tribunals.

(c) The certificate, when filed with the Secretary General, shall constitute a part of the record of the cause.

Rule 4. Time Intervening Between Service and Trial

A period of not less than 30 days shall intervene between the service of the indictment upon a defendant and the day of his trial pursuant to the indictment.

Rule 5. Notice of Amendments or Additions to Original Indictment

(a) If before the trial of any defendant the Chief of Counsel for War Crimes offers amendments or additions to the indictment,

such amendments or additions, including any accompanying documents, shall be filed with the Secretary General of Military Tribunals and served upon such defendant in like manner as the original indictment.

Rule 6. Defendant to Receive Certain Additional Documents on Request

(a) A defendant shall receive a copy of such Rules of Procedure, or amendments thereto as may be adopted by the Tribunal from time to time.

(b) Upon written application by a defendant or his counsel, lodged with the Secretary General for a copy of (1) the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, or (2) the judgment of the International Military Tribunal of 30 September and 1 October 1945, the same shall be furnished to such defendant, without delay.

Rule 7. Right to Representation by Counsel

(a) A defendant shall have the right to conduct his own defense, or to be represented by counsel of his own selection, provided such counsel is a person qualified under existing regulations to conduct cases before the courts of defendant's country, or is specially authorized by the Tribunal.

(b) Application for particular counsel shall be filed with the Secretary General promptly after service of the indictment upon the defendant.

(c) The Tribunal will designate counsel for any defendant who fails to apply for particular counsel, unless the defendant elects in writing to conduct his own defense.

(d) Where particular counsel is requested by a defendant but is not available or cannot be found within 10 days after application therefor has been filed with the Secretary General, the Tribunal will designate counsel for such defendant, unless the defendant elects in writing to conduct his own defense. If thereafter, before trial, such particular counsel is found and is available, or if in the meanwhile a defendant selects a substitute counsel who is found to be available, such particular counsel, or substitute, may be associated with or substituted for counsel designated by the Tribunal; provided that (1) only one counsel shall be permitted to appear at the trial for any defendant, except by special permission of the Tribunal, and (2) no delay will be allowed for making such substitution or association.

Rule 8. Order at the Trial

In conformity with and pursuant to the provisions of Articles IV

and VI of Military Government Ordinance No. 7, the Tribunal will provide for maintenance of order at the trial.

Rule 9. Oath; Witnesses

(a) Before testifying before the Tribunal each witness shall take such oath or affirmation or make such declaration as is customary and lawful in his own country.

(b) When not testifying, the witnesses shall be excluded from the courtroom. During the course of any trial, witnesses shall not confer among themselves before or after testifying.

*Rule 10. Applications and Motions, Before Trial **

(a) All motions, applications, or other requests addressed to the Tribunal shall be made in writing and filed, together with a copy thereof, with the Secretary General of Military Tribunals, at the Palace of Justice, Nuernberg, Germany.

(b) When any motion, application, or other request has been filed, the Secretary General shall deliver a copy thereof to the adverse party and note the fact of delivery, specifying date and place, upon the original. The adverse party shall have 2 days after delivery within which to file with the Secretary General his objections to the granting of such motion, application, or other request. If no objection is filed within the time allowed, the presiding judge of the Tribunal will make the appropriate order on behalf of the Tribunal. If objections are filed the Tribunal will consider the objections and determine the questions raised.

(c) Delivery of a copy of any such motion, application, or other request to counsel of record for the adverse party, shall constitute delivery to such adverse party.

Rule 11. Rulings During the Trial

The Tribunal will rule upon all questions arising during the course of the trial. If such course is deemed expedient, the Tribunal will order the clearing or closing of the courtroom while considering such questions.

Rule 12. Production of Evidence for a Defendant

(a) A defendant may apply to the Tribunal for the production of witnesses, or of documents on his behalf, by filing his application therefor with the Secretary General of Military Tribunals. Such application shall state where the witness or document is thought to be located, together with a statement of the last known location

*Concerning the amendment of Rule 10 by the Committee of Presiding Judges on 2 December 1947, see section IV E.

thereof.* Such application shall also state the general nature of the evidence sought to be adduced thereby, and the reason such evidence is deemed relevant to the defendant's case.

(b) The Secretary General shall promptly submit any such application to the Tribunal, and the Tribunal will determine whether or not the application shall be granted.

(c) If the application is granted by the Tribunal, the Secretary General shall promptly issue a summons for the attendance of such witness or the production of such documents, and inform the Tribunal of the action taken. Such summons shall be served in such manner as may be provided by the appropriate occupation authorities to ensure its enforcement, and the Secretary General shall inform the Tribunal of the steps taken.

(d) If the witness or the document is not within the area controlled by the United States Office of Military Government for Germany, the Tribunal will 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.

Rule 13. Records, Exhibits, and Documents

(a) An accurate stenographic record of all oral proceedings shall be maintained. Exhibits shall be suitably identified and marked as the Tribunal may direct. All exhibits and transcripts of the proceedings, and such other material as the Tribunal may direct, shall be filed with the Secretary General and shall constitute a part of the record of the cause.

(b) Documentary evidence or exhibits may be received in the language of the document, but a translation thereof into a language understood by the adverse party shall be furnished to such party.

(c) Upon proper request, and approval by the Tribunal, copies of all exhibits and transcripts of proceedings, and such other matter as the Tribunal may direct to be filed with the Secretary General, and all official acts and documents of the Tribunal, may be certified by said Secretary General to any government, to any other tribunal, or to any agency or person as to whom it is appropriate that copies of such documents or representations as to such acts be supplied.

*The second sentence of this rule was omitted from Rule 12 as adopted by Military Tribunals I, III, and II on 18, 19, and 24 February 1947 respectively (secs. III F and IV B), but was included again in the Uniform Rules of Procedure as subsequently published by the Secretary General of the Tribunals (sec. V).

Rule 14. Withdrawal of Exhibits and Documents, and Substitution of Photostatic Copies Therefor

If it be made to appear to the Tribunal by written application that one of the government signatories to the Four Power Agreement of 8 August 1945, or any other government having received the consent of the said four Signatory Powers, desires to withdraw from the records of any cause, and preserve, any original document of file with the Tribunal, and that no substantial injury will result thereby, the Tribunal may order any such original document to be delivered to the applicant, and a photostatic copy thereof, certified by the Secretary General, to be substituted in the record therefor.

Rule 15. Effective Date and Powers of Amendment and Addition¹

These rules shall take effect upon their approval by the Tribunal. Nothing herein contained shall be construed to prevent the Tribunal at any time in the interest of fair and expeditious procedure, from departing from, amending, or adding to these rules, either by general rules or special orders for particular cases, in such form and on such notice as the Tribunal may prescribe.

Promulgated and adopted by Military Tribunal I, this 2d day of November, A.D. 1946, at the Palace of Justice, Nuernberg, Germany.

[Signed] WALTER B. BEALS, Presiding Judge

[Signed] HAROLD L. SEBRING, Judge

[Signed] JOHNSON T. CRAWFORD, Judge

[Signed] VICTOR C. SWEARINGEN, Alternate Judge

ATTEST: [Signed] CHARLES E. SANDS
Acting Secretary General for
Military Tribunals

**C. Supplemental Rules of Trial Procedure Announced
by the Tribunal on 9 December 1946²**

PRESIDING JUDGE BEALS: I have a statement which I desire to make for the benefit of the prosecution, defendants, and all concerned: Before opening the trial of Case 1, the United States of America against Karl Brandt, *et al.*, there are certain matters

¹ Rule 15 was renumbered Rule 24 in the rules adopted by Military Tribunals I, III, and II on 18, 19, and 24 February 1947 respectively (secs. III F and IV B).

² Extract from mimeographed transcript, Case 1, U.S. *vs.* Karl Brandt, *et al.*, pages 9-11.

The rules herein numbered 1 through 6, were renumbered 15 through 20 in the rules adopted by Military Tribunals I, III, and II on 18, 19 and 24 February 1947 respectively (secs. III F and IV B).

which the Tribunal desires to call to the attention of the counsel for the prosecution and the counsel for the defendants.

1. The prosecution may be allowed, for the purpose of making the opening statement in this case, time not to exceed one trial day. This time may be allocated by the chief prosecutor, between himself and any of his assistants, as he desires.

2. When the prosecution has rested its case, defense counsel will be allowed two trial days in which to make their opening statements, and which will comprehend the entire theory of their respective defenses. The time allocated will be divided between the different defense counsel, as they may themselves agree. In the event the defense counsel cannot agree, the Tribunal will allocate the time, not to exceed 30 minutes to each defendant.

3. The prosecution shall, not less than 24 hours, before it desires to offer any record or document or writing in evidence as part of its case in chief, file with the Defense Information Center not less than one copy of such record, document, or writing for each of the counsel for defendants, such copies to be in the German language. The prosecution shall also deliver to the Defense Information Center at least four copies thereof in the English language.

4. When the prosecution or any defendant offers a record, document, or any other writing or a copy thereof in evidence, there shall be delivered to the Secretary General, in addition to the original document or other instrument in writing so offered for admission in evidence, six copies of the document. If the document is written or printed in a language other than English, there shall also be filed with the copies of the document above referred to, six copies of an English translation of the document. If such document is offered by any defendant, suitable facilities for procuring English translations of that document shall be made available.

5. At least 24 hours before a witness is called to the stand either by the prosecution or by any defendant, the party who desired to interrogate the witness shall deliver to the Secretary General an original and six copies of a memorandum which shall disclose: (a) the name of the witness; (b) his nationality; (c) his residence or station; (d) his official rank or position; (e) whether he is called as an expert witness or as a witness to testify to facts and, if the latter, a prepared statement of the subject matter on which the witness will be interrogated.

When the prosecution prepares such a statement in connection with the witness whom it desires to call, at the time of the filing of this statement, two additional copies thereof shall be delivered to the Defense Information Center. When a defendant prepares such a statement concerning a witness whom it desires to call, the

defendant shall, at the same time the copies are filed with the Secretary General, deliver one additional copy to the prosecution.

6. When either the prosecution or a defendant desires the Tribunal to take judicial notice of any official government documents or reports of the United Nations, including any action, ruling, or regulation of any committee, board, or counsel, heretofore established by or in the Allied Nations for the investigation of war crimes or any record made by, or the findings of, any military or other tribunal, this Tribunal may refuse to take judicial notice of such documents, rules, or regulations unless the party proposing to ask this Tribunal to judicially notice such documents, rules, or regulations, places a copy thereof in writing before the Tribunal.*

This Tribunal has learned with satisfaction of the procedure adopted by the prosecution with the intention to furnish to the defense counsel information concerning the writings or documents which the prosecution expects to offer in evidence for the purpose of affording the defense counsel information to help them prepare their respective defense to the indictments. The desire of the Tribunal is that this be made available to the defendants so as to aid them in the presentation of their respective defense.

The United States of America having established this Military Tribunal I, pursuant to law, through properly empowered military authorities, and the defendants having been brought before Military Tribunal I, pursuant to indictments filed 25 October 1946 in the Office of the Secretary General of the Military Tribunal at Nuernberg, Germany, by an officer of the United States Army, regularly designated as Chief of Counsel for War Crimes, acting on behalf of the United States of America, pursuant to appropriate military authority, and the indictments having been served upon each defendant for more than 30 days prior to this date, and a copy of the indictments in the German language having been furnished to each defendant, and having been in his possession more than 30 days, and each defendant having had ample opportunity to read the indictments, and having regularly entered his plea of not guilty to the indictments, the Tribunal is ready to proceed with the trial.

This Tribunal will conduct the trial in accordance with controlling laws, rules, and regulations, and with due regard to appropriate precedence in a sincere endeavor to ensure both to the prosecution and to each and every defendant an opportunity to present all evidence of an appropriate value bearing upon the

*Here ended rule 6. These six rules were also adopted in written form by Tribunal I as "Rules of Trial Procedure Announced by the Tribunal in Open Session, 9 December 1946" and were then filed with the Secretary General on the same day.

issues before the Tribunal; to this end, that under law and pending regulations impartial justice may be accomplished.

The trial, of course, will be a public trial, not one behind closed doors; but because of limited facilities available the Tribunal must insist that the number of spectators be limited to the seating capacity of the courtroom. Passes will therefore be issued by the appropriate authorities to those who may enter the courtroom. The Tribunal will insist that good order be at all times maintained, and appropriate measures will be taken to see that this rule is strictly enforced.

D. Amendment of Rule Concerning Requirements for Written Statements by Defense Witnesses "In Lieu of Oath," 9 January 1947

STATEMENT BY PRESIDING JUDGE BEALS AT SESSION OF 9 JANUARY 1947*

PRESIDING JUDGE BEALS: In the matter of the need for an established procedure for obtaining written statements from persons having knowledge of facts deemed by the defendants to be material and of probative value to their respective defenses having been called to the attention of the Tribunal, and the members of the Tribunal having met with representatives of the prosecution and with a committee of defense counsel, and thereafter the representatives of both the prosecution and counsel for the defendants having presented to the Tribunal a written and signed outline of a method mutually satisfactory to the prosecution and to the defendants' counsel, whereby written statements signed and witnessed may, if of probative value and otherwise in proper form, be offered in evidence before the Tribunal and received in evidence if in the judgment of the Tribunal they should be so received, notwithstanding the fact that such statements may be signed by the person making the same without having been sworn to before an officer or any person having by virtue of an office lawful authority to administer an oath in due form of law.

The Tribunal has considered the written stipulation signed by representatives of the prosecution's staff and by representatives of counsel for the defendants and desires the following order in connection with the subject matter thereof: First, it is ordered by Military Tribunal I that the rule heretofore promulgated and adopted by the Tribunal concerning the requirements to be observed by the defendants in the preparation of written statements

*Extract from mimeographed transcript, Case 1, U.S. vs. Karl Brandt, *et al.*, pages 1333-1336.

by defense witnesses "in lieu of oath" be and the same is hereby rescinded. Second, it is further ordered by Military Tribunal I that the following rule concerning the subject matter above referred to shall be and the same is hereby adopted and "promulgated by the Tribunal for the information of all concerned."

a. Statements of witnesses made "in lieu of an oath" may be admitted in evidence if otherwise competent and admissible and containing statements having probative value if the following conditions are met:¹

(1) The witness shall have signed the statement before defense counsel, or one of them, and defense counsel shall have certified thereto; or

(2) The witness shall have signed the statement before a notary, and the notary shall have certified thereto; or

(3) The witness shall have signed the statement before a Buergermeister and the Buergermeister shall have certified thereto, in case neither defense counsel nor a notary is readily available without great inconvenience; or

(4) The witness shall have signed the statement before a competent prison camp authority, and such authority shall have certified thereto in case the witness is incarcerated in a prison camp.

(5) The statement "in lieu of an oath" shall contain a preamble which shall state, "I, (name and address of the witness), after having first been warned that I will be liable for punishment for making a false statement in lieu of an oath, state and declare that my statement is true in lieu of an oath, and that my statement is made for submission as evidence before Military Tribunal I, Palace of Justice, Nuernberg, Germany, the following:"

(6) The signature of the witness shall be followed by a certificate stating: "The above signature of (stating the name and address of the witness) identified by (state the name of the identifying person or officer) is hereby certified and witnessed by me. (To be followed by the date and place of the execution of the statement and the signature and witness of the person or officer certifying the same.)

b. If special circumstances make compliance with any one of the above conditions impossible or unduly burdensome, then defense counsel may make application to the Tribunal for a special order providing for the taking of the statement of a desired witness concerning conditions to be complied with in that specific instance.²

¹ Part (a) of this rule was redesignated Rule 21 in the rules adopted by Military Tribunals I, III, and II on 18, 19 and 24 February 1947 respectively (secs. III F and IV B).

² Part (b) of this rule was redesignated Rule 22 in the rules adopted by Military Tribunals I, III, and II on 18, 19, and 24 February 1947 respectively (sec. III F and IV B).

Finally, it is further ordered by Military Tribunal I that the foregoing rule as adopted and announced by the Tribunal be incorporated in the minute book and in the journal of Military Tribunal I, and that copies thereof, together with correct translations thereof into the German language, properly certified by the Secretary General, be delivered to each of the defendants or their respective council.¹

E. Amendment to Rules of Procedure Concerning Interrogation of Persons Detained in Nuernberg Jail Who Have Been Approved as Defense Witnesses, 10 February 1947

AMENDMENT TO RULES OF PROCEDURE FOR MILITARY TRIBUNALS

**Adopted at a Meeting of Tribunal I
10 February 1947²**

In all cases where persons are detained in the Nuernberg jail and who have been approved by a Military Tribunal as a witness for the defense, it is hereby ordered that, after the date of such approval by a Military Tribunal, the following procedure shall be followed in the interviewing or interrogation of such witness or witnesses by either counsel for the prosecution or defense:

(1) Counsel desiring to interview such witness shall petition the Tribunal in writing, stating in general the scope and subject matter of such interview.

(2) The Tribunal shall thereupon appoint an impartial commissioner to represent the Tribunal at such interview, to the end that it shall be orderly, proper and judicial in character, and within the scope of the petition filed, and to the further end that there shall be no attempt to harass, intimidate, or improperly influence the witness in giving his answers.

(3) Whenever such a witness is being interviewed or interrogated in the presence of such commissioner by counsel for either side, counsel for the other side shall not be entitled to be present.

¹ The provisions of this paragraph directing the delivery of copies of the rules to the defendants or their counsel were subsequently adopted in altered form as Rule 25 by Military Tribunals I, III, and II on 18, 19, and 24 February 1947 respectively (sec. III F and IV B).

² U.S. vs. Karl Brandt, et al., Case 1, Official Record, volume 34, pages 964-965.

This rule was redesignated Rule 23 in the rules adopted by Military Tribunals I, III and II on 18, 19 and 24 February 1947 respectively (secs. III F and IV B). Rule 23 was amended as to content on 8 June 1947 by an Executive meeting of Military Tribunals I, II, III and IV (sec. IV D), and it was again amended by the Committee of Presiding Judges on 8 January 1948 (sec. IV F).

(4) If in the course of such interview it shall appear to such commissioner that the proper scope of such interview as set forth in the petition therefor is being exceeded by the counsel conducting such interview or that it is in any other manner being improperly conducted, said commissioner shall on behalf of the Tribunal stop said interview.

(5) In such event, said commissioner shall report in writing to the Tribunal the substantial and significant facts in relation to such interview and his reasons for having stopped the same.

(6) Counsel conducting such interview may, if he so desires, promptly bring before the Tribunal in writing, after giving notice to opposing counsel, his objections, if any, to the action of the commissioner, whereupon the presiding judge of such Tribunal shall either confirm the action of the commissioner or direct the interview of the witness to proceed, with such directions or limitations as he may order.

(7) In any appeal to the Tribunal from such act of a commissioner, counsel so appealing shall state the name of the witness, the name of the defendant whom he represents, and the title of the cause in which he is acting as counsel.

(8) The above procedure shall not be interpreted as in effect in cases (a) where the witness or prospective witness has been procured by the prosecution but has not been approved by the Tribunal as a witness for the defense, or (b) where the witness for the defense has been procured as such by the defense [and voluntarily appears without being confined in the Nuernberg jail].¹

[Stamp] Filed 10 February 1947

[Signed] WALTER B. BEALS
Presiding Judge, Tribunal I

[Signed] HAROLD L. SEBRING
Judge

[Signed] J. T. CRAWFORD

[Signed] VICTOR C. SWEARINGEN

F. Rules of Procedure for Military Tribunal I, as Codified on 18 February 1947

RULES OF PROCEDURE FOR MILITARY TRIBUNAL I²

Rule 1. Authority to Promulgate Rules

The present rules of procedure of the Military Tribunal consti-

¹ The portion of this rule appearing in brackets was deleted by Military Tribunal I on 13 February 1947.

² Official Record, Tribunal Records, volume I, pages 85-94. These same rules of procedure were adopted by Military Tribunals II and III within the next few days. See sections IV A and IV B.

tuted by General Order No. 68 of the Office of Military Government for Germany (U.S.) (hereinafter called "Military Tribunal_____" or "the Tribunal") are hereby promulgated by the Tribunal in accordance with the provisions of Article V (f) of Military Government Ordinance No. 7 issued pursuant to the powers conferred by Control Council Law No. 10.

Rule 2. Languages in Which Pleadings, Documents, and Rules Shall Be Transcribed

When any rule of procedure adopted by Military Tribunal I directs or requires that a defendant in any prosecution before the Tribunal shall be furnished with a copy of any pleading, document, rule, or other instrument in writing, such rule shall be understood to mean that such defendant shall receive a true and correct copy of such pleading, document, rule, or other instrument, written in the English language, and also a written translation thereof in a language which the defendant understands.

Rule 3. Notice to Defendants

(a) The Marshal of Military Tribunals, or his duly authorized deputy, shall make service of the indictment upon a defendant in any prosecution before the Tribunal by delivering to and leaving with him (1) a true and correct copy of the indictment and of all documents lodged with the indictment, (2) a copy of Military Government Ordinance No. 7, (3) a copy of Control Council Law No. 10, and (4) a copy of these Rules of Procedure.

(b) When such service has been made as aforesaid, the Marshal shall make a written certificate of such fact, showing the day and place of service, and shall file the same with the Secretary General of Military Tribunals.

(c) The certificate, when filed with the Secretary General, shall constitute a part of the record of the cause.

Rule 4. Time Intervening between Service and Trial

A period of not less than 30 days shall intervene between the service of the indictment upon a defendant and the day of his trial pursuant to the indictment.

Rule 5. Notice of Amendments or Additions to Original Indictment

If before the trial of any defendant the Chief of Counsel for War Crimes offers amendments or additions to the indictment, such amendments or additions, including any accompanying documents, shall be filed with the Secretary General of Military Tribunals

and served upon such defendant in like manner as the original indictment.

Rule 6. Defendant to Receive Certain Additional Documents on Request

(a) A defendant shall receive a copy of such Rules of Procedure, or amendments thereto, as may be adopted by the Tribunal from time to time.

(b) Upon written application by a defendant or his counsel, lodged with the Secretary General, for a copy of (1) the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, or (2) the judgment of the International Military Tribunal of 30 September and 1 October 1946, the same shall be furnished to such defendant, without delay.

Rule 7. Right to Representation by Counsel

(a) A defendant shall have the right to conduct his own defense, or to be represented by counsel of his own selection, provided such counsel is a person qualified under existing regulations to conduct cases before the courts of defendant's country, or is specially authorized by the Tribunal.

(b) Application for particular counsel shall be filed with the Secretary General promptly after service of the indictment upon the defendant.

(c) The Tribunal will designate counsel for any defendant who fails to apply for particular counsel unless the defendant elects in writing to conduct his own defense.

(d) Where particular counsel is requested by a defendant but is not available or cannot be found within 10 days after application therefor has been filed with the Secretary General, the Tribunal will designate counsel for such defendant unless the defendant elects in writing to conduct his own defense. If thereafter, before trial, such particular counsel is found and is available, or if in the meanwhile a defendant selects a substitute counsel who is found to be available, such particular counsel, or substitute, may be associated with or substituted for counsel designated by the Tribunal; provided that (1) only one counsel shall be permitted to appear at the trial for any defendant, except by special permission of the Tribunal, and (2) no delay will be allowed for making such substitution or association.

Rule 8. Order at the Trial

In conformity with and pursuant to the provisions of Articles IV and VI of Military Government Ordinance No. 7, the Tribunal will provide for maintenance of order at the trial.

Rule 9. Oath; Witnesses

(a) Before testifying before the Tribunal each witness shall take such oath or affirmation or make such declaration as is customary and lawful in his own country.

(b) When not testifying, the witnesses shall be excluded from the courtroom. During the course of any trial, witnesses shall not confer among themselves before or after testifying.

Rule 10. Applications and Motions Before Trial

(a) All motions, applications, or other requests addressed to the Tribunal shall be made in writing and filed, together with a copy thereof, with the Secretary General of Military Tribunals, at the Palace of Justice, Nuernberg, Germany.

(b) When any motion, application, or other request has been filed, the Secretary General shall deliver a copy thereof to the adverse party and note the fact of delivery, specifying date and place, upon the original. The adverse party shall have 2 days after delivery within which to file with the Secretary General his objections to the granting of such motion, application, or other request. If no objection is filed within the time allowed, the presiding judge of the Tribunal will make the appropriate order on behalf of the Tribunal. If objections are filed the Tribunal will consider the objections and determine the questions raised.

(c) Delivery of a copy of any such motion, application, or other request to counsel of record for the adverse party, shall constitute delivery to such adverse party.

Rule 11. Rulings During the Trial

The Tribunal will rule upon all questions arising during the course of the trial. If such course is deemed expedient, the Tribunal will order the clearing or closing of the courtroom while considering such questions.

Rule 12. Production of Evidence for a Defendant

(a) A defendant may apply to the Tribunal for the production of witnesses, or of documents on his behalf, by filing his application therefor with the Secretary General of Military Tribunals. Such application shall also state the general nature of the evidence sought to be adduced thereby, and the reason such evidence is deemed relevant to the defendant's case.

(b) The Secretary General shall promptly submit any such application to the Tribunal, and the Tribunal will determine whether or not the application shall be granted.

(c) If the application is granted by the Tribunal, the Secretary General shall promptly issue a summons for the attendance of

such witness or the production of such documents, and inform the Tribunal of the action taken. Such summons shall be served in such manner as may be provided by the appropriate occupation authorities to insure its enforcement, and the Secretary General shall inform the Tribunal of the steps taken.

(d) If the witness or the document is not within the area controlled by the United States Office of Military Government for Germany, the Tribunal will 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.

Rule 13. Records, Exhibits, and Documents

(a) An accurate stenographic record of all oral proceedings shall be maintained. Exhibits shall be suitably identified and marked as the Tribunal may direct. All exhibits and transcripts of the proceedings, and such other material as the Tribunal may direct, shall be filed with the Secretary General and shall constitute a part of the record of the cause.

(b) Documentary evidence or exhibits may be received in the language of the document, but a translation thereof into a language understood by the adverse party shall be furnished to such party.

(c) Upon proper request, and approval by the Tribunal, copies of all exhibits and transcripts of proceedings, and such other matter as the Tribunal may direct to be filed with the Secretary General, and all official acts and documents of the Tribunal, may be certified by said Secretary General to any government, to any other tribunal, or to any agency or person as to whom it is appropriate that copies of such documents or representations as to such acts be supplied.

Rule 14. Withdrawal of Exhibits and Documents, and Substitution of Photostatic Copies Therefor

If it be made to appear to the Tribunal by written application that one of the government signatories to the Four Power Agreement of 8 August 1945, or any other government having received the consent of the said four Signatory Powers, desires to withdraw from the records of any cause, and preserve, any original document on file with the Tribunal, and that no substantial injury will result thereby, the Tribunal may order any such original document to be delivered to the applicant, and a photostatic copy thereof, certified by the Secretary General, to be substituted in the record therefor.

Rule 15. Opening Statement for Prosecution

The prosecution may be allowed, for the purpose of making the opening statement, time not to exceed one trial day. The chief prosecutor may allocate this time between himself and any of his assistants as he may wish.

Rule 16. Opening Statement for Defense

When the prosecution rests its case, defense counsel will be allotted two trial days within which to make their opening statement, which will comprehend the entire theory of their respective defenses. The time allotted will be divided between defense counsel as they may themselves agree. In the event that defense counsel cannot agree, the Tribunal will allot the time not to exceed 30 minutes to each defendant.

Rule 17. Prosecution to File Copies of Exhibits—Time for Filing

The prosecution, not less than 24 hours before it desires to offer any record, document, or other writing in evidence as part of its case in chief, shall file with the Defendants' Information Center not less than one copy of each record, document, or writing for each of the counsel for defendants, such copy to be in the German language. The prosecution shall also deliver to defendants' Information Center at least four copies thereof in the English language.

Rule 18. Copies of All Exhibits To Be Filed With Secretary General

When the prosecution or any defendant offers a record, document, or other writing or a copy thereof in evidence, there shall be delivered to the Secretary General, in addition to the original of the document or other instrument in writing so offered for admission in evidence, six copies of the document. If the document is written or printed in a language other than the English language, there shall also be filed with the copies of the document above referred to, six copies of an English translation of the document. If such document is offered by any defendant, suitable facilities for procuring English translations of that document shall be made available to the defendant.

Rule 19. Notice to Secretary General Concerning Witnesses

At least 24 hours before a witness is called to the stand either by the prosecution or by any defendant, the party who desires the testimony of the witness shall deliver to the Secretary General an original and six copies of a memorandum which shall disclose (a) the name of the witness; (b) his nationality; (c) his residence or

station; (d) his official rank or position; (e) whether he is called as an expert witness or as a witness to testify to the facts, and if the latter, a brief statement of the subject matter concerning which the witness will be interrogated.

When the prosecution prepares such a statement in connection with a witness whom it desires to call, at the time of the filing of the foregoing statement two additional copies thereof shall be delivered to the Defendants' Information Center. When a defendant prepares the foregoing statement concerning a witness whom he desires to call, the defendant shall, at the same time the copies are filed with the Secretary General, deliver one additional copy to the prosecution.

Rule 20. Judicial Notice

When either the prosecution or a defendant desires the Tribunal to take judicial notice of any official government document or report to the United Nations, including any act, ruling, or regulation of any committee, board, or council heretofore established by or in the Allied nations for the investigation of war crimes, or any record made by, or finding of, any military or other tribunal of any of the United Nations, this Tribunal may refuse to take judicial notice of such document, rule, or regulation unless the party proposing to ask this Tribunal to judicially notice such a document, rule, or regulation places a copy thereof in writing before the Tribunal.

Rule 21. Procedure for Obtaining Written Statements

Statements of witnesses made "in lieu of an oath" may be admitted in evidence if otherwise competent and admissible and containing statements having probative value if the following conditions are met:

(1) The witness shall have signed the statement before defense counsel, or one of them, and defense counsel shall have certified thereof; or

(2) The witness shall have signed the statement before a notary, and the notary shall have certified thereto; or

(3) The witness shall have signed the statement before a Buergermeister and the Buergermeister shall have certified thereto, in case neither defense counsel nor a notary is readily available without great inconvenience; or

(4) The witness shall have signed the statement before a competent prison camp authority, and such authority shall have certified thereto in case the witness is incarcerated in a prison camp.

(5) The statement "in lieu of an oath" shall contain a preamble which shall state, "I, (name and address of the witness), after

having first been warned that I will be liable for punishment for making a false statement in lieu of an oath, state and declare that my statement is true in lieu of an oath, and that my statement is made for submission as evidence before Military Tribunal _____, Palace of Justice, Nuernberg, Germany, the following:"

(6) The signature of the witness shall be followed by a certificate stating: "The above signature of (stating the name and address of the witness) identified by (state the name of the identifying person or officer) is hereby certified and witnessed by me." (To be followed by the date and place of the execution of the statement and the signature and witness of the person or officer certifying the same.)

Rule 22. Special Circumstances

If special circumstances make compliance with any one of the above conditions impossible or unduly burdensome, then defense counsel may make application to the Tribunal for a special order providing for the taking of the statement of desired witness concerning conditions to be complied with in that specific instance.

Rule 23. In Re: Commissioners

In all cases where persons are detained in the Nuernberg jail and who have been approved by a Military Tribunal as a witness for the defense, it is hereby ordered that, after the date of such approval by a Military Tribunal, the following procedure shall be followed in the interviewing or interrogation of such witness or witnesses by either counsel for the prosecution or defense:

(1) Counsel desiring to interview such witness shall petition the Tribunal in writing, stating in general the scope and subject matter of such interview.

(2) The Tribunal shall thereupon appoint an impartial commissioner to represent the Tribunal at such interview, to the end that it shall be orderly, proper, and judicial in character and within the scope of the petition filed, and to the further end that there shall be no attempt to harass, intimidate, or improperly influence the witness in giving his answers.

(3) Whenever such a witness is being interviewed or interrogated in the presence of such commissioner by counsel for either side, counsel for the other side shall not be entitled to be present.

(4) If, in the course of such interview, it shall appear to such commissioner that the proper scope of such interview as set forth in the petition therefor is being exceeded by the counsel conducting such interview or that it is in any other manner being improperly conducted, said commissioner shall, on behalf of the Tribunal, stop said interview.

(5) In such event, said commissioner shall report in writing to the Tribunal the substantial and significant facts in relation to such interview and his reasons for having stopped the same.

(6) Counsel conducting such interview may, if he so desires, promptly bring before the Tribunal in writing, after giving notice to opposing counsel, his objections, if any, to the action of the commissioner, whereupon the presiding judge of such Tribunal shall either confirm the action of the commissioner or direct the interview of the witness to proceed, with such directions or limitations as he may order.

(7) In any appeal to the Tribunal from such act of a commissioner, counsel so appealing shall state the name of the witness, the name of the defendant whom he represents, and the title of the cause in which he is acting as counsel.

(8) The above procedure shall not be interpreted as in effect in cases (a) where the witness or prospective witness has been procured by the prosecution but has not been approved by the Tribunal as a witness for the defense, or (b) where the witness for the defense has been procured as such by the defense.

Rule 24. Effective Date and Powers of Amendment and Addition

These Rules shall take effect upon their approval by the Tribunal. Nothing herein contained shall be construed to prevent the Tribunal at any time in the interest of fair and expeditious procedure from departing from, amending, or adding to these rules, either by general rules or special orders for particular cases, in such form and on such notice as the Tribunal may prescribe.

Rule 25.

It is ordered that the foregoing rules be entered in the journal of this Tribunal and that mimeographed copies be prepared sufficient in number for the use of the Tribunal and counsel.

[Signed] WALTER B. BEALS

[Signed] HAROLD L. SEBRING

[Signed] J. T. CRAWFORD

[Signed] VICTOR C. SWEARINGEN

[Stamp] Filed: 18 February 1947

ATTEST: [Signed] CHARLES E. SANDS

Secretary General for
Military Tribunals

IV. DEVELOPMENT OF UNIFORM RULES OF PROCEDURE—ACTION BY INDIVIDUAL TRIBUNALS, EXECUTIVE SESSIONS OF SEVERAL TRIBUNALS, AND THE COMMITTEE OF PRESIDING JUDGES

A. Introduction

That Ordinance No. 7 intended the development of Uniform Rules of Procedure after several tribunals were active in the trial of cases is indicated by provisions from three of its various articles. Article V, dealing with the powers of the Tribunals, provides in subdivision (f) that the Tribunals shall have the power “to adopt Rules of Procedure not inconsistent with this ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the Tribunal or by the committee of presiding judges as provided in Article XIII.”

Article XIII, after stating that the Secretary General shall organize and direct the work of the Central Secretariat of the Tribunals, provides that this Secretary General “shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.”

Article XIV (c) provides that the Secretariat shall “prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.”

The Committee of Presiding Judges (sec. XXIII) was organized on 17 February 1947, when three Military Tribunals were engaged in the trial of three different cases. The three Tribunals and the cases they were assigned to try are shown by the following table:

<i>Military Tribunal</i>	<i>Popular Name of Case</i>	<i>Case No.</i>
I	Medical	1
II	Milch	2
III	Justice	3

The minutes of the organizational meeting of the Committee of Presiding Judges (sec. XXIII C) make no mention of any formal consideration of the rules of procedure. However, on the next day, 18 February 1947, Military Tribunal I issued codified and renumbered “Rules of Procedure for Military Tribunal I” (sec. III F), and on 18 and 24 February 1947, Military Tribunals III and II respectively, issued rules of procedure which were identical in substance with those adopted by Tribunal I (sec. IV B). Although these rules were not yet specifically called “uniform rules,” the

effect of uniform rules was achieved by this parallel action of the first three Tribunals in adopting the same rules. As Military Tribunal III stated in a note on the cover sheet of the rules it adopted on 19 February 1947:

“The following Rules are in substance the same as those promulgated by Tribunal I. For convenience of Court and Counsel the rules adopted by Tribunal I on 2 November 1946, 9 December 1946, 9 January 1947, and 10 February 1947 have been codified and are renumbered herein as rules 1 to 25 inclusive.”

The next two amendments in the rules of procedure of the Nuernberg Military Tribunals were accomplished by executive sessions of the members and alternate judges of all the Tribunals constituted at the time in question. On 25 March 1947, Rule 26—a new rule—was adopted at an executive session of all the members and alternate members, 12 judges in all, of Military Tribunals I, II, and III. The minutes of the executive session record that the meeting adopted an “amendment to the Rules of Procedure of the Military Tribunals,” thus further treating the rules of procedure as uniform rules of common practice in all the trials. The minutes of this executive meeting are reproduced in subsection C. A few days later, on 1 April 1947, the Secretary General of the Tribunals issued a mimeographed compilation of Rules 1 to 26 inclusive, entitled “Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 1 April 1947.” This is, so far as is known, the first use of the words “uniform rules” in the official papers of the Nuernberg trials apart from their use in Article XIV (c) of Ordinance No. 7.

The next amendment to the uniform rules of procedure was a revision of Rule 23 on 3 June 1947. It was accomplished at an executive session of four military tribunals, Tribunal IV having been established in the meantime and assigned the trial of the Flick case (Case 5). Altogether, 11 members and four alternate members of the four tribunals participated in the executive session which adopted this amendment. Judge Marshall of Tribunal III was absent due to illness. The minutes of this executive meeting are reproduced in subsection D. On this same date the Secretary General issued and circulated a second mimeographed edition of the uniform rules of procedure, entitled “Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 3 June 1947.”

The last two changes in the uniform rules of procedure were accomplished by action of the Committee of Presiding Judges. Rule 10 was amended on 2 December 1947. The relevant extract from the Minutes of the Conference of Presiding Judges on that

date is reproduced in subsection E. At that time there were seven military tribunals engaged in as many cases, which were at various stages of trial. The seven Military Tribunals and the cases then being tried are shown by the following table:

<i>Military Tribunal</i>	<i>Popular Name of Case</i>	<i>Case No.</i>
III	Justice	3
IV	Flick	5
VI	Farben	6
V	Hostage	7
I	RuSHA	8
II	Einsatzgruppen	9
III A	Krupp	10

Rule 23 was revised on 8 January 1948 by the Committee of Presiding Judges. The relevant extract from the minutes of the Conference of Presiding Judges is reproduced in subsection F. Since the last previous amendment to the uniform rules, judgments had been rendered in the Justice and Flick cases, and tribunals had been assigned to try the two last cases heard in Nuernberg, the Ministries and High Command cases (Case 11 and Case 12 respectively). Hence seven Tribunals were again represented on the Committee of Presiding Judges which effected the last change in the uniform rules of procedure. The third and last edition of the uniform rules was then published and circulated by the Secretary under the title "Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 8 January 1948." This last edition of the uniform rules is reproduced in section V. On 5 February 1948 the Committee of Presiding Judges adopted by order the uniform rules as revised to 8 January 1948, and recommended that the several tribunals likewise adopt and approve them. This order is reproduced in subsec. G. Between 6 February and 10 February 1948, each of the seven Tribunals adopted these uniform rules subsec. H.

Materials in this section have been grouped to show the history of the general rules of procedure developed by concerted action of the Tribunals. Materials in a number of the later sections will deal with the application and further development of many of these general rules in the day-to-day practice before the individual tribunals.

B. Adoption of Codified Rules of Procedure by Military Tribunals I, II, and III, 18-24 February 1947

I. INTRODUCTION

The "Rules of Procedure for Military Tribunal I," as codified, numbered into 25 separate rules, and adopted on 18 February

1947, are reproduced in section III F. On the next day, 19 February 1947, Military Tribunal III adopted the same 25 rules of procedure as "Rules of Procedure for Military Tribunal I" (2 below). Several days later, on 24 February 1947, Military Tribunal II followed the example of Military Tribunal III in adopting these same 25 rules of procedure.

2. RULES OF PROCEDURE FOR MILITARY TRIBUNAL III, 19 FEBRUARY 1947

MILITARY GOVERNMENT FOR GERMANY (US)* MILITARY TRIBUNAL III

[Stamp] Filed: 19 February 1947

United States of America

vs.

Josef Altstoetter, *et al.*,

Defendants

} *RULES OF PROCEDURE*

Note—The following Rules are in substance the same as those promulgated by Tribunal I. For convenience of Court and Counsel the rules adopted by Tribunal I on 2 November 1946, 9 December 1946, 9 January 1947, and 10 February 1947 have been codified and are renumbered herein as rules 1 to 25 inclusive.

RULES OF PROCEDURE FOR MILITARY TRIBUNAL III

[Here follows the text of rules 1 to 25 inclusive, which is identical with the text of the Rules of Procedure for Military Tribunal I, as codified on 18 February 1947 and as reproduced in section III F]

[Signed] CARRINGTON T. MARSHALL
Presiding Judge

[Signed] JAMES T. BRAND
Judge

[Signed] MALLORY B. BLAIR
Judge

[Signed] JUSTIN W. HARDING
Alternate Judge

ATTEST: [Signed] CHARLES E. SANDS
Secretary General for
Military Tribunals

*Official Record, Tribunal Records, volume 4, pages 18-28.

C. Adoption of Rule 26 by Executive Session of Military Tribunals I, II, and III, 25 March 1947, Concerning "Defense Counsel: Representing Multiple Defendants; Maximum Compensation"

*MINUTES OF EXECUTIVE MEETING OF MILITARY TRIBUNALS I, II, and III
PALACE OF JUSTICE, NUERNBERG, GERMANY*
25 MARCH 1947*

Present: Judge Walter B. Beals
Judge Harold L. Sebring
Judge Johnson T. Crawford
Judge Victor C. Swearingen
Judge Robert M. Toms
Judge Fitzroy D. Phillips
Judge Michael A. Musmanno
Judge John J. Speight
Judge Carrington T. Marshall
Judge James T. Brand
Judge Mallory B. Blair
Judge Justin W. Harding

Presiding: Judge Walter B. Beals

Secretary of the Meeting: Judge Robert M. Toms

It was moved, supported, and unanimously adopted that the following amendment to the Rules of Procedure of the Military Tribunals be declared effective as of 25 March 1947:

"26. Defense Counsel: Representing Multiple Defendants; Maximum Compensation

At no time shall defense counsel represent defendants, who have pleaded to the indictments, in more than two cases which are being tried concurrently in separate tribunals. It is permissible, however, for one counsel to represent two or more defendants in the same case.

No adjournment or delay shall be granted any defendant upon the ground that his counsel is engaged in the trial of another cause before a separate tribunal.

In no event shall a defense attorney receive as compensation for his services in one or more cases an amount in excess of seven thousand (7,000) reichsmarks per month."

[Signed] **ROBERT M. TOMS**
Secretary of the Meeting

*Official Record, Tribunal Records, volume 1, page 96.
Rule 26 and the 25 rules previously adopted by Military Tribunals I, II and III in February 1947 (secs. III F and IV B) were published in mimeographed form by the Secretary General on 1 April 1947 as "Uniform Rules of Procedure, Military Tribunals, Nuernberg, revised to 1 April 1947."

**D. Amendment of Rule 23 by Executive Session of
Military Tribunals I, II, III, and IV, 3 June 1947,
Concerning "Interviewing of Defense Witnesses"**

*MINUTES OF EXECUTIVE MEETING OF MILITARY
TRIBUNALS I, II, III, AND IV
PALACE OF JUSTICE, NUERNBERG, GERMANY**
3 JUNE 1947

Present: Judge Walter B. Beals
Judge Harold L. Sebring
Judge Johnson T. Crawford
Judge Victor C. Swearingen
Judge Robert M. Toms
Judge Fitzroy D. Phillips
Judge Michael A. Musmanno
Judge John J. Speight
Judge James T. Brand
Judge Mallory B. Blair
Judge Justin W. Harding
Judge Charles B. Sears
Judge Frank N. Richman
Judge William C. Christianson
Judge Richard D. Dixon

Absent: Judge Carrington T. Marshall

Presiding: Judge Walter B. Beals

Secretary of the Meeting: Judge Robert M. Toms

It was moved, supported, and adopted that Rule 23 of the Uniform Rules of Procedure of the Military Tribunals as Revised to 1 April 1947 be amended to read as follows:

"Rule 23. Interviewing of Defense Witnesses

In all cases where persons are detained in the Nuernberg jail either as witnesses or prospective witnesses for the defense, and counsel for the prosecution or the defense wish to interview or interrogate such witnesses, the following procedure shall be followed:

(1) Counsel desiring such interview or interrogation shall give at least forty-eight (48) hours' notice in writing to the opposite counsel, stating the title of the case, the name of the witness and the date and hour of the proposed interview or interrogation.

*Official Record, Tribunal Records, volume 1, pages 98 and 99.

(2) In case the prosecution wishes to interview or interrogate such witness, counsel for the defendant or defendants involved shall have the right to be present. In case a defense counsel wishes to interview or interrogate such a witness, a representative of the prosecution shall be entitled to be present.

(3) Defense Information Center shall have the right to make rules or regulations not inconsistent herewith for the purpose of facilitating the operation of this rule. Written copies of such rules or regulations shall be served on the prosecution and posted in Defense Information Center.

(4) Any provisions of Rule 23 which are inconsistent with this amendment are hereby repealed, including all provisions therein concerning commissioners.

(5) This amendment shall be effective on and after the 3d day of June 1947."

Judge Beals, presiding, declared the motion carried by a vote of 10 to 2.

[Signed] ROBERT M. TOMS
Secretary of the Meeting

E. Amendment of Rule 10 by Committee of Presiding Judges of Military Tribunals I, II, III, III-A, IV, V, and VI, 2 December 1947, concerning "Motions and Applications (except for Witnesses and Documents)"

**OFFICE OF MILITARY GOVERNMENT (U.S.)*
SECRETARIAT FOR MILITARY TRIBUNALS**

No. 2

Palace of Justice
Nuernberg

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES

2 December 1947

1635

Judge Curtis G. Shake, Executive Presiding

[Tribunal VI]

Members of the Committee Present:

Judge Charles B. Sears, Tribunal IV

Judge Hu Anderson, Tribunal III-A

Judge Michael A. Musmanno, Tribunal II

Judge Lee B. Wyatt, Tribunal I

Judge James T. Brand, Tribunal III

Judge Edward F. Carter, Tribunal V (sitting for Judge
Wennerstrum)

Colonel John E. Ray, Secretary General

*Official Record, Tribunal Records, volume 5, pages 136 and 136a.

1. *Revision of Rule 10:*

It was agreed that Rule 10 of the Uniform Rules of Procedure, Military Tribunals, Nuernberg, be revised to read as follows:

"Rule 10. Motions and Applications (except for witnesses and documents)

(a) All motions, applications (except applications for witnesses and documents) and other requests addressed to the Tribunal shall be filed with the Secretary General of Military Tribunals, at the Palace of Justice, Nuernberg, Germany.

(b) When any such motion, application, or other request is filed by the prosecution there shall be filed therewith five copies in English and two copies in German; when filed by the defense there shall be filed therewith one copy in German to which shall be added by the Secretary General eight copies in English.

(c) The Secretary General shall deliver a translated copy of such motion, application, or other request to the adverse party and note the fact of delivery, specifying the date, hour, and place, upon the original. The adverse party shall have 72 hours after delivery to file with the Secretary General his objections to the granting of such motion, application, or other request. If no objection is filed, the presiding judge of the Tribunal will make the appropriate order on behalf of the Tribunal. If objections are filed, the Tribunal will consider the objections and determine the questions raised.

(d) Delivery of a copy of any such motion, application, or other request to counsel of record for the adverse party shall constitute delivery to such adverse party."

* * * * *

The meeting adjourned at 1720.

[Signed] JOHN E. RAY
Colonel FA
Secretary General

Betty M. Low
Recorder

F. Amendment of Rule 23 by Committee of Presiding Judges of Military Tribunals I, II, III, IV, V, V-A, and VI, 8 January 1948, Concerning "Interviewing of Witnesses"

OFFICE OF MILITARY GOVERNMENT (U.S.)*
SECRETARIAT FOR MILITARY TRIBUNALS

Office of the Secretary General

No. 4

Palace of Justice
Nuernberg

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES
8 January 1948 1635

Judge Curtis G. Shake, Executive Presiding [Tribunal VI]

Members of the Committee Present:

Judge Lee B. Wyatt, Tribunal I

Judge Michael A. Musmanno, Tribunal II

Judge Hu C. Anderson, Tribunal III

Judge William C. Christianson, Tribunal IV

Judge Charles F. Wennerstrum, Tribunal V

Judge Justin W. Harding, Tribunal V-A (sitting for
Judge Young)

Colonel John E. Ray, Secretary General

* * * * *

2. *Interviewing of Prisoners:*

Colonel Ray read a revision of Rule 23 of the Rules of Procedure. Rule 23 was revised to read as follows:

"Rule 23. Interviewing of Witnesses

"In all cases where persons are detained in the Nuernberg jail either as witnesses or prospective witnesses, and counsel for the prosecution or the defense wish to interview or interrogate such witnesses, the following procedure shall be followed:

(1) Counsel desiring such interview or interrogation shall give at least forty-eight (48) hours' notice in writing to the opposite side, stating the title of the case, the name of the witness, and the date and hour of the proposed interview or interrogation, and no more. The proposed interview shall not involve compensation for overtime. Prosecution shall give notice by filing such notice with the Defense Center. Defense counsel shall file such notice with Defense Center which shall give notice to the division of the prosecution concerned.

**Ibid.*, pages 138, 139.

(2) In case the prosecution wishes to interview or interrogate such witness, counsel for the defendant or defendants involved shall have the right to be present. In case a defense counsel wishes to interview or interrogate such a witness, a representative of the prosecution shall be entitled to be present, but if the prosecution does not elect to be present at the time requested then the defense counsel may interview the witness without the presence of a representative of the prosecution.

(3) Defense Information Center shall have the right to make rules or regulations not inconsistent herewith for the purpose of facilitating the operation of this rule. Written copies of such rules or regulations shall be served on the prosecution and posted in Defense Information Center.

(4) Original Rule 23 and Rule 23 as amended on 3 June 1947 are superseded hereby.

(5) This Rule shall be effective on and after the 14th day of January 1948."

* * * * *

[Signed] JOHN E. RAY
Colonel FA
Secretary General

Betty M. Low
Recorder
Meeting adjourned at 1725

G. Order of Committee of Presiding Judges, 5 February 1948, Adopting "Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 8 January 1948" and Recommending Adoption by Seven Tribunals Currently Sitting in Trials

**UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY**

AT A SESSION HELD 5 FEBRUARY 1948, IN CHAMBERS
In the Matter of the Adoption of Uniform Rules of Practice and Procedure for the United States Military Tribunals

ORDER*

By virtue of authority granted by Article V (f) of Military Government Ordinance No. 7, the Committee of Presiding Judges of the United States Military Tribunals (Nuernberg), hereby approves

*Official Record, Tribunal Records, volume 4, page 77.

and adopts the annexed and attached "Uniform Rules of Procedure, Military Tribunals, Nuernberg," dated 8 January 1948, which are made a part hereof by reference.¹

The Committee further recommends that said rules of practice and procedure be also approved and adopted by the several Tribunals presently constituting said United States Military Tribunals.²

[Signed] CURTIS G. SHAKE
Executive Presiding Judge

[Signed] LEE B. WYATT
Presiding Judge, Tribunal I

[Signed] M. A. MUSMANN
Presiding Judge, Tribunal II

[Signed] HU C. ANDERSON
Presiding Judge, Tribunal III

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV

[Signed] CHARLES F. WENNERSTRUM
Presiding Judge, Tribunal V

[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V-A

H. Adoption by Last Seven Military Tribunals Sitting in Nuernberg of "Uniform Rules of Procedure, Military Tribunals, Revised to 8 January 1948"

I. INTRODUCTION

When on 5 February 1948 the Committee of Presiding Judges made its order recommending that the several Tribunals approve and adopt the Uniform Rules of Procedure as revised to 8 January 1948 (sec. IV G), there were seven Tribunals assigned to try the last seven war crimes cases held in Nuernberg. Within 1 week these Tribunals issued orders approving and adopting the uniform rules as recommended. The first Tribunal to act was Military Tri-

¹ Since these uniform rules were the last revision of the uniform rules published in Nuernberg, and were adopted by each of the seven last Tribunals sitting in Nuernberg war crimes trials, they are reproduced separately in section V.

² This order followed a decision taken by the Committee of Presiding Judges at a session on 4 February 1948. Concerning this matter the minutes of this meeting state: "3. Adoption of Rules of Procedure: It was moved by Judge Anderson, seconded by Judge Wyatt, and unanimously adopted, that the Committee of Presiding Judges ratify and approve the Rules of Procedure and Practice for the Tribunals distributed by the Secretary General's Office on 8 January 1948; and that the committee recommend to the members of the several Tribunals that said rules be likewise approved and adopted by the seven Tribunals currently sitting and the members thereof."

bunal VI, then engaged in the trial of the I.G. Farben case. The order of Tribunal VI, dated 6 February 1948, is reproduced immediately below. The remaining six Tribunals, using substantially the same language as Tribunal VI, approved and adopted these revised uniform rules as indicated in the following table:

<i>Military Tribunal</i>	<i>Case No.</i>	<i>Popular Name of Case</i>	<i>Date of Order Approving and Adopting</i>
V	7	Southeast or Hostage	8 February 1948
IV	11	Ministries	8 February 1948
I	8	RuSHA	9 February 1948
V-A	12	High Command	9 February 1948
II	9	Einsatzgruppen	10 February 1948
III	10	Krupp	10 February 1948

2. ORDER OF MILITARY TRIBUNAL VI IN THE I. G. FARBEN CASE, 6 FEBRUARY 1948, APPROVING AND ADOPTING THE UNIFORM RULES OF PROCEDURE AS REVISED TO 8 JANUARY 1948

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY
6 FEBRUARY 1948

United States of America

vs.

Carl Krauch, *et al.*,

Defendants

} *CASE 6*

*ORDER*¹

United States Military Tribunal VI and the judges constituting said Tribunal, pursuant to Military Government Ordinance No. 7, Article V (*f*), hereby approves and adopts the attached "Uniform Rules of Procedure, Military Tribunals, Nuernberg," dated 8 January 1948, which said rules of practice and procedure are made a part of this order by reference.²

[Signed] CURTIS G. SHAKE
Presiding Judge

[Signed] JAMES MORRIS
Judge

[Signed] PAUL M. HEBERT
Judge

[Signed] CLARENCE F. MERRELL
Alternate Judge

Dated this 6th day of February 1948.

¹ Official Record, Tribunal Records, volume 4, page 78.

² The rules of procedure here referred to are reproduced in full in section V.

V. UNIFORM RULES OF PROCEDURE, MILITARY TRIBUNALS, NUERNBERG, REVISED TO 8 JANUARY 1948¹

OFFICE OF MILITARY GOVERNMENT (US)

Uniform Rules of Procedure
Military Tribunals
Nuernberg

Revised to 8 January 1948²

[Stamp] Filed: 22 January 1948

RULES OF PROCEDURE FOR MILITARY TRIBUNAL

Rule 1. Authority to Promulgate Rules

The present Rules of Procedure of the Military Tribunal constituted by General Order No. 68 of the Office of Military Government for Germany (US) hereinafter called "Military Tribunal _____" or "the Tribunal" are hereby promulgated by the Tribunal in accordance with the provision of Article V (f) of Military Government Ordinance No. 7 issued pursuant to the powers conferred by Control Council Law No. 10.

Rule 2. Languages in which Pleadings, Documents, and Rules Shall be Transcribed

When any rule of procedure adopted by Military Tribunal _____ directs or requires that a defendant in any position before the Tribunal shall be furnished with a copy of any pleading, document, rule, or other instrument in writing, such rule shall be understood to mean that such defendant shall receive a true and correct copy of such pleading, document, rule, or other instrument, written in the English language, and also a written translation thereof in a language which the defendant understands.

Rule 3. Notice to Defendants

(a) The Marshal of Military Tribunals, or his duly authorized deputy, shall make service of the indictment upon a defendant in any prosecution before the Tribunal by delivering to and leaving

¹ Official Record, Tribunal Records, volume 4, pages 66-76.

² On three different occasions the Secretary General of the Military Tribunals published and circulated, in mimeographed form, "Uniform Rules of Procedure" (see sec. IV A). The first edition, entitled "Uniform Rules of Procedure, Military Tribunals, Nuernberg, revised to 1 April 1947" was identical in text with the "Rules of Procedure for Military Tribunal I," as codified on 18 February 1947 (sec. III F), except that it likewise included Rule 26 (sec. IV C). The second edition, entitled "Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised 3 June 1947," was the same as the first edition except that it incorporated Rule 23 as revised by an executive session of Military Tribunals I, II, III, and IV on 3 June 1947 (sec. IV D). The third edition, reproduced here, was the same as the second edition, except that it incorporated a revision of Rule 10 and a further revision of Rule 23 which meanwhile had been adopted by the Committee of Presiding Judges (see secs. IV E and IV F respectively).

with him, (1) a true and correct copy of the indictment and of all documents lodged with the indictment, (2) a copy of Military Government Ordinance No. 7, (3) a copy of Control Council Law No. 10, and (4) a copy of these Rules of Procedure.

(b) When such service has been made as aforesaid, the Marshal shall make a written certificate of such fact, showing the day and place of service, and shall file the same with the Secretary General of Military Tribunals.

(c) The certificate, when filed with the Secretary General, shall constitute a part of the record of the cause.

Rule 4. Time Intervening between Service and Trial

A period of not less than thirty days shall intervene between the service of the indictment upon a defendant and the day of his trial pursuant to the indictment.

Rule 5. Notice of Amendments or Additions to Original Indictment

(a) If before the trial of any defendant the Chief of Counsel for War Crimes offers amendments or additions to the indictment, such amendments or additions, including any accompanying documents, shall be filed with the Secretary General of Military Tribunals and served upon such defendant in like manner as the original indictment.

Rule 6. Defendant to Receive Certain Additional Documents on Request

(a) A defendant shall receive a copy of such Rules of Procedure or amendments thereto as may be adopted by the Tribunal from time to time.

(b) Upon written application by a defendant or his counsel, lodged with the Secretary General for a copy of (1) the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, or (2) the judgment of the International Military Tribunal of 30 September and 1 October 1946, the same shall be furnished to such defendant, without delay.

Rule 7. Right to Representation by Counsel

(a) A defendant shall have the right to conduct his own defense, or to be represented by counsel of his own selection, provided such counsel is a person qualified under existing regulations to conduct cases before the courts of defendant's country, or is specially authorized by the Tribunal.

(b) Application for particular counsel shall be filed with the

Secretary General promptly after service of the indictment upon the defendant.

(c) The Tribunal will designate counsel for any defendant who fails to apply for particular counsel, unless the defendant elects in writing to conduct his own defense.

(d) Where particular counsel is requested by a defendant but is not available or cannot be found within ten days after application therefor has been filed with the Secretary General, the Tribunal will designate counsel for such defendant, unless the defendant elects in writing to conduct his own defense. If thereafter, before trial, such particular counsel is found and is available, or if in the meanwhile a defendant selects a substitute counsel who is found to be available, such particular counsel, or substitute, may be associated with or substituted for counsel designated by the Tribunal; provided that (1) only one counsel shall be permitted to appear at the trial for any defendant, except by special permission of the Tribunal, and (2) no delay will be allowed for making such substitution or association.

Rule 8. Order at the Trial

In conformity with and pursuant to the provisions of Articles IV and VI of Military Government Ordinance No. 7, the Tribunal will provide for maintenance of order at the trial.

Rule 9. Oath; Witnesses

(a) Before testifying before the Tribunal each witness shall take such oath or affirmation or make such declaration as is customary and lawful in his own country.

(b) When not testifying, the witness shall be excluded from the courtroom. During the course of any trial, witnesses shall not confer among themselves before or after testifying.

Rule 10. Motions and Applications (except for witnesses and documents)

(a) All motions, applications (except applications for witnesses and documents), and other requests addressed to the Tribunal shall be filed with the Secretary General of Military Tribunals, at the Palace of Justice, Nuernberg, Germany.

(b) When any such motion, application or other request is filed by the prosecution there shall be filed therewith five copies in English and two copies in German; when filed by the defense there shall be filed therewith one copy in German to which shall be added by the Secretary General eight copies in English.

(c) The Secretary General shall deliver a translated copy of such motion, application or other request to the adverse party and

note the fact of delivery, specifying the date, hour and place, upon the original. The adverse party shall have 72 hours after delivery to file with the Secretary General his objections to the granting of such motion, application or other request. If no objection is filed, the Presiding Judge of the Tribunal will make the appropriate order on behalf of the Tribunal. If objections are filed, the Tribunal will consider the objections and determine the questions raised.

(d) Delivery of a copy of any such motion, application or other request to counsel of record for the adverse party shall constitute delivery to such adverse party.

Rule 11. Rulings during the Trial

The Tribunal will rule upon all questions arising during the course of the trial. If such course is deemed expedient, the Tribunal will order the clearing or closing of the courtroom while considering such questions.

Rule 12. Production of Evidence for a Defendant

(a) A defendant may apply to the Tribunal for the production of witnesses or of documents on his behalf, by filing his application therefor with the Secretary General of Military Tribunals. Such application shall state where the witness or document is thought to be located, together with the last known location thereof. Such application shall also state the general nature of the evidence sought to be adduced thereby, and the reason such evidence is deemed relevant to the defendant's case.

(b) The Secretary General shall promptly submit any such application to the Tribunal, and the Tribunal will determine whether or not the application shall be granted.

(c) If the application is granted by the Tribunal, the Secretary General shall promptly issue a summons for the attendance of such witness or the production of such documents, and inform the Tribunal of the action taken. Such summons shall be served in such manner as may be provided by the appropriate occupation authorities to insure its enforcement, and the Secretary General shall inform the Tribunal of the steps taken.

(d) If the witness or the document is not within the area controlled by the United States Office of Military Government for Germany, the Tribunal will 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.

Rule 13. Records, Exhibits, and Documents

(a) An accurate stenographic record of all oral proceedings shall be maintained. Exhibits shall be suitably identified and marked as the Tribunal may direct. All exhibits and transcripts of the proceedings, and such other material as the Tribunal may direct, shall be filed with the Secretary General and shall constitute a part of the record of the cause.

(b) Documentary evidence or exhibits may be received in the language of the document, but a translation thereof into a language understood by the adverse party shall be furnished to such party.

(c) Upon proper request, and approval by the Tribunal, copies of all exhibits and transcripts of proceedings, and such other matter as the Tribunal may direct to be filed with the Secretary General, and all official acts and documents of the Tribunal, may be certified by said Secretary General to any government, to any other tribunal, or to any agency or person as to whom it is appropriate that copies of such documents or representations as to such acts be supplied.

Rule 14. Withdrawal of Exhibits and Documents, and Substitution of Photostatic Copies Therefor

If it be made to appear to the Tribunal by written application that one of the government signatories to the Four Power Agreement of 8 August 1945, or any other government having received the consent of the said four Signatory Powers, desires to withdraw from the records of any cause, and preserve, any original document on file with the Tribunal, and that no substantial injury will result thereby, the Tribunal may order any such original document to be delivered to the applicant, and a photostatic copy thereof, certified by the Secretary General, to be substituted in the record therefor.

Rule 15. Opening Statement for Prosecution

The prosecution may be allowed, for the purpose of making the opening statement, time not to exceed one trial day. The Chief Prosecutor may allocate this time between himself and any of his assistants as he may wish.

Rule 16. Opening Statement for Defense

When the prosecution rests its case, defense counsel will be allotted two trial days within which to make their opening statement which will comprehend the entire theory of their respective defenses. The time allotted will be divided between defense counsel as they may themselves agree. In the event that defense counsel

cannot agree, the Tribunal will allot the time not to exceed 30 minutes to each defendant.

Rule 17. Prosecution to File Copies of Exhibits—Time for Filing

The prosecution, not less than 24 hours before it desires to offer any record, document, or other writing in evidence as part of its case in chief, shall file with the Defendants' Information Center not less than one copy of each record, document, or writing for each of the counsel for defendants, such copy to be in the German language. The prosecution shall also deliver to Defendants' Information Center at least four copies thereof in the English language.

Rule 18. Copies of all Exhibits to be Filed With Secretary General

When the prosecution or any defendant offers a record, document, or other writing or a copy thereof in evidence, there shall be delivered to the Secretary General, in addition to the original of the document or other instrument in writing so offered for admission in evidence, six copies of the document. If the document is written or printed in a language other than the English language, there shall also be filed with the copies of the document above referred to, six copies of an English translation of the document. If such document is offered by any defendant, suitable facilities for procuring English translations of that document shall be made available to the defendant.

Rule 19. Notice to Secretary General Concerning Witnesses

At least 24 hours before a witness is called to the stand either by the prosecution or by any defendant, the party who desires the testimony of the witness shall deliver to the Secretary General an original and six copies of a memorandum which shall disclose: (a) the name of the witness; (b) his nationality; (c) his residence or station; (d) his official rank or position; (e) whether he is called as an expert witness or as witness to testify to the facts, and if the latter, a brief statement of the subject matter concerning which the witness will be interrogated. When the prosecution prepares such a statement in connection with a witness whom it desires to call, at the time of the filing of the foregoing statement two additional copies thereof shall be delivered to the Defendants' Information Center. When a defendant prepares the foregoing statement concerning a witness whom he desires to call, the defendant shall, at the same time the copies are filed with the Secretary General, deliver one additional copy to the prosecution.

Rule 20. Judicial Notice

When either the prosecution or a defendant desires the Tribunal to take judicial notice of any official government document or

report to the United Nations, including any act, ruling, or regulation of any committee, board, or council heretofore established by or in the Allied nations for the investigation of war crimes, or any record made by, or finding of, any military or other Tribunal of any of the United Nations, this Tribunal may refuse to take judicial notice of such document, rule, or regulation unless the party proposing to ask this Tribunal to judicially notice such a document, rule, or regulation, places a copy thereof in writing before the Tribunal.

Rule 21. Procedure for Obtaining Written Statements

Statements of witnesses made "in lieu of an oath" may be admitted in evidence if otherwise competent and admissible and containing statements having probative value if the following conditions are met:

(1) The witness shall have signed the statement before defense counsel, or one of them, and defense counsel shall have certified thereof; or

(2) The witness shall have signed the statement before a notary, and the notary shall have certified thereto; or

(3) The witness shall have signed the statement before a buergermeister, and the buergermeister shall have certified thereto, in case neither defense counsel nor a notary is readily available without great inconvenience; or

(4) The witness shall have signed the statement before a competent prison camp authority, and such authority shall have certified thereto in case the witness is incarcerated in a prison camp.

(5) The statement "in lieu of an oath" shall contain a preamble which shall state, "I, (name and address of the witness) after having first been warned that I will be liable for punishment for making a false statement in lieu of an oath, state and declare that my statement is true in lieu of an oath, and that my statement is made for submission as evidence before Military Tribunal _____, Palace of Justice, Nuernberg, Germany, the following:"

(6) The signature of the witness shall be followed by a certificate stating: "The above signature of (stating the name and address of the witness) identified by (state the name of the identifying person or officer) is hereby certified and witnessed by me. (To be followed by the date and place of the execution of the statement and the signature and witness of the person or officer certifying the same.)"

Rule 22. Special Circumstances

If special circumstances make compliance with any one of the above conditions impossible or unduly burdensome, then defense

counsel may make application to the Tribunal for a special order providing for the taking of the statement of desired witness concerning conditions to be complied with in that specific instance.

Rule 23. Interviewing of Witnesses

In all cases where persons are detained in the Nuernberg jail either as witnesses or prospective witnesses, and counsel for the prosecution or the defense wish to interview or interrogate such witnesses, the following procedure shall be followed:

(1) Counsel desiring such interview or interrogation shall give at least 48 hours' notice in writing to the opposite side, stating the title of the case, the name of the witness, and the date and hour of the proposed interview or interrogation and no more. The proposed interview shall not involve compensation for overtime. Prosecution shall give notice by filing such notice with the Defense Center. Defense counsel shall file such notice with Defense Center which shall give notice to the division of the prosecution concerned.

(2) In case the prosecution wishes to interview or interrogate such witness, counsel for the defendant or defendants involved shall have the right to be present. In case a defense counsel wishes to interview or interrogate such a witness, a representative of the prosecution shall be entitled to be present, but if the prosecution does not elect to be present at the time requested then the defense counsel may interview the witness without the presence of a representative of the prosecution.

(3) Defense Information Center shall have the right to make rules or regulations not inconsistent herewith for the purpose of facilitating the operations of this rule. Written copies of such rules or regulations shall be served on the prosecution and posted in Defense Information Center.

(4) Original Rule 23 and Rule 23 as amended on 3 June 1947 are superseded hereby.

(5) This rule shall be effective on and after the 14th day of January 1948.

Rule 24. Effective Date and Powers of Amendment and Addition

These Rules shall take effect upon their approval by the Tribunal. Nothing herein contained shall be construed to prevent the Tribunal at any time in the interest of fair and expeditious procedure, from departing from, amending or adding to these rules, either by general rules or special orders for particular cases, in such form and on such notice as the Tribunal may prescribe.

Rule 25.

It is ordered that the foregoing rules be entered in the journal

of this Tribunal and that mimeographed copies be prepared sufficient in number for the use of the Tribunal and counsel.

Rule 26. Defense Counsel: Representing Multiple Defendants; Maximum Compensation

At no time shall defense counsel represent defendants, who have pleaded to the indictments, in more than two cases which are being tried concurrently in separate Tribunals. It is permissible, however, for the counsel to represent two or more defendants in the same case.

No adjournment or delay shall be granted any defendant upon the ground that his counsel is engaged in the trial of another case before a separate Tribunal.

In no event shall a defense attorney receive as compensation for his services in one or more cases an amount in excess of 7,000 reichsmarks per month.

VI. SUMMARY STATEMENTS FROM THE JUDGMENTS OF THE TRIBUNALS, OR FROM CONCURRING OR DISSENTING OPINIONS ON PROCEDURE, PRACTICE, AND EVIDENCE

A. Introduction

This section begins with a number of paragraphs from the early part of the judgment of the International Military Tribunal concerning procedure, practice, and evidence in the IMT Trial (subsec. B). A further statement of the International Military Tribunal concerning the nature of the IMT Trial, which was made at the opening of the case, is reproduced in section XIII J 3. The full text of the judgments in each of the 12 later trials before the Military Tribunals established pursuant to Ordinance No. 7 have been reproduced in the earlier volumes of this series which are devoted to the individual cases. Any concurring or dissenting opinions likewise have been reproduced in the earlier volumes. It is not the purpose of this section to reproduce once again any large part of these materials. However, most of the judgments contain summary statements on various general matters of procedure, practice, and evidence, and the collection of such material from the various cases at this point affords an easily used compendium which should make more understandable some of the detail reproduced in later sections of this volume.

These summary statements cover such matters as the length of the case in chief of the prosecution and the defense; the general nature and total volume of the evidence taken; and the principles applied with respect to the burden of proof and the presumption of innocence. In addition to statements from each of the final judgments, statements have been included from the concurring opinion by Judge Phillips in the Milch case (subsec. D 2); the Tribunal opinion and two concurring opinions in the Krupp case, concerning the dismissal of the aggressive war charges after the conclusion of the prosecution's case in chief, on the ground that the prosecution had not made out a *prima facie* case (subsecs. L 1, L 2, and L 3); the dissenting opinion of Judge Powers in the Ministries case (subsec. M 2); and the general order made by the Tribunal in the Ministries case, after judgment upon defense motions alleging errors of fact and law in the judgment (subsec. M 3).

In making these selections it has sometimes been difficult to draw the line between summary statements and relatively more lengthy statements, or between summary statements on general

practice and detailed statements on a special topic. In some instances statements reproduced here could perhaps as well have been reproduced in whole or in part in later sections and, conversely, some of the statements which have been reproduced in later sections could perhaps as well have been included in the present section.

B. IMT Case—Statement from the Judgment*

In Berlin, on 18 October 1945, in accordance with Article 14 of the Charter, an indictment was lodged against the defendants named in the caption, who had been designated by the Committee of the Chief Prosecutors of the Signatory Powers as major war criminals.

A copy of the indictment in the German language was served upon each defendant in custody, at least 30 days before the trial opened.

This indictment charges the defendants with crimes against peace by the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances; with war crimes; and with crimes against humanity. The defendants are also charged with participating in the formulation or execution of a common plan or conspiracy to commit all these crimes. The Tribunal was further asked by the prosecution to declare all the named groups or organizations to be criminal within the meaning of the Charter.

The defendant Robert Ley committed suicide in prison on 25 October 1945. On 15 November 1945 the Tribunal decided that the defendant Gustav Krupp von Bohlen und Halbach could not then be tried because of his physical and mental condition, but that the charges against him in the indictment should be retained for trial thereafter, if the physical and mental condition of the defendant should permit. On 17 November 1945 the Tribunal decided to try the defendant Bormann in his absence under the provisions of Article 12 of the Charter. After argument, and consideration of full medical reports, and a statement from the defendant himself, the Tribunal decided on 1 December 1945 that no grounds existed for a postponement of the trial against the defendant Hess because of his mental condition. A similar decision was made in the case of the defendant Streicher.

In accordance with Articles 16 and 23 of the Charter, counsel were either chosen by the defendants in custody themselves, or at their request were appointed by the Tribunal. In his absence the

*Trial of the Major War Criminals, *op. cit.*, volume I, pages 171-173.

Tribunal appointed counsel for the defendant Bormann, and also assigned counsel to represent the named groups or organizations.

The Trial, which was conducted in four languages — English, Russian, French, and German — began on 20 November 1945, and pleas of “Not Guilty” were made by all the defendants except Bormann.

The hearing of evidence and the speeches of counsel concluded on 31 August 1946.

Four hundred and three open sessions of the Tribunal have been held. Thirty-three witnesses gave evidence orally for the prosecution against the individual defendants, and 61 witnesses, in addition to 19 of the defendants, gave evidence for the defense.

A further 143 witnesses gave evidence for the defense by means of written answers to interrogatories.

The Tribunal appointed commissioners to hear evidence relating to the organizations, and 101 witnesses were heard for the defense before the commissioners, and 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits.

Thirty-eight thousand affidavits, signed by 155,000 people, were submitted on behalf of the Political Leaders, 136,213 on behalf of the SS, 10,000 on behalf of the SA, 7,000 on behalf of the SD, 3,000 on behalf of the General Staff and OKW, and 2,000 on behalf of the Gestapo.

The Tribunal itself heard 22 witnesses for the organizations. The documents tendered in evidence for the prosecution of the individual defendants and the organizations numbered several thousands. A complete stenographic record of everything said in court has been made, as well as an electrical recording of all the proceedings.

Copies of all the documents put in evidence by the prosecution have been supplied to the defense in the German language. The applications made by the defendants for the production of witnesses and documents raised serious problems in some instances, on account of the unsettled state of the country. It was also necessary to limit the number of witnesses to be called, in order to have an expeditious hearing, in accordance with Article 18 (c) of the Charter. The Tribunal, after examination, granted all those applications which in its opinion were relevant to the defense of any defendant or named group or organization, and were not cumulative. Facilities were provided for obtaining those witnesses and documents granted through the office of the General Secretary established by the Tribunal.

Much of the evidence presented to the Tribunal on behalf of the prosecution was documentary evidence, captured by the Allied

armies in German army headquarters, government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls, and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.

C. Medical Case—Statements from the Judgment*

PRESIDING JUDGE BEALS: The presentation of evidence to sustain the charges contained in the indictment was begun by the prosecution on 9 December 1946. At the conclusion of the prosecution's case in chief the defendants began the presentation of their evidence. All evidence in the case was concluded on 3 July 1947. During the week beginning 14 July 1947 the Tribunal heard arguments by counsel for the prosecution and defense. The personal statements of the defendants were heard on 19 July 1947 on which date the case was finally concluded.

The trial was conducted in two languages — English and German. It consumed 139 trial days, including 6 days allocated for final arguments and the personal statements of the defendants. During the 133 trial days used for the presentation of evidence 32 witnesses gave oral evidence for the prosecution and 53 witnesses, including the 23 defendants, gave oral evidence for the defense. In addition, the prosecution put in evidence as exhibits a total of 570 affidavits, reports, and documents; the defense put in a total number of 901 — making a grand total of 1,471 documents received in evidence.

Copies of all exhibits tendered by the prosecution in their case in chief were furnished in the German language to the defendants prior to the time of the reception of the exhibits in evidence.

Each defendant was represented at the arraignment and trial by counsel of his own selection.

Whenever possible, all applications by defense counsel for the procuring of the personal attendance of persons who made affidavits in behalf of the prosecution were granted and the persons brought to Nuernberg for interrogation or cross-examination by defense counsel. Throughout the trial great latitude in presenting evidence was allowed defense counsel, even to the point at times of receiving in evidence certain matters of but scant probative value.

*U.S. *vs.* Karl Brandt, *et al.*, Case 1, volume II, this series, pages 171 and 172, 183 and 184.

All of these steps were taken by the Tribunal in order to allow each defendant to present his defense completely, in accordance with the spirit and intent of Military Government Ordinance No. 7* which provides that a defendant shall have the right to be represented by counsel, to cross-examine prosecution witnesses, and to offer in the case all evidence deemed to have probative value.

The evidence has now been submitted, final arguments of counsel have been concluded, and the Tribunal has heard personal statements from each of the defendants. All that remains to be accomplished in the case is the rendition of judgment and the imposition of sentence.

* * * * *

JUDGE SEBRING: Whether any of the defendants in the dock are guilty of these atrocities is, of course, another question.

Under the Anglo-Saxon system of jurisprudence every defendant in a criminal case is presumed to be innocent of an offense charged until the prosecution, by competent, credible proof, has shown his guilt to the exclusion of every reasonable doubt. And this presumption abides with a defendant through each stage of his trial until such degree of proof has been adduced. A "reasonable doubt" as the name implies is one conformable to reason — a doubt which a reasonable man would entertain. Stated differently, it is that state of a case which, after a full and complete comparison and consideration of all the evidence, would leave an unbiased, unprejudiced, reflective person, charged with the responsibility for decision, in the state of mind that he could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge.

If any of the defendants are to be found guilty under counts two or three of the indictment it must be because the evidence has shown beyond a reasonable doubt that such defendant, without regard to nationality or the capacity in which he acted, participated as a principal in, accessory to, ordered, abetted, took a consenting part in, or was connected with plans or enterprises involving the commission of at least some of the medical experiments and other atrocities which are the subject matter of these counts. Under no other circumstances may he be convicted.

*Reproduced in section II C.

D. Milch Case—Statement from the Judgment and Statements from the Concurring Opinion of Judge Phillips

I. STATEMENT FROM THE JUDGMENT*

PRESIDING JUDGE TOMS: It must be constantly borne in mind that this is an American court of justice, applying the ancient and fundamental concepts of Anglo-Saxon jurisprudence which have sunk their roots into the English common law and have been stoutly defended in the United States since its birth. One of the principal purposes of these trials is to inculcate into the thinking of the German people an appreciation of, and respect for, the principles of law which have become the backbone of the democratic process. We must bend every effort toward suggesting to the people of every nation that laws must be used for the protection of people and that every citizen shall forever have the right to a fair hearing before an impartial tribunal, before which all men stand equal. We must never falter in maintaining, by practice as well as by preachment, the sanctity of what we have come to know as due process of law, civil and criminal, municipal and international. If the level of civilization is to be raised throughout the world, this must be the first step. Any other road leads but to tyranny and chaos. This Tribunal, before all others, must act in recognition of these self-evident principles. If it fails, its whole purpose is frustrated and this trial becomes a mockery. At the very foundation of these juridical concepts lie two important postulates (1) every person accused of crime is presumed to be innocent, and (2) that presumption abides with him until guilt has been established by proof beyond a reasonable doubt.

Unless the court which hears the proof is convinced of guilt to the point of moral certainty, the presumption of innocence must continue to protect the accused. If the facts as drawn from the evidence are equally consistent with guilt and innocence, they must be resolved on the side of innocence. Under American law neither life nor liberty is to be lightly taken away and, unless at the conclusion of the proof there is an abiding conviction of guilt in the mind of the court which sits in judgment, the accused may not be damnified.

Paying reverent attention to these sacred principles, it is the judgment of the Tribunal that the defendant is not guilty of the charges embraced in count two of the indictment.

*U. S. vs. Erhard Milch, *et al.*, Case 2, volume II, this series, pages 778 and 779.

2. STATEMENTS FROM THE CONCURRING OPINION OF JUDGE PHILLIPS*

The trial was conducted in two languages in the main, English and German, and in English, German, and French when French witnesses were testifying.

The hearing of evidence and the arguments of counsel concluded on 25 March 1947.

The prosecution offered three witnesses who gave evidence orally and 161 written exhibits, several exhibits containing many documents. The defense offered 27 witnesses who gave evidence orally and the defendant also testified in his own behalf, and in addition to oral evidence the defendant offered 51 written exhibits. The exhibits as offered by both the prosecution and defense contained documents, photographs, affidavits, interrogatories, letters, maps, charts, and other written evidence.

A complete stenographic record of everything said and done in court has been made as well as an electrical recording of all the proceedings.

Copies of all the documents and written evidence offered by the prosecution have been supplied to the defense in the German language. The applications made by the defendant for the production of witnesses and documents were passed upon by the Tribunal and orders made in pursuance thereof. The Tribunal, after examination, granted all of the defense applications which in their opinion were relevant to the defense of the defendant and denied a few that the Tribunal found not to be relevant. Facilities were provided for obtaining those witnesses and documents granted through the Office of the Secretary General of the Tribunal.

Much of the evidence presented to the Tribunal on behalf of the prosecution was documentary evidence captured by the Allied armies in German army headquarters, government buildings, and elsewhere, and some of said documents were captured in the private files of the defendant himself. The case therefore against the defendant rests in a large measure on the documents thus obtained. The documents offered against the defendant on the part of the prosecution were in a large measure of his own making or those that were made in the organizations of which he was a member and largely under his control, and the authenticity of which has not been challenged except in a few cases and in those he challenged them mainly on the correctness of the transcript and not upon the subject matter as a whole. The evidence, oral

**Ibid.*, pages 861, 862 and 877.

and written, together with exhibits and documents contain approximately 3,000 pages which constitutes the record in this case.

The trial was conducted generally along the lines as are usually followed in trial courts of the United States except as to the rules of evidence, and as to those the Tribunal was not bound by technical rules of evidence and admitted any and all evidence which it deemed to have probative value and in strict compliance with the provisions of Article VII of Ordinance No. 7.

The Tribunal has kept in mind throughout the entire trial that this was a Tribunal established for the purpose of trying major war criminals and in this particular case a fallen military field marshal of a conquered nation, and that he was entitled to the Anglo-Saxon and English common law presumption that he was innocent until his guilt was established beyond a reasonable doubt.

* * * * *

Under the American concept of liberty, as brought to us by our Anglo-Saxon heritage and the English Common Law, every person accused of crime is presumed to be innocent until proof of his guilt is established by the evidence and beyond a reasonable doubt. This presumption follows him throughout the trial and until he is found guilty beyond a reasonable doubt. In applying this God-given principle of liberty, one eminent American jurist uttered the following words:

“After considering and weighing all of the evidence you then find that your minds are disturbed, your convictions tempest-tossed, and your judgment, like the dove of the deluge, finds no place to rest; the law says you must acquit.”

The defendant was given the full benefit of these great and lasting rules of law and has received at the hands of the Tribunal a fair and impartial trial in full accord with the American concepts of justice under the law.

E. Justice Case—Statements from the Judgment*

PRESIDING JUDGE BRAND: The presentation of evidence in support of the charges was commenced on 6 March 1947 and was followed by evidence for the defendants. The taking of evidence was concluded on 13 October 1947. Copies of the exhibits tendered by the prosecution were furnished in the German language to the defendants prior to the time of the reception of the exhibits in evidence. The Tribunal has heard the oral testimony of 138 witnesses. In addition it has received 641 documentary exhibits

*U.S. vs. Josef Altstoetter, et al., Case 3, volume III, this series, pages 954, 955 and 984.

for the prosecution and 1,452 for defendants, many of them of considerable length. Some affidavits have been presented by the prosecution, but they are few in comparison with the hundreds offered by the defense.

Whenever possible, and in substantially all cases, applications of defense counsel for the production in open court of persons who had made affidavits in support of the prosecution have been granted and the affiants have appeared for cross-examination. Affiants for the defense were cross-examined orally by the prosecution in comparatively few cases.

The defendant Carl Westphal died before the commencement of the trial. On 22 August 1947, the Tribunal entered an order declaring a mistrial as to the defendant Karl Engert, who has been able to attend court for only two days since 5 March 1947. The action was rendered necessary under the provisions of Article IV (d) of Military Government Ordinance No. 7, and by reason of the serious and continuing illness of said defendant.

The trial was conducted in two languages with simultaneous translations of German into English and English into German throughout the proceedings.

* * * * *

The evidence has been submitted, final arguments of counsel have been concluded, and the Tribunal has heard a personal statement from each defendant who desired to address it.

In rendering this judgment it should be said that the case against the defendants is chiefly based upon captured German documents, the authenticity of which is unchallenged.

* * * * *

JUDGE BLAIR: Frank recognition of the following facts is essential. The jurisdictional enactments of the Control Council,¹ the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of the common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure.²

¹ Control Council Law No. 10, reproduced in section II B.

² The next following statements from the judgment concern the general nature of the charges of criminal conduct, and these statements are reproduced in section IX K, "Requirements as to the Contents of the Charges."

F. Pohl Case—Statements from the Judgment¹

JUDGE PHILLIPS: On 8 April 1947, the prosecution began its presentation of evidence. At the conclusion of the prosecution's case in chief the defendants began the presentation of their evidence. The submission of evidence and the arguments of counsel were concluded on 20 September 1947. The personal statements of all of the defendants were heard on 22 September 1947.

During the trial of the case, the Tribunal sat for 101 sessions (on 101 different dates, including date of arraignment; also, including one-half day joint session with all Tribunals *en banc*).²

During the trial the prosecution offered 21 witnesses, the Tribunal itself called one witness, and the defendants offered 45 witnesses, including the 18 defendants themselves, a total of 67 witnesses.

In addition, the prosecution put in evidence as exhibits, a total of 742 documents; the defendants put in evidence as exhibits a total of 614 documents, making a grand total of 1,356 documents received in evidence. The entire record of the case consists of more than 9,000 pages.

Copies of all exhibits offered in evidence by the prosecution in its case in chief were furnished in the German language to the defendants before the same were offered in evidence.

During the entire proceedings each defendant was present in Court, except when a defendant was absent for a short time upon his own motion, owing to illness or other reasons.

Counsel for the defendants made numerous applications to the Tribunal for the purpose of procuring the personal attendance of persons who had made affidavits on behalf of the prosecution. If at all possible, the Tribunal granted such applications and procured the personal attendance of such persons in order that they could be interrogated or cross-examined by defense counsel.

The 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. In compliance with the provisions of Article VII of Ordinance No. 7, great latitude in presenting evidence was allowed prosecution and defense counsel, even to the extent at times of receiving in evidence certain matters of but scant probative value.

The trial was conducted in English and German with an adequate sound system for conveying either language to all partici-

¹ U.S. vs. Oswald Pohl, *et al.*, Case 4, volume V, this series, pages 959, 960 and 965.

² See section XXIV, "Joint Sessions of the Military Tribunals."

pants and listeners. All proceedings on the trial were reduced to writing in English and German, and an electrical recording of all proceedings was also made.

The Tribunal was most diligent in its efforts to allow each defendant to present his defense completely, in accordance with the spirit and intent of Military Government Ordinance No. 7. Counsel for each defendant was permitted to cross-examine witnesses of the prosecution and other defense witnesses and to offer in evidence all matters deemed of probative value.

* * * * *

Under the American concept of liberty, and under the Anglo-Saxon system of jurisprudence, every defendant in a criminal case is presumed to be innocent until the prosecution by competent and credible proof has shown his guilt to the exclusion of every reasonable doubt. This presumption of innocence follows him throughout the trial until such degree of proof has been adduced. Beyond a reasonable doubt, does not mean beyond a vain, imaginary, or fanciful doubt, but means that the defendant's guilt must be fully proved to a moral certainty, before he is condemned. Stated differently, it is such a doubt as, after full consideration of all the evidence, would leave an unbiased, reflective person charged with the responsibility of decision, in such a state of mind that he could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge.

If any defendant is to be found guilty under counts two or three of the indictment, it must only be because the evidence in the case has clearly shown beyond a reasonable doubt that such defendant participated as a principal in, accessory to, ordered, abetted, took a consenting part in, or was connected with plans or enterprises involving the commission of at least some of the war crimes and crimes against humanity with which the defendants are charged in the indictment. Only under such circumstances may he be convicted.

If any defendant is to be found guilty under count four of the indictment, it must be because the evidence has shown beyond a reasonable doubt that such defendant was a member of an organization or group subsequent to 1 September 1939, declared to be criminal by the International Military Tribunal, as contained in the judgment of said Tribunal.*

*"The Accused Organizations," Trial of the Major War Criminals, *op. cit.*, volume I, pages 255-279.

G. Flick Case—Statements from the Judgment*

PRESIDING JUDGE SEARS: Before proceeding with our decision and judgment the Tribunal wishes to put on record its appreciation of the services rendered by counsel for both the prosecution and the defense in this case. In our American system of forensic jurisprudence counsel are officers of the Court representing their clients, of course, but also assisting the Court in finding the truth and upholding the integrity of the law. We have so considered the counsel one and all who have appeared before us here. The counsel for prosecution and defense have all performed their professional duties with earnestness, diligence, and ability. They have been of great service to the Tribunal and in no instance has any one of them failed in the loyalest duty or overstepped the limits of honorable service. For the help they have rendered the Tribunal, they have our thanks.

I will now read the decision on the motions.

At the close of the proceedings on 8 November, the defendants jointly and severally made a series of motions, among other things attacking the jurisdiction of this Tribunal, and asking for the dismissal of the various counts of the indictment as to the defendants charged therein, and seeking to strike from the record hearsay testimony and affidavits on various grounds, and on 12 November defendant Flick moved to strike documents offered by prosecution on rebuttal, and on 14 November defendant Steinbrinck made a further motion.

We have examined all of these motions with care and hereby deny them all except the motion to dismiss the third count which we will determine in that part of the judgment itself which relates to that count. We find the motions otherwise fully and conclusively answered in the brief interposed by the prosecution in objection to the motion.

In order to avoid any misunderstanding, however, we make these summary statements.

As to the Tribunal, its nature and competence: The Tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a court-martial. It is not a military commission. It is an international tribunal established by the International Control Council, the high legislative branch of the Four Allied Powers now controlling Germany. (*Control Council Law No. 10 of 20 December 1945.*) The judges were legally appointed by the Military Governor and the later act of the President of the United States in respect to this was nothing

*See judgment in the case of U.S. vs. Friedrich Flick, *et al.*, Case 5, volume VI, this series.

more than a confirmation of the appointments by the Military Governor. The Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States.

Some safeguards written in the Constitution and statutes of the United States as to persons charged with crime, among others such as the presumption of innocence, the rule that conviction is dependent upon proof of the crime charged beyond a reasonable doubt, and the right of the accused to be advised and defended by counsel, are recognized as binding on the Tribunal, as they were recognized by the International Military Tribunal (IMT). This is not because of their inclusion in the Constitution and statutes of the United States but because they are deeply ingrained in our Anglo-American system of jurisprudence as principles of a fair trial. In committing to the occupying authorities of the various zones the duty to try war criminals, it is implicit therein that persons charged with crime are to be given a fair trial according to the jurisprudence prevalent in the courts of the power conducting the trials.

As to hearsay evidence and affidavits: A fair trial does not necessarily exclude hearsay testimony and *ex parte* affidavits, and exclusion and acceptance of such matters relate to procedure and procedure is regulated for the Tribunal by Article VII of Ordinance No. 7 issued by order of the Military Government and effective 18 October 1946. By this article, the Tribunal is freed from the restraints of the common law rules of evidence and given wide power to receive relevant hearsay and *ex parte* affidavits as such evidence was received by IMT. The Tribunal has followed that practice here.

As to counsel and witnesses: The defendants have not been denied the right to be advised and defended by counsel of their own choice. Defendants have not been denied the right to call any witness to give relevant testimony nor has the production of any available relevant document been denied by the Court.

As to the law administered: The Tribunal is giving no *ex post facto* application to Control Council Law No. 10. It is administering that law as a statement of international law which previously was at least partly uncodified. Codification is not essential to the validity of law in our Anglo-American system. No act is adjudged criminal by the Tribunal which was not criminal under international law as it existed when the act was committed.

Now, I will read the opinion and judgment as to Case 5.

Facing this Tribunal are private citizens of a conquered state

being tried for alleged international crimes. Their judges are citizens of one of the victor states selected by its War Department. There may well be misgivings as to the fairness of such a trial. These considerations have made the judges of the Tribunal keenly aware of their grave responsibility and of the danger to the cause of justice if the conduct of the trial and the conclusions reached should even seem to justify these misgivings. To err is human but if error must occur it is right that the error must not be prejudicial to the defendants. That, we think, is the spirit of the law of civilized nations. It finds expression in the following principles well known to students of Anglo-American criminal law:

One: There can be no conviction without proof of personal guilt.

Two: Such guilt must be proved beyond a reasonable doubt.

Three: The presumption of innocence follows each defendant throughout the trial.

Four: The burden of proof is at all times upon the prosecution.

Five: If from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken.

We cannot imagine that German law contains concepts more favorable to defendants. Any less favorable, we, as American judges trained in Anglo-American criminal jurisprudence, would be reluctant to apply even though this is not an American court but a special Tribunal constituted pursuant to a four-power agreement administering public international law.

[The next paragraph of the judgment concerns the effect to be given to certain determinations in the judgment of the IMT and judgments of coordinate tribunals. It is reproduced in section XV, "Effect of Certain Findings and Statements in the Judgment of the International Military Tribunal Upon Later Nuernberg Trials Before the Military Tribunals Established Pursuant to Ordinance No. 7."]

* * * * *

The record comprises 10,343 pages. Not included therein are those portions of documents which were admitted without reading. The Court sat five days a week for six full months exclusive of recesses. Objection to evidence was rare until the prosecution was engaged in rebuttal. It is not too much to say that practically all the substantial evidence was received without objection.

Few of the legal questions in this case were suggested, much less argued and briefed, until the evidence had all been received. Arguments occupied the whole of the last week of November. Only since then has the Tribunal been able to obtain a comprehensive view of the evidence in the light of the legal principles sought to be applied by counsel. In reaching its conclusions, therefore,

the Tribunal has been compelled to rely upon authority presented in the argument and briefs supplemented by such independent research as is possible with very inadequate library facilities. All of these Tribunals, no doubt, have suffered from the same handicap. This recital will serve to explain, if not to excuse, the lack of cited authority and the general summarization of the evidence.

H. Farben Case—Statements from the Judgment*

JUDGE HEBERT: The trial opened 27 August 1947, and the evidence was closed on 12 May 1948. The case was prosecuted by a staff of 12 American attorneys, headed by the Chief of Counsel for War Crimes. Each defendant was represented by an approved chief counsel and assistant counsel of his own choice, all of whom were recognized and competent members of the German bar. In addition, the defendants, as a group, had the services of a specialist of their own selection in the field of international law, several expert accountants, and an administrative assistant to their chief counsel. The proceedings were conducted by simultaneous translation into the English and German languages and were electrically recorded and also stenographically reported. Daily transcripts, including copies of exhibits, in the appropriate language were provided for the use of the Tribunal and counsel. The following tabulation indicates the magnitude of the record:

	<i>Prosecution</i>	<i>Defense</i>	<i>Total</i>
Documents submitted (including affidavits)	2,282	4,102	6,384
Affidavits submitted	419	2,394	2,813
Witnesses called (including those heard by commissioners)	87	102	189
Pages of the transcript (not including the judgment)			15,638
Trial days consumed (not including hearings before commissioners)....			152

Between 2 and 11 June 1948, the prosecution consumed 1 day and the defense 6½ days in oral argument. Each defendant was allotted 10 minutes in which to address the Court in his own behalf free of the obligation of an oath, and fourteen availed themselves of this privilege. Exhaustive briefs were submitted on behalf of both sides.

* * * * *

PRESIDING JUDGE SHAKE: In weighing the evidence and in determining the ultimate facts of guilt or innocence with respect to each defendant, we have sought to apply these fundamental principles of Anglo-American criminal law:

1. There can be no conviction without proof of personal guilt.

*See judgment in the case of *U.S. vs. Carl Krauch, et al.*, volume VIII, this series.

2. Guilt must be proved beyond a reasonable doubt.
3. Each defendant is presumed to be innocent, and that presumption abides with him throughout the trial.
4. The burden of proof is, at all times, upon the prosecution.
5. If from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must prevail. (U. S. *vs.* Friedrich Flick, *et al.*, Case 5, American Military Tribunal IV, Nuernberg, Germany.)

In considering the many conflicts in the evidence and the multitude of circumstances from which inferences may be drawn, as disclosed by the voluminous record before us, we have endeavored to avoid the danger of viewing the conduct of the defendants wholly in retrospect. On the contrary, we have sought to determine their knowledge, their state of mind, and their motives from the situation as it appeared, or should have appeared, to them at the time.

1. Hostage Case—Statements from the Judgment*

JUDGE CARTER: That the acts charged as crimes in the indictment occurred is amply established by the evidence. In fact, it is evident that they constitute only a portion of the large number of such acts which took place as a part of a general plan for subduing the countries of Yugoslavia and Greece. The guilt of the German occupation forces is not only proved beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people. The defendants themselves recognize this situation when they decry the policies of Hitler and assert that they continually protested against orders of superiors issued in conformity with the plan of terrorism and intimidation.

It is the determination of the connection of the defendants with the acts charged and the responsibility which attaches to them therefor, rather than the commission of the acts, that poses the chief issue to be here decided.

Objection has been made that the documents offered in evidence by the prosecution are not the original instruments but photostatic copies only. No objection of this character was made at the time the exhibits were offered and received in evidence. In view of the fact that this objection was not timely made, it cannot receive the consideration of the Tribunal.

The record is replete with testimony and exhibits which have been offered and received in evidence without foundation as to

*U.S. *vs.* Wilhelm List, *et al.*, Case 7, volume XI, this series, pages 1257-1259, 1261, and 1318.

their authenticity and, in many cases where it is secondary in character, without proof of the usual conditions precedent to the admission of such evidence. This is in accordance with the provisions of Article VII, Ordinance No. 7, Military Government, Germany, which provides:

“The Tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the Tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements, and judgments of the Military Tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The Tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the Tribunal the ends of justice require.”

This Tribunal is of the opinion that this rule applies to the competency of evidence only, and does not have the effect of giving weight and credibility to such evidence as a matter of law. It is still within the province of the Tribunal to test it by the usual rules of law governing the evaluation of evidence. Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial. The interpretation thus given and consistently announced throughout the trial by this Tribunal is not an idle gesture to be announced as a theory and ignored in practice; it is a substantive right composing one of the essential elements of a fair and impartial adjudication.

The trial was conducted in two languages, English and German, and consumed 117 trial days. The prosecution offered 678 exhibits and the defendants 1,025 that were received in evidence. The transcript of the evidence taken consists of 9,556 pages. A careful consideration of this mass of evidence and its subsequent reduction into concise conclusions of fact is one of the major tasks of the Tribunal.

The prosecution has produced oral and documentary evidence to sustain the charges of the indictment. The documents consist mostly of orders, reports, and war diaries which were captured by the Allied armies at the time of the German collapse. Some

of it is fragmentary and consequently not complete. Where excerpts of such documents were received in evidence, we have consistently required the production of the whole document whenever the defense so demanded. The Tribunal and its administrative officials have made every effort to secure all known and available evidence. The prosecution has repeatedly assured the Tribunal that all available evidence, whether favorable or otherwise, has been produced pursuant to the Tribunal's orders.

The reports offered consist generally of those made or received by the defendants and unit commanders in their chain of command. By the general term "orders" is meant primarily the orders, directives, and instructions received by them or sent by them by virtue of their position. By war diaries is meant the records of events of the various units which were commanded by these defendants, such war diaries being kept by the commanding officer or under his direction. This evidence, together with the oral testimony of witnesses appearing at the trial, provides the basis of the prosecution's case.

The defense produced much oral testimony including that of the defendants themselves. Hundreds of affidavits were received under the rules of the Tribunal. All affidavits were received subject to a motion to strike if the affiants were not produced for cross-examination in open court upon demand of the opposite party made in open court.

* * * * *

In determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced. Unless this be true, a crime could not be said to have been committed unlawfully, willfully, and knowingly as charged in the indictment.

In making our findings of fact, we shall give effect to these general statements except where a contrary application is specifically pointed out. We shall impose upon the prosecution the burden of proving its case beyond a reasonable doubt. We shall also adhere to the rule that the defendants will be presumed innocent until proven guilty by the required quantum of competent evidence. With these general statements in mind, we shall turn to a consideration of the charges against the individual defendants.

* * * * *

PRESIDING JUDGE WENNERSTRUM: It has been suggested in the course of the trial that an element of unfairness exists from the inherent nature of the organizational character of the Tribunal. It is true, of course, that the defendants are required to submit

their case to a panel of judges from a victor nation. It is unfortunate that the nations of the world have taken no steps to remove the basis of this criticism. The lethargy of the world's statesmen in dealing with this matter, and many other problems of international relations, is well known. It is a reproach upon the initiative and intelligence of the civilized nations of the world that international law remains in many respects primitive in character. But it is a matter with which this Tribunal cannot deal, other than in justifying the confidence reposed in its members by insuring to the defendants a fair, dispassionate, and impartial determination of the law and the facts. A tribunal of this character should through its deliberations and judgment disclose that it represents all mankind in an effort to make contribution to a system of international law and procedure, devoid of nationalistic prejudices. This we have endeavored to do. To some this may not appear to be sufficient protection against bias and prejudice. Any improvement, however, is dependent upon affirmative action by the nations of the world. It does not rest within the scope of the functions of this Tribunal.

J. RuSHA Case—Statement from the Judgment¹

PRESIDING JUDGE WYATT: This Tribunal has convened at this time for the presentation of its opinion and judgment. The original will be filed in the office of the Secretary General. If there is any variation from this original in the reading of this opinion or in the mimeographed copies, the original shall constitute the official record of this Tribunal. (Tr. p. 5278.)

We shall now proceed with the reading of the judgment.

The constitution, powers, jurisdiction, and functions of this Tribunal are fully stated in the judgment of the International Military Tribunal² and the following subsequent cases: U. S. *vs.* Brandt, *et al.*, Case 1;³ U. S. *vs.* Altstoetter, *et al.*, Case 3;⁴ and U. S. *vs.* Pohl, *et al.*, Case 4.⁵ We deem it sufficient to say that this case was submitted to this Tribunal and the trial conducted, in accordance with the laws and rules of procedure applicable to the Tribunal.

When it is considered that the oral and documentary evidence in this case consists of approximately 10,000 pages, it becomes readily apparent that any effort to even summarize the evidence

¹ U.S. *vs.* Ulrich Greifelt, *et al.*, Case 8, volume V, this series, page 88.

² Trial of the Major War Criminals, *op cit.*, volume I, pages 171-341.

³ U.S. *vs.* Karl Brandt, *et al.*, Case 1, volume II, this series, pages 171-297.

⁴ U.S. *vs.* Josef Altstoetter, *et al.*, Case 3, volume III, this series, pages 954-1199.

⁵ U.S. *vs.* Oswald Pohl, *et al.*, Case 4, volume V, this series, pages 958-1062.

would be impracticable. We shall, in the main, therefore, record here our findings. Those interested in the details of evidence must be referred to the record.

During the course of the trial several witnesses, including some defendants who made affidavits that were offered as evidence by the prosecution, testified that they were threatened, and that duress of a very improper nature was practiced by an interrogator. The affidavits referred to were excluded from the evidence and have not been considered by the Tribunal.

K. Einsatzgruppen Case—Statement from the Judgment*

PRESIDING JUDGE MUSMANN: Under international law the defendants are entitled to a fair and impartial trial, which the Tribunal has endeavored throughout the long proceedings to guarantee to them in every way. The precept that every man is presumed innocent until proved guilty has held and holds true as to each and every defendant. The other equally sanctified rule that the prosecution has the burden of proof and must prove the guilt of the accused beyond a reasonable doubt has been, and is, assured.

This trial opened on 15 September 1947, and the taking of evidence began on 29 September. The prosecution required but two days to present its case in chief because its evidence was entirely documentary. It introduced in all 253 documents. One hundred and thirty-six days transpired in the presentation of evidence in behalf of the defendants, and they introduced, in addition to oral testimony, 731 documents. The trial itself was conducted in both English and German and was recorded stenographically and in both languages. The transcript of the oral testimony consists of more than 6,500 pages. An electric recording of all proceedings was also made. Copies of documents introduced by the prosecution in evidence were served on the defendants in the German language.

*U.S. vs. Otto Ohlendorf, *et al.*, Case 9, volume IV, this series, pages 454 and 455.

L. Krupp Case—Statements from the Opinion and Concurring Opinions Concerning the Dismissal during Trial of the Charges of Crimes against Peace and Statements from the Judgment Which Found Defendants Guilty under the Charges of Spoliation and Slave Labor

I. STATEMENT FROM THE OPINION OF THE TRIBUNAL CONCERNING ITS DISMISSAL OF THE CHARGES OF CRIMES AGAINST PEACE¹

A detailed review in this opinion of all the evidence offered by the prosecution upon these two counts [counts one and four] is not deemed essential. Assuming that all of the evidence so presented is considered as creditable, it was upon 5 April 1948² and is now, our considered opinion that the requirements for a finding of the defendants guilty upon these two counts have not been met. We do not hold that industrialists, as such, could not under any circumstances be found guilty upon such charges. Herein we state what we construe to be the necessary elements of proof for conviction upon these two counts, and have concluded that evidence of the same has not been submitted. This conclusion having been reached on 5 April 1948, it then appeared to us that it was our duty to state it immediately, and not require the defendants to offer further evidence upon these two counts. The obvious result of not having taken this course would have been to put the defendants, who otherwise would not know the views of the Tribunal, in the position of exposing themselves to a situation which we do not deem consistent with the rights of every defendant, namely, the right to have a fair trial. One of the requirements is that the prosecution shall sustain the burden of proving each defendant guilty beyond a reasonable doubt. The Tribunal having determined that the prosecution had failed to prove each defendant guilty beyond a reasonable doubt upon the two counts in question entertained the thought that the only possible effect of having the defendants present evidence upon these two counts would be that in doing so proof of facts required for conviction might then pos-

¹ U.S. vs. Alfred Krupp von Bohlen und Halbach, *et al.*, Case 10, volume IX, this series, page 393.

On 5 April 1948, just after the beginning of the defense case, the Tribunal issued an order acquitting the defendants under counts one and four of the indictment (*Ibid.*, page 390.)

The opinion of the Tribunal concerning this dismissal is reproduced in volume IX, pages 390-400. Statements from the respective concurring opinions of Presiding Judge Anderson and Judge Wilkins are reproduced immediately below.

² Reference is made to the order of the Tribunal dismissing the charges of crimes against peace.

sibly be produced to the advantage of the prosecution. It is our opinion that such a course would not be in keeping with our ideas of justice. It was because of this that we announced our conclusion in the manner in which we did in open court on 5 April 1948.

2. STATEMENT FROM THE CONCURRING OPINION OF PRESIDING JUDGE ANDERSON ON THE DISMISSAL OF THE CHARGE OF CRIMES AGAINST PEACE*

There are certain matters of general application which must be stated in the outset of this investigation. They must be borne in mind throughout the discussion. The first is that this Tribunal was created to administer the law. It is not a manifestation of the political power of the victorious belligerents which is quite a different thing. The second is that the fact that the defendants are alien enemies is to be resolutely kept out of mind. The third is that considerations of policy are not to influence a disposition of the questions presented. Of these there are but two; (a) what was the law at the time in question, and (b) does the evidence show *prima facie* that the defendants or any of them violated it. The fourth is that the defendants throughout are presumed to be innocent and before they can be put to their defense, the prosecution must make out a *prima facie* case of guilt by competent and relevant evidence. It is true that the procedural ordinance of the Military Government for Germany (US) provides that "they (the Tribunals) shall adopt and apply to the greatest possible extent* * * nontechnical procedure." But neither the members of this Tribunal nor the people of the nation prosecuting this case regard the presumption of innocence as nothing more than a technical rule of procedure. Nor do they, or we, think it a mere rhetorical abstraction to which lip service will suffice. Upon the contrary, in addition to its procedural consequences, it is a substantive right which stands as a witness for every defendant from the beginning to the end of his trial. The fifth is that Gustav Krupp von Bohlen is not on trial in this case. He is alleged to have been a co-conspirator with the defendants but his declarations, acts, and conduct are not binding on the defendants unless and until the existence of the criminal conspiracy charged in the indictment has been *prima facie* proved *aliunde* and then only insofar as they can be regarded as having been in furtherance of the alleged criminal purpose. The sixth is that it is a fundamental principle of criminal justice that criminal statutes are to

*U.S. vs. Alfried Krupp von Bohlen und Halbach, *et al.*, Case 10, volume IX, this series, pages 404-406.

be interpreted restrictively; that criminal responsibility is an individual matter; that criminal guilt must be personal. The seventh is that the application of *ex post facto* laws in criminal cases constitutes a denial of justice under international law.* Hence, if it be conceded that Control Council Law No. 10 is binding on the Tribunal, it nevertheless must be construed and applied to the facts in a way which will not conflict with this view.

*Quincy Wright: "The Law of the Nurnberg Trial," American Journal of International Law, January 1947, volume 41, page 53.

This is also the position of the prosecution, for General Telford Taylor, Chief of Counsel for War Crimes, in his recent report to the Secretary of the Army on Nuernberg Trials, among other things, said this:

"No one has been indicted before the Nuernberg Military Tribunals unless, in my judgment, there appeared to be substantial evidence of criminal conduct under accepted principles of international penal law."¹

3. STATEMENTS FROM THE SPECIAL CONCURRING OPINION OF JUDGE WILKINS ON THE DISMISSAL OF THE CHARGES OF CRIMES AGAINST PEACE²

The principles of criminal liability applicable with respect to the crime against peace are the same elementary and basic principles applicable generally with respect to other crimes. The basic principle is that criminal guilt requires two essential elements, namely, action constituting participation in the crime, and criminal intent. To establish the requisite participation there must be not merely nominal, but substantial participation in and responsibility for activities vital to building up the power of a country to wage war. To establish the requisite criminal intent, it seems necessary to show knowledge that the military power would be used in a manner which, in the words of the Kellogg [Briand] Pact, includes war as an "instrument of policy."

* * * * *

As to most of these defendants, it is true that the evidence with respect to both their knowledge and participation is far from unsubstantial; as to several of them it is well-nigh compelling.

¹ Telford Taylor: "Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10" (U.S. Government Printing Office, Washington, D. C., 15 August 1949), page 114.

² U.S. *vs.* Alfried Krupp von Bohlen und Halbach, *et al.*, Case 10, volume IX, pages 455, 456, and 466.

4. STATEMENTS FROM THE JUDGMENT WHICH FOUND DEFENDANTS GUILTY UNDER THE CHARGES OF SPOLIATION AND SLAVE LABOR*

JUDGE DALY: A copy of the indictment in the German language was served upon each defendant on 18 August 1947. The defendants were arraigned on 17 November 1947, each defendant entering a plea of "not guilty" to all charges preferred against him. Thirty-four German counsels selected by the 12 defendants were approved and have represented the respective defendants. One defendant was represented by an American attorney, selected by him, in addition to German counsel.

The presentation of evidence by the prosecution in support of the charges was commenced on 9 December 1947, and was followed by evidence offered by the defendants. The taking of evidence was concluded on 9 June 1948. The Tribunal has heard the oral testimony of 117 witnesses presented by the prosecution and the defendants and 134 witnesses have been examined before commissioners appointed under the authority of Ordinance No. 7 of Military Government for Germany (US) establishing the procedure for these trials. One thousand four hundred and seventy-one documents offered by the prosecution have been admitted in evidence as exhibits. One hundred and forty-five documents offered by the prosecution have been marked for identification. Two thousand eight hundred and twenty-nine documents offered by the defendants have been admitted in evidence as exhibits and 318 documents offered by the defendants have been marked for identification. No document marked for identification has been considered unless it was one the contents of which justified us in taking judicial notice thereof.

Ordinance No. 7, referred to above, provides that affidavits shall be deemed admissible. Exercising its right to construe this ordinance, this Tribunal announced at the beginning of the trial that it would not consider any affidavit unless the affiant was made available for cross-examination or unless the presentation of the affiant for cross-examination had been waived, and this ruling has been strictly adhered to.

The Tribunal ruled to the effect that the contents of affidavits made by defendants would only be considered as evidence against the respective affiants and not as against any other defendant unless such affiant or affiants took the witness stand and became subject to cross-examination by the other defendants or their counsel. None of the defendants took the stand to testify upon the

**Ibid.*, pages 1327, 1328, 1331, 1332, and 1448.

issues in this case, and hence such affidavits have only been considered in accordance with the ruling made.

The trial was conducted in two languages with simultaneous interpretations of German into English and English into German throughout the proceedings.

Final arguments of counsel have been concluded and briefs have been filed. Each defendant was given an opportunity to make a statement to the Tribunal in accordance with the provisions of Article XI of Ordinance No. 7 of the Military Government for Germany (US). Two of the defendants availed themselves of it, one in behalf of himself and the other in behalf of himself and the other ten defendants, and their statements were heard by the Tribunal. The briefs and final pleas of defense counsel consist of more than 1,500 pages, and counsel for the defendants consumed 5 days in final arguments. The briefs and arguments covered every conceivable question of law and fact connected with the case. The closing arguments were made on 30 June 1948, and the case was then taken under consideration.

* * * * *

The Tribunals authorized by Ordinance [No.] 7 are dependent upon the substantive jurisdictional provisions of Control Council Law No. 10 and administer international law as it finds expression in that enactment and the London Charter which is made an integral part thereof. They are not bound by the general statutes of the United States or by those parts of its Constitution which relate to the courts of the United States.

This Tribunal has recognized and does recognize as binding upon it certain safeguards for persons charged with crime. These were recognized by the International Military Tribunal (IMT). This is not so because of their inclusion in the Constitution and statutes of the United States, but because they are understood as principles of a fair trial. These include the presumption of innocence, the rule that conviction is dependent upon proof of the crime charged beyond a reasonable doubt and the right of the accused to be advised and defended by counsel.

The Tribunal has not given and does not give any *ex post facto* application to Control Council Law No. 10. It is administered as a statement of international law which previously was at least partly uncodified. This Tribunal adjudges no act criminal which was not criminal under international law as it existed when the act was committed.

The original of this opinion and the judgment will be filed in the Office of the Secretary General. If there is any variation from the original in the reading of this opinion or in the mimeographed

copies, the original shall constitute the official record of the opinion and judgment.

In examining the evidence in this case and in reaching our conclusions stated herein we have done so realizing that there can be no conviction without proof of personal guilt.

Our conclusions are based, in the main, upon written documents. It appears from the evidence that a great volume of documents from the files of the Krupp firm were burned by order of the defendant von Buelow and other Krupp officials, shortly before the entry of the Allied troops into Essen. The significance of the burning of these documents is not to be overlooked.

* * * * *

Law as to Individual Responsibility

PRESIDING JUDGE ANDERSON: As already said, we hold that guilt must be personal. The mere fact, without more, that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient. The rule which we adopt and apply is stated in an authoritative American text as follows:

“Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company’s business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers or agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission. He is liable where his scienter or authority is established, or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.”*

*Corpus Juris Secundum (American Law Book Co., Brooklyn, N. Y., 1940), volume 19, pages 363 and 364.

Under the circumstances as to the set-up of the Krupp enterprise after it became a private firm in December 1943, the same principle applies. Moreover, the essential facts may be shown by circumstantial as well as direct evidence, if sufficiently strong in probative value to convince the tribunal beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis.

M. Ministries Case—Statements from the Judgment; Statement from the Dissenting Opinion of Judge Powers; and the General Order of the Tribunal on Defense Motions Filed after Judgment

I. STATEMENTS FROM THE JUDGMENT¹

PRESIDING JUDGE CHRISTIANSON: Throughout the trial of this case, all of the defendants were represented by German counsel of their own choice. One defendant requested that he also be allowed to retain American counsel to represent him. The request was granted.

The presentation of evidence in the case was commenced on 7 January 1948. Final arguments before the Tribunal were concluded on 18 November 1948. The transcript record of the case consists of 28,085 pages. In addition thereto, the prosecution and the defense together introduced in evidence 9,067 documentary exhibits, totaling over 39,000 pages. Generally accepted technical rules of evidence were not adhered to during the trial, and any evidence that, in the opinion of the Tribunal, had probative value, was admitted when offered by either the prosecution or the defense. This practice was in accord with that followed by the International Military Tribunal, and as subsequently thereto provided in Article VII of the hereinbefore referred to Military Government Ordinance No. 7. In the interest of expedition the Tribunal, following the practice adopted by the International Military Tribunal, appointed court commissioners to assist in taking both oral and documentary evidence,² but many of the principal witnesses and all of the defendants who testified were heard before the Tribunal itself.

In order that any relevant documentary defense evidence of which the defendants had knowledge, or which they believed existed, might be made available to the defense, the Tribunal, in response to various defense motions, uniformly ordered that the persons or agencies having possession or custody of such evidence make same available to the defense. This was even true with respect to documentary evidence in possession of the prosecution. Moreover, at the request of a number of the defendants, the Tribunal appointed a German research analyst, of the defendants' choice, for the purpose of making a search of files of the former Reich government, located in the Documentary Center in Berlin,

¹ See Judgment in the case of *U.S. vs. Ernst von Weizsaecker, et al.*, Case 11, section XV, volume XIV, this series.

² See section XVII, "Taking of Evidence on Commission."

under Allied control. Such research analyst spent many months in Berlin in this search for defense evidence. The same research expert was further authorized by this Tribunal to visit London for the purposes of research, in behalf of the defendants, and was, in fact, so engaged for a number of weeks with the cooperation of British authorities. Other representatives were likewise authorized to make search of former Reich government files in Berlin.*

In arriving at the conclusions hereinafter reached, with respect to the charges against the defendants, as contained in the indictment, the Tribunal has undeviatingly adhered to the proposition that a defendant is presumed innocent until proven guilty beyond a reasonable doubt.

* * * * *

The record, including briefs of counsel, all of which the Court has considered and examined, amounts to approximately 79,000 pages. The evidence of this case presents a factual story of practically every phase of activity of the Nazi Party and of the Third Reich, whether political, economic, industrial, financial, or military.

Hundreds of captured official documents were offered, received, and considered, which were unavailable at the trial before the International Military Tribunal (sometimes herein referred to as the IMT), and which were not offered in any of the previous cases before United States Military Tribunals, and the record here presents, more fully and completely than in any other case, the story of the rise of the Nazi regime, its programs, and its acts.

The Tribunal has had the aid of, and here desires to express its appreciation and gratitude for, the skill, learning, and meticulous care with which counsel for the prosecution and defense have presented their case.

[The next paragraph from the judgment is reproduced in section XV F 11, "Effect of certain Findings and Statements in the Judgment of the International Military Tribunal upon Later Nuernberg Trials before the Military Tribunals Established Pursuant to Ordinance No. 7"—Ministries case.]

Before considering the questions of law and fact which are here involved, we deem it proper to state the nature of these trials, the basis on which they rest, and the standards by which these defendants should be judged.

These Tribunals were not organized and do not sit for the purpose of wreaking vengeance upon the conquered. Were such the purpose, the power existed to use the firing squad, the scaffold, or the prison camp, without taking the time and putting forth labor which have been so freely expended on them, and the Allied Powers

*See section XIII L, "Production of Documents for the Defense."

would have copied the methods which were too often used during the Third Reich. We may not, in justice, apply to these defendants, because they are Germans, standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations. Nor should Germans be convicted for acts or conducts which, if committed by Americans, British, French, or Russians would not subject them to legal trial and conviction. Both care and caution must be exercised not to prescribe or apply a yardstick to these defendants which cannot and should not be applied to others, irrespective of whether they are nationals of the victor or of the vanquished.

The defendants here are charged with violation of international law, and our task is: First, to ascertain and determine what it is, and second, whether the defendants have infringed these principles.

2. STATEMENT FROM THE DISSENTING OPINION OF JUDGE POWERS*

It is a matter of deep regret to me that I am unable to agree with my associates in all that is determined in the Opinion and Judgment filed herein. That was indicated when I signed it with reservations. One who disassociates himself from a substantial part of an Opinion and Judgment is under some obligation, it seems to me, to state the reasons. That is my present purpose.

The limited time available does not permit me to indulge in elaboration, or to mention all the points of difference with the opinion. I must be content, therefore, in indicating in broad outline those differences of view which seem to me to be of major importance. Some preliminary observations by way of background for such discussion may be helpful.

The evidence in this case is not in substantial conflict, so far as it relates to the vital evidentiary facts. For the most part, in spite of some difference in coloration, the evidence for the defense rounds out and supplements the picture given by the prosecution. The divergence of opinion of the Tribunal arises chiefly from a difference of view as to the interpretation of the evidence, and particularly as to what inferences may properly be drawn therefrom and as to what facts must necessarily be shown to constitute

*U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, section XVI, volume XIV, this series.

At the end of his dissenting opinion, Judge Powers stated that he expressed "no dissenting views as to the decision of the Tribunal concerning counts two, four, seven and eight." The Tribunal dismissed counts two and four as to all defendants charged. The only convictions, therefore, in which Judge Powers concurred were those under counts seven and eight.

guilt of a particular crime, and the degree of proof with which it must be established.

These matters will not be treated separately, or in order, but my position, with reference to all of them, will be expressed or illustrated in the course of this separate opinion.

It seems to me important also that we should refresh our recollection as to some of the rights of an accused and some dangers which must be guarded against to insure a just verdict, and that will be discussed also.

Beginning with the judgment of the International Military Tribunal decided under the London Charter, and running through all the decisions of subsequent tribunals at Nuernberg, which were decided under Control Law No. 10, of which the London Charter is made a part, the following propositions are clearly discernible:

1. That guilt is personal and individual and must be based on the personal acts of the individual charged and is not constructive or collective so that the criminal acts of some may be charged to others who had no part in their commission and no control over those who did commit them.

2. That to establish personal guilt it must appear that the individual defendant must have performed some act which has a causal connection with the crime charged, and must have performed it with the intention of committing a crime. Such act may be an act of omission where there is a duty to act and power to prevent. Crimes, generally speaking, are intentional wrongs, the intentional results of action or nonaction. They are committed willfully and knowingly as the indictment charges. They are not the result of accident or of circumstances over which the actor had no control and no reason to anticipate.

3. All the elements necessary to establish the personal guilt of the individual charged must be proven beyond a reasonable doubt.

This last proposition means that the burden is on the prosecution to establish the guilt of the defendant, in accordance with the preceding propositions, by proof beyond a reasonable doubt. It means that in the meantime he is presumed to be innocent, and that such presumption stands as a witness for him throughout the trial. It means that all the material evidence must be considered and if from the credible evidence two inferences may be drawn, one of guilt and one of innocence, the latter must prevail. It means that where circumstances are relied upon to establish guilt, the circumstances must be so complete as to exclude any other reasonable hypothesis.

These propositions are not a mere collection of words to be repeated, given lip service, and then ignored. They are basic. The ideas they represent must be constantly kept in mind if the

rights of the accused are to be properly safeguarded and the conviction of those who may not have actually committed the crime charged avoided. To ignore them and what they require of the Tribunal in the way of mental attitude at any stage of the proceedings is to open the door to error and injustice. There is a vast difference between evidence which proves a crime and that which confirms a suspicion.

Unfortunately the prosecution's case was, for the most part, not presented either in the evidence or in argument in harmony with these propositions and the concept which they represent. For example, evidence as to all the crimes committed by the Third Reich, and they were many and horrible, has been introduced before us in all their gory details, including movies of conditions in some concentration camps taken after Allied troops occupied the territory, although it is not charged that any defendant in this dock had any direct connection with or responsibility for such conditions. It is argued that the defendants are guilty of all these crimes of which they received knowledge, actual or constructive. Much of the time of the trial was taken up with an effort to prove such knowledge, frequently by means of documents which are shown to have reached their office. The theory is that if a defendant knew of a crime anywhere in the government and remained at his post of duty, he thereby approved the crime and became guilty of it. Of course, the same result would follow if a defendant by some document or otherwise took cognizance of the fact that a crime had been committed, unless he openly and vigorously protested against it.

Other statements of the prosecution are more frank and realistic. Witness the following from a prosecution brief:

"Unless we subscribe to the preposterous proposition that a crime should not be atoned for if it was committed by a state, those must atone for a nation's crimes who held prominent positions in agencies involved in their planning or execution."

This may explain many things in this case, including the fact that the men who seem to have actually committed war crimes by their own testimony appear in this case, not in the dock, but as witnesses for the prosecution.

These attitudes reflect impatience with the idea that these defendants, as individuals, must be shown to have personally committed crimes according to the usual and customary standards or tests. They may also indicate a realization that the evidence in many instances is insufficient to establish guilt by such standards. They represent a concept of mass or collective guilt, under which men should be found guilty of a crime even though they knew

nothing about it when it occurred, and it was committed by people over whom they had no responsibility or control. The theory seems to be that this concept applies with special emphasis when the defendants held prominent positions in the government of Germany when the crimes were committed.

There are other arguments advanced to sustain convictions on a mass scale, which, in my judgment, are even more unsound on legal grounds and more vicious in their consequences. But since the opinion does not mention them, or reveal the part they played in the decision, I shall not attempt to discuss them. It is sufficient to say that I reject them all. Since conspiracy is out of this case, no sort of legal legerdemain can substitute for proof that the defendant as an individual committed some act either of omission or commission with the intent thereby to bring about a result which is a crime charged in the indictment, and which accomplished its purpose. If the evidence is insufficient to establish guilt beyond a reasonable doubt on the basis of such individual responsibility, as distinguished from group responsibility, this Tribunal has no other alternative than to acquit.

All of these arguments and contentions in behalf of the prosecution lead by somewhat different routes to a very simple formula for determining guilt as follows: The government of the Third Reich committed many crimes; the defendants held prominent positions in that government, and knew of some of these crimes; therefore, they are guilty. It smacks more of something else than a proceeding to fix the legal responsibility for crime.

It is strange doctrine and reasoning to be advanced by lawyers representing American justice, and the American concept of crime. One excuse for it is that Control Law No. 10 contains a provision that those are guilty of a crime, "who took a consenting part therein."

The phrase is interpreted to mean that by giving consent to the crime after it was committed was to take a consenting part, and that failure to either openly protest or go on a sit-down strike in time of war, after receiving knowledge that somebody somewhere in the government committed a crime, was to consent to the crime and thereby become guilty of it. It makes proof easy and guilt almost universal.

Frankly, it is incredible to me that such a contention should be advanced, and more incredible that it should receive serious consideration. It is wholly unrealistic. It has neither reason nor a rudimentary conception of justice to support it. It does not even give proper effect to the language used in Control Law No. 10, and has no support so far as I have been able to ascertain in any of the

decisions here at Nuernberg. Properly construed, this phrase simply means that one who "took a consenting part," must be one who *took a part* in the *crime* and the consent must play a *part* in the crime. This is the language of the statute. Consent after the crime, if such a thing is possible, could not play a *part* in the crime. A failure to openly object to a crime after it has been committed, where there is no right of objection, because of absence of jurisdiction in the matter, and where such objection would, therefore, accomplish nothing, cannot properly be called "consent" at all, and even if failure to resign under such circumstances after hearing about a crime can properly be called "consent" it could not play a *part* in the crime. The phrase "take a consenting part" properly construed is not inconsistent with the idea of individual responsibility for crimes. It is not inconsistent with the idea that to constitute a crime there must be, on the part of the person charged, some action or omission of duty having a causal connection with the crime charged and undertaken, with the intention of committing a crime. Any person who can order a crime committed can consent to its commission with equal effect and with equal responsibility. To take a consenting part means no more than that.

This is the only interpretation which makes sense. It is the only interpretation which is consistent with the allegations of the indictment that defendants committed crimes "knowingly and willfully." It is the only interpretation which is consistent with a presumption of innocence, and that personal and individual guilt must be established beyond a reasonable doubt.

Moreover, Control Council Law No. 10 does not provide that remaining in office after receiving knowledge that someone in the government has committed a crime is in itself a crime, and the indictment makes no such charge. It is not a crime and it does not in itself prove any other crime. Nor can it properly be allowed to sustain a conviction, or motivate a conviction on some other ground.

In order to comply with the letter and spirit of what has been heretofore stated, we must put out of mind entirely the fact that these defendants were recently members of a regime which we thoroughly disliked and with which we were recently at war, and that some of them have uttered offensive sentiments against our country, its leaders, and its troops. We must put out of mind entirely all the crimes of their compatriots in which they took no part. We must disregard all the evidence of such crimes and the horrible details and pictures presented here in connection therewith, all of which are inflammatory in character and likely to arouse passion and prejudice. The men in this dock must be tried

and judged on what they did, and not on what somebody else did. They must be tried solely on the evidence relating to the particular crimes charged against them. They must be judged on fair and impartial consideration of all the evidence relating to their guilt, and not on the personal beliefs of members of the Tribunal, which are not established by the evidence beyond a reasonable doubt. There must be no assumption on the part of the Tribunal that it knows more about the facts than is thus established by the evidence. Such detachment from all of these irrelevant and inflammatory matters, and such devotion to the essentials of a fair and proper trial must be achieved, if justice is to be done.

If there be those who regard such an approach with disfavor, let them take comfort in the fact that it represents not only the law applicable to the Tribunals, but the ideals of justice of the people of the nation which sponsors these trials, and that a vast majority of those people would feel betrayed if convictions were based on any lesser standard.

Moreover, they should reflect on the fact that if these trials have a reason for existence, it is to encourage respect for the rules applicable to warfare. Such encouragement comes quite as much in freeing from punishment those who are not shown to have willfully, knowingly, and with criminal intent violated these rules as it does in punishing those who have so violated them. Any suggestion of constructive or collective guilt, no matter how disguised, would, of course, punish those who did not individually and personally violate the rules equally with those who did, and thus destroy not only respect for the rules but also the whole legitimate purpose of the trials.

Any other approach to these trials or purpose in pursuing them could not have respect for law and justice as its object.

It has seemed to me not only proper but necessary to refer in this separate opinion to the arguments and contentions in behalf of conviction hereinabove discussed because of the light they may cast on many of the convictions contained in the Tribunal's judgment. Many of these convictions are incomprehensible to me except as viewed in the light of such arguments and similar lines of reasoning. Unfortunately the opinion, long as it is, reveals little of the process of legal reasoning which sustains the conclusion.

3. GENERAL ORDER OF THE TRIBUNAL ON DEFENSE MOTIONS FILED AFTER THE JUDGMENT*

MILITARY TRIBUNALS TRIBUNAL IV

United States of America
vs.
Ernst von Weizsaecker, *et al.* } ORDER

GENERAL

The defendants von Weizsaecker, Steengracht von Moyland, Keppler, Woermann, Ritter, Veesenmayer, Lammers, Stuckart, Darré, Dietrich, Berger, Schellenberg, Schwerin von Krosigk, Puhl, Koerner, Pleiger, Kehrl, and Rasche have filed individual motions for correction of alleged errors of law and fact contained in the Tribunal's judgment. The defendant Bohle filed but has since abandoned a like motion.

In dealing with these motions, the Tribunal has had constantly in mind the diversity of the charges of criminality included in the indictment, the number of defendants involved, the numerous and intricate questions of law and fact necessarily to be considered and determined, the length of the record to be considered, and the absence of any appellate procedure.

It felt that notwithstanding any diligence which it might exercise, the possibility of error was present. To the end that justice shall be done and errors of fact and law corrected, it entered an order permitting the defendants to file motions calling attention to any alleged errors in its judgment.

The defendants have availed themselves of the right thus accorded them, and it becomes necessary for the Court to consider motions (which in the aggregate cover several hundred pages), which represent most of the contentions which were presented by their original briefs. We have painstakingly considered them and have re-addressed ourselves to the record to determine whether and where the Tribunal may have erred. *In limine* certain general observations should be made. It is not the function or within the power or jurisdiction of these Tribunals to consider political considerations or exercise either pardoning power or executive clemency. Its jurisdiction is to find the facts and apply the law as it conceives it to be. In proper cases where conviction becomes necessary extenuating circumstances may be considered in determining the sentence to be passed. Should it proceed otherwise,

*U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, section XVIII C, volume XIV, this series. Concerning the provision of the Tribunal in the Ministries case for post-trial motions alleging errors of fact and law in the judgment of the Tribunal, see section XXVII.

the Tribunal would exceed its jurisdiction and invade fields which belong exclusively to the executive branch of the military government.

In considering the defense motions which have been interposed, the Tribunal makes no claim to infallibility, either as to past or present determinations. Of necessity, it must be content, when after a careful consideration of the questions involved, it arrives at maturely considered conclusions. Many of the errors asserted depend upon the evaluation of disputed testimony and the acceptance or rejection of testimony, either documentary or oral. This, however, is not a novel situation. In all litigation, criminal or civil, the triers of facts, whether juries or judges, do not act *in vacuo*. They do not and should not count witnesses but weigh evidence. Evidence is judged by its inherent probabilities or improbabilities, the bearing, demeanor, frankness of witnesses, contradictory evidence, together with other indicia of truth or falsity.

There are no mathematical, mechanical, or scientific formulae which can be applied in determining where the truth lies. Where the determination of fact affects, as it does here, the liberty or reputation of a defendant, the responsibility of decision is a heavy one, but neither difficulty of determination nor possibility of error relieves the triers of fact of the duty of declaring the truth as they see it. In exercising these functions, we do not, as judges, abandon our experience and knowledge as men, and we apply the same tests which as practical men we would in reaching conclusions upon which we would be willing to base a decision in our own most serious affairs of life. There is not and never has been a formula of precision. Proof of guilt beyond a reasonable doubt does not involve mathematical demonstration nor proof beyond fanciful or factious doubt. It is proof to a moral but not a mathematical certainty.

The judgment of the Tribunal made no pretense of quoting or referring to all evidence regarding a particular point, and the failure to discuss the testimony of any witness or witnesses or particular exhibits does not indicate that such evidence has been disregarded.

In determining these motions we have examined, not only the briefs and arguments offered in support thereof, but the testimony relating to the defendants' participation in the matters involved and the testimony offered in defense. The orders which we have entered represent conclusions and determinations arrived at only after meticulous consideration of the issues. Neither in the orders

nor the memoranda is it possible to cite all the evidence relied on for conviction or offered in defense.

We have made specific orders disposing of each of these motions, and what is said in this order is by reference made a part of the orders and memoranda concerning each of these motions.¹

Dated this 12th day of December 1949

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge

[Signed] ROBERT F. MAGUIRE
Judge

N. High Command—Statements from the Judgment²

PRESIDING JUDGE YOUNG: The trial began 5 February 1948, and the prosecution's case was substantially completed on 5 March, at which time a recess was taken until 12 April 1948 to enable counsel to prepare their defense, then resumed and completed on 13 August 1948. Each defendant has been represented by German lawyers of his own selection who have conducted the defense with great ability, energy, and zeal.

A huge mass of evidence has been submitted in behalf of the prosecution and defense. The trial was conducted in two languages—English and German—and all documents submitted were duly translated and given counsel. The defense was also furnished with photostat copies of the original captured documents.

The prosecution's case, including those introduced on cross-examination and rebuttal, was made in part by the introduction of 1,778 documents, the vast majority of which were taken from German records and documents captured by the Allied armies. The defendants complained that the context of many of these documents was necessary to their proper understanding and evaluation and that other documents would tend to explain or refute any inference of criminality that might be drawn from the documents relied upon by the prosecution. The defendants requested that they be supplied with additional material for their defense specified by them in their application. To this end the Tribunal ordered the Secretary General to procure such thereof as it was possible to procure, and as a result of this order there were procured from Washington 1,503 document folders which filled 37 footlockers.

¹ The individual orders and memorandums are reproduced in section XVIII D, volume XIV, this series.

² U.S. *vs.* Wilhelm von Leeb, *et al.*, Case 12, volume XI, this series, pages 466, 467, 480, 483, and 484.

These the defense counsel and the defendants were permitted to examine and they have used such thereof as they deemed necessary in the presentation of their case either as new evidence or to supplement and explain the documents introduced by the prosecution.

The material used for such purpose by the defendants was taken from 259 different document folders and comprised 2,058 pages which were photostated and used as exhibits in the case. Such material was received at different times. The first shipment from Washington was received on 10 April and the last on 27 May 1948. The case was not closed for the taking of testimony until 6 August 1948. In addition the defense counsel and the defendants were allowed access to all of the captured records and documents not yet sent over to the United States and still stored in the Court Archives in Nuernberg for the purpose of using such portions thereof as they might deem material. The defendants introduced a total of 2,130 documents and affidavits as exhibits in the presentation of their defense. The transcript of the record contains 10,000 pages.

Insofar as lay within its power, the Tribunal directed and aided in procuring all the witnesses that defense counsel requested, that their testimony might be heard in open court.

One hundred sixty-five witnesses were ordered summoned for the defendants. One hundred five of those summoned it was possible to procure, and they were brought to Nuernberg and were available for the defendants to call to the witness stand. Of these, only 80 in fact were called by the defendants. That so many of those requested were in fact procured is a tribute to the efficiency and to the cooperation that the administrative officers of the court have rendered in this trial.

* * * * *

JUDGE HARDING: There is no doubt of the criminality of the acts with which the defendants are charged. They are based on violations of international law well recognized and existing at the time of their commission. True, no court had been set up for the trial of violations of international law. A state having enacted a criminal law may set up one or any number of courts and vest each with jurisdiction to try an offender against its internal laws. Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty the state has the right to set up a tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign state owes to the violator of one of its laws is to give him a fair trial in a forum where he

may have counsel to represent him—where he may produce witnesses in his behalf, and where he may speak in his own defense. Similarly, a defendant charged with a violation of international law is in no sense done an injustice if he is accorded the same rights and privileges. The defendants in this case have been accorded those rights and privileges.

* * * * *

Controlling Principles in Trial

JUDGE HARDING: The proper attitude to be observed in approaching a case of the character of the one before the Tribunal is so well stated by Judge Anderson in his concurring opinion in Case No. 10, the United States *vs.* Alfried Krupp, *et al.*, that we set it forth, omitting only such portions as had particular application to that case, as a statement of the principles that we deem controlling in the approach to the instant case. Therein he said:

[At this point the judgment quoted most of the statement from Presiding Judge Anderson's concurring opinion in the Krupp case which is reproduced in section VI L 2.]

To the above we add that the burden rests upon the prosecution to present evidence that satisfies the Tribunal of the guilt of the defendants beyond a reasonable doubt. This rule also we have adhered to in arriving at our judgment. Where there was ambiguity in the testimony or uncertainty as to the defendants' connection with the transactions relied upon to establish their guilt, we have followed the well-recognized principle of criminal law and have accorded to the defendants the benefit of the doubt.

VII. HANDLING OF LANGUAGE PROBLEMS ARISING BECAUSE OF THE BILINGUAL OR MULTILINGUAL NATURE OF THE NUERNBERG TRIALS

A. Introduction

In all 13 Nuernberg trials it was mandatory that the proceedings be conducted in a language understood by the defendants and their counsel, as well as in the language of the members of the tribunal and of the prosecution staff. Occasionally witnesses testified in still other languages. Thus, from the beginning, the Nuernberg trials involved formidable problems of translation as well as the concurrent reproduction for the record of materials in two or more languages. Since such language problems touch upon or overlap nearly every aspect of the trials, this topic is treated at this early point in a section containing general illustrative materials. The problem, however, will recur throughout many of the later sections.

The Multilingual Nature of the IMT Trial

The proceedings of the IMT trial were conducted in four languages: English, French, Russian, and German (see Article 25, Charter of the IMT, reproduced in section I C, and the judgment of the IMT, Trial of the Major War Criminals, *op.cit.*, vol. I, p. 172). When a witness testified in a language other than the four basic languages, his testimony was simultaneously translated into each of the four basic languages. How discrepancies in the text of basic documents were corrected in connection with the IMT trial is indicated by the "Protocol Rectifying Discrepancy in text of Charter" of 6 October 1945 (p. 17); and by the "Motion of the Prosecution for Correcting Discrepancies in the Indictment" which was granted by the IMT on 7 June 1946 (see Trial of the Major War Criminals, *op.cit.*, vol. I, p. 93).

The daily court sessions before the IMT were conducted by means of simultaneous interpretation of the proceedings and a complex electrical sound system by which any participant in the sessions could adjust his earphones to a particular "channel" so as to hear the proceedings in any one of the four languages or so as to hear the original language spoken. The original language was heard on channel 1, technically called the "verbatim channel," which was connected with the microphones placed on the bench, at the podium from which counsel spoke, and before the witness box. With the use of an electrical sound recording instrument attached to channel 1 the original language spoken in the court-

room was recorded on disks or records which could later be played back in the same manner as a phonograph record. This provided a means for checking the accuracy of the translation by the interpreters as well as for settling any disputes as to what transpired in open session. The entire sound system was operated by personnel of the United States Army Signal Corps. As a whole, this system of simultaneous interpretation and sound recording of the IMT proceedings worked remarkably well. The same general system was later adopted by the United Nations Organization.

One of the greatest translation problems in the IMT trial was afforded by the mass of captured German documents upon which the prosecution sought to rely. The available translation staff was not ample so that all these documents could be translated in advance of the court sessions and certified translations made available in English, French, and Russian. The IMT met this problem by ruling that either certified translations had to be offered at the time a document was offered as an exhibit or else counsel wishing to rely upon the document had to read the portions relied upon into the record in open court, translation then being accomplished by means of the simultaneous interpretation system. Under this second alternative the judges heard in their respective languages the parts of documents upon which counsel sought to rely, and the official daily transcript in the four languages recorded these parts as a permanent record. Defense counsel, having access to copies of the entire German document, could later refer to parts not quoted by the prosecution. Thus the official transcript of the daily proceedings in the English, French, and Russian languages contained translations of much of the documentary evidence which would have ordinarily appeared in document books containing translations of the documentary exhibits. Many of the most basic documents were, however, translated in full into the three other basic languages of the trial, in which event there was no requirement that the relevant contents be read in open session. With respect to documents put in evidence, the IMT stated in its judgment: "Copies of all the documents put in evidence by the prosecution have been supplied to the defense in the German language." (Trial of the Major War Criminals, *op. cit.*, vol. I, p. 172.)

The Bilingual Nature of the Last Twelve Trials

The language problem in the twelve Nuernberg trials subsequent to the IMT trial was much less troublesome, since these proceedings had only to be conducted in two languages instead of four. Dr. Howard H. Russell, the last Secretary General of the Tribunals, stated the following in his "Interim Report" to the United States High Commissioner for Germany (sec. VIII E) :

“The judges and the prosecution were Americans; the defendants were Germans; and the defense counsel were both Germans and Americans, the Germans far outnumbering the Americans. The courts were bilingual, with a system of communication whereby interpreters provided immediate translations in court. Thus all persons in the courtroom could listen, by means of earphones, to either the English or the German version of anything which was being said in either language. Daily court transcripts were prepared in mimeographed form, as taken by court reporters in both the English and German languages.”

As in the IMT case, the original language of the proceedings was recorded on disks and later, on special tapes. A special section (Sound-Reviewing Section, Interpreters Branch) checked the initial stenographic record against the sound records. Any corrections noted were thereafter incorporated in the official transcript before it was published in mimeographed form.

Document Books

“Document books” were as much the stock in trade of the Nuernberg trials as the daily transcript of the proceedings. The numbers of exhibits introduced in the various trials ran from several hundred to several thousand. Reference to the documentary evidence was facilitated immensely by the use of bound mimeographed copies of the documents in both English and German. Since most of the documents and affidavits were in the German language, the German document books were overwhelmingly made up of copies of German documents, whereas the English document books for the most part contained translations. Where the original language of the document was English, the situation was reversed. Where the document was in a different language than English or German, a translation appeared in both the English and the German document books. Counsel for the prosecution or the defense, as the case may be, determined the order of the documents in the respective document books and were allowed to make a self-serving “index” to each document book which identified each document, stated counsel’s purpose in offering it, or otherwise described its contents in summary form. The documents in the document book were later assigned exhibit numbers in open court as the individual exhibits were offered. Copies of documents introduced during cross-examination or which were not processed in time for inclusion in the appropriate document book were circulated separately and generally referred to as “loose documents” or supplements to particular document books.

A later subdivision of this volume on "Court Archives" (sec. VIII H) deals in considerable detail with the maintenance of official records of all kinds. The present section contains the following materials: the applicable provisions of Ordinance No. 7 on the conduct of the trial in a language understood by the defendant (subsec. B); the applicable provisions of the Uniform Rules of Procedure of the Nuernberg Military Tribunals as revised to 8 January 1948 (subsec. C); two affidavits by officials concerned with the processing of captured German documents which were used in the trials (subsec. D); a statement from the beginning of the case in chief of the prosecution in the Medical case as to the authentication of documents, the use of document books, and related matters (subsec. E); representative certificates of translation for individual documents or for whole document books (subsec. F); and various representative extracts from the record of several of the trials, such as motions, answers, stipulations, and orders of the Tribunals, which treat of the correction of translation errors (subsec. G).

The English-German dictionaries available at the time of the trials were not always adequate to assure a uniform and accurate translation of many words, terms, and titles, particularly because many terms and titles were newly created during the Nazi regime and therefore had not found their way into standard reference works. For this and other reasons a number of glossaries were drawn up on the spot in Nuernberg and published in mimegraphed form for staff use. See, for example, the "Glossary—Some German Terms and Expressions used in Connection with Case 11" in the "Basic Information" in the Ministries case, reproduced in section IV B, volume XII, this series. The editor of the International Military Tribunal Record, Mr. Lawrence Deems Egbert, after his Nuernberg experiences, published a law dictionary in English, Spanish, French, and German, entitled "Law Dictionary: English—Español—Français—Deutsch" (Falon, New York, 1949). This is the first law dictionary of its kind and it was not available at the time of the Nuernberg trials.

B. Provisions of Article IV (a) and (b), Ordinance No. 7

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

(a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with

the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

(b) The trial shall be conducted in, or translated into, a language which the defendant understands.

Comparable provisions of the Charter of the IMT are the following:

IV. FAIR TRIAL FOR DEFENDANTS

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

* * * * *

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

* * * * *

Article 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

C. Applicable Provisions of Rules 2, 10, 13, 17, and 18 of the Uniform Rules of Procedure as Revised to 8 January 1948*

Rule 2. Languages in which Pleadings, Documents, and Rules shall be Transcribed

When any Rule of Procedure adopted by Military Tribunal _____ directs or requires that a defendant in any position before the Tribunal shall be furnished with a copy of any pleading, document, rule, or other instrument in writing, such rule shall be understood to mean that such defendant shall receive a true and correct copy of such pleading, document, rule, or other instrument, written in the English language, and also a written translation thereof in a language which the defendant understands.

*The full text of the Uniform Rules of Procedure, revised to 8 January 1948, is reproduced in section V.

Rule 10. Motions and Applications (except for witnesses and documents)

* * * * *

(b) When any such motion, application or other request is filed by the prosecution there shall be filed therewith five copies in English and two copies in German; when filed by the defense there shall be filed therewith one copy in German to which shall be added by the Secretary General eight copies in English.

(c) The Secretary General shall deliver a translated copy of such motion, application, or other request to the adverse party and note the fact of delivery, specifying the date, hour, and place, upon the original.

* * * * *

Rule 13. Records, Exhibits, and Documents

* * * * *

(b) Documentary evidence or exhibits may be received in the language of the document, but a translation thereof into a language understood by the adverse party shall be furnished to such party.

* * * * *

Rule 17. Prosecution to File Copies of Exhibits — Time for Filing

The prosecution, not less than 24 hours before it desires to offer any record, document, or other writing in evidence as part of its case in chief, shall file with the Defendants' Information Center not less than one copy of each record, document, or writing for each of the counsel for defendants, such copy to be in the German language. The prosecution shall also deliver to Defendants' Information Center at least four copies thereof in the English language.

Rule 18. Copies of All Exhibits to be Filed with Secretary General

When the prosecution or any defendant offers a record, document, or other writing or a copy thereof in evidence, there shall be delivered to the Secretary General, in addition to the original of the document or other instrument in writing so offered for admission in evidence, six copies of the document. If the document is written or printed in a language other than the English language, there shall also be filed with the copies of the document above referred to, six copies of an English translation of the document. If such document is offered by any defendant, suitable facilities

for procuring English translations of that document shall be made available to the defendant.

D. Captured German Documents—Discovery, Registration, Reproduction of Copies, Safekeeping

I. THE "COOGAN AFFIDAVIT"

Affidavit of Major William H. Coogan, Chief of the Documentation Division, Office of the United States Chief of Counsel, 19 November 1945; concerning the Procurement, Analysis, Preservation, Reproduction, and Translation of German Documents Captured in the American and British Zones of Occupation*

19 November 1945

I, Major William H. Coogan, O-455814, QMC., a commissioned officer of the Army of the United States of America, do hereby certify as follows:

1. The United States Chief of Counsel in July 1945 charged the Field Branch of the Documentation Division with the responsibility of collecting, evaluating and assembling documentary evidence in the European Theater for use in the prosecution of the major Axis war criminals before the International Military Tribunal. I was appointed Chief of the Field Branch on 20 July 1945. I am now the Chief of the Documentation Division, Office of United States Chief of Counsel.

2. I have served in the United States Army for more than four years and am a practicing attorney by profession. Based upon my experience as an attorney and as a United States Army officer, I am familiar with the operation of the United States Army in connection with seizing and processing captured enemy documents. In my capacity as Chief of the Documentation Division, Office of the United States Chief of Counsel, I am familiar with and have supervised the processing, filing, translation, and photostating of all documentary evidence for the United States Chief of Counsel.

3. As the Army overran German occupied territory and then Germany itself, certain specialized personnel seized enemy documents, books, and records for information of strategic and tactical value. During the early stages such documents were handled in bulk and assembled at temporary centers. However, after the surrender of Germany, they were transported to the various docu-

*This affidavit was introduced in evidence as Exhibit WSA-1 in the IMT trial and as a separate exhibit in each of the later Nuernberg trials.

ment centers established by Army Headquarters in the United States Zone of Occupation. In addition to the documents actually assembled at such document centers, Army personnel maintained and secured considerable documents *in situ* at or near the places of discovery. When such documents were located and assembled they were cataloged by Army personnel into collections, and records were maintained which disclosed the source and such other information available concerning the place and general circumstances surrounding the acquisition of the documents.

4. The Field Branch of the Documentation Division was staffed by personnel thoroughly conversant with the German language. Their task was to search for and select captured enemy documents in the European Theater which disclosed information relating to the prosecution of the major Axis war criminals. Officers under my command were placed on duty at various document centers and also dispatched on individual missions to obtain original documents. When documents were located, my representatives made a record of the circumstances under which they were found and all information available concerning their authenticity was recorded. Such documents were further identified by Field Branch pre-trial serial numbers, assigned by my representatives who would then periodically dispatch the original documents by courier to the Office of the United States Chief of Counsel.

5. Upon receipt of these documents they were duly recorded and indexed. After this operation, they were delivered to the Screening and Analysis Branch of the Documentation Division of the Office of the United States Chief of Counsel, which Branch re-examined such documents in order to finally determine whether or not they should be retained as evidence for the prosecutors. This final screening was done by German-speaking analysts on the staff of the United States Chief of Counsel. When the document passed the screeners, it was then transmitted to the document room of the Office of United States Chief of Counsel, with a covering sheet prepared by the screeners showing the title or nature of the document, the personalities involved, and its importance. In the document room, a trial identification number was given to each document or to each group of documents, in cases where it was desirable for the sake of clarity to file several documents together.

6. United States documents were given trial identification numbers in one of five series designated by the letters: "PS," "L," "R," "C," and "EC," indicating the means of acquisition of the documents. Within each series documents were listed numerically.

7. After a document was so numbered, it was then sent to a German-speaking analyst who prepared a summary of the docu-

ment with appropriate references to personalities involved, index headings, information as to the source of the document as indicated by the Field Branch, and the importance of the document to a particular phase of the case. Next, the original document was returned to the document room and then checked out to the photostating department, where photostatic copies were made. Upon return from photostating, it was placed in an envelope in one of several fireproof safes in the rear of the document room. One of the photostatic copies of the document was sent to the translators, thereafter leaving the original itself in the safe. A commissioned officer has been, and is, responsible for the security of the documents in the safe. At all times when he is not present the safe is locked and a military guard is on duty outside the only door. If the officers preparing the certified translation, or one of the officers working on the briefs, found it necessary to examine the original document, this was done within the document room in the sections set aside for that purpose. The only exception to this strict rule has been where it has been occasionally necessary to present the original document to the defendants for examination. In this case, the document was entrusted to a responsible officer of the prosecution staff.

8. All original documents are now located in safes in the document room, where they will be secured until they are presented by the prosecution to the court during the progress of the trial.

9. Some of the documents which will be offered in evidence by the United States Chief of Counsel were seized and processed by the British Army. Also, personnel from the Office of the United States Chief of Counsel and the British War Crimes Executive have acted jointly in locating, seizing, and processing such documents.

10. Substantially the same system of acquiring documentary evidence was utilized by the British Army and the British War Crimes Executive as that hereinabove set forth with respect to the United States Army and the Office of the United States Chief of Counsel.

11. Therefore, I certify in my official capacity as hereinabove stated, to the best of my knowledge and belief, that the documents captured in the British Zone of Operations and Occupation, which will be offered in evidence by the United States Chief of Counsel, have been authenticated, translated, and processed in substantially the same manner as hereinabove set forth with respect to the operations of the United States Chief of Counsel.

12. Finally, I certify, that all documentary evidence offered by the United States Chief of Counsel, including those documents

from British Army sources, are in the same condition as captured by the United States and British Armies; that they have been translated by competent and qualified translators; that all photostatic copies are true and correct copies of the originals and that they have been correctly filed, numbered, and processed as above outlined.

[Signed] WILLIAM H. COOGAN
Major, QMC
O-455814

2. THE "NIEBERGALL AFFIDAVIT" *

Affidavit of Fred Niebergall, Chief of the Document Control Branch, Evidence Division, Office United States Chief of Counsel for War Crimes, concerning further procedures adopted after the IMT trial in the Procurement, Analysis, Preservation, Reproduction, and Translation of Captured German Documents.

3 December 1946

I, Fred Niebergall, A.G.O. D-150636, of the Office of Chief of Counsel for War Crimes, do hereby certify as follows:

1. I was appointed Chief of the Document Control Branch, Evidence Division, Office of Chief of Counsel for War Crimes, (hereinafter referred to as "OCC") on 2 October 1946.

2. I have served in the United States Army for more than 5 years, being discharged as a 1st Lieutenant, Infantry, on 29 October 1946. I am now a reserve officer with the rank of 1st Lieutenant in the Army of the United States of America. Based upon my experience as a United States Army Officer, I am familiar with the operation of the United States Army in connection with seizing and processing captured enemy documents. I served as Chief of Translations for OCC from 29 July 1945 until December 1945, when I was appointed liaison officer between Defense Counsel and Translation Division of OCC and assistant to the executive officer of the Translation Division. In my capacity as Chief of the Document Control Branch, Evidence Division, OCC, I am familiar with the processing, filing, translation, and photostating of documentary evidence for the United States Chief of Counsel.

3. As the Army overran German occupied territory and then Germany itself, certain specialized personnel seized enemy documents, records, and archives. Such documents were assembled in temporary centers. Later fixed document centers were established in Germany and Austria where these documents were assembled

*This affidavit was introduced as an exhibit in each of the 12 Nuernberg trials subsequent to the IMT trial.

and the slow process of indexing and cataloging was begun. Certain of these document centers have since been closed and the documents assembled there sent to other document centers.

4. In preparing for the trial before the International Military Tribunal (hereinafter referred to as "IMT") a great number of original documents, photostats, and microfilms were collected at Nuernberg, Germany. Major Coogan's affidavit of 19 November 1945 describes the procedures followed. Upon my appointment as Chief of the Document Control Branch, Evidence Division, OCC, I received custody, in the course of official business, of all these documents except the ones which were introduced into evidence in the IMT trial and are now in the IMT Document Room in Nuernberg. Some have been screened, processed, and registered in accordance with Major Coogan's affidavit. The unregistered documents remaining have been screened, processed, and registered for use in trials before Military Tribunals substantially in the same way as described below.

5. In preparing for trials subsequent to the IMT trial personnel thoroughly conversant with the German language were given the task of searching for and selecting captured enemy documents which disclosed information relating to the prosecution of Axis war criminals. Lawyers and research analysts were placed on duty at various document centers and also dispatched on individual missions to obtain original documents or certified photostats thereof. The documents were screened by German-speaking analysts to determine whether or not they might be valuable as evidence. Photostatic copies were then made of the original documents and the original documents returned to the files in the document centers. These photostatic copies were certified by the analysts to be true and correct copies of the original documents. German-speaking analysts either at the document center or in Nuernberg, then prepared a summary of the document with appropriate references to personalities involved, index headings, information as to the source of the document, and the importance of the documents to a particular division of OCC.*

6. Next, the original document or certified photostatic copy was forwarded to the Document Control Branch, Evidence Division, OCC. Upon receipt of these documents, they were duly recorded and indexed and given identification numbers in one of six series designated by the letters: "NO," "NI," "NM," "NOKW," "NG,"

*Concerning the division into which the Office, United States Chief of Counsel was organized, see "Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10" by Telford Taylor, Brigadier General, U.S.A., Chief of Counsel for War Crimes (U.S. Government Printing Office, Washington 25, D. C., 15 August 1949).

and "NP," indicating the particular Division of OCC which might be most interested in the individual documents. Within each series documents were listed numerically.

7. In the case of the receipt of original documents, photostatic copies were made. Upon return from the photostat room, the original documents were placed in envelopes in fireproof safes in the document room. In the case of the receipt of certified photostatic copies of documents, the certified photostatic copies were treated in the same manner as original documents.

8. All original documents or certified photostatic copies treated as originals are now located in safes in the document room, where they will be secured until they are presented by the prosecution to a court during the progress of a trial.

9. Therefore, I certify in my official capacity as hereinabove stated, that all documentary evidence relied upon by OCC is in the same condition as when captured by military forces under the command of the Supreme Commander, Allied Expeditionary Forces; that they have been translated by competent, qualified translators; that all photostatic copies are true and correct copies of the originals, and that they have been correctly filed, numbered, and processed as above outlined.

[Signed] FRED NIEBERGALL
Chief of Document Control Branch
Evidence Division, OCC

E. Practice in the Presentation and Offer of Documents —Statement of the Prosecution in the Medical Case

Statement by the Prosecution in the Medical case, 10 December 1946, Concerning the Procurement and Processing of Captured German Documents and the Proposed Method of the Presentation and Offer of Documents by the Prosecution¹

Official Transcript of the American Military Tribunal in the matter of the United States of America against Karl Brandt, *et al.*, defendants, sitting at Nuernberg, Germany, on 10 December 1946, 0930-1430, Justice Beals, presiding.²

THE MARSHAL: The honorable judges of Military Tribunal I. Military Tribunal I is now in session. God save the United States

¹ This statement was made by the prosecution at the beginning of its case in chief, i.e., just following its opening statement and just before it began the introduction of evidence. Similar statements were made by the prosecution in the other trials. This statement is an extract from the mimeographed transcript, *U.S. vs. Karl Brandt, et al.*, Case 1, pages 75-83.

² On the first page of transcript for each daily session a caption such as this appeared. Ordinarily such formal matters will be omitted from extracts from the transcript which are reproduced hereinafter.

of America and this Honorable Tribunal. There will be order in the courtroom.

PRESIDING JUDGE BEALS: Will the Marshal ascertain if the defendants are all present.

THE MARSHAL: May it please Your Honor, all defendants are present in the courtroom.

PRESIDING JUDGE BEALS: Secretary General, will you note for the record the presence of the defendants in the courtroom.

The prosecution may proceed.

MR. MCHANEY: May it please the Tribunal:

Before any evidence is presented, it is my purpose to show the process whereby documents have been procured and processed in order to be presented in evidence by the United States. I shall also describe and illustrate the plan of presenting documents to be followed by the prosecution in this case.

When the United States Army entered German territory it had specialized military personnel whose duties were to capture and preserve enemy documents, records, and archives.

Such documents were assembled in temporary document centers. Later each Army established fixed document centers in the United States Zone of Occupation where these documents were assembled and the slow process of indexing and cataloging was begun. Certain of these document centers in the United States Zone of Occupation have since been closed and the documents assembled there sent to other document centers.

When the International Military Tribunal was set up, field teams under the direction of Major William H. Coogan were organized and sent out to the various document centers. Great masses of German documents and records were screened and examined. Those selected were sent to Nuernberg to be processed. These original documents were then given trial identification numbers in one of five series designated by the letters: "PS," "L," "R," "C," and "EC," indicating the means of acquisition of the documents. Within each series, documents were listed numerically.

The prosecution in this case shall have occasion to introduce in evidence documents processed under the direction of Major Coogan. Some of these documents were introduced in evidence before the IMT and some were not. As to those which were, this Tribunal is required by Article IX of Ordinance No. 7 to take judicial notice thereof. However, in order to simplify the procedure, we will introduce photostatic copies of documents used in Case 1 before the IMT to which will be attached a certificate by Mr. Fred Niebergall, the Chief of our Document Control Branch, certifying

that such document was introduced in evidence before the IMT and that it is a true and correct copy thereof. Such documents have been and will be made available to defendants just as in the case of any other document.

As to those documents under the direction of Major Coogan which were not used in the case before the IMT, they are authenticated by the affidavit of Major Coogan, dated 19 November 1945. This affidavit served as the basis of authentication of substantially all documents used by the Office of Chief of Counsel before the IMT. It was introduced in that trial as Exhibit USA-1. Since we will use certain documents processed for the IMT trial, I would now like to introduce as Prosecution Exhibit 1 the Coogan affidavit,* in order to authenticate such documents. This affidavit explains the manner in and means by which captured German documents were processed for use in war crimes trials. I shall not burden the court with reading it as it is substantially the same as the affidavit of Mr. Niebergall to which I shall come in a moment.

I have thus far explained the manner of authenticating documents to be used in this case which were processed under the direction of Major Coogan. I now come to the authentication of documents processed not for the IMT trial, but for subsequent trials such as this one. These documents are authenticated by the affidavit of Mr. Niebergall which I offer in evidence as Prosecution Exhibit 2. Since this affidavit explains the procedure of processing documents by the Office of Chief Counsel for war crimes, I shall read it in full:

[Here Mr. McHaney read the "Niebergall affidavit," reproduced in full in section VII D 2.]

The Niebergall affidavit is in substance the same as the Coogan affidavit which was accepted by the International Military Tribunal as sufficient authentication of documents used in Case 1. However, in addition to these affidavits, the prosecution in this case will attach to each document submitted in evidence, other than self-proving documents such as affidavits signed by the defendants, a certificate signed by an employee of the Evidence Division of the Office of Chief of Counsel for War Crimes, reading, for example, as follows:

"I, Donald Spencer, of the Evidence Division of the Office of Chief of Counsel for War Crimes, hereby certify that the attached document, consisting of one photostated page and entitled, 'Letter from John Doe to Richard Roe, dated 19 June

*Reproduced in section VII D 1.

1943,' is the original of a document which was delivered to me in my above capacity, in the usual course of official business, as a true copy of a document found in German archives, records, and files captured by military forces under the command of the Supreme Commander, Allied Expeditionary Forces.

"To the best of my knowledge, information, and belief, the original document is at the Berlin Document Center."

So much for the authentication of documents to be presented in this trial. I turn now briefly to the distribution of documents which we will use. The prosecution made available to the Defendants' Information Center,* approximately a week ago, three photostatic copies of the great bulk of the documents which will be used in our case in chief. These documents are of course in German. In addition, the prosecution has prepared document books in both German and English which contain, for the most part, mimeographed copies of the documents, arranged substantially in the order in which they will be presented in this court. Each document book contains an index giving document number, description, and page number. A space is also provided for writing in the exhibit number.

Twelve official copies of the German document books will be filed in the Defendants' Information Center at least 24 hours prior to the time that particular material will be introduced in court. In addition, defense counsel will receive seven so-called unofficial German document books, which will contain mimeographed copies prepared primarily for the German press. Five official copies of the German document books will be presented to the Tribunal — that part should read six, Your Honor — one for each of the Justices on the bench and one for the Secretary General. Two of such document books will contain photostatic copies in order that the Tribunal may from time to time refer to the original. Document books will also be made available to the German interpreters and court reporters.

The English document books will contain certified translations of the documents in the German document books. The documents will be numbered and indexed identically in both the English and German versions. The Defendants' Information Center will receive four copies of the English document books at the same time the corresponding German document book is delivered. A representative group of the defense attorneys have agreed that four of the English document books are sufficient to meet their needs.

*For a summary of the activities of the Defendants' Information Center, later called the Defense Center, see "Final Report of the Defense Center," section VIII G 1.

The Tribunal will receive six English document books and sufficient copies will also be made available to the interpreters and court reporters. Copies of all documents introduced in evidence will thereafter be made available to the press.

The prosecution will sometimes have occasion to use documents which have just been discovered and are not in document books. In such cases we will try to have copies in the Defendants' Information Center a reasonable time in advance of their use in court. Now, I must point out to Your Honors, and I do so without any embarrassment, that there will surely be some instances during the course of this trial when the prosecution fails to comply with one or the other of the court's rulings in view of the fact that few of our personnel were here to obtain experience and training in the technicalities in the course of the case before the International Military Tribunal, but be that as it may, we shall constantly endeavor to present our case as fairly, as clearly, and as expeditiously as is humanly possible.

The prosecution, when presenting a document in court, will physically hand the original, or the certified photostatic copy serving as the original, to the clerk of the Tribunal, and give the document a prosecution exhibit number.

In the IMT trial, the usual practice, to which there were many exceptions, was that only those documents or portions of documents which had been read aloud in court were considered to be in evidence and part of the record. Now this was due to the fact that the IMT trial was conducted in four languages and only through that method were translations in all four languages ordinarily available. However, the IMT Tribunal ruled several times; for example, on 17 December 1945, (Trial of the Major War Criminals, *op. cit.*, volume IV, page 2) that documents which had been translated into all four languages and made available to defense counsel in the Defendants' Information Center were admissible in evidence without being read in full.

The prosecution believes that, under the circumstances of this trial, which will be conducted in German and English only, and with all the prosecution's documents translated into German, it will be both expeditious and fair to dispense with the reading in full of all documents or portions of documents. The prosecution will read some documents in full, particularly in the early stages of the trial, but will endeavor to expedite matters by summarizing documents when possible, or otherwise calling the attention of the Tribunal to such passages therein as are deemed important and relevant.

F. Certificates of Translation

I. EXAMPLE OF HEADING AND CERTIFICATE OF TRANSLATION OF DOCUMENTS

TRANSLATION OF DOCUMENT NO — 2503 OFFICE OF CHIEF OF COUNSEL FOR WAR CRIMES

[This document was a letter from defendant Pohl to Heinrich Himmler, dated 29 October 1943, enclosing "a report about the measures taken up to now, with regard to the demolition of the ghetto in Warsaw." The mimeographed translation shows that the transmittal letter was stamped by the receiving office, Himmler's personal staff, and that it contained "(initials illegible)" at the top. It was later determined that the "illegible" part contained the comment "good" followed by the initials "H. H." for Heinrich Himmler. Photographs of the four pages of this document are reproduced in volume V, this series, pages 635-638, and the translation, with the addition of "[Handwritten] good [Initials] H. H. [Heinrich Himmler]," appears on pages 628-630, volume V.]

CERTIFICATE OF TRANSLATION

I, E. M. Redelstein, No. X-046289, hereby certify that I am thoroughly conversant with the English and German languages, and that the above is a true and correct translation of Document NO-2503, 11 April 1947.

E. M. REDELSTEIN
No. X-046289

2. EXAMPLE OF CERTIFICATE OF TRANSLATION BY SEVERAL TRANSLATORS OF A DOCUMENT BOOK CONTAINING TRANSLATIONS OF NUMEROUS DOCUMENTS

AMERICAN MILITARY TRIBUNAL

Case 11

DOCUMENT BOOK IV FOR DR. WOERMANN*

Presented by: Dr. Alfred Schilf
[Defense Counsel]
Nuernberg

[Here follows the translation of an index, written by defense counsel, identifying and describing the purpose of the offer of each document. Then follows the translations of the individual documents.]

Document Book IV Woermann

CERTIFICATE OF TRANSLATION

23 June 1948

We, Brigitte Turk

ETO No. 35130

*Ernst Woermann, a leading official of the German Foreign Office, was a defendant in the Ministries Case. See volumes XII-XIV, this series.

Eugene R. Kun	AGO No. D-429798
Patricia E. C. Wood	ETO No. 20139
Julius J. Steuer	AGO No. A-442654
Anne Martin	ETO No. 20144
Beryl C. Beswick	ETO No. 20183
Alfred Rabl	AGO No. B-398081
Leonard J. Lawrence	ETO No. 20138

hereby certify that we are duly appointed translators for the German and English languages and that the above is a true and correct translation of the Document Book IV Woermann.

Brigitte Turk	Eugene R. Kun
ETO No. 35130	AGO No. D-429798
Pages 1-7, 56, 57	Pages 8-15, 58-61
Patricia E. C. Wood	Julius J. Steuer
ETO No. 20139	AGO No. A-442654
Pages 24-30, 45-49	Pages 31, 32, 35-37
Anne Martin	Beryl C. Beswick
ETO No. 20144	ETO No. 20183
Pages 38-44	Pages 50, 50a, 50b, 54
Alfred Rabl	Leonard J. Lawrence
AGO No. B-398081	ETO No. 20138
Pages 16-23	Pages I-VII

G. Correction of Translations

I. HANDLING OF COMMUNICATION OF 9 FEBRUARY 1947, BY COUNSEL FOR DEFENDANT HANDLOSER IN THE MEDICAL CASE ALLEGING A TRANSLATION ERROR

a. COMMUNICATION FROM DEFENSE COUNSEL, 9 FEBRUARY 1947*

9 February 1947

[Stamp] Filed: 17 February 1947

To the Prosecution
 Military Tribunal No. I
 Nuernberg
 Subject: Proceedings against Karl Brandt, *et al.*
 Defense of Siegfried Handloser

During the proceedings of 28 January, Mr. McHaney made the following statement. I quote from the official transcript, page 2054:

*U.S. *vs.* Karl Brandt, *et al.*, Case 1, Official Record, volume 24, page 1023.

"December 1940.

"Protective vaccinations: Typhus, dysentery, combined vaccination.

"I would like to remark parenthetically that as early as December of 1940 they were interested in typhus vaccinations and the Tribunal will recall that the so-called Commission on Typhus met in December of 1941 and set up the experimental series, which were carried during the following four years at Buchenwald."

A comparison with the original text of the German book from which the two first lines of the quotation are taken shows that not the vaccination against *typhus* but against *typhoid fever* is mentioned.

That means that the following parenthetical remarks of Mr. McHaney are based again on the erroneous translation of the German word "Typhus," which in English means "typhoid fever," and has nothing whatever to do with the disease typhus, the German name of which is "Fleckfieber."

The conclusion drawn by Mr. McHaney "that they were interested as early as 1940 in typhus vaccinations" has no foundation in the document to which the remark refers.

[Signed] DR. NELTE
Defense Counsel

b. COMMUNICATION OF PROSECUTION, 14 FEBRUARY 1947, AGREEING THAT TRANSLATION ERROR HAD OCCURRED

Memorandum to: Mr. John R. Niesley, Legal Adviser,
Secretary General, Room 278

From: James M. McHaney, Room 208

Subject: Communication of Dr. Nelte, defense counsel for Handloser, dated 9 February 1947*

14 February 1947

1. I have today received a copy of the above communication delivered to the Secretary General, a copy of which is attached.

2. I have checked the original German text and it appears that Dr. Nelte is quite correct. The German word "Typhus" was incorrectly translated to read "Typhus," whereas in fact it should read "typhoid fever."

**Ibid.*, page 1021.

3. Dr. Nelte may have this correction noted in the record with the approval of the prosecution.

[Signed] JAMES M. MCHANEY
Director
SS Division

c. TRANSMITTAL BY SECRETARY GENERAL OF COMMUNICATION CONCERNING TRANSLATION ERROR TO MILITARY TRIBUNAL I, 17 FEBRUARY 1947*

**OFFICE OF MILITARY GOVERNMENT FOR
GERMANY (US)**

Secretariat for Military Tribunals
Office of the Secretary General

17 February 1947

Memorandum to: Tribunal I
From: Secretary General
Subject: Transmittal of Defense Request — Case 1

1. Attached is a request by defense counsel for correction of the transcript of the proceedings for 28 January 1947.

2. The prosecution agrees that defense counsel is correct, and has no objection to the correction of the record.

3. For Tribunal approval.

For the Secretary General: [Initials] MSC

M. S. Celis
Asst. Chief, Administration

d. HANDWRITTEN MEMORANDUM OF MILITARY TRIBUNAL I, DIRECTING CORRECTION OF RECORD

17 February 1947

Request of counsel for defendant Handloser is granted, the prosecution having in writing agreed that Dr. Nelte is correct. Let the record be corrected accordingly.

[Stamp]

Filed: 17 February 1947

[Signed] WALTER B. BEALS
Presiding Judge

Prosecution and Defense notified 17 February 1947.

[Initials] MSC

*Ibid., page 1020.

2. STATEMENT BY PRESIDING JUDGE SHAKE OF TRIBUNAL VI IN THE I. G. FARBEN CASE, 11 FEBRUARY 1948, CONCERNING CORRECTIONS OF TRANSLATION RAISED BY COUNSEL DURING DIRECT EXAMINATION OF A DEFENDANT¹

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE SHAKE: Dr. Berndt (counsel for defendant ter Meer), may I interrupt you for a moment to make an observation? It has come to our attention that there are a good many corrections of translations being made.² That does not call for any hard and fast rule. Purely technical and incidental mis-translations will be taken care of on the record automatically anyway.³ However, if there is a substantial error as to something that is calculated to mislead the Tribunal, it would not be proper to deny counsel an opportunity to call it to our attention. We think that this is a matter that calls for the exercise of sound discretion and that perhaps a little more of it has been indulged in than is warranted in the interests of time. Unless counsel feels that the error is one that is of serious importance and calculated to convey a wrong impression to the Tribunal, we think that you had better content yourself with seeing that the correction is made on the record in the transcript. Ordinarily those things are made automatically by the translation staff where there is just a slip of a translation. I just mention that and ask your cooperation in seeing that too much of our time is not taken up in correcting these errors.

3. STATEMENT OF DEFENSE COUNSEL AND ORDER OF TRIBUNAL VI IN THE I. G. FARBEN CASE, 3 MAY 1948, CONCERNING JOINT MOTION OF THE PROSECUTION AND DEFENSE TO CORRECT THE ENGLISH TRANSCRIPT⁴

THE MARSHAL: The Tribunal is again in session.

DR. DIX (counsel for defendant Schmitz and general spokes-

¹ Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, page 6808.

² This statement occurred during the direct examination of defendant ter Meer after Dr. Berndt had interposed questions to the defendant ter Meer on several occasions to correct alleged errors of interpretation of the testimony. The prosecution had made no comment to any of these questions, but apparently a representative of the interpreters' branch had objected in chambers to this procedure, whereby members of the interpreting staff were not heard as to alleged mistakes in the work of the interpreting staff.

³ Reference is made to the work of the Sound-Reviewing Section, Interpreters' Branch, in checking the stenographic record of the proceedings against recordings of the original language spoken to ascertain errors of translation (sec. VII A). Concerning the further handling of corrections to the transcript in the I. G. Farben case by joint motions of prosecution and defense, see the order of Tribunal VI, immediately following.

⁴ Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, page 13, 189.

man for defense counsel) : Mr. President, a very brief statement I have to make. A few weeks ago I presented the corrections for the transcript and the Tribunal recommended that I study it through with Mr. Sprecher [Chief, I.G. Farben trial team]. That was done and the Secretary General received a copy, signed by both Mr. Sprecher and myself, and I herewith want to introduce these stipulations for the record.¹

Mr. President, one more thing. We shall have to submit further corrections but I already talked about this to Mr. Sprecher and that will not be possible by the 12th of May. However, I believe that there won't be any objections on your part that Mr. Sprecher and I will be permitted to submit these after the 12th of May.

PRESIDING JUDGE SHAKE: That will be entirely satisfactory, Gentlemen, and we do appreciate your cooperation in saving time with respect to making these corrections on the record. May I suggest that you mark one copy of these corrections so as to indicate that the corrections are agreed upon by counsel for prosecution and defense, and hand it to the Secretary General for the record. You could just endorse on it on the outside or some place so that it will show.

DR. DIX: That has already been done. We both of us signed it and I shall now sign another copy.

PRESIDING JUDGE SHAKE: Very well. Then the record may show that the agreed corrections of the record, joined in by counsel for prosecution and defense, is now filed and made a part of the record in this case.

4. HANDLING OF DEFENSE MOTION IN THE MINISTRIES CASE CONCERNING DISCREPANCIES BETWEEN ENGLISH AND GERMAN DOCUMENT BOOKS AND TRANSLATION ERRORS

a. DEFENSE MOTION, 9 FEBRUARY 1948 ²

Nuernberg, 9 February 1948

To the Honourable
Military Tribunal IV
c/o the Secretary General

¹ What counsel refers to as a stipulation was actually the "First Joint Motion of the Prosecution and Defense to Correct the English Transcript," dated 30 April 1948 (U.S. vs. Carl Krauch, *et al.*, Case 6, Official Record, volume 50, pages 1849-2004). Ultimately six such joint motions were filed and approved in the I. G. Farben case covering several thousand corrections of translation, typographical errors, grammatical mistakes, and similar matters. With very few exceptions all corrections to the record in the I. G. Farben case were made in this manner.

² U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 70, pages 960-962.

Subject: Motion of defense counsel concerning discrepancies
between English and German Document Books;
Case 11¹

The undersigned defense counsels hereby respectfully draw the attention of the Tribunal to the fact that there are numerous discrepancies between the text of the English and the German document books. Some of them are of vital importance. Words, sentences and sometimes even quite a number of pages contained in the German book are omitted in the English book and viceversa.

In addition many translations contained in the English books are erroneous. Partly the English expressions have a meaning which differs essentially from the meaning the German word has. The undersigned are fully aware that the task of the translators is particularly difficult in this case as many expressions are to be rendered in English which cannot be found in the best dictionary, because they came into fashion only quite recently and there meaning is unknown even to the average German unless he is thoroughly acquainted with the institutions where they are used. To ensure a fair trial, the defendants and there counsels must be able to rely on the absolute conformity of the German and the English text as far as the difference of the languages and institutions permits. Here the case as it is presented by the prosecution to the Tribunal bears quite a different aspect from the evidence as it appears to the defense, but neither of the two is aware of it. The Tribunal may draw from a certain document as it is presented in the English book an unfavourable conclusion "since there was no defense in this respect" not knowing that there could be no defense because the defense counsel was not cognizant of the document in this form.

As a test, the defense has checked document books 31 A and B and submits a list² of the discrepancies which is far from being complete to the Tribunal. It is a particularly striking feature in this survey that for the same German expression which means a definite institution quite a number of different English expressions is used so that the American reader is naturally led to the opinion that the different English words also mean different German institutions. For the German word "Reichsverteidigungsreferent" (the official chiefly concerned with preparing the work in matters of the Reichs defense according to instructions given to him by

¹ This motion was filed in the English language. Dr. von Zwehl, one of the defense counsel signing the motion, was counsel for defendant Stuckart in the Ministries case. He often addressed the Tribunal in English (see sec. XIII-I, volume XIV, this series, "Extracts from Closing Statement for the Defendant Stuckart"). Accordingly, the expressions, spelling, and punctuation in this motion have not been edited.

² The list of alleged errors attached to this motion is not reproduced herein.

his superior who later reviews his drafts and submits the result to the responsible Minister for signature) no less than 11 different translations are used in one volume, for "Kriegsleistungsgesetz" (War Performance Law) 4 a. s. f. for "Generalbevollmaechtigter" "plenipotentiary" about half a dozen of different translations.

The defense wants to emphasize that it is immaterial if one or the other of these discrepancies are irrelevant in an individual case. It is counsel's duty examine the evidence and to find out what of it may be material and what not. In order to do that he must know it *in total* such as it is presented to the Tribunal.

In order to ensure that evidence is brought before the Tribunal in absolute conformity with the evidence as known to the defense the latter now moves:

may it please the Tribunal to issue the following order:

(1) The prosecution and the defense, each represented by appropriate delegates are directed to check the English and the German document books and the photostats and to establish a perfect conformity between them as to their contents.

(2) Translations which are obviously erroneous should be corrected in the same way.

(3) In order to meet the problems of the more difficult translations, one or two experienced translators are to be put at the disposal of the defense who under the control of an appropriate delegate for the defense are to attempt a solution in agreement with the translators of the prosecution and its delegate.

(4) Whenever an agreement is reached about the translation of a frequently used technical term this is to be entered into the catalogue already offered before Document Book 1.*

(5) The translation section is directed to use for words listed in this catalogue exclusively the translation given therein.

(6) If the parties should fail to come to an agreement on a translation of vital importance they may raise the question in Court and submit a neutral expert's opinion if necessary.

(7) The catalogue of translations should also be given to the interpreters' section for use in court.

[Signed] DR. HANS FRITZ VON ZWEHL

[Signed] STEFAN FRITSCH

*Reference is apparently made to a glossary of terms which the prosecution submitted in a "Basic Information" at the beginning of the trial. See section IV B, volume XII, this series.

b. DISCUSSION OF THE DEFENSE MOTION IN OPEN COURT, 16 FEBRUARY 1948¹

JUDGE POWERS, PRESIDING: Just a minute. It is suggested that I call attention to a motion that is here with reference to translation.²

DR. VON ZWEHL (counsel for defendant Stuckart): Yes, Your Honors.

JUDGE POWERS, PRESIDING: The Tribunal, of course, is anxious that these differences in translation be composed so far as possible.

DR. VON ZWEHL: Yes.

JUDGE POWERS, PRESIDING: Dr. Kempner, have you seen the motion?

MR. KEMPNER (deputy chief counsel): Yes. I had occasion to see the motion, and I think I know what it is about. It is about various technical words that were not translated properly. That was the contention, and I will see that Mr. Landis, who is handling the Stuckart case, will come together with defense counsel for Stuckart in order to straighten it out.

JUDGE POWERS, PRESIDING: Well, I suppose you are going to need, in addition to counsel, some expert who is familiar with the languages to compose some of these differences.

MR. KEMPNER: I might be able myself to straighten it out. I saw that some of these contentions are —

JUDGE POWERS, PRESIDING: Well, the Tribunal suggests that you people get together and see if you can't work out these differences in translation. If you can, of course, it will be unnecessary to do anything further about it. If you can't, I suppose we will have to take some action, either permit you to call witnesses on each side which will take a lot of time, or appoint some disinterested expert on languages to give a report on the matter. Our suggestion is that you try and work it out.

MR. KEMPNER: Yes.

JUDGE POWERS, PRESIDING: And if you can't, why you can bring the matter again to our attention.

MR. KEMPNER: I assume we can reach certain stipulations in this matter.

JUDGE POWERS, PRESIDING: Well, the Tribunal then will just simply hold up the motion until we hear from you people further and subject to your trying to work the thing out.

¹ Extract from mimeographed transcript, *U.S. vs. Ernst von Weizsaecker, et al.*, Case 11, pages 1864-1865.

² Defense motion of 9 February 1948, reproduced immediately above.

c. PROSECUTION'S ANSWER TO DEFENSE MOTION,
17 FEBRUARY 1948

ANSWER TO THE MOTION OF DEFENSE COUNSEL
CONCERNING DISCREPANCIES BETWEEN ENGLISH
AND GERMAN DOCUMENT BOOKS¹

The prosecution is in answer to the motion of defense counsel concerning discrepancies between English and German document books.

1. With reference to this motion the prosecution suggests that the motion in behalf of defense counsel is not sound; however, variations in form may occur in translated material. In order to insure that these variations will not lead to confusion, the Language Division has employed various methods, such as the use of specially prepared glossaries, reviewing sections, etc. This prevailing procedure has been employed for 10 cases before these Tribunals and thus far has been perfectly satisfactory.

2. We desire to point out that the prosecution has submitted a basic information brief which contains a glossary of terms to be employed by translators, court reporters, and interpreters. In addition, the Language Division has extensive glossaries of "Nazi-Deutsch," glossaries of terms used by the Dresdner Bank, etc. The prosecution suggests that whenever defense counsel encounter variations in translations they notify the prosecution who will endeavor to reach an agreement with the defense. When necessary the prosecution will issue errata sheets to be distributed to all concerned. If the possibility exists that the prosecution and defense should fail to come to an agreement on a translation of vital importance, only then should the matter be referred to the Tribunal. The prosecution herewith designates Mr. Wolfgang von Eckardt (Room 122) as the representative of the prosecution to discuss these variations with defense counsel concerned.

3. Accordingly, the prosecution respectfully requests that the motion as stated be denied but that the suggestions as outlined herein be followed to dispose of the matters referred to in the defense motion.²

Respectfully,
By: [Signed]
ALEXANDER G. HARDY
Associate Trial Counsel

Nuernberg
17 February 1948

¹ U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 70, pages 958 and 959.

² No record has been found of any further tribunal action expressly directed to this defense motion other than the comments of Judge Powers, reproduced in the subsection immediately above. In practice these matters of variation and disagreement about translations were almost always worked out by stipulation.

**d. DEFENSE REPLY TO THE PROSECUTION'S ANSWER,
19 FEBRUARY 1948¹**

Nuernberg, 19 February 1948

Defense Counsel
Dr. von Zwehl

To the Honourable Military Tribunal IV
Reply re Motion of Defense Counsel concerning discrepancies
between English and German Document Books
Case 11

It is understood that, as it was agreed in Court,² the prosecution and the defense will check the English and the German document books in order to eliminate the existing variations and apply to the Tribunal again only in case of persistent disagreement. It must be stressed, however, that these variations are due, not only to inaccuracies of translation, but also to a number of omissions of words, parts of documents, or whole documents sometimes in the German, sometimes in the English book and even to the fact that in the English and the German book different documents are filed at the same place.

[Signed] DR. VON ZWEHL

**5. CORRECTION OF A MISTRANSLATION NOTED DURING
THE OFFER OF DOCUMENTS BY THE PROSECUTION IN
THE MINISTRIES CASE³**

MR. KEMPNER (deputy chief counsel): I am now going to proceed with the affidavit of the defendant Wilhelm Keppler, NG-1640, and we are emphasizing the point, looking to page 24 of Document Book No. 1, and I am going to stress the point under number 3 that Keppler was Economic Deputy to the Fuehrer in the Reich Chancellery from 1933 to 1936, and furthermore, that he was a Reich Deputy for Austria from March 1938 to May 1938 and to the fact that he was a State Secretary for Special Assignments in the Foreign Office in the time from March 1938 until the end of the war. I offer NG-1640 as Exhibit 6.

PRESIDING JUDGE CHRISTIANSON: Now just a moment, Mr. Kempner. This may be a matter of translation, but under number

¹ U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 70, page 957.

² See discussion of the defense motion in open court on 16 February 1948, reproduced in section VII G 4 b.

³ Extract from mimeographed transcript, U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, 7 January 1948, pages 170 and 171.

9 it states on page 4, "State Secretary for Special Decrees in the Foreign Office."

MR. KEMPNER: I would like to make it very clear that the word "decree" is an absolute mistranslation.

PRESIDING JUDGE CHRISTIANSON: Mistranslation?

MR. KEMPNER: A mistranslation, and if I don't receive any objection, I would say it should read — "State Secretary for Special Assignments in the Foreign Office."

PRESIDING JUDGE CHRISTIANSON: Oh, you have the original there, the German affidavit.

MR. KEMPNER: I have the original here, and the original under point number 9 says in German: "Staatssekretaer zur besonderen Verfuegung in Auswaertigen Amt." I can only read it as it is in the German document.

PRESIDING JUDGE CHRISTIANSON: Is that agreeable to the defense counsel, that interpretation?

MR. KEMPNER: I understand it is agreeable to defense counsel and to the defendant Keppler that if I say point number 9 should read, "State Secretary for Special Assignments" and not "for Special Decrees."

PRESIDING JUDGE CHRISTIANSON: All right. That will be noted, and you have offered that as Prosecution Exhibit 6.

6. ORDER OF TRIBUNAL IV IN THE MINISTRIES CASE, 10 JANUARY 1949, DIRECTING CORRECTIONS OF TRANSLATION IN A CLOSING BRIEF OF THE PROSECUTION, WHICH ERRORS WERE ALLEGED BY DEFENSE COUNSEL AND CHECKED AND AGREED TO BY THE CHIEF OF COURT INTERPRETERS AND BY PROSECUTION COUNSEL

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

United States of America
 against
Ernst von Weizsaecker, *et al.* }

[Stamp] Filed: 11 January 1949

ORDER*

On 13 December 1948, Dr. Karl Arndt submitted a memorandum regarding erroneous translations in the prosecution final brief on the alleged resistance of defendant Ernst von Weizsaecker,

*U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 80, page 5104.

with the request that these errors be officially checked and corrected. On 10 January 1949, Mr. Ramler, Chief of the Court Interpreting System, recommended that the corrections be made, as suggested by Dr. Arndt, to which Dr. Kempner, for the prosecution has agreed.

NOW THEREFORE, IT IS ORDERED that the Secretary General be, and he is hereby, authorized and directed to file said correspondence and to make the said corrections in the prosecution brief on the alleged resistance of defendant Ernst von Weizsaecker.

Nuernberg, Germany

10 January 1949

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

7. ORDER OF TRIBUNAL IV IN THE MINISTRIES CASE, 14 JANUARY 1949, DIRECTING CORRECTIONS IN THE DEFENSE REPLY BRIEF TO A PROSECUTION CLOSING BRIEF, THE CORRECTIONS HAVING BEEN RAISED BY A DEFENSE MEMORANDUM AND NO ANSWER HAVING BEEN INTERPOSED BY THE PROSECUTION

[Stamp] Filed: 18 January 1949

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

United States of America
against
Ernst von Weizsaecker, *et al.* }

ORDER¹

On 7 January 1949, defense counsel for defendant Schwerin von Krosigk filed a memorandum² regarding corrections to be made in the English reply brief [of the defense] to the prosecution closing brief of 19 October 1948 for the defendant Schwerin von Krosigk.

Now Therefore, IT IS ORDERED that the Secretary General be, and he is hereby, authorized and directed to file said memorandum and to make the said corrections in the English reply brief

¹ Ibid., page 6161.

² The prosecution filed no answer to this memorandum.

to the prosecution closing brief of 19 October 1948 for the defendant Schwerin von Krosigk.
Nuernberg, Germany

Presiding Judge
Tribunal IV
[Signed] WILLIAM C. CHRISTIANSON

14 January 1949

H. Statement from the Judgment in the Farben Case Concerning a Disputed Translation*

PRESIDING JUDGE SHAKE: The facts and circumstances principally relied upon by the prosecution to establish guilty knowledge on the part of said defendants in connection with "Medical Experiments" may be summarized as follows: (1) criminal experiments were admittedly conducted by SS physicians on concentration-camp inmates; (2) said experiments were performed for the specific purpose of testing Farben products; (3) some of said experiments were conducted by physicians to whom Farben had entrusted the responsibility of testing the efficacy of its drugs; (4) the reports made by said physicians were calculated to indicate that illegal experiments had been conducted; and (5) drugs were shipped by Farben directly to concentration camps in such quantities as to indicate that these were to be used for illegitimate purposes.

Without going into detail to justify a negative factual conclusion, we may say that the evidence falls short of establishing the guilt of said defendants on this issue beyond a reasonable doubt. The inference that the defendants connived with SS doctors in their criminal practices is dispelled by the fact that Farben discontinued forwarding drugs to these physicians as soon as their improper conduct was suspected. We find nothing culpable in the circumstances under which quantities of vaccines were shipped by Farben to concentration camps, since it was reasonable to suppose that there was a legitimate need for such drugs in these institutions. The question as to whether the reports submitted to Farben by its testing physicians disclosed that illegal uses were being made of such drugs revolves around a controversy as to the proper translation of the German word "Versuch" found in such reports and in the documents pertaining thereto. The prosecution says that "Versuch" means "experiment" and that the use of this

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, 29 July 1948, pages 15776-15778.

word in said reports was notice to the defendants that testing physicians were indulging in unlawful practices with such drugs. The defendants contend, however, that "Versuch," as used in the context, means "test" and that the testing of new drugs on sick persons under the reasonable precautions that Farben exercised was not only permissible but proper. Applying the rule that where from credible evidence two reasonable inferences may be drawn, one of guilt and the other innocence, the latter must prevail, we must conclude that the prosecution has failed to establish that part of the charge here under consideration.

I. Statement from the Judgment in the High Command Case Concerning the Handling of Alleged Translation Errors*

PRESIDING JUDGE YOUNG: At many times during the progress of the case, counsel for the defendants insisted there were many and damaging errors made in the translations of the many documents offered in evidence by the prosecution. The Tribunal repeatedly advised counsel that if any errors had been made and were called to the Tribunal's attention, all efforts would be made to obtain a correct translation.

In the closing statement Dr. Surholt, counsel for the defendant General Reinecke, said:

"The documents must be properly translated, that is, the American translation must convey to the Tribunal the sense of the German text correctly and without omissions. This cannot be said of any of the document books. The English text in the hands of the Tribunal contains such a vast number of mistakes that to correct even the essential points is a task the defense is unable to cope with.

"The reviewing of the document books arranged by the defense went as far as document books 1-9Q, which is about half of the material. The number of mistakes so far established amounts to 1,936."

And then he gave a few examples of the supposed erroneous translations.

Before the trial ended, the Tribunal again pointed out to counsel the advisability of submitting lists of the translations questioned. Dr. Frohwein, representing the defendant General Reinhardt, submitted a list consisting of thirty-one documents in which there were claimed errors of translation. This list was handed over to

*U.S. vs. Wilhelm von Leeb, *et al.*, Case 12, volume XI, this series, pages 467 and 468.

the prosecution which agreed to all of the contentions with the exception of three which were left to the decision of the Tribunal. Dr. Mueller-Torgow, for the defendant Hoth, submitted to the Tribunal a list of eighteen documents containing erroneous translations. All were agreed to by the prosecution.

Dr. Leverkuehn, representing the defendant Warlimont, submitted one item which was agreed to by the prosecution. Dr. von Keller, representing the defendant Dr. Lehmann, submitted a list consisting of twelve documents containing alleged errors, all of which were corrected by agreement with the prosecution.

These were the only corrections submitted by any of the counsel and many were of minor, if any, importance. For instance, we notice in one spot there were deleted the words: "These prisoners were shot on the spot after short interrogation." And there was substituted: "These prisoners are shot on the scene of action after short interrogation." At other points, the word "partisan" is deleted and the word "franc-tireur" substituted. In other places, the word "officials" was deleted and the word "functionaries" substituted in lieu thereof. Other criticisms were of more importance but this shows that many were more captious than material.

Such errors and ambiguities as were material and were not cleared up by agreement of counsel were noted and in accordance with proper rules of criminal procedure, any doubts and ambiguities are resolved in favor of the defendants.

VIII. CENTRAL SECRETARIAT OF THE NUERNBERG MILITARY TRIBUNALS—THE SECRETARY GENERAL

A. Introduction

The Central Secretariat of the Nuernberg Military Tribunals was the principal administrative arm of the military tribunals, the custodian of the official records, the official liaison between prosecution and defense, the agency charged by the tribunals with various duties calculated to insure a fair trial for the defendants, and the permanent agency on the judicial side of the war crimes establishment which generally serviced the successive tribunals and helped to maintain uniformity in judicial administration. The Central Secretariat was under the direction of a Secretary General appointed by the Military Governor. The Secretariat frequently was called the Office of the Secretary General.

Since the history of the Secretariat covers nearly every aspect of the actual administration of the Nuernberg war crimes trials, this section on the Secretariat with its various divisions has been placed well toward the beginning of this volume even though some of the materials included in this section intrude upon topics to which later sections are devoted. It is believed that this arrangement gives a unity or at least a correlation to the later sections which otherwise would not have been possible.

It has been particularly difficult in this section to draw the line between the inclusion of necessary detail and detail of interest to too few persons to deserve reproduction here. However, this section as much as any other section of this volume shows the practical difficulties encountered by officials faced with day-to-day questions of administration, many of them novel, arising in trials of an international character. Consequently, materials have been included which otherwise might have been rejected, simply because these materials reflect how detailed problems were met in these 12 related international trials. In any event the materials have been so arranged that the reader can pretty much pick and choose his way among these voluminous materials, passing over those of little interest to him.

This section includes the relevant provisions of Ordinance No. 7 dealing with the Central Secretariat and the Secretary General (subsec. B); the order of Military Government establishing the Secretariat (subsec. C); an official statement to the presiding judges on the policies and procedures of the Office of the Secretary General (subsec. D); the detailed report on the operations of the Secretariat (subsec. E) made after the hearing of evidence had

been concluded in the last case (some of the appendices to this report are reproduced in later subsections for purposes of clarity); the history of the Marshal's Office (subsec. F); the history of the Defense Center, together with an "Index of Defense Center Organizational Procedures" (subsec. G); and several basic items on the maintenance and organization of official records and the Court Archives (subsec. H).

B. Provisions of Article XII, XIII, and XIV, Ordinance No. 7

Article XII

A Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable. The main office of the Secretariat shall be located in Nurnberg. The Secretariat shall consist of a Secretary General and such assistant secretaries, military officers, clerks, interpreters and other personnel as may be necessary.

Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

Article XIV

The Secretariat shall:

(a) Be responsible for the administrative and supply needs of the Secretariat and of the several tribunals.

(b) Receive all documents addressed to tribunals.

(c) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.

(d) Secure such information for the tribunals as may be needed for the approval or appointment of defense counsel.

(e) Serve as liaison between the prosecution and defense counsel.

(f) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the tribunals.

(g) Be responsible for the preparation of the records of the proceedings before the tribunals.

(h) Provide the necessary clerical, reporting and interpretative services to the tribunals and its members, and perform such other

duties as may be required for the efficient conduct of the proceedings before the tribunals, or as may be requested by any of the tribunals.

C. Order of Military Government, 25 October 1946, Establishing the Secretariat for Military Tribunals and Related Matters*

OFFICE OF MILITARY GOVERNMENT FOR
GERMANY (US)
APO 742

General Orders)
No. 67)

25 October 1946

I. ESTABLISHMENT OF SECRETARIAT FOR CERTAIN MILITARY TRIBUNALS

Pursuant to Military Government Ordinance No. 7, promulgated 24 October 1946, entitled "Organization and Powers of Certain Military Tribunals," there is established, effective this date, a Secretariat for Military Tribunals.

II. ORGANIZATION AND LOCATION OF SECRETARIAT FOR MILITARY TRIBUNALS

The Secretariat shall consist of a Secretary General, and such assistant secretaries, consultants, military officers, clerks, interpreters, and other personnel as may be necessary. The Secretary General shall organize and direct the work of the secretariat, subject to the supervision of the members of the Tribunals or of a committee composed of the presiding judges of the several Tribunals. The Headquarters of the Secretariat shall be in Nuernberg, Germany.

III. DUTIES OF THE SECRETARIAT FOR MILITARY TRIBUNALS

The Secretariat shall:

a. Be responsible for the administrative and supply needs of the Secretariat and of the several Military Tribunals.

b. Receive all documents addressed to the Tribunals.

c. Prepare, and recommend to the committee of presiding judges of the Tribunals, uniform rules of procedure, not inconsistent with the provisions of Military Government Ordinance No. 7.

*Official Record, Over-all Index, pages 115 and 116.

d. Secure such information for the Tribunals as may be needed for the approval or appointment of defense counsel.

e. Serve as liaison between the prosecution and defense counsel.

f. Arrange for aid to be given defendants in obtaining production of witnesses or evidence authorized by the Tribunals.

g. Be responsible for the preparation of the records of the proceedings before the Tribunals.

h. Provide the necessary clerical, reporting, and interpretative services to the Tribunals and its members, and perform such other duties as may be required for the efficient conduct of the proceedings before the Tribunals, or as may be requested by any of the Tribunals.

i. Report to the Deputy Military Governor in connection with all responsibilities set forth in this order.

IV. ANNOUNCEMENT OF ASSIGNMENT

Effective this date, Charles E. Sands is announced as Acting Secretary General for Military Tribunals.

BY COMMAND OF LIEUTENANT GENERAL CLAY:

C. K. GAILEY
Brigadier General, USA
Chief of Staff

OFFICIAL:

G. H. GARDE
Lieutenant Colonel, AGD
Adjutant General

DISTRIBUTION: "B" plus
2-AG MRU USFET

D. Minutes of the Conference of the Committee of Presiding Judges, 20 November 1947, Containing a Statement on the "Policies and Procedures of the Office of the Secretary General"

OFFICE OF MILITARY GOVERNMENT (US)*
SECRETARIAT FOR MILITARY TRIBUNALS

Palace of Justice
Nurnberg

No. 1

Conference of Committee of Presiding Judges
20 November 1947
Judge Curtis G. Shake, Executive Presiding

1635

*Official Record, Tribunal Records, volume 5, pages 134 and 135.

Members of the Committee Present:

Judge Michael A. Musmanno, Tribunal II

Judge Frank N. Richman, Tribunal IV (sitting for Judge
Sears)

Judge Charles F. Wennerstrum, Tribunal V

Colonel John E. Ray, Secretariat for Military Tribunals

Members of the Committee Absent:

Judge James T. Brand, Tribunal III

Judge Lee B. Wyatt, Tribunal I

Judge Hu C. Anderson, Tribunal IIIA

* * * * *

5. *Policies and Administrative Procedures in the Office of the
Secretary General:*

Colonel Ray, the Secretary General, made the following statement: "I desire to make clear some of the administrative procedures in the Office of the Secretariat to the Presiding Judges. We have three subsidiary departments in the Secretariat:

1. The Office of the Marshal
2. The Defense Information Center
3. The Archives

"The Marshal's Office is responsible for order in the Court; for the appearances of witnesses before the Tribunal after they are procured either by the prosecution or the defense; the procurement of court witnesses; for the procurement of office space and supplies for the judges. In addition the Marshal's Office maintains a department to advise and assist the judges as to their personal needs (travel, recreation, billeting, commissary and household supplies, etc.). The Assistant Marshal assigned to your Court is always available and is your agent.

"The Defense Information Center procures defense counsel and administers their activities (office space and supplies, payment of counsel, official travel, processing of applications and motions, legal advice as to procedure, etc.).

"The Archives Section maintains all records of the individual Tribunals.

"An assistant to the Secretary General is assigned to each Tribunal. In addition to acting as a clerk of the Tribunals and being responsible to the Chief of the Archives Section for the record of his Tribunal, he is the personal representative of the Secretary General in his Tribunal. He should be required to act as the agent of the Tribunal in all matters not specifically assigned to the Office of the Marshal.

"We have an allotment of seven Legal Consultants. They are assigned as directed by this committee. At the moment one (Mr. Fried) is the General Consultant to all Tribunals, primarily on international law, and six are assigned to individual Tribunals: one to Tribunal I, two to Tribunal III, one to Tribunal IV, and two to Tribunal VI.

"We have a great deal of difficulty from counsel bypassing the regular procedure of the Defense Information Center and delivering applications and motions directly to the judges. Please refuse these and require counsel to submit same to the Defense Information Center for processing in the normal manner.

"Translation and mimeographing of defense documents, briefs, final statements, etc., takes time. Please require your Assistant Secretary General to contact the Defense Information Center as to what deadlines the Tribunal must announce for the submission of the above if copies are to be available for the Tribunal when required and delays and confusion avoided."

* * * * *

[Signed] JOHN E. RAY
Colonel FA
Secretary General

E. Interim Report on The Secretariat for the Military Tribunals, 30 September 1949, Submitted by the Secretary General of the Military Tribunals to the United States High Commissioner for Germany

INTERIM REPORT
to
U.S. HIGH COMMISSIONER FOR GERMANY
on
THE SECRETARIAT FOR UNITED STATES MILITARY
TRIBUNALS AT NUERNBERG, GERMANY
UNDER MILITARY GOVERNMENT ORDINANCE NO. 7

Submitted by
Howard H. Russell
Secretary General
for
Military Tribunals

30 September 1949
Nuernberg, Germany

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30 September 1949

INTERIM REPORT SECRETARIAT FOR MILITARY TRIBUNALS NUERNBERG, GERMANY

Introduction

The United States Military Tribunals were established, pursuant to Control Council Law No. 10, for the purpose of trying a limited number of German nationals accused of war crimes.

The legal principles applied by the Tribunals were those of international criminal law as set forth in the Moscow Declaration of 30 October 1943, the London Agreement of 8 August 1945, and the Charter issued pursuant thereto, Control Council Law No. 10 dated 20 December 1945, and the basic principles of criminal law of all civilized nations.

The judges and the prosecution were Americans; the defendants were Germans; and the defense counsel were both Germans and Americans, the Germans far outnumbering the Americans. The

*Not reproduced hereina.

Courts were bilingual, with a system of communication whereby interpreters provided immediate translations in court. Thus all persons in the courtroom could listen, by means of earphones, to either the English or the German version of anything which was being said in either language. Daily court transcripts were prepared in mimeographed form, as taken by court reporters in both the English and German languages.

Twelve cases were tried before the United States Military Tribunals in Nuernberg. The prosecution of these cases was handled by the Office of Chief of Counsel for War Crimes.

All administrative and housekeeping functions for the Nuernberg United States War Crimes Trials were performed by or secured by administrative personnel employed by and under the supervision of the Chief of Counsel for War Crimes. These services included assurance of all facilities necessary for conducting the trials, such as translation, mimeographing, photostating, space allocation, billeting, messing, communications, transportation, fiscal office, personnel office, library service, dispensary, etc. These services were performed by OCCWC for the United States Military Tribunals, the Secretariat and the defense counsel. It is understood that the Final Report to the Secretary of the Army by the Chief of Counsel for War Crimes includes a full description of the administrative organization.¹

The trials have closed and the defendants sentenced have been committed to Landsberg Prison, Germany, with one exception. The last convicted defendant of the United States War Crimes Trials still in Nuernberg is Walter Schellenberg of Case 11 [the Ministries case], confined to the Nuernberg City Hospital. In 11 of the cases, the sentences have been acted on by the Military Governor. In Case 1 [the Medical case], the death sentences have been executed on order of the Military Governor. In Case 4 [the Pohl case], and Case 9 [the Einsatzgruppen case], death sentences wait orders of execution. In the last case to be tried, Case 11, *United States vs. Ernst von Weizsaecker*, Tribunal IV (IV-A), whose members are now back in the States, is considering the Defense Memoranda re Alleged Errors of Fact in the Judgment, the Prosecution Answer and the Defense Replies thereto. It is expected that the awaited Tribunal decision on these Defense Memoranda will end Case 11,² after which review of the case will be

¹ Telford Taylor, "Final report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10," *op. cit.*

² See "Orders and Memoranda on the Motions of Individual Defendants for the Correction of Alleged Errors of Fact and Law in the Judgment, 12 December 1949," *U.S. vs. Ernst von Weizsaecker, et al.*, Case 11, volume XIV, this series, section XVIII D.

completed by the Legal Division, and the appropriate authority will take action on the sentences already pronounced.

Authority and Establishment of the Secretariat

1. The Secretariat for Military Tribunals, Nuernberg, was authorized by Military Government Ordinance No. 7, entitled "Organization and Powers of Certain Military Tribunals," which ordinance became effective 18 October 1946, "to provide for the establishment of military tribunals which shall have the power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10."

2. The Secretariat for Military Tribunals, Nuernberg, was established by OMGUS General Order No. 67,¹ dated 25 October 1946, pursuant to Military Government Ordinance No. 7. In said general order it was set forth that the Secretariat shall report to the Deputy Military Governor in connection with its responsibilities.

3. Appointment of a Secretary General to organize and direct the work of the Secretariat subject to the supervision of the members of the Tribunals or the presiding judges thereof, was authorized in Military Government Ordinance No. 7.

General Functions and Responsibilities of the Secretariat

1. The functions and responsibilities of the Secretariat for Military Tribunals were contained in Articles XII, XIII, XIV, and XVII of Military Government Ordinance No. 7, and in Regulation No. 1 under Military Government Ordinance No. 7.²

2. The functions as outlined stated that the Secretariat shall:

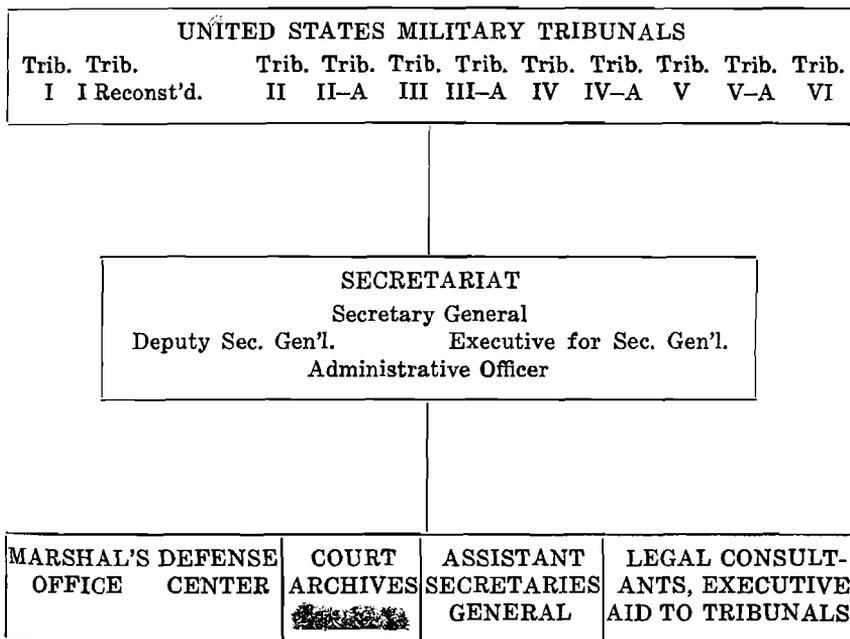
- (a) Be responsible for the administrative and supply needs of the Secretariat and of the several Tribunals.
- (b) Receive all documents addressed to Tribunals.
- (c) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this ordinance.
- (d) Secure such information for the Tribunals as may be needed for the approval or appointment of defense counsel.
- (e) Serve as liaison between the prosecution and defense counsel.
- (f) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the Tribunals.

¹ Reproduced in section VIII C.

² This regulation, reproduced in section XXV D, deals with petitions for review of sentences, the forwarding to the Military Governor of records of trials, and related matters.

- (g) Be responsible for the preparation of the records of the proceedings before the Tribunals.
- (h) Provide the necessary clerical, reporting, and interpretative services to the Tribunals and its members, and perform such other duties as may be required for the efficient conduct of the proceedings before the Tribunals, or as may be requested by any of the Tribunals.
- (i) Prepare and forward copy of the record of each case to the Military Governor for his review.
- (j) Receive, process, and forward to the Military Governor defendants' petitions for clemency.

Administrative Chart



Operational functions

1. Military Tribunals

A total of 11 United States Military Tribunals functioned in the Nuernberg War Crimes trials. Each Tribunal consisted of a presiding judge and two member judges, with occasionally an alternate member.*

The judges were designated to serve on the respective Tribunals by OMGUS or EUCOM General Order, and were appointed by Executive Order of the President of the United States. The

*Concerning alternate members, see section XXII.

judges' qualifications were set forth in Article II (b) of Military Government Ordinance No. 7.

Each judge was furnished secretarial and office help as required, and the Tribunals were assigned legal consultants or advisers as required.

The presiding judges of the various Tribunals functioning at any one time formed the Committee of Presiding Judges, which committee held regular meetings to discuss and consider various matters of interest to all the Tribunals. One member of the committee was elected to serve as chairman, known as the Executive Presiding Judge. The duties of the Executive Presiding Judge, in addition to presiding at the conferences of the Committee of Presiding Judges, included making decisions and issuing orders on matters not having to do with a specific tribunal, as for instance, on defense applications for counsel or for witnesses in a case not yet assigned to a tribunal. The three judges who held the post of Executive Presiding Judge, in the order as named, were:

Judge Robert M. Toms
Judge Curtis G. Shake
Judge William C. Christianson

Since the Committee of Presiding Judges did not file a report, information regarding its activities will be found only in the minutes of the conferences of the Committee of Presiding Judges. These minutes are being bound with the Tribunal Records of the Court Archives, and will be shipped to the States in November 1949, where they will be available in the AGO Departmental Records Branch.*

Below is a comprehensive list of the Tribunals and the members thereof:

	<i>Judges</i>	
	<i>No.</i>	<i>Date</i>
<i>Tribunal I</i>		
Constituted by OMGUS General Order 68 dated 26 Oct. 46, effective 25 Oct. 46.		
Walter B. Beals, Presiding Judge	9813	20 Dec. 46
Harold L. Sebring, Judge	9813	20 Dec. 46
Johnson Tal Crawford, Judge	9813	20 Dec. 46
Victor C. Swearingen, Alternate Judge	9813	20 Dec. 46
<i>Tribunal I (reconstituted)</i>		
Reconstituted by EUCOM General Order 110 dated 8 Oct. 47, effective 30 Sep. 47.		
Lee B. Wyatt, Presiding Judge	9917	31 Dec. 47
Daniel T. O'Connell, Judge	9917	31 Dec. 47
Johnson T. Crawford, Judge	9813	20 Dec. 46

*Reference is to report concerning the location of various records of the Nuernberg trials as contained in appendix C.

<i>Tribunal II</i>		<i>Judges Appointed by Exec. Order</i>	
		<i>No.</i>	<i>Date</i>
Constituted by OMGUS General Order No. 85 dated 16 Dec. 46, effective 14 Dec. 46.			
Robert Morrell Toms, Presiding Judge		9819	10 Jan. 47
Fitzroy Donald Phillips, Judge		9819	10 Jan. 47
Michael A. Musmanno, Judge		9819	10 Jan. 47
John Joshua Speight, Alternate Judge		9819	10 Jan. 47
<i>Tribunal II (II-A)</i>			
Constituted by EUCOM General Order No. 100 dated 12 Sep. 47, effective 10 Sep. 47.			
Michael A. Musmanno, Presiding Judge		9819	10 Jan. 47
John J. Speight, Judge		9819	10 Jan. 47
Richard D. Dixon, Judge		9858	31 May 47
<i>Tribunal III</i>			
Constituted by OMGUS General Order No. 11 dated 14 Feb. 47, effective 13 Feb. 47.			
Carrington T. Marshall, Presiding Judge (relieved because of illness 19 Jun. 47)		9827	21 Feb. 47
James T. Brand, Judge (appointed Presiding Judge by EUCOM General Order 69 dated 27 Jun. 47, effective 19 Jun. 47)		9827	21 Feb. 47
Mallory B. Blair, Judge		9827	21 Feb. 47
Justin Woodward Harding, Alternate Judge (appointed Judge by EUCOM General Order 69)		9827	21 Feb. 47
<i>Tribunal III (III-A)</i>			
Constituted by EUCOM General Order No. 126 dated 21 Nov. 47, effective 12 Nov. 47.			
Hu C. Anderson, Presiding Judge		9917	31 Dec. 47
Edward J. Daly, Judge		9917	31 Dec. 47
William J. Wilkins, Judge		9917	31 Dec. 47
<i>Tribunal IV</i>			
Constituted by EUCOM General Order No. 21 dated 12 Apr. 47, effective 12 Apr. 47.			
Charles B. Sears, Presiding Judge		9858	31 May 47
William C. Christianson, Judge		9858	31 May 47
Frank N. Richman, Judge		9858	31 May 47
Richard D. Dixon, Alternate Judge (assigned to Tribunal II-A 10 Sep. 47)		9858	31 May 47
<i>Tribunal IV (IV-A)</i>			
Constituted by EUCOM General Order No. 134 dated 17 Dec. 47, effective 11 Dec. 47.			
William C. Christianson, Presiding Judge		9917	31 Dec. 47
Leon W. Powers, Judge		9917	31 Dec. 47
Robert F. Maguire, Judge		9917	31 Dec. 47
<i>Tribunal V</i>			
Constituted by EUCOM General Order No. 70 dated 28 June 47, effective 28 June 47.			
Charles F. Wennerstrum, Presiding Judge		9852	15 May 47
Edward F. Carter, Judge		9868	24 Jun. 47
George J. Burke, Judge		9882	7 Aug. 47

Tribunal V (V-A)

Constituted by EUCOM General Order No. 137
dated 24 Dec. 47, effective 23 Dec. 47.

John C. Young, Presiding Judge
Winfield B. Hale, Judge
Justin W. Harding, Judge

<i>Judges Appointed by Exec. Order</i>	
<i>No.</i>	<i>Date</i>
9917	31 Dec. 47
9917	31 Dec. 47
9827	21 Feb. 47

Tribunal VI

Constituted by EUCOM General Order No. 87
dated 9 Aug. 47, effective 8 Aug. 47.

Curtis Grover Shake, Presiding Judge
James Morris, Judge
Paul M. Hebert, Judge
Clarence F. Merrell, Alternate Judge

9868	24 Jun. 47
9882	7 Aug. 47
9882	7 Aug. 47
9917	31 Dec. 47

2. Marshal's Office

The Marshal's Office was charged with the responsibility for the requisitioning and arranging for courtrooms, judges' chambers and necessary equipment and furnishing thereof. The Marshal acted as liaison officer between the Tribunals and the Office of Secretary General. The Marshal served indictments on accused, and notices of their arraignment. He ascertained what witnesses were to be called and verified the fact that they were ready to proceed without loss of time. The deputy marshals opened and closed sessions of court. They maintained order and decorum in the courtroom. In addition, they saw that courtroom furniture was properly placed, that the communication system was in order, that prosecution and defense counsel were present, that the defendants were in the dock, court reporters present, and that water, pads, and pencils were properly distributed. The Marshal's Office also furnished necessary pages and messengers in court, issued permanent passes for the main floor of all Tribunals, and kept the necessary records therefor, and furnished list of prosecution and defense witnesses, recording the date and time witnesses appeared before the Tribunals.

Below is a list of officers who held the post of Marshal of the United States Military Tribunals in the order named:

Col. Charles W. Mays, appointed 4 November 1946
Col. Samuel L. Metcalfe, appointed 7 September 1947
Capt. Kenyon S. Jenckes, appointed 30 August 1948
Capt. Gerald B. Sterling, appointed 2 April 1949

(For more complete information, see attached history of the Marshal's Office, appendix 6.)*

3. Defense Center

The Defense Center served as the liaison for the defense with

*Reproduced in section VIII F.

the Tribunals and with the prosecution. Every means was taken to insure a fair treatment of the defense. The Defense Center assisted the accused in the procurement of defense counsel, witnesses, and documents. Defense motions, document books, briefs, clemency petitions, etc., were filed with and processed through the Defense Center. This branch was also charged with the responsibility for assuring the provision of offices, equipment, billeting, messing, and transportation for defense counsel, billeting, messing, and transportation for defense witnesses, and for issuing free cigarette rations to defense counsel. An American legal consultant was available for consultation in the Defense Center throughout the period of the trials. A detailed listing of the extent of the facilities provided to the defense is included in attached history of Defense Center, appendix 7.¹

Defense counsel were authorized pay of 3,500 marks per month per client, this pay not to exceed a total of 7,000 marks per month for any one defense counsel. Only the main counsel for each defendant was on the payroll, he having to meet the expenses of any assistant counsel approved for him by the Tribunal, as well as secretarial or clerical help. Pay of defense counsel was an occupation cost.

The accommodations, messing, and medical care of the defendants, as well as of defense and prosecution witnesses called to Nuernberg for the purpose of testifying or interrogations, were a Nuernberg Military Post responsibility, with liaison functions performed by the Office of Chief of Counsel for War Crimes. The operation of the Prison and the Witness House is included in the Final Report to the Secretary of the Army by the Chief of Counsel for War Crimes.²

Listed below are the persons who were in charge of Defense Center administration in the order as named:

Lt. George N. Garrett, placed in charge of Defendants' Information Center in October 1946

Lambertus Wartena, appointed Defense Administrator, 3 March 1947

Lt. Col. Herbert M. Holsten, appointed Chief of Defense Center in addition to his other duties, 17 September 1947

Major Robert G. Schaefer, appointed Chief of Defense Center 20 October 1947

Capt. Lowell O. Rice, appointed Chief of Defense Center in February 1949

¹ Reproduced in section VIII G.

² Telford Taylor, "Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10," *op. cit.*, "War Crimes Suspects and Witnesses," pages 50-62.

Barbara Skinner Mandellaub, appointed Chief of Defense Center in addition to her other duties, 29 June 1949.

(For more complete information, see attached:
History of Defense Center including Organizational Procedures, appendix 7¹
Biographical list of Defense Counsel, appendix 8²
Support Letter of U. S. Military Tribunals, appendix 11³
Headquarters United States Forces Letter re Cigarettes to Defense Counsel, appendix 12.⁴)

4. Court Archives

The primary function of the Court Archives was to maintain a complete official court record of each case before the United States Military Tribunals, Nuernberg. Linked with this was the function of a reference service for the judges, for defense counsel, for prosecution counsel, and for the OMGUS Legal Division.

The Court Archives, in its capacity as an administrative part of the United States Military Tribunals, also prepared the progress docket for each case. Finally, the archives assembled and maintained the duplicate record of each case for forwarding to the Military Governor to be utilized in his review.

The Court Archives were organized and directed by Barbara Skinner Mandellaub, who was appointed Chief of Archives on 21 February 1947 and given custody of the official seal of the United States Military Tribunals.

The official records maintained by the Court Archives are now being bound for permanent storage, and indexed. The records of eight cases have been shipped to The Adjutant General's Office in Washington as of date of this report: Cases 1, 2, 3, 4, 5, 7, 8, 9. The records of Cases 6, 10, 11, and 12 are expected to be ready for shipment to Washington in November 1949, at which time a final report will be made to the High Commissioner attaching copy of the Over-all Index of the official record of the 12 United States war crimes trials.

Disposition of the duplicate set of the court record of each case, which has been returned to this office by the Legal Division upon completion of review, is awaiting policy decision of the High Commissioner for Germany. Letter requesting such policy decision was submitted to the General Counsel on 1 September 1949.

(For more complete information, see the attached History of Court Archives, dated 6 July 1948, appendix 9,⁵ which will be

¹ Reproduced in section VIII G.

² Not reproduced herein.

³ Reproduced at the end of this report.

⁴ Not reproduced herein.

⁵ Reproduced in section VIII H 2.

brought up to date in the Final Report of the Office of Secretary General mentioned in cover letter hereto.)

5. *Assistant Secretaries General*

An Assistant Secretary General was assigned to each of the United States Military Tribunals. In addition to acting as a clerk of the Tribunal, and being responsible to the Chief of Archives for the record of his Tribunal, he was the personal representative of the Secretary General in his Tribunal and acted as an agent of the Tribunal in all matters not specifically assigned to the Office of the Marshal.

It was the responsibility of each Assistant Secretary General to record the daily court happenings, documents offered in evidence and witnesses presented by prosecution or defense, and to maintain a Minute Book of the proceedings before his Tribunal. At the end of each court session, the Assistant Secretary General delivered to the Court Archives all original documents or exhibits offered in evidence. The Assistant Secretary General ascertained and reported to his Tribunal the names of any persons attending the court sessions whose public or other service was of such a nature as to merit official consideration and attention of the Tribunal. He assisted the Secretary General and the Tribunal in the execution of administrative rules of procedure, Tribunal rules and directives, etc. He cooperated with all branches and sections of the Secretariat for Military Tribunals in matters concerning administration and personnel. During the court sessions he cooperated with the Marshal of the court insofar as the requirement of the court reporting and court interpreting staffs were concerned.

(For more complete information, see attached, Duties of Assistant Secretaries General, appendix 10.) *

The following list indicates the Assistant Secretaries General who were assigned to the respective Tribunals. It is pointed out that only one Assistant Secretary General served a Tribunal at any one time.

Tribunal I—21 Nov. 46—1 Sep. 47

Dehull N. Travis

Mills C. Hatfield

M. A. Royce

Tribunal I—10 Oct. 47—24 Mar. 48

(reconstituted)

M. A. Royce

*Not reproduced herein. See the "Minutes of the Conference of the Committee of Presiding Judges, 20 November 1947," reproduced in section VIII D.

Maurice De Vinna

Tribunal II—20 Dec. 46—17 Nov. 47

*Richard D. Dixon
Mills C. Hatfield
J. C. Knapp

*(Richard D. Dixon's title was Deputy Secretary General. On 12 Apr. 47 he was appointed a Judge.)

Tribunal II (II-A)—15 Sep. 47—24 Apr. 48

J. C. Knapp
Maurice De Vinna

Tribunal III—17 Feb. 47—18 Dec. 47

Arthur P. Nesbit
C. G. Willsie

Tribunal III (III-A)—17 Nov. 47—14 Aug. 48

C. G. Willsie
Carl I. Dietz
John L. Stone

Tribunal IV—15 Mar. 47—5 Jan. 48

Richard D. Dixon
Carl I. Dietz

Tribunal IV (IV-A)—20 Dec. 47—28 Apr. 49

Carl I. Dietz
John L. Stone
Evert C. Way
J. Knight
Maurice De Vinna
J. C. Knapp
Howard H. Russell, Jr.
Elizabeth Dinning

Tribunal V—8 Jul. 47—5 Mar. 48

Mills C. Hatfield
John L. Stone
M. A. Royce
Evert C. Way

Tribunal V (V-A)—30 Dec. 47—12 Nov. 48

Evert C. Way
John L. Stone
C. G. Willsie
J. C. Knapp

Tribunal VI—14 Aug. 47—14 Aug. 48

John L. Stone
Letta Hedblom
Maurice de Vinna

6. *Legal Consultants and Executive Aid to Tribunals*

This personnel was operationally responsible to the Tribunals and was under the Secretariat for administrative control only.

The legal consultants advised the judges on various aspects of international law, and rendered advice on constitutional, penal and other branches of the laws of countries occupied by Germany during the war. Some of these consultants were also appointed by the Tribunals to serve as commissioners, to preside at hearings, to hear testimony of witnesses, and to receive documents, for consideration of the Tribunals.*

The Executive Aid supervised and directed the administrative details of the individual members of the Tribunals and their staffs. He acted as liaison officer between Tribunals and Secretariat personnel, directed the coordination of requests for equipment and supplies through the Secretariat administration, supervised and directed arrangements for transportation and billeting for members of the Tribunals and for official guests of the Tribunals, and acted as personal aid to each individual judge for personal needs.

7. *Office of the Secretary General*

In order to accomplish its functions, the Secretariat was organized into offices, branches, and sections as hereinbefore briefly summarized. The Office of Secretary General was composed of the following personnel engaged in carrying out the responsibilities outlined elsewhere:

Secretary General

Deputy Secretary General

Executive for the Secretary General

In addition, an Administrative Section served the purely local needs of the organization and was responsible for the Secretariat Message Center, Supply Section, and Personnel Section.

Below are listed the officials of the Office of Secretary General for Military Tribunals:

Secretary General

25 Oct. 46 to 17 Nov. 46 Charles E. Sands

18 Nov. 46 to 23 Jan. 47 George M. Read

24 Jan. 47 to 18 Apr. 47 Charles E. Sands

19 Apr. 47 to 9 May 48 Col. John E. Ray

10 May 48 to 30 Sep. 49 Dr. Howard H. Russell

Deputy and Executive Secretary General

18 Nov. 46 to 23 Jan. 47 Charles E. Sands (Deputy)

25 Nov. 46 to 5 Mar. 47 Richard D. Dixon (Deputy)

*Concerning the taking of evidence by commissioner, see section XVII.

- 6 Mar. 47 to 9 May 47 Henry A. Hendry (Deputy)
- 3 Mar. 47 to 5 Oct. 47 Homer B. Millard (Executive Secretary General)
- 6 Oct. 47 to 23 Apr. 49 Lt. Col. Herbert N. Holsten (Executive Secretary General)
- 9 May 49 to 2 Jul. 49 Capt. Lowell O. Rice (Deputy)

Work still to be Done

1. Court Archives

As described under section 4, above, the official archives records are being bound for permanent storage, and an over-all index of the complete court record is being prepared. The records of eight cases have been shipped to The Adjutant General's Office in Washington. The status of the remaining records, as of date of this report, is as follows:

Case 10	Record packed for shipment.
Case 12	Record packed for shipment.
Case 6	In process of being bound, indexed, and packed.
Case 11	Still to be bound, indexed, and packed.
Tribunal Records	Still to be bound, indexed, and packed.
Archives Miscellaneous and Office Files	Still to be packed.
Duplicate set of records	Being coordinated with over-all index of official record of each case. Still to be packed. Awaiting decision of High Commissioner regarding disposition. See copy of the letter to the High Commissioner dated 1 September 1949 requesting policy decision on disposition of duplicate set of records, appendix 13.*

2. Final Report

The continuing residual functions of the Court Archives and of the Defense Center are expected to be completed by 15 November 1949, at which time a final report will be submitted attaching copy of the over-all index of the complete official court record of the Nuernberg United States War Crimes Trials.

If time is granted, Barbara Skinner Mandellaub, Chief of Court Archives and Chief of Defense Center, is prepared to submit a full final report on the operation of the Secretariat for Military Tribunals. If no additional time for preparing a full

*Not reproduced herein.

report is allowed, the final report will cover only the residual operations performed between now and 15 November 1949.

3. Completion of Case 11

As described in the Introduction, page 156, a Tribunal decision is awaited on Defense Memoranda re Alleged Errors in the Judgment in Case 11. The material being considered by the judges of Tribunal IV in the States, consists of the following: Defense Memoranda, forwarded to the judges 10 June 1949; Prosecution Reply, forwarded to the judges on 6 June 1949; Defense Rejoinders to Prosecution Reply, forwarded to the judges on 14 July 1949. It is pointed out that as of date of this report there has been no word to indicate the time when the Tribunal decision will be rendered. Upon receipt of said Tribunal decision, it will be necessary that someone be designated to insure translation into German; mimeographing of the English and the German versions; forwarding of English and German copies to the defense counsel, to Legal Division and to Prosecution, and forwarding of the signed original to the [Historical Records Section] Departmental Records Branch, AGO, [Department of the Army] in Washington for inclusion in the official record of the case. This should complete Case 11, as it is not expected that the Tribunal will allow the filing of any further motions or petitions in the case.

Upon completion of review by the Legal Division, and upon action having been taken on the sentences by the appropriate authority, it will be necessary that someone be designated to insure photostating of the Orders with Respect to Sentences; forwarding certified photostatic copies to Landsberg Prison; forwarding copies to the defense counsel of the convicted defendants in Case 11; and forwarding the signed originals of said Orders re Sentences to the Historical Records Section, Departmental Records Branch, AGO, Department of the Army for inclusion in the official record of the case.

Appendix 1

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity.

[This law is reproduced in section II B.]

Appendix 2

Military Government-Germany, Ordinance No. 7, Organization and Powers of Certain Military Tribunals.

[This ordinance is reproduced in section II C.]

Appendix 3

Military Government-Germany, Ordinance No. 11, Amending Military Government Ordinance No. 7 of 18 October 1946 Entitled "Organization and Powers of Certain Military Tribunals."

[This ordinance is reproduced in section II D.]

Appendix 4

Regulation No. 1 under Military Government Ordinance No. 7 as Amended by Military Government Ordinance No. 11.

[This regulation, dealing entirely with procedures to be followed in connection with the Military Governor's review of sentences of the Military Tribunals, is reproduced in section XXV.]

Appendix 5

[This appendix is a large table showing as to each of the 12 trials at Nuernberg under Control Council Law No. 10 the following: the case number, the Tribunal number, the short title of the case, the dates on which the indictment was filed and served, the leading representatives of the prosecution conducting the case, the judges, the date of arraignment, the opening date of trial, the date of sentence, and the nature of the sentences. Since this chart would be difficult to produce and since these materials appear elsewhere in the earlier volumes of this series, this table is not reproduced here.]

Appendix 6

History of the Marshal's Office.

[Reproduced in section VIII F.]

Appendix 7

Final Report of the Defense Center, United States Military Tribunals, Nuernberg, Germany.

[Reproduced in section VIII G.]

Appendix 8

Biographical List of Defense Counsel.

[Not reproduced herein. The earlier volumes of this series, in the preliminary parts devoted to each of the cases, contain lists of defense counsel in the individual cases. An alphabetical list of defense counsel in all cases, together with certain information as to each defense counsel listed, is included as appendix Q in "Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10," by Telford Taylor, *op. cit.*]

Appendix 9

Court Archives History.

[Reproduced in section VIII H 2.]

Appendix 10

Duties of Assistant Secretaries General.

[Not reproduced herein. Concerning the duties of the Assistant Secretaries General, see section VIII D, which contains "Minutes of the Conference of the Committee of Presiding Judges" on the "Policies and Procedures of the Office of the Secretary General."]

Appendix 11

Order of Headquarters, United States Forces, European Theater,
26 February 1947, concerning "Support of United States
Military Tribunals"

HEADQUARTERS

UNITED STATES FORCES, EUROPEAN THEATER

APO 757

AG 383 GDS-AGO

26 February 1947

Subject: Support of the United States Military Tribunals

To: Commanding Generals:

U. S. Forces, Austria
Office of Military Government for Germany (U.S.)
U. S. Constabulary
Western Base Section
U. S. Air Forces in Europe
Continental Base Section
European Division, U. S. Forces
Headquarters Command, U. S. Forces, European
Theater
Commanding Officer, American Graves Registration
Command, European Theater Area.

1. *United States Military Tribunals. a.* The United States Military Tribunals have been established at Nuernberg, Germany, as a successor of the International Military Tribunal, for the trial of persons charged with offenses under Control Council Law No. 10. For the accomplishment of this mission the following principal organizations have been established:

- (1) The Military Tribunals, composed of the judges and staffs for each of the courts.
- (2) The Office of Chief of Counsel for War Crimes, composed of the Chief Counsel, prosecutors, and staff.
- (3) The Office of the Secretary General, composed of the Tribunal Secretariat charged with the coordination of the trials in the six courts.
- (4) The Staff of the International Tribunal Secretariat charged with the preparation of the record of Case 1.

b. The Commanding General, Nuernberg-Fuerth Military Community, is charged with furnishing all necessary supplies, services, and facilities necessary to the maintenance of the establishment and to the conduct of the trials in addition to his other functions as community commander.

c. The mission of the Military Tribunals and of the trial they are conducting, and the responsibility of the United States military forces to aid wherever possible in the furtherance of that mission, cannot be overemphasized. All personnel and agencies concerned will, therefore, render all possible assistance to the Commanding General, Nuernberg-Fuerth Military Community, as may be necessary to expedite and further the conduct of the trials.

2. Supplies and Services. a. By direction of the President, the cost of the trials shall be borne by the War Department regardless of the department or agency incurring such costs. All supplies procured locally from indigenous sources or charged against theater appropriated funds for use in the United States Military Tribunals shall be considered as property of the United States Army and accounted for as such.

b. Supplies and equipment required by the several organizations of the United States Military Tribunals shall be requisitioned by the Commanding General, Nuernberg-Fuerth Military Community, in accordance with the provisions of USFET-SOP 98, 1947. He will make every effort to obtain necessary supplies and equipment through normal supply channels. When unable to obtain supplies through such channels, local procurement is authorized in accordance with the provisions of Parts I and II, USFET-SOP 75, 21 March 1946, as amended. All requisitions and procurement forms will be clearly marked "For the U. S. Military Tribunals."

c. In order to expedite local procurement, the Commanding General, United States Constabulary, will appoint by special order as purchasing and contracting officer for the United States Military Tribunals, one officer of the Nuernberg-Fuerth Military Community as may be designated and requested by the commanding general thereof. Such officer will remain under the command of the Commanding General, Nuernberg-Fuerth Military Community, but will report on all procurement matter direct to the Commanding General, United States Constabulary. He will further cooperate to the maximum with the locally appointed purchasing and contracting officers of the several services. Necessary funds, both indigenous and appropriated, will be allocated to the Commanding General, United States Constabulary, for this purpose, upon request.

d. The Commanding General, Nuernberg-Fuerth Military

Community, will operate all messes for United States Military Tribunals personnel in accordance with the provisions of Circular 131, this headquarters, 1946, as amended. He will furnish to such personnel and to authorized newspaper correspondents and officials commissary privileges, and other necessary supplies in accordance with the provisions of Circular 165, this headquarters, 1946, as amended.

3. *Transportation.* a. All transportation will be controlled by the Commanding General, Nuernberg-Fuerth Military Community. He is authorized to operate a bus service for the convenience of personnel between key points in the military community, and to operate a civilian taxi service to supplement existing transportation facilities. No charge will be made to individuals or agencies for such services, but the use and dispatch of such vehicles will be strictly controlled.

b. Drivers of the civilian taxis will be paid by the local Military Government, in accordance with the provisions of USFET-SOP 75, 21 March 1946, as amended, at rates approved by the Military Government and the Commanding General, Nuernberg-Fuerth Military Community, subject to deduction for gasoline, oil, and lubricants furnished. Accurate records will be maintained of all gasoline, oil, and lubricants furnished civilian taxi drivers employed under this authority and will be made available to the local Military Government to insure the proper deduction is made from the payrolls of the individuals concerned. Pay so deducted will be collected by the local Military Government and forwarded to the Reichsbank Branch, Frankfurt, Germany, for deposit to the special account marked "U. S. Military and Supply Account, U. S. Military Tribunals."

4. *Support of Indigenous Personnel.* a. *Messing.*

(1) German defense counsels and assistant defense counsels are authorized a separate mess. Three adequate hot meals per day will be served. One prisoner-of-war ration per person per day will be drawn from the U. S. quartermaster to be used in preparation of the noonday meal. The cost and accounting for this ration will be in compliance with Circular 131, this headquarters, 1946, as amended. In addition to the normal ration cards, defense counsels and assistant defense counsels are authorized the heavy worker's ration cards. Both ration cards will be collected by the officer operating this mess who in turn will purchase food on the German market to be used in preparation of the morning and evening meals. The cost of these meals will be borne by those eating in the mess. The officer operating this mess is authorized to draw American coffee from the U. S. quartermaster on the basis of three meals per day.

(2) A separate mess is authorized for these indigenous personnel employed as linguists, court reporters, radio operators, and high category personnel for the Office of the Chief Counsel for War Crimes, International Military Tribunals, Secretary General of the Tribunals, accredited members of the German press, and employees of Mackay Radio, RCA, Western Union, and Press Wireless. One prisoner-of-war ration per person per day will be drawn from the U. S. quartermaster to be used in preparation of the noonday meal. The cost and accounting for this ration will be in compliance with Circular 131, this headquarters, 1946, as amended. Ration coupons will be collected by the officer operating this mess who in turn will purchase food on the German market to be utilized in the preparation of the morning and evening meals. The cost of these meals will be borne by those eating in the mess.

(3) German civilian witnesses are authorized a separate mess in which the rations, cost, and accounting will be the same as in (2) above.

(4) All indigenous personnel not included in (1), (2), and (3) above, who are employed by the United States Military Tribunals, will be fed one prisoner-of-war ration per person per day drawn from the U. S. quartermaster, in a mess designated by the Commanding General, Nuernberg-Fuerth Military Community. The cost and accounting for this meal will be in compliance with Circular 131, this headquarters, 1946, as amended.

b. German defense counsels and assistant counsels are authorized gratuitous issue of one carton of American cigarettes per person per week. In the interest of sanitation and hygiene, indigenous personnel provided for in *a* (1), and (3) above are also authorized gratuitous issue of one bar of soap per person, per week.

c. Minimum essential accommodations, with furnishings and utilities, may be furnished such personnel as may be required at the discretion of the Commanding General, Nuernberg-Fuerth Military Community. No charge will be made for such accommodations.

d. Necessary transportation (air, rail, and motor), supplies, and services for German defense counsel and investigators, witnesses, authorized official visitors, prosecution employees, and accredited newspaper correspondents will be controlled by the Commanding General, Nuernberg-Fuerth Military Community. Transportation will be dispatched by him as needed for official use of such personnel in the conduct of the trials. Where transportation facilities are not adequate, he may authorize the issue of POL [petroleum, oil, lubricants] products to permit the use of private

transportation. Such issues will, however, be rigidly controlled in such manner as the commanding general deems adequate and restricted to essential requirements. This letter will be cited by the commanding general as the authority to requisition additional gasoline as may be required to accomplish the above.

5. *International Military Tribunal. a.* The provisions of letter, this headquarters, File AG 230 GDS-AGO, Subject: "Support of the International Military Tribunal," 13 August 1946, are applicable to the delegates to the International Military Tribunal still remaining in Nuernberg, with the exception that the duties previously performed by the Commanding General, Headquarters Command, International Military Tribunal (Provisional) will be assumed by the Commanding General, Nuernberg-Fuerth Military Community.

b. Support of Allied delegates to the International Military Tribunal, or of Allied delegates or official Allied visitors to the Military Tribunal, will be in accordance with the provisions of above-cited letter, or Circular 72, this headquarters, 1946, as amended, as applicable.

c. For support of indigenous personnel the provisions of paragraph 4 above will apply.

BY COMMAND OF GENERAL McNARNEY:

PETER CALZA
Lieutenant Colonel AGD
Assistant Adjutant General

Telephone: Frankfurt 23008

Distribution: C

Appendix 12

Memorandum of Headquarters, United States Forces, European Theater, 15 January 1947, concerning the Supply of Free Cigarettes to Defense Counsel.

[Not reproduced herein.]

Appendix 13

Request for Policy Decision on Disposition of Duplicate Set of Court Records of the United States Military Tribunals, Nuernberg, 1 September 1949, from the Secretary General of the Military Tribunals to the United States High Commissioner for Germany.

[Not reproduced herein. The duplicate set of the Court Records was sent to the Departmental Records Branch, Office of The Adjutant General, Department of the Army, Washington, D. C. See appendix C for a report concerning the location of various records of the Nuernberg trials.]

F. History of the Marshal's Office, Office of the Secretary General

OFFICE OF MILITARY GOVERNMENT FOR GERMANY (US)

Military Tribunals Office of the Secretary General

HISTORY

MARSHAL'S OFFICE*

INDEX

Section	I. Organization
	II. Procedure
	III. Indictment
	IV. Arraignment
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	VIII. Permanent Passes
	IX. Duties of Enlisted Personnel
	X. Miscellaneous
	XI. Personnel

Section I

Organization, Functions, and Responsibilities of the Marshal's Office

1. The Marshal's office consists of the following personnel with general duties as described:

a. The Marshal is liaison officer between Tribunals and the Secretary General's Office; serves indictments and notices of arraignment on defendants. Supervises courtrooms, requisitions and arranges for space and equipment for present and future courtrooms and judges' chambers; supervises other personnel.

b. Executive officer is assistant to the Marshal and has general supervision of all duties and personnel of the Marshal's office.

c. Deputy marshals see that courtrooms are ready for each session, open and close courts, maintain order and decorum in courtroom, produce witnesses, and serve as liaison officers between the Tribunal and the Marshal.

d. Administrative noncommissioned officer, in charge of deputy marshal's office and witness room, sees that witnesses are avail-

*Appendix 6 to the Secretary General's Interim Report of 30 September 1949, section VIII E.

able, supervises pages, and assists in supply and service of offices, courtrooms and judges' chambers.

e. Enlisted men are the pages in the courtroom and messengers in the office.

f. Secretary to the Marshal does stenographic work, keeps files and records appropriate to the Marshal's Office.

Section II

Procedure to be followed during the Trial

1. The Tribunal will sit from Monday through Friday each week and will convene at 0930 hours each day.

2. At 0928 hours the Marshal will come on the floor of the Tribunal and announce:

(Marshal): "Persons in the courtroom will please find their seats."

3. As the members of the Tribunal enter the courtroom at 0930 hours, everyone will rise and remain standing while the Marshal announces:

(Marshal): "The Honorable, the Judges of Military Tribunal _____."

4. The judges will be seated. Thereupon the Marshal will announce:

(Marshal): "Military Tribunal _____ is now in session. God save the United States of America and this Honorable Tribunal."

5. All persons in the courtroom will then be seated, whereupon the presiding judge will address the Marshal:

(Presiding judge): "Mr. Marshal, ascertain if all defendants are present."

6. After the Marshal has ascertained this fact, he will state to the Tribunal:

(Marshal): "May it please Your Honors, all the defendants are present in the courtroom." (Or give the names of absentees and the reason for such absence and the probable length of such absence.)

7. The presiding judge will then announce:

(Presiding judge): "Mr. Secretary General, note for the record the presence of the defendants in the court." (Or such other fact for the record as will meet the situation.)

8. At approximately 1045 hours a short recess will be taken, the presiding judge announcing:

(Presiding judge): "The Tribunal will be in recess for 15 minutes."

When the judges have left the courtroom, the Marshal will announce the recess. (If the presiding judge did not announce the length of the recess, the Marshal will announce the length of the recess.)

9. All persons stand while the judges are leaving the courtroom.

10. When all but 2 minutes of the recess period have expired, the Marshal will come on the floor of the Tribunal and announce:

(Marshal): "The persons in the courtroom will find their seats." (Prior to making this announcement from the floor of the courtroom, the Marshal should go to the hallway and announce: "All persons interested in this trial will please take your seats in the courtroom.")

11. As the members of the Tribunal come into the courtroom everyone will rise. After the judges have taken their seats the Marshal will then announce:

(Marshal): "The Tribunal is again in session."

12. This procedure will be followed at each recess period.

13. The Tribunal will take a noon recess at 1230 hours and will convene at 1330 hours or 1345 hours. (The wishes of the presiding judge governing the time of convening.)

14. An afternoon recess will be taken at approximately 1515 hours.

15. Recess for the day will be taken at 1630 hours. All rise as the judges leave the courtroom.

16. After the judges have left the courtroom the Marshal will announce:

(Marshal): "The Tribunal will recess until 0930 hours tomorrow morning," (or such other time designated by the presiding judge).

Section III

Indictment

- a. Indictment is served by the Marshal.
- b. Mimeographed copies of indictment, in English and in German, are sent to the Secretary General's Office, where envelopes are prepared containing the following:
 1. Indictment
 2. Control Council Law No. 10
 3. Military Government Ordinance No. 7
 4. Military Government Ordinance No. 11
 5. Military Government Ordinance No. 7, amended
 6. London Agreement
 7. Rules of Procedure

c. The Marshal notifies Security Detachment C. O. that the defendants are to be present in room No. _____ at an hour to be indicated. *He then notifies General Watson*, Military Post Commander, that indictment, Case No. _____, including the persons by name, will be served at a certain time. He then requests the Language Division director to furnish an interpreter. He notifies the Defense Section.

d. After the persons to be indicted are in the room, the Marshal states that a form is being distributed to them which lists the various documents they are to receive and that after they have verified that these documents are present that they will sign this form. This form will then be given to the Secretary General.

e. The Marshal then proceeds as follows:

(Statements used by Marshal in serving indictments)

Do you answer to the name of _____?
Do you understand the German language _____?
My name is _____. I am a duly commissioned officer in the United States Army, holding the rank of _____. I am the Marshal of Military Tribunals, Office of Military Government, United States for Germany, with my official headquarters in the Palace of Justice, Room 147, Nuernberg, Germany. I have in my official custody, and now exhibit to you, an original indictment lodged with the Secretary General of Tribunals, Palace of Justice, Nuernberg, Germany, on the _____ day of _____ A. D. 194__ by the Chief of Counsel for War Crimes, Office of Military Government, United States. I now officially serve the indictment upon you by delivering to and leaving with you: _____

Name

(1) A true and correct copy of said indictment and all documents lodged with the indictment; (2) Control Council Law No. 10; (3) Military Government Ordinance No. 7; (4) Military Government Ordinance No. 11; (5) Regulation No. 1 under Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11; (6) London Agreement; and (7) a copy of the Rules of Procedure* under which service of this indictment is now being made upon you. As a convenience to you in the preparation of your defense, I call your attention to the fact that Rule 4 of the Rules of Procedure, which I have delivered to you, provides, in effect, that you may be brought to trial upon such day as the Military Tribunal may direct, but not less than 30 days after the service of this indictment upon you. Also as a

*See sections IV and V.

convenience to you in the preparation of your defense, I call your attention to the fact that Rule 7 of the Rules of Procedure which I have delivered to you provides the method by which you may have legal counsel to represent you in your defense.

f. The Defense Section then interviews the defendants concerning their counsel.

Section IV

Arraignment

1. On arraignment day the Tribunal will convene at 10:00 o'clock.

2. At 0958 the Marshal will come on the floor of the Tribunal and announce:

(Marshal): "Persons in the courtroom will please find their seats."

3. As the members of the Tribunal enter the courtroom, everyone will rise and remain standing while the Marshal announces:

(Marshal): "The Honorable, the Judges of Military Tribunal

4. The judges will be seated. Thereupon the Marshal will announce:

(Marshal): "Military Tribunal _____ is now in session. God save the United States of America, and this Honorable Tribunal."

5. All persons in the courtroom will then be seated as the presiding judge announces:

(Presiding judge): "Military Tribunal _____ will come to order."

6. The presiding judge will then announce:

(Presiding judge): "The Tribunal will now proceed with the arraignment of the defendants in Case No. _____ pending before this Tribunal."

7. The presiding judge will then address the Secretary General:

(Presiding judge): "Mr. Secretary General, call the names of the defendants."

8. The Secretary General will then proceed to the prosecutor's microphone while the Marshal readies the "traveling mike" for use of the defendants. As this is transpiring, the presiding judge will turn to the defendants and announce:

(Presiding judge): "As the names of the defendants are called, each defendant will stand, answer, 'present', and remain standing until told to be seated."

9. Presiding judge will then address the Secretary General:

(Presiding judge): "Mr. Secretary General, you may proceed with the roll call."

10. At the conclusion of the roll call the Secretary General will address the presiding judge:

(Secretary General): "Your Honor, all defendants are present."

11. The Secretary General will then take his place and while he is returning to his place, the presiding judge will announce to the defendants:

(Presiding judge): "The defendants will be seated."

12. The presiding judge will then address the Prosecutor:

(Presiding judge): "Counsel for the prosecution will proceed with the arraignment of the defendants."

13. The Prosecutor will approach the microphone and announce to the defendants:

(Prosecutor): "The defendants will attend to the reading of the indictment containing the charges lodged against them."*

14. After reading the indictment in full, counsel for the prosecution will be seated.

15. Thereupon the presiding judge will announce to the defendants:

(Presiding judge): "I shall now call upon the defendants to plead 'guilty' or 'not guilty' to the charges against them. Each defendant, as his name is called, will stand and speak clearly into the microphone. At this time there will be no arguments, speeches, or discussions of any kind. Each defendant will simply plead 'guilty' or 'not guilty' to the offenses with which he is charged by the indictment."

16. The presiding judge then calls the names of the defendants in the order in which they are listed in the indictment, asking:

(Presiding judge): 1. "Are you represented by counsel before this Tribunal?"

2. "How do you plead to the charges and specifications and each thereof set forth in the indictment against you — guilty or not guilty?"

17. As the pleas are given, the Secretary General makes note of them so that they can be correctly entered in the records of the Tribunal.

18. After the pleas are completed, the presiding judge then announces to the Secretary General:

(Presiding judge): "The pleas of the defendants will be entered by the Secretary General in the records of the Tribunal."

19. The presiding judge will make announcements.

*In five of the trials the indictment was not actually read at the arraignment. See section X A (Arraignment).

20. The presiding judge will then announce:

(Presiding judge): "Military Tribunal _____ will be at recess until _____."

21. The Marshal will then announce:

(The Marshal): "Military Tribunal _____ will be at recess until _____."

Section V

Courtroom

1. Deputy marshal will check the following work of pages.

a. Place a pad and two pencils at each judge's place on the bench. (Note — In Tribunal No. II the pads must be large ruled pads and pencils No. 2 or softer.)

b. Water at (1) podium, (2) prosecution table, (3) witness stand, (4) interpreters' box, (5) judges' bench.

c. Bring documents desired by each judge and place them on the judge's bench.

2. Courtroom should be clean and orderly and all chairs properly placed.

3. Listen to the headsets at the interpreters' box and have the page talk into each microphone to see that the sound system is in working order. Don't accept the Signal Corps operator's statement for its condition.

4. Check translator switch in the witness box to see that it is properly set for the expected witness (No. 3 for German; No. 2 for English).

5. Place gavel at presiding judge's place on the bench.

6. Check heat, light, ventilation, phone 019 for correct time and check clock to see that it is correct. (If the clock is not correct, call the engineers — telephone 61140 or 61141 — and have them set the clock.)

7. Have deputy marshal notebook with witness oath forms available at the Marshal's table.

8. At 0925 hours check to see that the following persons are present in the courtroom:

a. Prosecutor and defense counsel

b. Court reporters (German and English)

c. Defendants. If any are absent, find the reason for such absence and the expected length of such absence

d. Interpreters

e. Assistant Secretary General

9. Upon direction of the presiding judge, get the witness, escort him to the witness stand, hand him the earphones and help him

adjust them to his head if that is necessary. Raise the microphone, stand beside him until the oath has been taken, and then lower the microphone and return to the Marshal's desk.

Section VI

Witnesses

1. General Information

The prosecution and defense will generally make arrangements for producing their own free witnesses, often keeping them in their office until needed in the courtroom.

Defense free witnesses are messed and billeted by the Defense Information Center.

a. Make every effort that these free witnesses will be in Room 143, one-half hour before they are needed on the witness stand.

b. Find out whether the prosecutor or the defense attorney has made arrangements for the witness to be present at the required time. Free witnesses will cause embarrassment by not arriving on time, and it is particularly important that every effort be made to make certain that they will be on time.

c. Assure yourself that definite arrangements have been made for the witness to be on hand at the required time.

2. Prisoner Witnesses

a. Determine what prisoner witnesses are desired and that they are in this prison.*

b. Give information to the Marshal of the court as to any prison witnesses desired in court and the time requested; the Marshal will then notify the Security Office. Furthermore, the deputy marshal will call the prison office, telephone 61828, and give the same information.

c. The Security Office is responsible that prisoner witnesses are under guard at all times. The Marshal's office will at no time accept responsibility for an unguarded prisoner witness.

d. Prisoner witnesses are to be kept in Room 143 until a few minutes before they are placed on the witness stand. Witnesses are not to be allowed to stand outside the courtrooms while waiting to be called to the stand.

Section VII

Witness Form MT-10/MT-11 and Records

1. The deputy marshal will determine what witnesses are needed by the prosecution or defense for the next session, also whether they are free or prisoner witnesses. This list will indicate the first and last name and rank or title (if any). If this

*The Nuernberg Prison.

information is not available call Defense Information Center, or prosecution, depending on the particular case.

2. Deputy marshal will give the list to the secretary to type on MT-11 form. Take clear copy and write whether each witness is free or a prison witness. If no witness is desired for the next session, the MT-11 form will be completed indicating "No Witnesses." Having completed the MT-11 form, with the necessary notes, this copy will be given to the Marshal's executive officer and discussed with him. The executive will then give the forms to the Marshal and discuss the report as necessary with him.

3. The MT-11 form will be prepared in seven copies with distribution as follows:

- a. 1 copy—Marshal's executive officer (with notes for the Marshal as indicated)
- b. 2 copies—Judges' bench
- c. 1 copy—Interpreters
- d. 1 copy—Podium
- e. 1 copy—Defense
- f. 1 copy—File (This is the deputy marshal's copy to complete as to time the witnesses appeared on the stand or left the stand and such notes as are pertinent regarding the daily session. This copy is turned over to the secretary for the completion of her records and is filed).

4. The MT-11 form will be completed at the end of each day's session of court. The time a witness was put on the witness stand and the time he left the stand will be indicated after each witness name. If a witness is listed as being called for that day and was not used, his name will be ruled out and the words "Not Called" will be written after that name. If a witness is called who has not had his name placed on the MT-11 form, his name will be added to the form.

5. At the completion of the daily session the completed MT-11 form and the Marshal's book will be turned over to the secretary for completion of her records.

6. Notebooks. Each deputy marshal will maintain a notebook, consisting of the following:

- a. Copy of Standard Operating Procedure for Marshal's office
- b. Procedure to be followed during the trial
- c. List of defendants for the case on trial on separate pages and for prosecution witnesses
- d. During presentation of prosecution case, all witnesses will be listed by name, time called, and time dismissed
- e. The page for each defendant will have the following information:

- (1) Date indictment served
- (2) Date of arraignment
- (3) Date of first and last session
- (4) Date of judgment and sentence
- (5) List of witnesses, time called, and time dismissed
- (6) Any unusual parts, absence of defendants, etc.

Section VIII

Permanent Passes

1. The Marshal will issue all permanent courtroom passes. The requests for passes come from the various section chiefs and are in turn approved by the Marshal. Each pass must be signed for by the section chief. The secretary maintains a double entry record of each pass issued to insure proper regulation and control of permanent passes.

2. The following notation appears on each receipt: "It is understood that only persons are permitted to enter the courtroom who are assigned to seats by your section. More permanent passes are issued than there are seats available in any of the courtrooms. When there is no further need for any of these tickets, please return them to this office."

Section IX

Duties of Enlisted Personnel

1. Sergeant will be in charge of pages, maintain duty roster, supervise pages, and assist on obtaining supplies and services for court.

2. Duties of pages:

- a. Distribute pads, pencils, water, etc.
- b. Take documents from prosecution and defense lawyers to the Tribunal, to the Secretary General, or to witnesses as required
- c. Act as messenger for Tribunal
- d. When two pages are present, the page beside the Marshal will act as messenger for the judges and the deputy marshal
- e. See that the chairs are properly placed.

Section X

Miscellaneous

1. Duty Hours:

Each deputy marshal will report daily, not later than 0900 hours, to the executive officer, check his pages, then his court, in order that everything will be in readiness when court opens.

2. Dignity in the Courtroom:

- a. The deputy marshal will see that all persons present the

proper respect to the Tribunal by rising and standing in silence when the judges enter the court and leave the court.

b. In making the different announcements, talk so that you address the person in the rear of the courtroom. Put life into your voice and carry yourself in good manner.

3. Pertinent Room Numbers :

Courtroom No. 1—600
Courtroom No. 2—581
Courtroom No. 3—295
Courtroom No. 4—196
Courtroom No. 5—319
Courtroom No. 6— 70

4. Telephone numbers pertinent to courts (add such other numbers as are pertinent to each court) :

x Prosecutor (list the one of your court)	
Time monitor (German)	019
x Security chief	61039
x Visitors' passes to courtroom	61178
Locator	61168
Information (telephone)	61600
x Prison operations officers	61037
Engineers—heat, light, etc.	61140 and 61141
x*Security officer	61040
x Prison officer—prison witnesses	61828
x Court reporters—English	61335
x Court reporters—German	61330
x Press—public relations	61299
x Interrogation—Mr. Mercer	61106
x Signal Corps	61050
☐☐☐ Photo section	61260 and 61153
Cafeteria	61561

CODE:

- x—Notify these people if anything happens, not announced in open court, that affects the opening of court.
- *—When a prisoner witness is desired for the next session—give security officer a written note on the day before the witness is desired, giving the name and time the witness is desired.
- ☐—Call this office and notify them of any recess—if this recess is for more than a day-and-a-half—give the information to the secretary and request that a written memo be forwarded to that office.
- ☐☐☐—Call both photo sections the day before a witness is to go on the stand.

5. Notify all sections concerned of any unusual circumstances such as:

- (a) Extra sessions
- (b) Closed conferences
- (c) Long or unusual recess

SECTION XI

Personnel

The Marshal's office was organized by the first Marshal of the Military Tribunals, Colonel Charles W. Mays, who was the Marshal for the Military Tribunals from 4 November 1946 to 5 September 1947, at which date he returned to the United States. Colonel Samuel L. Metcalfe succeeded Colonel Mays and remained in this position until 29 August 1948, at which date Colonel Metcalfe returned to the United States. Captain Kenyon S. Jenckes succeeded Colonel Metcalfe and remained in this position until 1 April 1949, at which time Captain Jenckes was transferred to the United States Constabulary. Captain Jenckes was succeeded by Captain Gerald B. Sterling, who remained in this position until 27 May 1949, at which time Captain Sterling returned to the United States.

The following is a list of all assistant marshals:

- Lt. Col. William Turner
- Capt. Nathan Lewis
- Capt. Kenyon S. Jenckes
- Capt. Newton L. P. Jackson
- Capt. Lowell O. Rice
- Capt. Donald McCarthy
- Capt. Everett C. Way
- 1st Lt. Charles M. Pace
- 1st Lt. Jack Wheelis
- 2d Lt. Bud Jones
- S/Sgt. Elwood Muelheim

G. Defense Center

I. FINAL REPORT OF THE DEFENSE CENTER

*UNITED STATES MILITARY TRIBUNALS, NUERNBERG, GERMANY**

At the start of the United States Military Tribunals, the Office of the Secretary General was organized. Mr. Charles E. Sands was appointed as Secretary General, 25 October 1946. The Defendants' Information Center was organized by Mr. Sands shortly thereafter. Second Lieutenant George N. Garrett and Mrs. Edna Maloy were placed in charge of the Defendants' Information Center. This section was patterned after the Defend-

*Appendix 7 to the Secretary General's Interim Report of 30 September 1949. See section VIII E.

ants' Information Center of the International Military Tribunal.* This section was organized for the purpose of furnishing information to the defendants as to availability of defense counsel, furnish copies of Allied Control Council laws, etc., having a bearing on the pending trials.

The Defense Witness and Document Procurement Section was also organized in the Defendants' Information Center for procurement of documents and defense witnesses. This section was supervised by Miss Doreen Griffith.

The first indictment was served on the defendants of the Medical case on 5 November 1946. At this time the Defendants' Information Center began many new functions. Request forms were made available to the defendants for the purpose of requesting a defense counsel. These requests were submitted to the Defendants' Information Center and cables were sent to the counsel advising them to come to Nuernberg, in case they desired to defend the client as requested. Counsel were obtained for all the defendants and upon their arrival in Nuernberg they were given a letter by the Defendants' Information Center to the OCCWC Billeting Office authorizing them messing and billeting. The first trial began on 21 November 1946. The Defendants' Information Center made available to the defense counsel all support necessary for them to properly defend their clients. Travel orders were issued, upon proper written request by the defense counsel, throughout the occupied zone of Germany. All prosecution document books, prosecution motions, court orders, etc., were made available to the defense counsel and their defendants through the Defendants' Information Center.

The Defendants' Information Center was the liaison office between the defense, prosecution, and the Tribunal. Witnesses and documents were procured by the Defense Witness and Document Procurement Section of the Defendants' Information Center, upon written request of the defense counsel, approved by the prosecution and the Tribunal. All defense document books, defense motions, etc., were processed through the Defendants' Information Center. The defense counsel were required to file typewritten copies or stencils of their motions or document books with the Defendants' Information Center.

*The Secretary General of the IMT, through the Defendants' Information Center, was the principal arm of the IMT in extending assistance to defense counsel. Mention of the scope of the services of the Secretary General of the IMT was made near the opening of the statement of Professor Jahrreiss on behalf of all defendants concerning judicial questions of the IMT case: "I wish to thank the General Secretary of the Tribunal for having placed at my disposal documents of a decisive nature and very important literature. Without this chivalrous assistance it would not have been possible, under the conditions obtaining at present in Germany, to complete my work." (Trial of the Major War Criminals," *op cit.*, volume XVII, page 469.)

Mrs. Edna Maloy was transferred from the Defendants' Information Center to the Court Reporting Section and Miss Barbara B. Burns was appointed administrative assistant. Captain Lowell O. Rice, who had been assigned to the Office of the Secretary General as an assistant marshal of the Tribunals, was placed on TDY with the Defendants' Information Center, 19 January 1947. Captain Rice was placed in charge of the Defense Witness and Document Procurement Section, and Miss Doreen Griffith returned to the Zone of Interior, shortly thereafter.

Mr. Lambertus Wartena was appointed defense administrator on 3 March 1947. Lieutenant George N. Garrett was transferred shortly thereafter. Major Robert G. Schaefer was assigned to the Defendants' Information Center in February 1947 and he was appointed as the deputy defense administrator. Soon thereafter the name of the Defendants' Information Center was changed to the Defense Center. Captain Lowell O. Rice was transferred to the Defense Center as administrative officer. Major Robert G. Schaefer was placed in charge of the Defense Witness and Document Procurement Section in addition to his other duties. Miss Betty Benford was assigned to the Defense Witness and Document Procurement Section to work under Major Schaefer.

At this time, new procedures were inaugurated in standard operating procedures of the Defense Center.* The Defense Witness and Document Procurement Section was streamlined, to the effect that the prosecution had no say in what documents the defense could request; in other words, a request by the defense for procurement of a witness or document now went direct to the Tribunal, and by approval of the Tribunal witnesses and documents were procured direct, if possible, by the Defense Witness and Document Procurement Section.

Headquarters, U. S. Forces, European Theater, issued a support letter for the United States Military Tribunals dated 26 February 1947. This support letter provided the German defense counsel with a prisoner-of-war ration plus the heavy workers' ration. A separate mess was provided for the defense counsel and this support letter also authorized the issue of one carton of cigarettes per week to the defense counsel, and one bar of soap, per week, to all defense counsel, assistants and their secretaries. Cigarettes were issued at the defense counsel mess hall, and soap was issued at the Defense Center.

The defense counsel were authorized pay of 3,500 marks per month, per client, not to exceed a total of 7,000 marks. Office

*See section VIII G 2 for the "Index of Defense Center Organizational Procedures" as published by the Defense Administrator in the spring of 1947.

space and office furniture was furnished to defense counsel, assistants and their secretaries. Office supplies, such as stencils, paper, pencils, etc., were available through the Defense Center on written request by the defense counsel. Telephones were made available to the defense counsel for local and long distance calls. There was no limit on the number of calls a defense counsel could make in the occupied zone of Germany. Also official cables to anywhere in the world could be forwarded at no expense to the defense counsel, through the Defense Center. An interrogation room was organized and made available for the purpose of defense counsel interviewing their defendants and involuntary prosecution and defense witnesses. The interrogation room was open daily from 0930 to 1130, from 1330 to 1630, and from 1800 to 2100.

An American legal consultant was available at all times in the Defense Center for consultation by all defense counsel, defendants, and witnesses. Mr. John Niesley was appointed as legal consultant, 4 March 1947. He was later succeeded by Mr. Henry Chiles, who remained in this position until he resigned to accept a new position. Mr. John Fried was then appointed as legal consultant for defense counsel in addition to his other duties as legal consultant to the Tribunals.

A few trips were authorized the defense counsel out of the occupied zone of Germany, for the purpose of obtaining evidence to be used in the trials. One defense counsel was sent to London, several defense counsel visited Switzerland, one defense counsel was authorized to travel to Norway with the Tribunal and the prosecution, and at least one defense counsel was authorized to visit Prague, Czechoslovakia. Obtaining clearance for these counsel to leave Germany was an extremely difficult job.

Mr. Lambertus Wartena was relieved of his assignment as defense administrator, 16 April 1947. Lieutenant Colonel Herbert N. Holsten was appointed as Chief of Defense Center from 17 September 1947 through 19 October 1947. Major Robert G. Schaefer was appointed as Chief of the Defense Center, 20 October 1947. At this time Captain Lowell O. Rice was appointed as his deputy. Major Robert G. Schaefer was relieved of his duty and transferred to the United States, February 1949. At this time Captain Lowell O. Rice was appointed Chief of the Defense Center and remained in this position until his return to the United States, 2 July 1949, at which time, Mrs. Barbara S. Mandellaub was appointed Chief of the Defense Center.

(a) *Motions and Court Orders*

All motions by the prosecution or defense were processed through the Defense Center. Upon receipt of a motion in the

Defense Center, it was stamped filed, and sent to the Translation Division for translation. The stencils in English were returned to the Defense Center by the Language Division. These stencils were then forwarded to the Reproduction Division for mimeographing. After they had been mimeographed, personnel of the Assembly Room in the Defense Center, picked up this material and returned it to the Defense Center Assembly Room where it was assembled and distributed to the Tribunal, prosecution and defense counsel. The original motion plus English copies were sent to Court Archives. All court orders of the Tribunal were filed with the Defense Center and upon receipt of a court order it was stamped filed, and copies were made available to the defense, prosecution, and other interested persons. The originals of all court orders were sent to the Court Archives with a notation on the original that the defense and prosecution had been notified.

(b) Document Books

All prosecution document books were distributed by the Defense Center to the defense counsel. Defense document books that had been prepared by the defense counsel were submitted to the Defense Center, either in typewritten copies or in stencils. Copies were sent to the Language Division for translation as soon as the German copies were available. If typewritten copies were submitted German copies were submitted to the Translation Division immediately and copies were submitted to the Defense Center typing pool to have stencils prepared. As soon as the stencils were prepared they were sent to the reproduction section for mimeographing. As soon as the mimeograph work was completed, personnel of the Assembly Room, Defense Center, picked this material up and moved it to the Assembly Room of the Defense Center where it was assembled and distributed to the Tribunal, prosecution, Court Archives, Washington Library of Congress, Allied delegations, and other interested persons. Approximately 100 copies were distributed of each German document book.

Upon receipt of the English translation which was delivered to the Defense Center in stencils, these stencils were assembled and distributed, in the same manner as the German copies, to all interested persons. There were approximately 100 copies of each English document book distributed.

(c) Witness Procurement

When the Tribunal had approved a request for procurement of a witness or document, the Defense Witness and Document Procurement Section, by phone, cable, or letter—whichever was applicable—requested that the witnesses or documents come or be sent to Nuernberg. Upon arrival of a witness, a letter was given to the

witness authorizing the witness mess and billeting facilities through the OCCWC billeting office, and the defense counsel were notified. Upon arrival of a document that had been requested, it was immediately made available to the defense counsel concerned. An approved, or disapproved request for witnesses or documents was forwarded to the Court Archives for filing. The index cards, maintained by this office on all witnesses, were submitted to the office of the Chief of Counsel at the completion of the trials. All other records of the entire Defense Center are still on file with the Secretary General.

(d) Statistics

The records that are available in the Defense Center show that the defense counsel received 2,798 travel orders, 21,043 bars of soap, 106,360 cartons of cigarettes or smoking tobacco, 2,038 gallons of gasoline.

Attached is a list of all defendants, by cases, with their defense counsel.*

LOWELL O. RICE
Captain Infantry
Chief, Defense Center

ANNEX TO DEFENSE CENTER FINAL REPORT

On 29 June 1949, Barbara Skinner Mandellaub was appointed Chief of Defense Center in addition to her other duties; vice Captain Lowell O. Rice, relieved. The defense of Case 11, the last case, was still active, due to the order of Tribunal IV allowing the defense to file memoranda concerning alleged errors in the judgment, allowing the prosecution to file a reply and the defense to file rejoinders to the prosecution reply.

The defense memoranda, the prosecution reply, and the defense rejoinders have been filed, translated, and forwarded to the judges of Tribunal IV who are in the States. There has been no indication from the Tribunal as to when a decision will be rendered.

Motion was also filed to continue defense counsel in their appointment until further notice. This motion was denied by Tribunal order, at which time defense counsel were officially severed from the United States Military Tribunals.

30 September 1949

*Not reproduced herein. The earlier volumes of this series, in the preliminary parts devoted to each of the cases, contain lists of defense counsel in the individual cases.

2. INDEX OF DEFENSE CENTER ORGANIZATIONAL PROCEDURES AS ISSUED AND PUBLISHED BY THE DEFENSE ADMINISTRATOR IN THE SPRING OF 1947¹

1. Procedure for Securing Defense Counsel.
 2. Procedure for Defense to Secure Involuntary and Prison Witnesses.
 3. Procedure for Defense to Secure Voluntary Allied and German Defense Witnesses.
 4. Procedure for Defense to Secure Documents.
 5. Procedure for Making Up and Distributing Defense Document Books.
 - *6. Defense Notification of Defense Witnesses Who Testify In Court.
 - *7. Prosecution Notification About Prosecution Witnesses Who Testify In Court.
 - *8. Defense Notification about Document Books to be Resubmitted in Evidence.
 - *9. Distribution of Prosecution Document Books.
 - *10. Prosecution Notification About Document Books to be Resubmitted in Evidence.
 - *11. Procedure for Defense Counsel to Interrogate Persons in Nuernberg Jail.
 12. Procedure for Securing Written Statements by Defense Witness.
 - *13. Procedure of Interrogating Defense Witness by Mail.
 - *14. Procedure for Submitting Defense Motions in Writing.
 - *15. Procedure on Prosecution Motions in Writing.
 16. Procedure for Introducing Exhibits and Document Books.
- * Procedures indicated by the asterisk (*) are of interest to the prosecution as well as to the defense.

H. Court Archives

I. MAINTENANCE OF OFFICIAL RECORDS AS ORDERED BY MILITARY TRIBUNAL I AT ITS ORGANIZATION MEETING, 26 OCTOBER 1946²

MINUTES OF FIRST AND ORGANIZATION MEETING OF MILITARY TRIBUNAL I HELD AT THE PALACE OF

¹In the spring of 1947, the defense administrator circulated to the staffs of both the prosecution and the defense, a mimeographed publication of "Defense Center Organizational Procedures." This index to the publication indicates the various topics which were treated in great detail in the text of the publication, which is not reproduced herein.

² Official Record, Tribunal Records, volume I, pages 10 and 11.

JUSTICE, NUERNBERG, GERMANY, 26 OCTOBER 1946,
AT 10:00 A.M.

Present:

Walter B. Beals, Presiding Judge
Harold L. Sebring, Judge
Johnson T. Crawford, Judge
Victor C. Swearingen, Alternate Judge
Charles E. Sands, Acting Secretary General

The following proceedings were had:

It was ordered that the Secretary General procure and keep the following official records, in which shall be entered a true and complete record of all judicial proceedings before the several Military Tribunals:

1. A Progress Docket, which shall contain a chronological record of the filing of all pleadings, notices, returns, motions, applications, petitions, and requests.
2. A Minute Book, in which shall be entered the daily official proceedings of the Tribunals in causes pending before them.
3. An Order and Judgment Book, in which shall be entered all orders, judgments, and sentences of the Tribunals and such other matters as the Tribunals shall direct to be entered therein.
4. Bound volumes of testimony taken, in which shall be kept a true and complete record thereof in English.
5. Bound volumes of testimony taken, in which shall be kept a true and complete record thereof in German.
6. Bound volumes of documentary exhibits in English, which shall contain true copies of all documents submitted in evidence.
7. Bound volumes of documentary exhibits in German, which shall contain true copies of all documents submitted in evidence.

It was ordered that a duplicate original of each of said official records shall be kept by the Secretary General.

It was ordered that a copy of each of the following documents be filed and entered at the beginning of the Order and Judgment Book of each Tribunal:

1. The Moscow Declaration of October 30, 1943.
2. The Act of Military Surrender signed at Rheims on May 7, 1945.
3. The Act of Military Surrender signed at Berlin on May 8, 1945.

4. The Declaration of the Allied Representatives signed at Berlin on June 5, 1945.
5. The London Agreement of August 8, 1945.
6. The Charter of the International Military Tribunal, dated October 6, 1945.
7. Control Council Law No. 10, dated December 20, 1945.
8. Ordinance No. 7 of United States Military Government, dated October 25, 1946, with any amendments thereto.
9. Copies of Executive Orders of the President of the United States setting up and constituting the several Tribunals and appointing the members thereof.
10. Copies of general orders issued by the Office of Military Government for Germany (US) establishing and constituting the several Tribunals and appointing the members thereof.
11. Copies of all orders issued by the Office of Military Government for Germany (US) appointing a Secretary General, an Acting Secretary General and a Deputy Secretary General of the Tribunals.
12. Copies of all orders issued by the Office of Military Government for Germany (US) or by the Secretary General of the Tribunals designating and appointing a Marshal of the Tribunals.

Whereupon Military Tribunal I recessed until the further order of the Tribunal.

[Signed] WALTER B. BEALS
Presiding Judge

ATTEST:

[Signed] CHARLES E. SANDS
Acting Secretary General

2. COURT ARCHIVES HISTORY

6 July 1948

To: Dr. Howard H. Russell,
Secretary General for Military Tribunals

Subject: Court Archives History*

Herewith submitted is history of the Court Archives

[Signed] BARBARA SKINNER MANDELLAUB
Chief, Court Archives

*Appendix 9 to the Secretary General's Interim Report, 30 September 1949 (sec. VIII E).

COURT ARCHIVES HISTORY

Contents

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Breakdown of Each Category	199
Certification of Documents	205
Receipts	205
Necessity of Keeping Archives Intact	205
Problem of Defense Exhibits	206
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*Appendices:

1. Sign prominently displayed in Court Archives with signature of Secretary General
2. Transcript Registry Form
3. Transcript-Correction-Sheet Registry Form
4. Exhibit Registry Form
5. Exhibit Cross-Index Card
6. Document-Book-Recapitulation Form
7. Loose-Document-Recapitulation Form
8. Receipt Form for Exhibits
9. Withdrawn-Exhibit Identification Slip
10. Receipt Form for other Documents
11. Identification Slip for other Documents

COURT ARCHIVES HISTORY

Introduction

The scope and functions of the Court Archives for the United States Military Tribunals in Nuernberg developed out of the requirements placed upon it. Prior to the actual functioning of the Archives, beginning 21 February 1947, no preconceived plan going beyond the general idea of a "collection center" for the records existed. The organization and development of the procedures and techniques, of the understanding of the functions, and of the systematic coordination with the administrative workings of the whole of OCCWC and the Secretariat were left to the initiative of the head of the Archives.

The specific situation of the Nuernberg Tribunals called for specific solutions which had no precedent. There was a great variance in legal procedural techniques between these Tribunals and tribunals anywhere else. There was the novelty of commission hearings. There were records coming in from as many as seven Tribunals, simultaneously. There was a great fluctuation in judges and prosecution staffs, all of whom were accustomed to their own home court set-ups. The sensitivity of the defense

³ Not reproduced herein.

toward an archive controlled by Americans had to be taken constantly into account. The urgency of the archives operations did not allow for a slow and gradual training of the inexperienced assistants. The planning for, and the operation of, the Court Archives had to be performed simultaneously, without the comfort of a time period between the two phases.

When the Archives were established (21 February 1947), Case 1 (U. S. *vs.* Karl Brandt, *et al.*) had been underway since 21 November 1946. Case 2 (U. S. *vs.* Erhard Milch) had been underway since 20 December 1946. Case 3 (U. S. *vs.* Josef Altstoetter, *et al.*) had held arraignment proceedings on 17 February 1947. In Case 4 (U. S. *vs.* Oswald Pohl, *et al.*), indictment had been filed on 13 January 1947, and arraignment was to come on 10 March 1947. In Case 5 (U. S. *vs.* Friedrich Flick, *et al.*), the original indictment had been filed on 8 February 1947. (This original indictment was withdrawn with the filing of an amended indictment on 18 March 1947.)

Thus the immediate task was (1) to organize and set up a working system for efficiently recording, identifying, cross-indexing, and filing the various categories of records to come, and (2) to determine what records in each category were missing as of 21 February and to follow up. (Many original motions, applications, and court orders of Cases 1, 2, and 3, as well as copies of some of the prosecution document books of said cases, had been assembled and were in the custody of Judge Toms' office and of the administrative office of the Office of Secretary General. Prosecution exhibits received in Cases 1 and 2 had been placed in a filing cabinet without being recorded. All these served as a working basis from which to determine what was missing.)

The Archives began with three employees and expanded to eight. In order to accomplish all the detailed tasks an archivist could envision for such an operation, at least 50 percent more personnel would have been required. In view of the overseas personnel situation, all efforts towards obtaining the full help desired failed.

The difficulties created by this permanent understaffing were met by the Archives by first, sifting and organizing the work to be done (abandoning at the outset the more intricate cataloging and classifying which could have been done in great detail), doing currently that work which was necessary to be done at once, and putting off until the time the pressure would ease, such work required to bring the records of all the cases into shape for permanent storing; and second, demanding an extraordinary industriousness on the part of the Archives employees, all of whom worked under constant pressure which had no "seasonal" let-up.

The Archives began with two rooms, and expanded to six rooms, with shelving, pigeon-hole cabinets and filing cabinets full of records compactly packed. Measures were taken for protection against fire. Security measures were taken by the installation of adequate bolts on all doors, and locks on all cabinets. Filing cabinets and wardrobes were locked at closing time every night. Combination locks were used as far as they were available. No more than three employees knew the combinations, and the combination locks were periodically switched around. No one except authorized Archives personnel was allowed to take out from the files or put back any type of record whatsoever.

Function of Court Archives

The primary function of Court Archives is to maintain and preserve the complete original official court record of each case before the United States Military Tribunals in Nuernberg for historical purposes. (The records kept in the Archives will be the only authentic source of legal knowledge for future historical and juridical reference to these trials, when historians and international lawyers will be drawing conclusions, referring to precedents, shaping future international law, etc.)

Linked with the above is the natural function of a contemporary reference service for the judges, for Defense Center, for prosecution and defense counsel, Reproduction Division Document Control Branch, OMGUS Legal Division, etc., since the Archives contain the original official court papers.

A third function is the assembling and maintenance of a complete duplicate set of records of each case, and the preparation therefrom of a certified copy of the record to be sent to the Military Governor for review 16 days after sentence is pronounced on the defendants of any case (see Regulation No. 1 under M. G. Ordinance No. 7 as amended by M. G. Ordinance No. 11).*

A fourth function is the drawing of court orders for each case before the United States Military Tribunals, covering defense applications for witnesses and documents. These original applications come to the Archives with the Tribunal decisions appended; orders are drawn and periodically sent to the presiding judge of the respective tribunal for signature, after which the orders become part of the official records.

Categories of Records

The official records maintained in the Archives in each case before the United States Military Tribunals, Nuernberg, fall into the following categories:

*Reproduced in section XXV D.

- (a) Daily transcriptions of court sessions and commission hearings, English and German (in duplicate)
- (b) Exhibits, prosecution and defense, which have been offered in court
- (c) Document Books, prosecution and defense, English and German (in duplicate)
- (d) Official Court File (only original papers, from which photostat sets are prepared for duplicate file)
- (e) Order and Judgment Book (in duplicate)
- (f) Minute Book (in duplicate)
- (g) Defendants' petitions for clemency (signed carbon only; originals go to Military Governor)
- (h) Tribunal Records (in duplicate)
- (i) Minutes of meetings of Executive Committee of Presiding Judges (original only)
- (j) Joint session records
- (k) Miscellaneous files

All records are kept by cases, except for Tribunal records. Every paper is first entered in the incoming book.

Breakdown of each Category

(a) Daily Transcripts

Mimeographed transcripts of the proceedings of each court session and each commission hearing are maintained in the Archives in English and in German, two copies of each.

In the Archives each transcript is registered in the Transcript Registry (see sample page attached).^{*} Each transcript is then checked for page numbers to be sure no pages are missing, and for hours of adjourning and convening to be sure no sessions are missing. If the year ("1946," "1947," etc.) from the heading at top of first page of any session has been omitted, it is written in. The transcripts are stacked chronologically by page numbers, upside down on the shelf, in the required order for binding. As correction sheets come through, corrections are made and the correction sheets filed as authority for the corrections.

When required corrections are listed in a mimeographed "Joint Motion to Correct the Transcript" (which motions are sometimes 300 pages long), such motion is filed before the session containing the first page listed to be corrected. The pages of the motion are numbered correspondingly (with a, b, or similar device) to indicate where it is filed. Notation that such motion for correction is filed is then made at the beginning of the session containing the

^{*}Not reproduced herein.

first page listed to be corrected, and at the beginning of the session containing the last page listed to be corrected.

In the event of a joint session of all the Tribunals, enough mimeographed copies of the transcript are obtained to be inserted in the transcript record of each Tribunal in session at that time. The pages of each set of the joint session transcripts are numbered to conform to the numbering of the transcript of the respective case at that date.

(b) Exhibits

All exhibits offered in court (in evidence, for reference, or for identification) are given by the court to the Assistant Secretary General assigned to that Tribunal. He turns them over to the Court Archives each day.

In the Archives, each exhibit is registered by exhibit number. (See sample page attached.)* A cross-index card is made for each exhibit, which card is filed according to document number. (See sample attached.)* Each exhibit is then checked for conformity of the exhibit to the certificate attached. In case of discrepancy, the exhibit is held out until such discrepancy is corrected. Each exhibit folder is examined for proper identification, such as case and tribunal numbers, exhibit and document numbers.

The majority of exhibits are documents in manila folders, stapled or bound into the folders and filed in legal-size filing cabinets. However, frequently exhibits are of odd sizes and shapes, such as bricks, SS whips, photo albums, model houses, etc. Exhibits of this nature are checked for certificate; said certificate is placed in a folder and filed in the proper filing cabinet with notation as to location of the exhibit itself. The exhibit itself is identified and labeled, and placed in a locked wardrobe.

Many prosecution exhibits are original documents. The Document Control Branch eventually replaces most of these with certified photostat copies, thus making the originals again available for use in other cases. This is done through channels as authorized by the prosecution chief of counsel and agreed to by the Secretary General. This procedure involves seeing that no original exhibits are given out from the Archives without the authorized letter of request; securing proper receipts; following up at regular intervals to get the photostatic copies into the files within a reasonable time after the originals are withdrawn; checking the photostat against the description on the receipt, to assure that it is a true and complete copy; and checking the new certificate provided with the photostat.

*Not reproduced herein.

In the case of the defense, no procedure was set up for automatic withdrawal of any original exhibits for replacement by photostat. Whenever a defendant or defense counsel wishes to make such replacement, he puts his request in writing to the Tribunal. When approved, the actual withdrawal, securing of photostats, and replacement is handled by the administrative officer of Defense Center, who then sees that the defense counsel receives the original or the photostat, as the Tribunal directed, and the other is deposited with the Archives.

Exhibits are constantly needed in court for use in cross-examination, discussion, etc. The procedure evolved has been that the Assistant Secretary General for the court in question either comes in for needed exhibits or sends the page of the court with a note. The needed exhibits are listed on a receipt form in the Archives, with description of each, and the receipt is signed in triplicate, one copy given to the withdrawing party, two kept in the Archives. Exhibits withdrawn for use in court must be returned the same day.

(c) Document Books

Document books are prepared in English and German by the prosecution and by the defense in each case before the Military Tribunals. Each English and German document book is maintained in duplicate in the Archives.

These document books contain mimeograph copies of documents which it is thought may be put into evidence. As the trial of a case progresses, it may be decided not to put every document, appearing in the document books, into evidence. Likewise, it may be decided to put still other documents, not in the books, into evidence. In the latter case, loose documents are distributed for insertion in specified document books; or distributed separately not to go into any specific document books, in which case these are set up in the Archives in a folder labeled "Separate Distribution."

The document books of each case are cataloged, checked for proper identification, and filed in two complete sets. The loose documents are cataloged, properly identified, and filed.

Briefs are also filed with the document book record of each case.

(d) Official Court File

The following types of papers make up the Official Court File of each case before the Military Tribunals:

Indictment and certificate of service

Notice of arraignment and certificate of service

Motions and answers thereto

Stipulations

Defendants' applications for documents, witnesses and for counsel (including security reports on counsel)

Notices of witnesses

Defendants' medical reports

Commissioners' reports and certificates and oaths

Resignation notices of defense counsel

Rules of Procedure

Any other official paper which goes through Court

Upon receipt of these papers in the Archives, each is examined to insure, first, that each properly belongs in the Official Court File; second, that all necessary action has been completed before each is placed in the file; and third, that all supporting papers are received before a paper is permanently filed.

A "Progress Docket," or chronological index of the Official Court File, is maintained for each case. The Progress Docket of necessity remains approximately 60 days behind current date until the end of a case, because of the mechanics of getting all the papers into the Archives, followed up for action completed, and each paper permanently filed, before it can be entered in its proper place on the Progress Docket.

The papers in the Official Court File are not received in duplicate. In order to create a duplicate set to be included in the certified copy of record for review by the Military Governor, as well as a set for reference, the Official Court Files of each case are photostated, one folder at a time. This involves getting receipts from the reproduction division at the time a folder is given for photostating, and checking of the original and the photostat sets on their return, for errors made in reassembling or for omissions.

(e) Order and Judgment Book

The Order and Judgment Book for each case, maintained in duplicate, contains all court orders and, at the end of the case, the judgment and sentences of the Tribunal.

The Archives receives the original and first two carbons of every Court Order, all signed. The original and first carbon go into the two sets of Order and Judgment Book. The second carbon with "FILE" stamp and "PROSECUTION AND DEFENSE NOTIFIED" stamp appended, goes into the Official Court File attached to the motion covered by the order and all papers pertinent thereto.

All court orders on defense witnesses and documents are drawn in the Archives. The applications are received in the Archives with Tribunal decisions appended, and with Defense Center stamp re date of filing and re notification of defense and prosecution of

the decision. Uniform court orders are drawn covering said applications and decisions, and periodically sent to the presiding judge for signature. Then the application is placed in the Official Court File and the order in the Order and Judgment Book.

It is often necessary to draw an order in the Archives to cover situations such as the following examples: In Case 1, a book belonging to the University of Munich had been handed the Tribunal by defense counsel during the trial, for judicial notice, and had been deposited in the Archives. At the end of the trial, judgment had been handed down and sentences pronounced, but no provision had been made for the return of said book. The Archives drew up an order directing return of the book, took it to the presiding judge of the Tribunal for signature, returned the book by mail to the University, and sent copies of letter of transmittal and of the order to Defense Center for the defense counsel involved.

Or, in Case 10, the presiding judge had told the Assistant Secretary General to have copies made of all the official papers in the Archives having to do with the defendant Krupp's request for American counsel. Since the cardinal rule of the Archives is to let no original papers leave without a Tribunal order, and since the judge's oral directive involved keeping the papers out for several weeks while being copied, the Archives drew up a suitable order covering the situation and sent it to the presiding judge for signature before releasing the required papers.

Orders drawn in the Archives in this manner are of course distributed in the usual way, with notification to prosecution and defense.

(f) *Minute Book*

The Assistant Secretary General for each Tribunal prepares the minutes of each session of his court. The original and duplicate-original come to the Archives and become a part of the official record of the case in question.

Each day's minutes are checked for signature before they are filed. At the end of a case, the transcripts are double-checked against minutes for missing dates of either one.

(g) *Defendants' Petitions for Clemency*

After pronouncement of sentence, a deadline of 15 days is allowed for defense counsel to file clemency pleas to the Military Governor. In addition, with no deadline indicated, defense counsel file pleas to United States Supreme Court, Judge Advocate General, Secretary of the Army, United States District Court for the District of Columbia, President of the Swiss Confederation,

etc. All these petitions are forwarded by the Secretary General to the Military Governor for disposition.

These petitions are all filed with Defense Center. In the first few cases, the Chief of Archives aided in assembling the clemency petitions, and created a "Recapitulation Sheet" form for listing the various types of petitions, which form was adopted and used by Defense Center for all subsequent cases also.

Upon forwarding of the petitions to the Military Governor, a signed German copy and mimeographed English copy of each is sent to the Archives for official filing. (In many instances, two sets are sent, but not often enough to provide complete duplicate sets.)

(h) Tribunal Records

Records are maintained of each Nuernberg Tribunal which include copies of authorizations for the trials, such as the London Agreement Control Council Law No. 10, IMT Chapter, Military Government Ordinances No. 7 and 11; copies of the Executive Order appointing the judges on that Tribunal, EUCOM and OMGUS General Order constituting the Tribunal, individual letters from the Military Governor appointing the judges to that Tribunal, all Tribunal orders drawn by that Tribunal which are not limited to a specific case, etc.

(i) Minutes of Meetings of Executive Committee of Presiding Judges

These minutes are received in the original only, and are filed chronologically with the Tribunal records.

(j) Joint Session Records

This file is maintained in duplicate. It consists of copies of all motions for joint sessions and Tribunal orders thereon. (The originals are filed with the record of the respective cases.) In addition, this file contains copies of the mimeographed transcript of any joint session.

(k) Miscellaneous Files

(1) Miscellaneous file for each case

In this file are placed all papers handed to the Archives by the judges with the statement, "No action to be taken by the Tribunal," as well as all papers pertinent to a case but which have not gone through the court and are not part of the official record of the case.

(2) True copies file

In this file are placed any carbons of motions, etc. which reach the Archives, plus any extra copies which are made of such papers, for use in certifying to copies of documents.

(3) Requests for certification file

This file contains records on certification of documents or transcripts prepared by the Chief of Archives for authorized persons in accordance with Rule 13c of the Uniform Rules of Procedure.

Certification of Documents

The Chief of Archives was deputized on 27 February 1947 to authenticate for the Secretary General copies of documents filed in the Archives and was given custody of the official seal of the United States Military Tribunals.* In compliance with Rule 13c of Uniform Rules of Procedure, certified copies of any original document which is part of the official files of the United States Military Tribunals may be furnished authorized persons upon written request and approval of the Tribunal involved or (if it concerns a case already closed, with no longer a competent Tribunal in existence) of the executive presiding judge.

Receipts

The system adopted in the Archives for handling receipts is as follows: Upon release of a document from the Archives by court order, for example, receipt is prepared in triplicate, containing complete description of the document. The withdrawee signs the receipt in triplicate, is given the document and one carbon of the receipt. An identification slip is then prepared in duplicate from the information on the receipt. The two copies of the receipt are then filed: one in the "Outstanding Receipts" folder in miscellaneous, one in the "Outstanding Receipts" folder in the desk of the head of the Archives. The two identification slips are then filed: one in the file from which the document has been withdrawn, and one in the "Outstanding" folder of the assistant archivist.

Necessity of Keeping Archives Intact

A persistent and ever-recurring problem has been the lack of understanding of the function of the court Archives on the part of many persons. Plans made by others for taking away original papers for urgent use in other offices, in other cities of the United States Zone of Occupation, and even in Washington, had to be constantly disabused. In addition, the seemingly simple matter of getting all the records into the Archives, of having the Archives included on every distribution list for briefs, motions, document books, loose documents, transcripts, etc., in reality required con-

*The official seal of the Military Tribunals was adopted at an executive meeting of Tribunals I, II, and III on 17 February 1947. Official Record, Tribunal Records, volume I, Tribunal II, page 86.

stant watchfulness, liaison, and checking, because of this lack of understanding of the important function of the Archives.

Dispersal of the Archives would mean the loss to posterity of the historical role of these trials. If provision later is to be made for publishing the legal history of the OCCWC processes, this is the only authentic source of legal knowledge of these cases.

In the event of questions arising over various aspects of a trial which would involve possible revision of judgment, etc., the complete original records are the only authentic source from which decisions can be made.

In the event of a congressional investigation after OCCWC proceedings are through, it would reflect on the whole of OCCWC and on the Secretariat if complete original official records had not been preserved to show without any doubt what was accomplished in Nuernberg.

Lastly, the complete original record of every case has been at all times indispensable in the Archives as reference. The Tribunals, the prosecution, and the defense of all the cases constantly refer to the records of all the other cases, in addition to constant reference made to all the records by OMGUS Legal Division and by other military courts in the United States Zone of Occupation.

Problem of Defense Exhibits

The defense was apparently never required by the Tribunals to submit original or certified documents for their exhibits. (All prosecution exhibits are certified to in a comprehensive form, indicating whether it was a captured document, where the original is to be found if it is not an original, etc.)

Hundreds of defense exhibits have been accepted in evidence in the various cases, in the form of mimeographed or photostat copies without certificates; many of those which did have certificates were superficially certified to by the counsel for the defendant involved. To an archivist the evidential value of these defense exhibits without proper certification seems doubtful. The Archives on various occasions pointed out this situation to the Assistant Secretaries General, the prosecution, and Defense Center.

Miscellaneous

Accuracy has been promoted by the use of 3 x 5 cards, typed with the following information (one card for each of the 12 cases): case number, Tribunal number, name of case, defendants listed alphabetically with figures opposite each name indicating the position of that defendant's name on the indictment. A set of these cards was used by each Archives employee for constant reference.

A loose-leaf binder called "Double Check of Official Court File" has been helpful in determining whether all necessary papers have been received in the Official Court File of any case. Loose-leaf sheets are prepared for each case, listing the papers essential to every case which must be included, such as indictment, certificate of service, rules of procedure, etc., and listing the defendants in the case with space for jotting down the counsel and assistant counsel approved for each defendant. These sheets are periodically checked with the Official Court Files of the various cases in progress.

3. "INTRODUCTION" BY CHIEF, COURT ARCHIVES, TO "OVERALL INDEX, OFFICIAL RECORD, UNITED STATES MILITARY TRIBUNALS, NUERNBERG," 3 NOVEMBER 1949

OFFICIAL RECORD, UNITED STATES MILITARY TRIBUNALS, NUERNBERG

OVER-ALL INDEX¹

INTRODUCTION

The official record of the United States Military Tribunals, Nuernberg, is composed of the records of the 11 Tribunals (Tribunal records), and the court records of the 12 cases (case records).²

Various categories of the official record of the United States Military Tribunals were determined at the "First and Organization Meeting of Military Tribunal I," held at the Palace of Justice, Nuernberg, 26 October 1946, the minutes of which Meeting are contained in the Records of Tribunal I.* (See vol. 1, Tribunal Records.) Other categories grew out of the daily

*The Minutes of the 26 Oct. 46 meeting of Tribunal I, ordering the Secretary General to procure and keep stated categories of official records, virtually established the Court Archives. The actual functioning of the Archives did not begin until 4 months later, in February 1947, by which date the trial of Cases 1 and 2 were well under way and Cases 3, 4 and 5 had progressed to the filing of the indictment. The Archives, in compliance with the order set forth in the minutes of the 26 October 1946 meeting mentioned above, had to assemble the records of these cases retroactively as the trials proceeded. Up to the time of the establishing of the Archives, the office of the Executive Presiding Judge of the Tribunals, and the administrative office of the Office of Secretary General, had assumed the function of receiving motions, orders, exhibits, and some of the document books of said cases.

¹ See Official Record, Over-all Index, pages *i-ix*.

² See appendix C for a report concerning the location of various records of the Nuernberg trials.

experience of the Court Archives whenever documents or papers not yet coming under the categories determined at the aforementioned meeting were closely enough associated to make advisable the creation of a new category under which to be grouped.

Under Tribunal records are coordinated the following categories:

- Copies of Executive Orders appointing the Judges
EUCOM or OMGUS General Orders constituting the
Tribunals

- Copies of letters from the Military Governor appointing
the Judges to specific Tribunals

- Copies of documents comprising basic authority for War
Crimes Trials and United States Military Tribunals,
such as the London Agreement and IMT Charter issued
pursuant thereto, Control Council Law No. 10, Military
Government Ordinance No. 7, etc.

- Tribunal Orders which have significance apart from a
specific case

- Copies of appointment papers of Secretariat officials
Joint Session records.

Under case records are coordinated the following categories:

- Daily court transcripts

- Minute Book

- Progress docket

- Official Court File

- Exhibits

- Order and Judgment Book

- Document books, opening and closing statements, briefs,
final pleas

- Commitment papers

- Defendants' clemency petitions

- Orders of Military Governor with respect to sentences.

Tribunal records, and case records of the 12 trials, are thus two separate units of the official record. Some papers are contained in the Tribunal records in typed copies, the originals of which are in the case records.

The following Over-all Index presents the categories comprising the Tribunal records and the categories comprising the case records of the twelve trials. It was not designed to assume the task of analyzing the records or of giving a breakdown of the substance presented in each case. It was devised to shorten the search for the location of facts and dates by giving an over-all picture of which volume of the bound material, and which part of

the volume or of the unbound material, contain what types of information and facts.*

*The limitation of personnel throughout the whole operation of Court Archives and the time limit set for the winding-up operations made a more elaborate indexing impossible.

In addition to the official categories of the record of each case, the Over-all Index includes an exhibit index and a list of witnesses, drawn up by the Assistant Secretary General assigned to the Tribunal before which the case was tried. It also includes a document book recapitulation for each case as established by Court Archives. These additions were not intended to and do not form part of the official record, but are merely annexes for working references.

The Over-all Index for each case is grouped under seven category headings and various subheadings, the specific meanings of which are explained below.

1. Transcripts

The transcripts of each case are the daily trial record taken by court reporters in both the English and the German languages. Whenever any other language was used in court, it appears in the transcript as translated by an official sworn interpreter.

The Over-all Index indicates the bound volumes in which both the English and German transcripts appear, showing the dates and page numbers included in each volume. The symbols M, A, or E, appearing after the dates, indicate morning, afternoon, or evening sessions. The symbols C, C I, or C II, indicate commission hearings. One or more commissions were used by the United States Military Tribunals in the various cases to sit as part of the proceedings to hear testimony and to receive documentary evidence for consideration of the Tribunals.

To illustrate the usefulness of this index, the following example is pointed out: When studying a brief in which reference is made to a specific page number in the German transcript, one can refer to this index and quickly ascertain, first, in which bound volume of the case in question that page appears; second, the date of the court session in which the page is included; and third, the volume in which that date appears in the English transcript.

2. Minute Book

Minutes of the daily court sessions of each case were kept by the Assistant Secretary General assigned to the Tribunal in question (or, as in the Milch case, by the Deputy Secretary General). The minutes are in chronological order by dates of the court sessions. The Minute Book provides a quick reference to the main happenings of each court session.

3. Official Court File

a. Progress Docket

The progress docket for each case was prepared by Court Archives in its official capacity as an administrative part of the United States Military Tribunals. The progress docket serves as a complete index by document number of the document in the Official Court File. The Over-all Index reveals that the progress docket for each case appears just before the Official Court File in the bound volumes.

b. Official Court File

The Official Court File for each case contains all official court papers of the case filed with the Secretary General, including:

Indictment

Certificate of service of indictment

Notice of arraignment and certificate of service

Motions, applications, of defense or prosecution;* answers thereto; signed carbon of court order acting thereon, on which appears Defense Center stamp indicating that defense and prosecution were notified of such Tribunal action

Defendants' applications for counsel, witnesses and documents, with prosecution comment and Tribunal decision appended

Rules of Procedure

Medical reports on defendants

Stipulations.

*The majority of defense motions were written in German and translated for distribution to the Tribunal and to prosecution. Therefore these defense motions appear in German signed by defense counsel, with English translations appended.

The documents in the Official Court File are in chronological order by date of filing of the last paper in each document. For instance, if a motion is filed, an answer by the other side, a reply to the answer, a rejoinder to the reply, and then a court order, the file date governing the complete document is the date of filing of the court order, the last paper in that document. (Exception: defendants' applications for witnesses or documents are filed by file date of said application, although Tribunal decision of a later date is appended.)

c. Appendix to Official Court File

The appendix contains the three working references described in page *ii* of this introduction:

(1) *Document Book Recapitulation.* Prepared in Court Archives, this recapitulation lists all prosecution and defense document books, briefs, manuscript copies of opening and closing statements and final pleas, of the case in question, as established by the Archives.

As a matter of convenience briefs, opening and closing statements and final pleas were classified with document books, since the similarity of size and shape made it practicable to file these categories in conjunction with each other in the Archives in the shelving especially constructed to our specifications.

Note: This recapitulation, prepared at the time the certified copy of the record went forward to the Military Governor for review, indicates only English copy of each item. Actually almost every item is contained in both the English and the German languages.*

*A few prosecution briefs, and a few defense items submitted in English, were not translated into German. In these instances a folder has been incorporated in the proper place in the German portion of the record, containing the information that the brief in question was never translated.

(2) *Exhibit Index.* Prepared by the Assistant Secretary General assigned to the Tribunal, this is a complete index of prosecution and defense exhibits of the case in question. (The first such index, that for Case 2, was prepared in Court Archives. The form was adopted for all subsequent exhibit indices.) Each exhibit index was painstakingly checked in Court Archives with the actual exhibits and document books of the case. Discrepancies found in the exhibit index were resolved by checking with the Tribunal, with prosecution and defense, and with the Assistant Secretary General. All copies of the index were then corrected.

The exhibit index lists exhibits chronologically by exhibit number, giving also document number, description, date the exhibit was offered in court, and document book number and page number where a mimeographed English or German copy of the document in question can be found.

(3) *List of Witnesses.* Prepared by the Assistant Secretary General assigned to the Tribunal, this is a list of defense and prosecution witnesses in the case.

(4) *Order and Judgment Book.* The order and judgment book contains all court orders in the case, chronologically by date of the orders. (As described on page *iv*, signed carbons of these orders are in the Official Court File in chronological order by date of filing.)

Also contained in the order and judgment book are the judgment of the Tribunal, concurring or dissenting opinions, and the sentence of the Tribunal. (These appear in the daily court transcripts as read in court.) Contained also are the following official papers received after the case was completed: Signed and attested carbon copies of defendants' commitment papers, and the orders of the Military Governor of the United States Zone of Occupation with respect to sentence of the defendants.*

*These Orders of the Military Governor were issued after study of the

defendants' clemency petitions, and after review of certified copy of the record of the case prepared by Court Archives. It is pointed out that the Military Governor took no action on sentences of defendants who did not file clemency petitions to the Military Governor.

(5) *Defendants' Clemency Petitions.* Regulation No. 1 under Military Government Ordinance No. 7 as amended by Military Government Ordinance No. 11, provides that defendants sentenced by a Military Tribunal may file petitions to the Military Governor for mitigation, reduction or alteration of sentence within 15 days of imposition of sentence or within 10 days of final action by the Military Tribunal following remand of case reviewed by a joint session.

The Defense Center of the Office of Secretary General accepted all petitions filed by such defendants, including petitions to other agencies such as the Supreme Court or Secretary of the Army. All petitions were translated and submitted to the Military Governor for disposition.

The clemency petitions are contained in the record of each case in a signed German copy with English translation. The Over-all Index indicates that recapitulation sheets (as drawn up at time of forwarding of petitions to the Military Governor) appear in the bound volume just before the petitions, itemizing attachments and enclosures to same.

(6) *Exhibits.* All prosecution and defense exhibits offered in court are contained in the record of each case. (For complete breakdown, with description of each exhibit, see Exhibit Index in appendix to Official Court File in the bound volumes.)

The majority of exhibits consist of German documents. (Prosecution exhibits in the various cases were accepted by the court in either original form or in the form of certified photostats. Defense exhibits in the various cases were often accepted by the court in uncertified form or as merely certified to by defense counsel.)

Other types of exhibits are films, a model house, SS whip, etc. In the case of an exhibit of this latter type, the Archives prepared a folder with certificate for the exhibit files, and the exhibit itself, properly labeled, was kept in a large wall cabinet — the "Exhibit Wardrobe."

It will be noted that the defense exhibits in Case 10 are numbered consecutively from Defense Exhibit 1 to 3147, and they are identified with the respective defendants only by means of the document number. For instance, Defense Exhibit 1 is Loeser Document 68, Defense Exhibit 3 is Krupp Document 171, Defense Exhibit 21 is Pfirsch Document 42, etc. (This is a departure from the procedure followed in the other cases, where each defendant's

exhibits began anew with the number 1, and were identified by the defendant's name, or first two letters of his name, appearing before both the exhibit number and the document number.)

It will also be noted that in several of the cases the prosecution set aside certain exhibit numbers which were never assigned to any exhibits. Thus the total figure of prosecution exhibits indicated in the Over-all Index of these cases is less than the last exhibit number in the prosecution exhibit index.

Translations of all exhibits which consist of German documents are contained in the English Document Books. The exhibit index for each case provides quick reference as to page number of what document book contains such translation.

(7) *Document Books, Briefs, Opening-Closing Statements, Final Pleas.* Prosecution and defense items under this category are contained in the record of each case in English and German languages.* (For breakdown, see Document Book Recapitulation in appendix to Official Court File in the bound volumes.)

*See footnote, page v, for exception.

Document books were prepared by prosecution and defense of each case before the presentation of evidence in the case began. Therefore, in addition to copies of documents presented in evidence, the document books contain many documents which were never offered as exhibits. Thus in order to evaluate evidence, one must study the document books of a case in conjunction with the exhibit index.

As a case progressed, it was often decided by the prosecution or the defense to offer into evidence certain documents not contained in the document books. When this happened, the Archives procured English and German copies of such documents from the Document Control Branch of the Office of Chief of Counsel for War Crimes, or from Defense Center of the Office of Secretary General. In the Archives these loose documents either were inserted into the official copies of specified document books, or were assembled into folders and labeled "Loose Documents Separately Distributed."

The prosecution sometimes set aside certain document book numbers, plans for which were later discarded, so that gaps occasionally occur between numbers of actual document books. This is indicated by folders inserted at the missing numbers, with the statement that the document book numbers in question are nonexistent.

English document books of prosecution and defense contain English translations of exhibits. German document books contain

*Page 211, this volume.

copies of the exhibits as offered in the German language. (Vice versa of course in the few instances where exhibits consisted of original English documents.)

Opening-closing statements and final pleas are contained in the record of each case in English and German manuscript version, in addition to the version appearing in the daily court transcripts as read in court. Various of the Tribunals stated that, in case of question, the manuscript copy as filed with the Secretary General and brought to the attention of the Tribunal shall be considered official; or, that there was not time to read a complete plea in court and the filed copy shall be considered official.

Summary of Principal Dates

This item appears in the Over-all Index at the end of each case. It is not numbered, as it is not a category contained in the record. It is thought valuable to be included, as it gives an over-all picture of the time allotment between filing of the indictment in each case and action of the Military Governor on the sentence imposed.

Uniform binding of the entire Official Court Record was not possible due to the necessity of winding up the court Archives immediately the trials were over. The binding of recommended categories consisting largely of loose sheets (the most satisfactory means of preserving them intact and of allowing for fruitful reference) was approved. The Over-all Index indicates the portions of the record which have been bound, and the portions which are not in book form. The official records which have been bound in Nuernberg total 837 volumes.

[Signed] BARBARA SKINNER MANDELLAUB
Chief, Court Archives

3 November 1949

IX. THE INDICTMENT AND THE CONDUCT OF THE PROSECUTION

A. Introduction

Article III (a) of Ordinance No. 7 charged the Chief of Counsel for War Crimes with the exclusive responsibility for (a) the determination of who should be tried in the American Zone of Occupation under Control Council Law No. 10; (b) the filing of the indictments; and (c) the conduct of the prosecution. In his "Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10," Brigadier General Telford Taylor, the Chief of Counsel for War Crimes, devotes separate sections to the "Selection of Defendants" (pp. 73-85), and the "Form of the Indictments" (pp. 71-73).

Article III (b) authorized the Chief of Counsel for War Crimes to "invite one or more United Nations to designate representatives to participate in the prosecution of any case." In only one Nuernberg trial subsequent to the IMT trial did a representative of one of the United Nations actually participate in the prosecution. Mr. Charles Gerthoffer, who had been one of the assistant prosecutors of the French Republic in the IMT trial, participated in the prosecution of the Ministries case by addressing the Tribunal and conducting the examination of a witness. However, a number of the United Nations maintained delegations at Nuernberg (see sec. "Foreign Delegations" of Brigadier General Taylor's Final Report, *op. cit.*, p. 46), and representatives of these delegations, on many occasions, were helpful in the procurement of evidence and witnesses.

This section begins with President Truman's Executive Order of 16 January 1946, concerning the extension of the authority of the Chief of Counsel to the prosecution of war crimes trials against Axis adherents before United States military or occupational Tribunals (subsec. B.) Then came the provisions of Ordinance No. 7 dealing with the conduct of the prosecution and the origin, filing, service, and content of the charges of criminal conduct (subsec. C), the general order of General McNarney establishing the Office, Chief of Counsel for War Crimes and appointing Brigadier General Telford Taylor as Chief of Counsel for War Crimes (subsec. D), and the Order of the Tribunal in the Ministries case authorizing two representatives of the Republic of France to participate in the prosecution of that case (subsec. E).

The next following subsections contain material from several

cases illustrating the practice followed in the filing and service of indictments (subsec. F) ; in the withdrawal of original indictments and the filing of substitute indictments therefor (subsec G) ; the amendment of withdrawal of charges in the indictment during the course of trial upon the initiative of the prosecution or with the prosecution's agreement (subsec. H) ; the dismissal by Tribunal order of charges or entire counts prior to judgment (subsec. I).

The next subsection contains materials on the defense motion in the Krupp case alleging prejudicial joinder of defendants and moving for separate trials (subsec. J). The last subsection is devoted to illustrative materials from various cases on the requirements as to the contents of the charges (subsec. K). These materials relate mainly to the provision of Article IV (a) of Ordinance No. 7 that, "The indictment shall state the charges plainly, concisely, and with sufficient particulars to inform defendant of the offenses charged."

The full text of the indictment of any one of the twelve trials is not reproduced in this volume since the full text of each indictment has been reproduced in the earlier volumes of this series. In the volumes devoted to the individual cases, the indictment appears uniformly under section I. The following table will facilitate reference to the indictments in the various trials as reproduced in the earlier volumes :

<i>Popular name of case</i>	<i>Case No.</i>	<i>Section I of Volume</i>
Medical	1	I
Milch	2	II
Justice	3	III
Pohl	4	V
Flick	5	VI
Farben	6	VII
Hostage	7	XI
RuSHA	8	IV
Einsatzgruppen	9	IV
Krupp	10	IX
Ministries	11	XII
High Command	12	X

B. Order of the President of the United States, 16 January 1946, Executive Order 9679, Extending Powers of the Representative of the United States and the Chief of Counsel

EXECUTIVE ORDER 9679

AMENDMENT OF EXECUTIVE ORDER No. 9547 OF MAY 2, 1945,* ENTITLED "PROVIDING FOR REPRESENTATION OF THE UNITED STATES IN PREPARING AND PROSECUTING CHARGES OF ATROCITIES AND WAR CRIMES AGAINST THE LEADERS OF THE EUROPEAN AXIS POWERS AND THEIR PRINCIPAL AGENTS AND ACCESSORIES"

By virtue of the authority vested in me as President and Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, it is ordered as follows:

1. In addition to the authority vested in the Representative of the United States and its Chief of Counsel by Paragraph 1 of Executive Order No. 9547 of May 2, 1945, to prepare and prosecute charges of atrocities and war crimes against such of the leaders of the European Axis powers and their accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal, such Representative and Chief of Counsel shall have the authority to proceed before United States military or occupation tribunals, in proper cases, against other Axis adherents, including but not limited to cases against members of groups and organizations declared criminal by the said international military tribunal.

2. The present Representative and Chief of Counsel is authorized to designate a Deputy Chief of Counsel, to whom he may assign responsibility for organizing and planning the prosecution of charges of atrocities and war crimes, other than those now being prosecuted as Case No. 1 in the international military tribunal, and, as he may be directed by the Chief of Counsel, for conducting the prosecution of such charges of atrocities and war crimes.

3. Upon vacation of office by the present Representative and Chief of Counsel, the functions, duties, and powers of the Representative of the United States and its Chief of Counsel, as specified

*This Executive Order concerns the designation of Associate Justice Robert H. Jackson "as the Representative of the United States and its Chief of Counsel in preparing and presenting charges of atrocities and War Crimes against such of the leaders of the European Axis Powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal." This order is introduced in the introductory materials appearing at the beginning of volumes I, III, IV, VI, VII, IX, X, and XII, this series.

in the said Executive Order No. 9547 of May 2, 1945, as amended by this order, shall be vested in a Chief of Counsel for War Crimes to be appointed by the United States Military Governor for Germany or by his successor.

4. The said Executive Order No. 9547 of May 2, 1945 is amended accordingly.

THE WHITE HOUSE,
January 16, 1946.

HARRY S. TRUMAN

C. Articles III and IV, Ordinance No. 7

Article III

(a) Charges against persons to be tried in the Tribunals established hereunder shall originate in the Office of the Chief Counsel for War Crimes, appointed by the Military Governor pursuant to paragraph 3 of the Executive Order Number 9679* of the President of the United States dated 16 January 1946. The Chief of Counsel for War Crimes shall determine the persons to be tried by the Tribunals and he or his designated representative shall file the indictments with the Secretary General of the Tribunals (see Art. XIV, *infra*) and shall conduct the prosecution.

(b) The Chief of Counsel for War Crimes, when in his judgment it is advisable, may invite one or more United Nations to designate representatives to participate in the prosecution of any case.

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

(a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

* * * * *

Comparable provisions of the Charter of the IMT are the following:

III. COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14. Each Signatory shall appoint a Chief Prosecutor for

*Reproduced in subsection B.

the investigation of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes :

- (a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
- (b) to settle the final designation of major war criminals to be tried by the Tribunal,
- (c) to approve the Indictment and the documents to be submitted therewith,
- (d) to lodge the Indictment and the accompanying documents with the Tribunal,
- (e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties :

- (a) investigation, collection, and production before or at the Trial of all necessary evidence,
- (b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
- (c) the preliminary examination of all necessary witnesses and of the Defendants,
- (d) to act as prosecutor at the Trial,
- (e) to appoint representatives to carry out such duties as may be assigned to them,
- (f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

D. Order of Commanding General, United States Forces, European Theater, and Military Governor, United States Zone of Occupation, 24 October 1946 (General Orders No. 301), Concerning the Transfer of the Office of Chief of Counsel for War Crimes to the Office of Military Government for Germany (US), and the Appointment of Brigadier General Telford Taylor as Chief of Counsel for War Crimes and Chief Prosecutor

HEADQUARTERS
US FORCES, EUROPEAN THEATER

GENERAL ORDERS } 24 OCTOBER 1946
No. 301 }

Office of Chief of Counsel for War Crimes I
Chief Prosecutor II
Announcement of Assignments III

I.OFFICE OF CHIEF OF COUNSEL FOR WAR CRIMES. Effective this date, the Office of Chief of Counsel for War Crimes is transferred to the Office of Military Government for Germany (US). The Chief of Counsel for War Crimes will report directly to the Deputy Military Governor and will work in close liaison with the Legal Adviser of the Office of Military Government for Germany and with the Theater Judge Advocate.

II.CHIEF PROSECUTOR. Effective this date, the Chief of Counsel for War Crimes will also serve as Chief Prosecutor under the Charter of the International Military Tribunal, established by the Agreement of 8 August 1945.

III.ANNOUNCEMENT OF ASSIGNMENTS. Effective this date, Brigadier General Telford Taylor, USA, is announced as Chief of Counsel for War Crimes, in which capacity he will also serve as Chief Prosecutor for the United States under the Charter of the International Military Tribunal, established by the Agreement of 8 August 1945.

BY COMMAND OF GENERAL McNARNEY:

C. R. HUEBNER
Major General, GSC,
Chief of Staff

OFFICIAL:

GEORGE F. HERBERT
Colonel, AGD
Adjutant General

DISTRIBUTION: D

E. Order of the Tribunal in the Ministries Case, 11 February 1948, Authorizing Two Representatives of the French Republic to Participate in the Prosecution

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

[Stamp] Filed: 12 February 1948

United States of America
against
Ernst von Weizsaecker, *et al.*

*ORDER*¹

The Chief of Counsel for War Crimes having, pursuant to Ordinance No. 7, Article 3 (b), invited the Republic of France through its Minister of Justice to designate representatives to participate in the prosecution of Case 11 now pending before this Tribunal, in which the evidence to be presented is asserted to be of especial interest to the Republic of France, and the said Minister of Justice having, in compliance with such invitation, designated M. Charles Gerthoffer and M. Charles deBonnechose as the authorized representatives of France to participate in the prosecution of such case, and the prosecution counsel in said case having requested that the Tribunal approve the appearance of the said M. Charles Gerthoffer and M. Charles deBonnechose before this Tribunal, in accordance with provisions of Article 3 (b), Ordinance No. 7.

IT IS ORDERED THAT M. CHARLES GERTHOFFER AND M. CHARLES DEBONNECHOSE BE AND THEY HEREBY ARE AUTHORIZED TO APPEAR BEFORE THIS TRIBUNAL AS REPRESENTATIVES OF THE REPUBLIC OF FRANCE TO PARTICIPATE IN THE PROSECUTION OF SAID CASE 11.²

Nuernberg, Germany
11 February 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Military Tribunal IV

¹ U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 88, page 108.

² Only M. Charles Gerthoffer did appear before the Tribunal and participate in the presentation of evidence.

F. Form, Filing, and Service of Indictments

I. INTRODUCTION

The general form of the indictments is illustrated herein by extracts taken from the indictment in the Medical case, (2 below). Rule 3 of the Uniform Rules of Procedure contains the general requirements with respect to the service of the indictment (3 below). The manner and form of service of defendants is shown herein by the Certificate of Service of eight of the defendants in the Medical case (4 below). Reference is also made to the language used by the Marshal in serving indictments upon the defendants. (See "History of the Marshal's Office," sec. VIII F.) How defendants acknowledged receipt of service is illustrated herein by the receipt executed by the defendant Ohlendorf in the Einsatzgruppen case (5 below).

2. THE BEGINNING, ENDING, AND COUNT HEADINGS OF THE INDICTMENT IN THE MEDICAL CASE¹

MILITARY TRIBUNAL NO. I
CASE 1

UNITED STATES OF AMERICA
against

KARL BRANDT, SIEGFRIED HANDLOSER, PAUL ROSTOCK, OSKAR SCHROEDER, KARL GENZKEN, KARL GEBHARDT, KURT BLOME, RUDOLF BRANDT, JOACHIM MRUGOWSKY, HELMUT POPPENDICK, WOLFRAM SIEVERS, GERHARD ROSE, SIEGFRIED RUFF, HANS WOLFGANG ROMBERG, VIKTOR BRACK, HERMANN BECKER-FREYSENG, GEORG AUGUST WELTZ, KONRAD SCHAEFFER, WALDEMAR HOVEN, WILHELM BEIGLBOECK, ADOLF POKORNY, HERTA OBERHEUSER, AND FRITZ FISCHER, *Defendants.*²

SEAL:

U.S. MILITARY TRIBUNALS
NUERNBERG

Received 1340, 25 Oct 46
by the Secretariat for
Military Tribunals

[Signed] CHARLES E. SANDS
Acting Secretary General

¹ U.S. *vs.* Karl Brandt, *et al.*, Case 1, Official Record, volume 32, pages 39-56. The entire indictment is reproduced in volume I, this series, pages 8-17.

² Hereinafter the formal caption of orders and other items from the record in the Medical case will be omitted.

INDICTMENT

The United States of America, by the undersigned Telford Taylor, Chief of Counsel for War Crimes, duly appointed to represent said Government in the prosecution of war criminals, charges that the defendants herein participated in a common design or conspiracy to commit and did commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945. These crimes included murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts, as set forth in counts one, two, and three of this indictment. Certain defendants are further charged with membership in a criminal organization, as set forth in count four of this indictment.

The persons accused as guilty of these crimes and accordingly named as defendants in this cause are:

[Here follow the names of each defendant, each name being followed by a short description of the defendant's positions.]

COUNT ONE—THE COMMON DESIGN OR CONSPIRACY

[Here follow five paragraphs of specifications.]

COUNT TWO—WAR CRIMES

[Here follow five paragraphs of specifications, the first of which contains 12 separate subsections on different experiments on human beings.]

COUNT THREE—CRIMES AGAINST HUMANITY

[Here follow five paragraphs of specifications.]

COUNT FOUR—MEMBERSHIP IN CRIMINAL ORGANIZATION

[Here follows one paragraph of specification.]

Wherefore, this indictment is filed with the Secretary General of the Military Tribunals and the charges herein made against the above-named defendants are hereby presented to Military Tribunal I.

[Signed] TELFORD TAYLOR

Brigadier General, U.S.A.

Chief of Counsel for War Crimes

Acting on Behalf of the United States of America

Nuernberg, 25 October 1946

3. RULE 3, UNIFORM RULES OF PROCEDURE, "NOTICE TO DEFENDANTS"

Rule 3. Notice to Defendants

(a) The Marshal of Military Tribunals, or his duly authorized deputy, shall make service of the indictment upon a defendant in any prosecution before the Tribunal by delivering to and leaving with him, (1) a true and correct copy of the indictment and of all documents lodged with the indictment, (2) a copy of Military Government Ordinance No. 7, (3) a copy of Control Council Law No. 10, and (4) a copy of these Rules of Procedure.²

(b) When such service has been made as aforesaid, the Marshal shall make a written certificate of such fact, showing the day and place of service, and shall file the same with the Secretary General of Military Tribunals.

(c) The certificate, when filed with the Secretary General, shall constitute a part of the record of the case.

4. CERTIFICATE OF SERVICE OF EIGHT DEFENDANTS IN THE MEDICAL CASE

CERTIFICATE OF SERVICE³

I hereby certify that I have served the indictment in the above cause, lodged 25 October, A.D. 1946, with the Secretary General of Military Tribunals, by delivering to and leaving with each of the defendants listed below, at the time and place set opposite their respective names, true and correct copies of the following instruments and documents; (1) The indictment and all documents lodged with the indictment; (2) Military Government Ordinance No. 7; (3) Control Council Law No. 10; (4) Rules of Procedure for Military Tribunal I adopted by the Tribunal on 2 November A.D. 1946.⁴ I further certify that at the same time and place I delivered to and left with each of the defendants copies of the afore-mentioned instruments and documents translated into a language understood by the defendant upon whom said indictment was served.

¹ This rule was not revised at any time during the twelve trials. It first appeared in the Rules of Procedure announced by Military Tribunal I in the Medical case, on 2 November 1946 (see sec. III B).

² Rule 2 of the Uniform Rules of Procedure (see sec. V) stated that service on a defendant of "any pleading, document, rule, or other instrument in writing," meant that he should receive a copy thereof in English as well as in his own language.

³ U.S. vs. Karl Brandt, *et al.*, Case 1, Official Record, volume 32, page 75. The formal caption of the case has been omitted. Certificates in identical form were filed by the Marshal as to the remaining 15 defendants in the Medical case. This same form was used with respect to service upon the defendants in all cases.

⁴ Reproduced in section III B.

<i>DEFENDANT</i>	<i>DATE</i>	<i>PLACE</i>
Karl Brandt	5 November 1946	Palace of Justice, Nuernberg
Siegfried Handloser	5 November 1946	Palace of Justice, Nuernberg
Paul Rostock	5 November 1946	Palace of Justice, Nuernberg
Oskar Schroeder	5 November 1946	Palace of Justice, Nuernberg
Karl Genzken	5 November 1946	Palace of Justice, Nuernberg
Karl Gebhardt	5 November 1946	Palace of Justice, Nuernberg
Kurt Blome	5 November 1946	Palace of Justice, Nuernberg
Rudolf Brandt	5 November 1946	Palace of Justice, Nuernberg

Made this 5th day of November A.D. 1946 at Nuernberg, Germany.

[Signed] CHARLES W. MAYS
 Marshal, Military Tribunals
 Palace of Justice,
 Nuernberg, Germany

By _____
 Deputy Marshal, Military Tribunals

5. RECEIPT OF SERVICE BY DEFENDANT OHLENDORF IN THE EINSATZGRUPPEN CASE*

Nuernberg, Germany
 7 July 1947

English:

I certify that this date I have been served the indictment in German and in English (Case 9) by the Marshal, Military Tribunals, and have received the following documents:

- Control Council Law No. 10
- Military Government Ordinance No. 7
- Military Government Ordinance No. 11
- Regulation No. 1 under Military Government
- Ordinance No. 7, as Amended by Military Government
- Ordinance No. 11
- Uniform Rules of Procedure Military Tribunal Nuernberg
- London Agreement
- All in the German and English languages.

German:

Nuernberg, Deutschland
 7. Juli 1947

Ich bestaetige, dass mir die Anklageschrift des Falles Nr. 9 (in deutscher und englischer Sprache) vom Marschall der Militaergerichte zugestellt wurde, und dass ich ausserdem die folgenden Dokumente heute erhielt:

- Kontrollrats-Gesetz Nr. 10

*U.S. vs. Otto Ohlendorf, et al., Case 9, Official Record, volume 19, page 86.

Verordnung der Militaerregierung Nr. 7
Verordnung der Militaerregierung Nr. 11
Anordnung Nr. 1 erlassen aufgrund der Verordnung der Militaerregierung Nr. 7 ergaenzt durch Verordnung der Militaerregierung Nr. 11
Verhandlungsregeln der Militaergerichte zu Nuernberg
Londoner Uebereinkunft
(Saemtliche in deutscher und englischer Sprache).

[Signed] OTTO OHLENDORF
(Unterschrift)
(Signature)
(OTTO OHLENDORF)

G. Withdrawal of Original Indictment and Substitution of New Indictment

I. INTRODUCTION

In three of the trials the original indictment was withdrawn and superseded by an entirely new indictment. These cases were the Flick, Einsatzgruppen, and Ministries cases. In a fourth case, the RuSHA case, the original German translation of the indictment was withdrawn and a revised translation substituted.

This subsection contains Rule 5 of the Uniform Rules of Procedure, "Notice of Amendments or Additions to Original Indictment" (2 below); the "Notice of Amended Indictment" filed by the prosecution in the Ministries case (3 below); and the "Supplemental Certificate of Service" in the RuSHA case (4 below). Amendments to the indictment during the course of trial are the subject of section IX H.

2. RULE 5, UNIFORM RULES OF PROCEDURE, MILITARY TRIBUNALS, NUERNBERG, REVISED TO 8 JANUARY 1948*

Rule 5. Notice of Amendments or Additions to Original Indictment

(a) If before the trial of any defendant the Chief of Counsel for War Crimes offers amendments or additions to the indictment, such amendments or additions, including any accompanying documents, shall be filed with the Secretary General of Military Tribunals and served upon such defendant in like manner as the original indictment.

*This rule was never changed from the time it was first adopted by Tribunal I on 2 November 1946 (see secs. III B and IV A).

3. NOTICE OF AMENDED INDICTMENT, FILED BY THE PROSECUTION IN THE MINISTRIES CASE, 19 NOVEMBER 1947

MILITARY TRIBUNALS
CASE 11

[Stamp] Filed: 19 November 1947

United States of America

against

Weizsaecker, *et al.*

NOTICE OF AMENDED INDICTMENT¹

In the above-entitled action, marked as Case 11, the prosecution has filed an amended indictment, dated 15 November 1947, which supersedes the indictment dated 1 November 1947. The prosecution will rely exclusively on the amended indictment, dated 15 November 1947, and hereby serves notice that the indictment, dated 1 November 1947, is herewith withdrawn and set aside.

[Signed] TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

4. SUPPLEMENTAL CERTIFICATE OF SERVICE OF CORRECTED INDICTMENT IN THE RuSHA CASE, 7 JULY 1947

UNITED STATES MILITARY TRIBUNAL
PALACE OF JUSTICE
NUERNBERG, GERMANY

United States of America }
against } CASE 8
Ulrich Greifelt, *et al.* }

SUPPLEMENTAL CERTIFICATE OF SERVICE²

I hereby certify that I have, on 7 July, A.D., 1947, withdrawn the original indictment, German translation, Case 8, and have served a corrected copy of indictment, Case 8, in the German language on each defendant listed below:

[Here follows the names of the 14 defendants in this case.]

Made this 7th day of July, A.D., 1947, at Nuernberg, Germany.

[Signed] CHARLES W. MAYS
Marshal, Military Tribunals
Palace of Justice,
Nuernberg, Germany

¹ U.S. *vs.* Ernst von Weizsaecker, *et al.*, Official Record, volume 69, page 405.

² U.S. *vs.* Ulrich Greifelt, *et al.*, Case 8, Official Record, volume 14, page 54.

H. Amendment or Withdrawal of Particular Charges During the Course of Trial

I. INTRODUCTION

The materials in this subsection illustrate amendments or withdrawal of charges where no objection was interposed by the opposing side. The practice with respect to amendments to correct an error in a specific allegation is shown by the unopposed motion of the prosecution in the Medical case and by the Tribunal's ruling thereon (2 below). An amendment changing the charges of criminal responsibility of one defendant for one specification under one count is illustrated by a Tribunal order in the Flick case upon an unopposed motion of the prosecution (3 below). On several occasions the prosecution, upon its own initiative, requested the withdrawal of certain charges as to one or more defendants on the ground that it had failed to sustain its burden of proof. Two examples are included here: a statement made during the defense case in the Farben trial as to several specifications under one count of the indictment as to all defendants (4 below); a statement made during the prosecution's closing statement in the Ministries case as to two counts against defendant Meissner (5 below). During the defense case in the Ministries trial the prosecution joined the defense in requesting the dismissal of one count as to defendant Meissner (6 below).

2. MOTION TO AMEND INDICTMENT IN THE MEDICAL CASE, 20 NOVEMBER 1946, AND TRIBUNAL RULING THEREON, 21 NOVEMBER 1946*

MOTION TO AMEND INDICTMENT

The United States of America, by the undersigned Telford Taylor, Chief of Counsel for War Crimes, duly appointed to represent said Government in the prosecution of war criminals, hereby moves to amend paragraph 8 of count two and paragraph 13 of count three of the indictment filed in this case by changing the date there mentioned as "January 1943" to "January 1944."

[Signed] TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes
Acting on Behalf of the United States of
America

*U.S. vs. Karl Brandt, *et al.*, Case 1, Official Record, volume 32, page 162.

[Handwritten] Filed with the Secretariat
for Military Tribunals, 20 November 1946
[Signed] CHARLES E. SANDS
Deputy Secretary General

*ORDER*¹

Upon the motion of the United States of America, by Telford Taylor, Chief of Counsel for War Crimes, duly appointed to represent said Government in the prosecution of war criminals, it is hereby ordered and directed that paragraph 8 of count two and paragraph 13 of count three of the indictment in this case be amended, and they hereby are amended, by changing the date there mentioned as "January 1943" to "January 1944."

[Signed] WALTER B. BEALS
Presiding Judge
21 November 1946

3. ORDER BY THE TRIBUNAL IN THE FLICK CASE, 10
SEPTEMBER 1947, AMENDING INDICTMENT PURSUANT
TO AN UNOPPOSED MOTION OF THE PROSECUTION

MILITARY TRIBUNAL IV
CASE 5

[Stamp] Filed: 11 September 1947

United States of America }
 vs. }
Friedrich Flick, *et al.* }

*ORDER*²

The prosecution having made a motion in open court at the session of 14 July 1947 to amend the indictment in the following respects,³ and there having been no objection on the part of counsel for the defendants, it is hereby ordered that the indictment be further amended⁴ as follows:

1. The following sentence which appears in paragraph 6 of count one of the indictment, page 8 of the printed English version, "Flick and Weiss are also charged with responsibility for the acts

¹ Ibid., page 163.

² U.S. *vs.* Friedrich Flick, *et al.*, Case 5, Official Record, volume 34, page 460.

³ The motion by the prosecution appears in the mimeographed transcript, Case 5, U.S. *vs.* Friedrich Flick, *et al.*, 14 July 1947, pages 3586-3597.

⁴ Further amendments to the indictment in the Flick case were accomplished by a Tribunal Order of 9 July 1947 (Official Record, volume 34, pages 416-417). The motion of the prosecution requesting these amendments (U.S. *vs.* Friedrich Flick, *et al.*, Case 5, 13 June 1947, tr. pages 3105-3108) was also unopposed by the defense.

and conduct set forth in this paragraph insofar as they relate to the Siemag Company" is amended to read as follows: "Weiss is also charged with responsibility for the acts and conduct set forth in this paragraph insofar as they relate to the Siemag Company."

2. The following sentence which appears in paragraph 10 of count two of the indictment under subsection B, page 11 of the printed English version, "Siemag was owned principally by Weiss and was controlled and influenced by Flick and Weiss, both of whom are charged with responsibility therefor" is amended to read as follows: "Siemag was owned principally by Weiss who is charged with responsibility therefor."

Date: 10 September 1947

[Signed] CHARLES B. SEARS
Presiding Justice
Military Tribunal IV

4. STATEMENT BY THE PROSECUTION IN THE FARBEN CASE THAT IT HAD FAILED TO ESTABLISH ITS BURDEN OF PROOF CONCERNING CERTAIN CHARGES, AND STATEMENT OF TRIBUNAL THEREON, 29 JANUARY 1948*

THE MARSHAL: Persons in the courtroom will find their seats, please. The Tribunal is again in session.

MR. DUBOIS (deputy chief counsel): Mr. President. I have been discussing with Dr. Nelte [counsel for defendant Hoerlein], in connection with the preparation of his defense for Dr. Hoerlein, the question concerning allegations in section F in count one, with respect to atabrine and sulphur drugs. Now, we believe that the Tribunal made the situation in this respect clear when it stated on the opening day of the defense's case that if there are allegations or charges of fact in the indictment that have not been established by proof on the part of the prosecution that there is no obligation or burden on the defense to meet the unsustained allegations. However, in order that there may be no misunderstanding whatsoever with respect to this matter in connection with the preparation of the defense of Dr. Hoerlein, the prosecution hereby stipulates that it is of the view that the evidence which it has presented has not established its burden of proof with respect to the allegations contained in section F of count one insofar as such allegations relate to atabrine and sulphur drugs.

PRESIDING JUDGE SHAKE: Very well. The defense will take notice of that as a proper limitation upon the scope of the defense — of the proof that may be offered to meet the indictment.

*Extract from mimeographed transcript, Case 6, U.S. vs. Carl Krauch, et al., page 0046.

5. WITHDRAWAL OF THE CHARGES UNDER COUNTS ONE AND TWO AGAINST DEFENDANT MEISSNER DURING THE PROSECUTION'S CLOSING STATEMENT IN THE MINISTRIES CASE, AND THE TRIBUNAL'S STATEMENT THEREON, 9 NOVEMBER 1948*

MR. CAMING (associate counsel): We now come to the defendant Otto Meissner [in connection with the charges under counts one and two]. Meissner participated in a number of outstanding international meetings which were part and parcel of Germany's political aggression. Meissner was present at the meeting with the Slovak President, Tiso, which prepared the separation of Slovakia from the sovereign Czechoslovak State. He was present at the conferences with President Hacha when Hacha was bullied into surrendering Czechoslovakia without resistance upon threat of devastation. Meissner was present at the conferences with Japanese Foreign Minister Matsuoka in which Japan was urged:

“* * * to strike at the right moment and take the risk upon herself of a fight against America.”

But upon a reconsideration of all the evidence in the case, we are not convinced that the evidence proves beyond a reasonable doubt that the defendant Meissner took substantial initiative or played an important role in bringing about these conferences, in influencing what was said or done, or in following up on any decisions taken. After Hitler became both Fuehrer and Reich Chancellor of Germany, it appears that in the consolidation of executive functions under Hitler, the functions of the Chief of the Presidential Chancellery were narrowed. In the field of foreign policy, the Office of the Presidential Chancellery did perform certain functions of protocol and no doubt it was not entirely sterile in influencing or executing the foreign policy of the Third Reich. But on the basis of the entire record we are not convinced that we have established our burden of showing a substantial participation by Meissner in the preparation, initiation, or waging of aggressive war. It does appear that the Office of the Presidential Chancellery played a highly significant part in certain policy matters, especially in respect to the treatment of certain prisoners turned over for “special treatment” or murder to the Gestapo.

JUDGE POWERS: Do we understand that you are abandoning the case against Meissner on counts one and two?

MR. CAMING: I am coming to that, Your Honor.

*Extract from mimeographed transcript, Case 11, U.S. vs. Ernst von Weizsaecker, et al., pages 26957-26958.

Such conduct, however, is properly a matter for consideration under count five. Therefore, upon consideration of all the evidence in the case, the prosecution feels that it has not established its burden of proof as against the defendant Meissner with respect to crimes against peace. The prosecution hereby formally withdraws its charges against the defendant Otto Meissner under counts one and two of the indictment.

PRESIDING JUDGE CHRISTIANSON: It will be noted that the charges in the indictment in counts one and two as to Meissner are dismissed.

6. ORDER OF TRIBUNAL IN THE MINISTRIES CASE, 23 JUNE 1948, DISMISSING CHARGES UNDER COUNT SIX AS TO DEFENDANT MEISSNER

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

United States of America
 against
Ernst von Weizsaecker, *et al.* } [Stamp] Filed: 23 June 1948

ORDER¹

On 17 June 1948, a motion was made on behalf of Dr. Otto Meissner for an order dismissing the charges of count six of the indictment, as to him.² In support of such motion, it was asserted that the indictment did not state in what respects Meissner participated in the crimes referred to in such charges, and that his name was mentioned only at the outset of paragraph 52. It was further alleged that the prosecution, in the presentation of its case against Meissner, did not introduce a single document to show the participation of Meissner in the offenses referred to in count six.

To such motion, the prosecution, under date of 21 June 1948, filed an answer, wherein it was also requested that the charges in count six of the indictment against the defendant Meissner be dismissed.³

The Tribunal having considered the motion and the answer thereto,

IT IS ORDERED that the charges in count six of the indictment, insofar as they relate to the defendant Meissner, be and the same are hereby dismissed.

¹ U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 76, page 2966.

² *Ibid.*, page 2966.

³ *Ibid.*, page 2967.

Nuernberg, Germany
23 June 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

I. Dismissal before Judgment of All or Parts of Counts of the Indictment as to All Defendants

I. INTRODUCTION

In a number of the trials substantial parts of a count or entire counts were dismissed by the Tribunal for various reasons: failure of the indictment to allege a substantive crime as defined in Control Council Law No. 10; lack of jurisdiction of the Tribunal to try the offense alleged; and failure of the prosecution to sustain its burden of proof by the evidence offered during its case in chief.

The first major occurrence of this kind involved parallel action in three trials, the Medical, Justice, and Pohl cases. Count one of the indictment in each of these cases was titled "The Common Design or Conspiracy" and paragraph 1 of count one in each indictment alleged that "all of the defendants herein, acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, Article II." Further paragraphs of these counts set forth various specifications concerning the alleged conspiracy and the acts committed in connection therewith. In each of these cases the defense made motions for the dismissal of this charge on the ground that Control Council Law No. 10 did not define conspiracy to commit war crimes and crimes against humanity as a crime. On 7 July 1947, the Committee of Presiding Judges, which at the time included representatives of five Tribunals, met and directed that a joint session of all Tribunals be convened to hear arguments on the above motions, "it being desirable that there be a uniform determination on the issue presented by such motions." The arguments held before the joint session on 9 July 1947 are reproduced later in the section devoted to the activities of the Committee of Presiding Judges (sec. XXIV C 2). The Tribunals *en banc* made no ruling or statement on the questions raised by the defense motions, but each of the three Tribunals which had the motions before them made definitive rulings within one week after the joint session. The separate orders, which were generally similar in substance, each stated that

“neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crimes against humanity as a separate substantive crime. Therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense***.” Since the specifications of the counts alleging conspiracy also alleged unlawful participation in the commission of war crimes and crimes against humanity, separate and distinct from conspiracy as such, the Tribunals did not strike the counts involved in their entirety. The order of Tribunal III in the Justice case, dated 11 July 1947, is reproduced in 2 below. The order of Tribunal I in the Medical case* on 14 July 1947 is in almost identical language and is not reproduced herein. The order of Tribunal II in the Pohl case on 18 July 1947 is reproduced in 3 below.

In the Krupp case, after the prosecution had rested its case in chief, the Tribunal dismissed counts one and four upon a defense motion. Count one was entitled “crimes against peace” and count four charged a “common plan or conspiracy” to commit crimes against peace. In its order the Tribunal stated that it was “of the opinion that the competent and relevant evidence fails to show *prima facie* that any of the defendants is guilty of the offense charged in count one or the offense charged in count four of the indictment. * * *” The defense motion, extracts from the prosecution’s answer to the defense motion, the Tribunal’s order, the opinion of the Tribunal, the concurring opinion of Presiding Judge Anderson, and the special concurring opinion of Judge Wilkins are reproduced in section VI, volume IX, this series, on pages 356–466.

In the Farben case, the Tribunal on 22 April 1948 dismissed the charges of plunder and spoliation under count two as to those offenses alleged to have been committed in Austria and the Sudetenland and made further statements concerning the relation of this ruling to count five. Count five alleged a common plan and conspiracy to commit crimes against peace. The Tribunal’s ruling is reproduced in 4 below.

During the prosecution’s case in chief in the Ministries case, the Tribunal, upon a defense motion, dismissed count four of the indictment. This count was entitled “Crimes against humanity: atrocities and offenses committed against German Nationals on political, racial, and religious groups from 1933 to 1939.” The defense motion, the oral arguments, the Tribunal order and the

*U.S. vs. Karl Brandt, et al., Case 1, Official Record, volume 36, page 162.

Tribunal memorandum explaining the reasons for the dismissal, are reproduced in section VIII, volume XIII, this series.

2. ORDER OF THE TRIBUNAL IN THE JUSTICE CASE, 11 JULY 1947, CONCERNING THE DEFENSE MOTION AGAINST COUNT ONE OF THE INDICTMENT*

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
AT A SESSION OF MILITARY TRIBUNAL III
HELD 11 JULY 1947, IN OPEN COURT

United States of America }
 Plaintiff, } *ORDER*
 vs. } *Case 3*
Josef Altstoetter, *et al.,* } *Re: Defendants' Motions against*
 Defendants } *Count One of Indictment*

Count one of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article II. It is charged that the alleged crime was committed between January 1933 and April 1945.

It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crimes against humanity as a separate substantive crime. Therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense. Count one of the indictment, in addition to the separate charge of conspiracy, also alleges unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involve the commission of such crimes. We, therefore, cannot properly strike the whole of count one from the indictment. But, insofar as count one charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard the charge.

This ruling must not be construed as limiting the force or effect of Article II, paragraph 2 of Control Council Law No. 10, or as denying to either prosecution or defense the right to offer in evidence any facts or circumstances occurring either before or after

*U.S. vs. Josef Altstoetter, *et al.*, Case 3, Official Record, volume 36, page 115.

September 1939, if such facts or circumstances tend to prove or disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10.

[Signed] JAMES T. BRAND
Presiding Judge Military Tribunal III

3. ORDER OF THE TRIBUNAL IN THE POHL CASE, 18 JULY 1947, CONCERNING THE DEFENSE MOTION AGAINST PARAGRAPH ONE OF COUNT ONE OF THE INDICTMENT*

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
AT A SESSION OF MILITARY TRIBUNAL II
HELD 18 JULY 1947, IN CHAMBERS

United States of America)
 vs.) ORDER
Oswald Pohl, et al.,) CASE 4
 Defendants)

Upon hearing and considering the motion of the several defendants to quash and strike from the indictment paragraph 1 of count one thereof upon the ground that the Tribunal has no jurisdiction to consider or determine the guilt or innocence of the defendants thereunder, it is ordered as follows: -

Paragraph 1 of count one of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, willfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article II. It is charged that the alleged crime was committed between January 1933 and April 1945.

It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of such conspiracy considered as a separate substantive offense. *Paragraph 1 of count one will accordingly be quashed and stricken from the indictment.*

This ruling must not be construed as limiting the force or effect of Article II, paragraph 2, of Control Council Law No. 10, or as denying to either prosecution or defense the right to offer

*U.S. vs. Oswald Pohl, et al., Case 4, Official Record, volume 27, page 95.

evidence of any facts or circumstances tending to prove or to disprove the actual commission of war crimes or crimes against humanity as defined in Control Council Law No. 10.

[Signed] ROBERT M. TOMS
Presiding Judge

4. RULING OF THE TRIBUNAL IN THE FARBEN CASE, 22 APRIL 1948, DISMISSING TWO SECTIONS OF COUNT TWO AND DISCUSSING THE RELATION OF THIS RULING TO COUNT FIVE¹

PRESIDING JUDGE SHAKE: We are also ready to dispose of the motion filed on 15 April 1948 by Dr. Dix on behalf of all counsel, in which it is requested that the Tribunal shall reopen the subject of the legal sufficiency of the indictment with respect to conspiracy to commit war crimes and crimes against humanity and other incidental questions that are therein contained.²

The ruling of the Tribunal with respect to this motion, insofar as it pertains to certain portions of the indictment, pertaining to the alleged plunder of the Skoda-Wetzler [in Austria] and Aussig-Falkenau [in the Sudetenland] is as follows:

The particulars set forth in sections "A" and "B" of count two of the indictment, "Plunder and Spoliation," if fully established by the evidence, would not constitute a crime against humanity, since these particulars relate wholly to offenses against property. Neither are they sufficient to constitute a war crime, since they describe incidents in territory not under the belligerent occupation of Germany.

On the other feature of the same motion the Tribunal feels as follows:

A common plan or conspiracy does not exist as a matter of law with respect to war crimes and crimes against humanity. However, we point out that under the second paragraph of count five it is alleged that the acts and conduct of the defendants set forth in counts one, two, and three are, by reference, incorporated in count

¹ Extract from mimeographed transcript, Case 6, U.S. vs. Carl Krauch, *et al.*, pages 12194-12196.

² The defense motion requested "the Tribunal now to make a ruling on the question of the applicability of count five to counts two and three, as well as on the justification of count two in the cases of Austria and the Sudetenland." Count two, "Plunder and Spoliation," alleged in section A, offenses in Austria, which Germany had occupied in March 1938; and in section B, alleged offenses in the Sudetenland which Germany occupied after the Munich Pact of September 1938. Count five alleged "a common plan or conspiracy to commit * * * crimes against peace (including the acts constituting war crimes and crimes against humanity, which were committed as an integral part of such crimes against peace," and alleged that the acts and conduct set forth in counts one, two, and three "formed a part of said common plan or conspiracy * * * " (see section I, volume VII, this series).

five. Therefore, evidence of such acts or conduct may, if it has probative value, be considered with respect to the alleged conspiracy or common plan to commit crimes against peace.

I may say that the Tribunal may or may not, in its discretion, be disposed to discuss some of these questions further in its final judgment.¹ But that will at least give counsel for the defense who have joined in these motions the advantage of the conclusion that the Tribunal has reached with respect to these matters.

J. Joinder of Defendants—Denial of Defense Motions for Severance for Alleged Prejudicial Joinder in the Krupp Case²

I. MOTION ON BEHALF OF ALL DEFENDANTS, 9 DECEMBER 1947, REQUESTING SEPARATE TRIAL FOR EACH DEFENDANT

Otto Kranzbuehler

Nuernberg, 9 December 1947

[Stamp] Filed: 10 December 1947

To: Military Tribunal III—A, CASE 10

Subject: Motion for separate trial³

In compliance with the order the Tribunal issued in today's morning session, to the effect that the motion for severance presented orally would not be considered unless submitted in writing, I now move the Tribunal for and on behalf of the defendants and each of them for a separate trial for good reasons as follows:

1. The defense of each of the defendants is mutually antagonistic to that of the codefendants.

2. The evidence as to each of the codefendants will prejudice the defense of each defendant particularly in that the rules of evidence as set forth in Ordinance No. 7 permitting the admission of affidavits, *ex parte* statements, hearsay and other evidence not generally admissible in the trial of criminal cases.

In support of this ground each of the defendants has been informed and believes and upon such information and belief alleges that the prosecution proposes to offer into evidence against this

¹ See section XIII (Decision and Judgment of the Tribunal, Statement by Judge Hebert), the I. G. Farben case, Case 6, volume VIII, this series.

² In connection with the question of severance, see also the materials from the record in the Ministries case which arose from a motion of seven defendants on 22 March 1948 for the production of documents and a recess of six months or in the alternative for a severance and delay of the case as to the seven defendants in question. These materials are reproduced below in sections XIII L 8 b and XIV H.

³ U.S. vs. Alfred Krupp von Bohlen und Halbach, *et al.*, Case 10, Official Record, volume 36, pages 370-371.

defendant certain statements purported to be those of each of the codefendants which statements were made, if at all, after the common design alleged was accomplished or abandoned and not made in the presence of this defendant constituting as to him nothing but hearsay. In further support of this ground each of the defendants urges that he will be unable to place the codefendants on the witness stand and subject them to cross-examination as to the contents of the purported affidavits; and that under the provisions of Ordinance No. 7 it is beyond the power of this Tribunal to compel the said codefendants to subject themselves to such cross-examination; and that by reason of his being placed on trial jointly or in common with the said codefendants unless this motion for severance be granted this defendant will be denied the right to confrontation, Sixth Amendment, Constitution of the United States of America, Title 10, United States Code, Section 1495, Control Council Proclamation No. 3.

3. Each of the defendants desires to avail himself on his trial of the testimony of each of the codefendants.

In support of this ground each of the defendants is informed and believes and upon such information and belief alleges; that each of the codefendants is in the possession of certain facts and knowledge material and essential to the proper presentation of his defense by this defendant and that as to certain of such evidence no other witness or witnesses are available and that unless this motion for severance be granted each of such codefendants will not be available as a witness for this defendant.

4. Each of the defendants will be prejudiced in his defense by the evidence in the trial of each of the codefendants. That prejudice will result to each of the defendant if he is tried jointly with the codefendants.

5. Each of the defendants urges that a separate trial will better secure the defendant a fair trial and assist the administration of justice in his case in that the confusion of issues, the diversity of interests, the multitude of several and independent acts of the various defendants, the separate delays to which each of the said defendants may be entitled, all combine to render a fair trial under such circumstances impracticable and improbable, if not in fact impossible.

For and on behalf of the defendants and each of them,

[Signed] KRANZBUEHLER

2. ORDER OF TRIBUNAL, 10 DECEMBER 1947,
DISMISSING DEFENSE MOTION

UNITED STATES MILITARY TRIBUNAL III
IN CHAMBERS, NUERNBERG, GERMANY
10 DECEMBER 1947

[Stamp] Filed: 15 December 1947

United States of America

vs.

Alfried Krupp Von Bohlen Und Halbach, *et al.*,

Defendants

ORDER¹
CASE 10

In this case the oral motion for a severance heretofore made before the Tribunal in open session, having been reduced to writing as directed and duly considered, the Tribunal is of the opinion that the showing made is insufficient to warrant the granting of a severance and it is accordingly so ordered.

[Signed] HU C. ANDERSON
Presiding Judge

3. MOTION ON BEHALF OF ALL DEFENSE COUNSEL, 11
FEBRUARY 1948, RENEWING REQUEST FOR SEPARATE
TRIAL FOR EACH OF THE DEFENDANTS

Nuernberg, 11 February 1948

[Stamp] Filed: 12 February 1948

To: Military Tribunal III²
CASE 10

1. On 9 December 1947 a motion for separate trial for each of the defendants was submitted by the defense counsel.³ Reason for this motion was the fact stated therein, that the defense of each of the defendants is antagonistic to that of his codefendants. This motion was denied in the afternoon session of 11 December 1947 (English tr. p. 345) without further arguments.⁴

2. Up to now this motion was not yet renewed since a decision concerning another application in connection with the motion mentioned hereinbefore, viz., the motion re the admissibility of affidavits of the defendants was still pending. This question was disposed of by an order made in open session of the Tribunal held on 6 January 1948 (English tr. p. 1029) which states as follows:

¹ *Ibid.*, p. 369.

² *Ibid.*, volume 37, pages 695 and 696.

³ Reproduced in section IX J I.

⁴ The written order of the Tribunal dismissing the defense motion in question is reproduced immediately above.

“The affidavit of a defendant who does not take the witness stand * * * will not be considered as evidence against any defendant other than the affiant.”*

This order made in open session was confirmed in writing by order of the Tribunal of the same date.

3. According to this decision the affidavits of any defendant who is called to the witness stand by his defense counsel will be considered as evidence against each of his codefendants. The affidavits which the prosecution has introduced in evidence up to now frequently express antagonistic interests or contain charges against codefendants. We should like to state the following examples:

a. In his affidavit of 8 July 1947, NIK-9329, [Prosecution] Exhibit 40 the defendant Alfried Krupp von Bohlen und Halbach describes Eberhard's position as plenipotentiary of the board of directors for the “Elmag.” This declaration is incorrect and antagonistic to the interests of his codefendant Eberhard (Doc. Book 3, p. 15 English, p. 9 German).

b. In his affidavit of 6 August 1947, NIK-9650, [Prosecution] Exhibit 43 the defendant Alfried Krupp von Bohlen und Halbach states that any person on the distribution list was obliged to read the mail. This statement is directed against each of his codefendants (Doc. Book 3, p. 26 Engl., p. 34 German).

c. In his affidavit of 31 July 1947, NIK-11668, [Prosecution] Exhibit 366, concerning Loeser's personality and his activities the defendant Alfried Krupp von Bohlen und Halbach has rendered a statement which is directed against the person of his codefendant Loeser, Doc. Book 9A, p. 173 English, German, part II, p. 1).

Other instances for the antagonistic character of affidavits of the defendants are:

Affidavit of 17 July 1947, NIK-10779, [Prosecution] Exhibit 252, Doc. Book 7, page 74 English, page 94 German;

Affidavit of 30 June 1947, NIK-9345, [Prosecution] Exhibit 367, Doc. Book 9A, page 176 English, page 8 German, part II;

Affidavit of 30 June 1947, NIK-9345, [Prosecution] Exhibit 659, Doc. Book 19, page 116 English, page 151 German.

Other defendants, too, have rendered affidavits concerning the personality and activities of their codefendants.

*See section XVIII K 7 (re affidavit evidence).

4. Thus the defense is necessarily antagonistic. This results from the decision mentioned hereinbefore under 2 giving each defendant the right to cross-examination of his codefendants who take the witness stand as to the affidavits they have rendered. The defense counsel therefore ask for a renewed decision in this respect, referring moreover to the grounds as laid down in the motion of 9 December 1947.

For and on behalf of all defense counsel,
[Signed] DR. WOLFGANG POHLE

4. ORDER OF TRIBUNAL DISMISSING DEFENSE MOTION,
13 FEBRUARY 1948

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
AT A SESSION OF MILITARY TRIBUNAL III
HELD 13 FEBRUARY 1948, IN CHAMBERS*

[Stamp] Filed: 14 February 1948

United States of America

vs.

Alfried Krupp von Bohlen Und Halbach, *et al.*,
Defendants

} ORDER
CASE 10

In this case the defendants filed a written motion renewing a motion for a severance on the ground that the defense of each of the defendants is antagonistic to that of his codefendants; the original motion having heretofore been denied, and after due consideration thereof, the Tribunal is of the opinion that the grounds set forth in the renewal motion are insufficient to warrant the granting of a severance, and it is accordingly so ordered.

[Signed] HU C. ANDERSON
Presiding Judge

*U.S.*vs.* Alfried Krupp von Bohlen und Halbach, *et al.*, Case 10, Official Record, volume 37, page 694.

K. Requirements as to the Contents of the Charges

I. DENIAL OF MOTION OF DEFENDANT SCHAEFER IN THE MEDICAL CASE REQUESTING THAT THE PROSECUTION "SUPPLEMENT THE INDICTMENT"

a. Motion of 21 November 1946¹

Horst Pelckmann, Attorney at Law
Military Tribunal
Nuernberg

21 November 1946

With the permission of the Tribunal; I should like to raise the following objection on behalf of the defendant Konrad Schaefer:

The written indictment of 25 October 1946 does not meet the requirements of Ordinance No. 7.²

Ordinance No. 7, Article IV (a) reads: "The indictment shall state the charges plainly, concisely, and with sufficient particulars to inform defendant of the offenses charged."

Konrad Schaefer is only indicted under count two (G), page 10 f., (English text). The experiments with sea water are described in only two sentences: "The subjects were deprived of all food and given only chemically processed sea water. Such experiments caused great pain and suffering and resulted in serious bodily injury to the victims."

The indictment does not state at all what the individual defendants and particularly the defendant Schaefer are alleged to have done in the experiments or in the preparations for them.

The indictment states only the following: "The defendants Karl Brandt, Handloser, Rostock, Schroeder, Gebhardt, Rudolf Brandt, Mrugowsky, Poppendick, Sievers, Becker - Freyseng, Schaefer, and Beiglboeck are charged with special responsibility for and participation in these crimes."

This statement of the indictment is not "plain, concise, and with sufficient particulars of the offenses charged."

This is merely a listing of the legal concepts "responsibility" and "participation." This is not a statement of "sufficient particulars." The 12 defendants, particularly the defendant Schaefer, cannot know from these legal concepts what they are alleged to have done in these experiments. In what does his "responsibility," his "participation" consist?

The indictment, to be sure, states under count one, (2) (p. 6 of the English text) that all the defendants, "were principals in,

¹ U.S. vs. Karl Brandt, et al., Case 1, Official Record, volume 32, pages 164 and 165.

² During the arraignment of the defendants on this same day, 21 November 1946, Dr. Pelckmann had first raised this objection orally. See pages 18-21, volume I, this series.

accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises"; but these too are merely legal concepts, which are to apply to all the defendants in all the counts of the indictment; and the defendant *Schaefer* cannot see this as "sufficient particulars" of *his* activities specifically in the sea-water experiments.

The indictment states further under count one, (4): "It was a part of the said common design, conspiracy, plans, and enterprises to perform medical experiments upon concentration camp inmates *** *more fully described* in counts two or three of this indictment."

However, the experiments in the concentration camps and the defendants' participation in them, particularly the activities of the defendant *Schaefer*, are *not* described more fully.

I believe I have proved that the defendant *Schaefer* cannot deduce from the indictment with what criminal activity in the sea-water experiments he is charged.

According to Ordinance No. 7, Article IV (a), however, this must be possible on the basis of the *written* indictment. It is not sufficient that, as General Taylor has announced, the prosecution will produce these particulars in the oral presentation of its case. The intention of Ordinance No. 7, Article IV (a) and Rule 4 of the Rules of the Procedure of 2 November 1946 is that the defendant shall have a period of 30 days between the arraignment and the beginning of the trial in which to prepare his defense on the basis of the *written* charges.

The fact that the indictment is incomplete is not affected by the defendant *Schaefer's* plea of not guilty on 21 November 1946.

I therefore apply to the Tribunal to have the prosecution supplement the indictment and submit it again to the defendant *Schaefer*; and I trust that this will not delay the proceedings.

[Signed] HORST PELCKMANN
Attorney at Law

b. Prosecution's "Brief in Opposition to Motion for a Bill of Particulars," 27 November 1946*

[Handwritten] Filed: November 27, 1946

BRIEF IN OPPOSITION TO MOTION FOR
BILL OF PARTICULARS

The defendant *Schaefer*, by his attorney *Horst Pelckmann*, has filed a motion with this Tribunal in the nature of a demand for a

*U.S. vs. *Karl Brandt, et al.*, Case 1, Official Record, volume 32, pages 189-192.

bill of particulars. This motion is dated 21 November 1946 and was served upon the prosecution on 25 November 1946 following translation from German into English.

The motion states that paragraph 6 (G) of count two of the indictment does not, as to the defendant Schaefer, comply with Article IV (a) of Ordinance No. 7 which requires that "The indictment shall state the charges plainly, concisely, and with sufficient particulars to inform defendant of the offenses charged." While defendant Schaefer is also indicted under count one and paragraph 11 of count three of the indictment, the particulars set forth in paragraph 6 of count two are incorporated by reference in the aforementioned counts. Hence, decision on the motion rests upon the sufficiency of the charge against the defendant Schaefer contained in paragraph 6 of count two.

Each of the defendants is charged in paragraph 6 of count two with having committed war crimes, in that each was a principal in, accessory to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving medical experimentation on involuntary human subjects. Particulars concerning certain of the experiments are set forth in (A) to (L) of paragraph 6. The particulars of an experiment in which the defendant Schaefer is alleged to have participated are detailed in (G), which reads as follows:

"(G) *SEA-WATER EXPERIMENTS.* From about July 1944 to about September 1944 experiments were conducted at the Dachau concentration camp for the benefit of the German Air Force and Navy to study various methods of making sea water drinkable. The subjects were deprived of all food and given only chemically processed sea water. Such experiments caused great pain and suffering and resulted in serious bodily injury to the victims. The defendants Karl Brandt, Handloser, Rostock, Schroeder, Gebhardt, Rudolf Brandt, Mrugowsky, Poppendick, Sievers, Becker-Freyseng, Schaefer, and Beiglboeck are charged with special responsibility for and participation in these crimes."

It is respectfully submitted that the crime alleged is not only stated plainly and concisely, but also "with sufficient particulars to inform defendant of the offenses charged." The time, place, and nature of the crime is clearly stated and the defendant Schaefer, among others, is alleged to have been responsible for and participated in that crime. There cannot be any doubt in the mind of the defendant Schaefer as to the offense charged—which is participation in the sea-water experiments at the time and place mentioned. No more is required by Ordinance No. 7.

It is clear that the defendant Schaefer seeks to force the prosecution to allege the precise manner in which he participated in the crime. This would of course necessitate pleading *in extenso* the evidence of the prosecution. This is neither practicable nor required by Ordinance No. 7. To plead the precise part played by each of the 23 defendants in each of the 12 medical experiments particularized in the indictment would extend its length beyond all reason, as well as unfairly restrict the prosecution in the presentation of its case. The pleading of the ultimate facts of the crime does not require the specification of each act of the defendant with respect to that crime. The defendant is his own best informant as to such matters.

The indictment in this case specifies in much greater detail the charges against the defendants than the indictment in Case 1, before the International Military Tribunal.* And yet the requirements of Article IV (a) of Ordinance No. 7 in regard to particulars are certainly no more exacting than Article 16 of the Charter of the International Military Tribunal. This article states that "The Indictment shall include full particulars specifying in detail the charges against the Defendants."

It should also be pointed out that a number of documents which will be used in evidence with respect to the crimes charged in the indictment, including the sea-water experiments, will shortly be filed by the prosecution in the Defendants' Information Center. These documents will be available to the defendant Schaefer and his counsel and ample time will be available for the preparation of his defense. Accordingly, no further particulars are required in the indictment to protect the rights of the defendant.

WHEREFORE, it is requested that the motion in the nature of a demand for a bill of particulars heretofore filed by the defendant Schaefer be denied.

Respectfully submitted,

[Signed] TELFORD TAYLOR

Brigadier General, U.S.A.

Chief of Counsel for War Crimes

Acting on Behalf of the United States of America

Nuernberg, 27 November 1946

*See Trial of the Major War Criminals, *op. cit.*, volume I, pages 27-92.

c. Order of Tribunal I, Denying Motion, 3 December 1946

ORDER DENYING MOTION OF DEFENDANT KONRAD SCHAEFER FOR SUPPLEMENTATION OF INDICTMENT¹

The above-named defendant, Konrad Schaefer, by Horst Pelckmann, his counsel, having filed herein his motion in writing for an order requiring the prosecution to supplement the indictment herein, insofar as defendant Schaefer is concerned, by including therein additional allegations stating in greater detail the charges against defendant Schaefer; and counsel having been heard by way of oral argument in open court 21 November 1946;² and the Tribunal having considered the oral argument of counsel for the respective parties and the briefs filed herein by counsel; and the Tribunal being fully advised in the premises:

It is now by the Tribunal ordered and adjudged that the said application or motion of defendant Konrad Schaefer be, and the same is hereby, denied.

Dated at Nuernberg, Germany, this third day of December 1946.

Military Tribunal I

[Signed] WALTER B. BEALS
Presiding Judge

2. STATEMENT FROM THE JUDGMENT IN THE MEDICAL CASE, 19 AUGUST 1947, DECLINING TO MAKE AN ADJUDICATION OF GUILT OR INNOCENCE UNDER THE CHARGES OF CRIMINAL PARTICIPATION IN "MALARIA EXPERIMENTS" AS TO DEFENDANT ROSE, BECAUSE ROSE WAS NOT AMONG THE DEFENDANTS PARTICULARLY CHARGED WITH RESPONSIBILITY FOR THESE EXPERIMENTS³

JUDGE SEBRING: Evidence was offered concerning Rose's criminal participation in malaria experiments at Dachau, although he was not named in the indictment as one of the defendants particularly charged with criminal responsibility in connection with

¹ U.S. vs. Karl Brandt, *et al.*, Case 1, Official Record, volume 32, page 249.

² This oral argument arose during the arraignment of the defendants in the Medical case, see section II, "Arraignment," volume I, page 18-21.

³ U.S. vs. Karl Brandt, *et al.*, Case 1, volume II, this series, pages 264, 266 and 267.

malaria experiments.* Questions presented by this situation will be discussed later.

* * * * *

MALARIA EXPERIMENTS

* * * * *

It is impossible to believe that during the years 1942 and 1943 Rose was unaware of malaria experiments on human beings which were progressing at Dachau under Schilling, or to credit Rose with innocence of knowledge that the malaria research was not confined solely to vaccinations designed for the purpose of immunizing the persons vaccinated. On the contrary, it is clear that Rose well knew that human beings were being used in the concentration camp as subject for medical experimentation.

However, no adjudication either of guilt or innocence will be entered against Rose for criminal participation in these experiments for the following reason: In preparing counts two and three of its indictment the prosecution elected to frame its pleading in such a manner as to charge all defendants with the commission of war crimes and crimes against humanity, generally, and at the same time to name in each subparagraph dealing with medical experiments only those defendants particularly charged with responsibility for each particular item.

In our view this constituted, in effect, a bill of particulars and was, in essence, a declaration to the defendants upon which they were entitled to rely in preparing their defense, that only such persons as were actually named in the designated experiments would be called upon to defend against the specific items. Included in the list of names of those defendants specifically charged with

*The relevant parts of "count two—War Crimes" of the indictment are the following:

"6. Between September 1939 and April 1945 all of the defendants herein unlawfully, wilfully, and knowingly committed war crimes, as defined by Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving medical experiments without the subjects' consent, upon civilians and members of the armed forces of nations then at war with the German Reich and who were in the custody of the German Reich in exercise of belligerent control, in the course of which experiments the defendants committed murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts. Such experiments included, but were not limited to, the following:

* * * * *

"(C) *Malaria Experiments.* From about February 1942 to about April 1945 experiments were conducted at the Dachau concentration camp in order to investigate immunization for and treatment of malaria. Healthy concentration camp inmates were infected by mosquitoes or by injections of extracts of the mucous glands of mosquitoes. After having contracted malaria the subjects were treated with various drugs to test their relative efficacy. Over 1,000 involuntary subjects were used in these experiments. Many of the victims died and others suffered severe pain and permanent disability. The defendants Karl Brandt, Handloser, Rostock, Gebhardt, Blome, Rudolf Brandt, Mrugowsky, Poppendick, and Sievers are charged with special responsibility for and participation in these crimes."

responsibility for the malaria experiments the name of Rose does not appear. We think it would be manifestly unfair to the defendant to find him guilty of an offense with which the indictment affirmatively indicated he was not charged.

This does not mean that the evidence adduced by the prosecution was inadmissible against the charges actually preferred against Rose. We think it had probative value as proof of the fact of Rose's knowledge of human experimentation upon concentration camp inmates.

3. STATEMENT FROM THE JUDGMENT IN THE JUSTICE CASE, 3 DECEMBER 1947, CONCERNING THE 'APPARENT GENERALITY OF THE INDICTMENT'

JUDGE BLAIR: No defendant is specifically charged in the indictment² with murder or abuse of any particular person. If he were, the indictment would, no doubt, have named the alleged victim. Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist. The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that the apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.³

¹ U.S. *vs.* Josef Altstoetter, *et al.*, Case 3, volume III, this series, pages 984 and 985.

² *Ibid.*, pages 15-26.

³ Summary statements from the judgment in the Justice case on procedure, practice, and evidence are reproduced in section VI E.

4. DENIAL OF MOTION OF DEFENDANT VON BUELOW IN
KRUPP CASE, TO DISMISS THE INDICTMENT FOR "DE-
FECT APPEARING ON ITS FACE"

a. Defense Motion, 29 March 1948

MOTION BY DEFENDANT TO DISMISS THE
"INDICTMENT" FOR DEFECTS APPEARING ON ITS FACE¹

[Stamp] Filed: 29 March 1948
Motion No. 3²

The defendant Friedrich von Buelow moves as to him

- a. on the first count of the "indictment"
- b. on the second count of the "indictment"
- c. on the third count of the "indictment"
- d. on the fourth count of the "indictment"

that each such count be dismissed on the following grounds:

1. that each of the several counts therein contained does not state facts sufficient to constitute an offense;

2. that each of the several counts therein contained does not state facts sufficient to constitute an offense against the United States of America;

3. that the allegations contained in each of the several counts are duplicitous and fatally defective;

4. that the allegations contained in each of the several counts are vague, indefinite, uncertain, multifarious, and confusing to an extent that the defendant herein cannot determine the offenses sought to be charged against him and he is unable to prepare a defense thereto;

5. that the indictment was not found within three years after the offenses therein were allegedly committed;

6. that each such count alleges the commission of offenses prior to 7 December 1941, the date of the commencement of war between Germany and the United States of America, and therefore alleges no offense against the sovereignty of the United States of America under national or international law.

[Signed] JOSEPH S. ROBINSON

[Signed] DR. WOLFGANG POHLE

Attorneys for Friedrich von Buelow

¹ U.S. vs. Alfried Krupp von Bohlen und Halbach, *et al.*, Case 10, Official Record, volume 38, pages 1076 and 1077.

² This motion was third of a group of 15 motions filed by counsel for defendant von Buelow on 29 March 1948. None of the other motions are reproduced herein. On 5 April 1948, counsel for the other 11 defendants in the Krupp case filed joint motions embodying the same language in substance as the motions filed on behalf of von Buelow.

b. Prosecution's Answer and Memorandum, 12 April 1948

ANSWER AND MEMORANDUM IN RESPONSE TO
MOTION TO DISMISS THE INDICTMENT FOR DEFECTS
APPEARING ON ITS FACE*

[Stamp] Filed: 12 April 1948

For the reasons hereinafter set forth, the prosecution respectfully opposes the motions, both designated as Motion No. 3, filed by the defendant Friedrich von Buelow and the other defendants in this proceeding, "To Dismiss the Indictment for Defects Appearing on its Face."

As set forth in response to Motion No. 1, this Tribunal derives its jurisdiction from Control Council Law No. 10 and Ordinance No. 7. Article II of Control Council Law No. 10 defines certain acts as war crimes and crimes against humanity. Ordinance No. 7 gives this Tribunal jurisdiction, "to try and punish persons charged with offenses described as crimes in Article II of Control Council Law No. 10." The indictment under which these defendants are being tried describes in four counts offenses declared indictable under Control Council Law No. 10. The commission by the defendants of war crimes and crimes against humanity as defined in Control Council Law No. 10 is clearly alleged. The indictment, therefore, states facts sufficient to constitute an offense and there can be no question of its sufficiency on its face.

It is no part of the definition, contained in Article II of Control Council Law No. 10, of the crimes this Tribunal is given jurisdiction to try that they be offenses against the United States of America. Consequently there is no merit in paragraphs 2 and 6 of defendants' motions which attack the indictment as defective for failing to allege such offense. Nor does Article II require that the indictment be found within three years after the offenses therein were allegedly committed. On the contrary, it provides that "the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945." Paragraph 5 of the motion is accordingly without merit.

The remaining paragraphs of the motions, paragraphs 3 and 4 (one of which appears to have been inadvertently omitted from the copy of the motion of Friedrich von Buelow served on the prosecution), are addressed to the manner of pleading. These objections would appear to have no place at this stage in the pro-

*U.S. vs. Alfred Krupp von Bohlen und Halbach, *et al.*, Case 10, Official Record, volume 38, pages 972-975.

ceeding. Basically they are attacks on the indictment for failing properly to apprise the defendants of the charges against them. At this point, however, the defendants not only know the details of the charges against them but they know the evidence upon which the prosecution relies in support of these charges. The motion at this time is accordingly purposeless.

In any event, however, it is without merit. The indictment alleges with even greater precision and clarity than that filed before the International Military Tribunal the offenses of which the defendants are accused.

Tribunal III in its judgment specifically recognized that indictments before these Tribunals must be, and are properly couched in general terms. The Tribunal there said:

“Frank recognition of the following facts is essential. The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure.”

[Here the answer continues to quote that part of the judgment in the Justice case which is reproduced above in section IX K 3.]

In the language used by the Supreme Court of the United States, in a case involving an American military tribunal before whom the requirements of precision and clarity dictated by the Anglo-American common law are certainly no less than those proper to an internationally constituted tribunal such as this one, “Obviously charges of violations of the law of war*** need not be stated with the precision of a common law indictment.”

In re Yamashita, October Term, 1945.*

WHEREFORE the prosecution respectfully requests that the motion be denied.

[Signed] RAWLINGS RAGLAND
Deputy Chief of Counsel

[Signed] CECELIA H. GOETZ

For: TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

12 April 1948

*827 U.S. 1, 17 (1946).

c. Order of Tribunal Dismissing Motion No. 3 and 14 Other
Motions, 22 April 1948

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY

AT A SESSION OF MILITARY TRIBUNAL III
HELD IN CHAMBERS
22 APRIL 1948

*ORDER*¹

In this case the defendant von Buelow filed the following motions² on 29 March 1948:

1. Motion to dismiss for lack of jurisdiction.
 2. Motion to dismiss for failure to properly prepare, refer, or investigate the charges.
 3. Motion to dismiss the indictment for defects appearing on its face.
 4. Motion to dismiss for misjoinder and other defects appearing on the face of the indictment.
 5. Motion to dismiss indictment for failure to allege an offense cognizable by this Tribunal.
 6. Motion to dismiss for lack of jurisdiction over the person of the defendant.
 7. Motion for a mistrial and to dismiss the charges.
 8. Motion to strike certain allegations of the indictment.
 9. Motion to strike evidence.
 10. Motion to vacate order dated 16 January 1948 appointing a commissioner to take evidence and to strike all the testimony taken pursuant thereto.
 11. Motion for judgment of acquittal.
 12. Renewal of motion for separate trial.
 13. Motion requiring the appearance as witnesses of Major William H. Coogan, a commissioned officer of the Army of the United States, and Fred Niebergall, Chief of Document Control Branch, Evidence Division, OCC, Nuernberg, and for the production of certain documents.
 14. Motion for continuance.
 15. Motion to terminate the proceeding and dismiss the charges.
- Upon consideration of said motions the Tribunal is of the opinion that the respective replies of the prosecution are an adequate answer to said motions and that for this and other satis-

¹ U.S. vs. Alfried Krupp von Bohlen und Halbach, et al., Case 10, Official Record, volume 41, pages 120 and 121.

² Only the motion mentioned in item 3 hereof is reproduced herein.

factory reasons, the said motions and each of them should be overruled. It is accordingly so ordered.

[Signed] HU C. ANDERSON
Presiding Judge

22 April 1948

5. DENIAL OF DEFENSE MOTIONS IN THE MINISTRIES CASE ATTACKING THE SUFFICIENCY OF THE INDICTMENT

a. Motion by General Spokesman for Defense Counsel, 18 December 1947¹

[Stamp] Filed: 19 December 1947
Nuernberg, 18 December 1947

Dr. Kubuschok
Counsel for defendant
Karl Rasche

To: The Secretary General, Military Tribunal IV
Nuernberg

In my capacity as speaker of the defense appointed by my colleagues I request that the indictment² filed by the prosecution be declared insufficient prior to the questioning of the defendants whether they plead guilty or not guilty.

The indictment served upon the defendants does not meet the requirements defined by Article IV of Ordinance No. 7 of the Military Government for Germany. According to these regulations, "the indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged." The indictment does not comply with these requirements. In its individual counts the indictment lists the names of the defendants as far as charges against them are raised and then reproduces the whole text of the law. Thereafter individual historical fact complexes are being listed in which in every case only the names of some of the defendants can be found.

This manner of presenting the accusations to a preponderant degree does not clearly enough define the actual and judicial charges against the individual defendants. The individual defendants are being related with great fact complexes without defining sufficiently clearly the particular participation of the individual defendant. The quotation of the text of the law with its various conceptions of participation, the elaboration of the planning of and

¹ U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 69, pages 612-614.

² This indictment is reproduced in section I, volume XII, this series.

the association with a crime does not show an interpretation of the indictment as far as the legal qualification of the conception of the participation of the individual defendants is concerned. Particularly striking is the lack of precision of the indictment as far as the conspiracy charges are concerned. There is not the least indication from which individual facts, the forming of a conspiracy and the participation of the individual defendants in these charges could result. One more shortcoming consists in the fact that no definite data on organization or groups were given which have been associated with the crimes the defendants are charged with. The names of the members of such groups have not been given.

Through the shortcomings mentioned, none of the parties involved in the trial, save the prosecution, has been enabled to make the necessary arrangement by dint of their knowledge of the actual and judicial charges. Thus the purpose of the 30 days given the defendants prior to the arraignment has been frustrated. Considering the present version of the indictment the defendants have to enlarge the preparations for their defense to an extent which will prove too large once the charges will have been more specified. Considering the prevailing difficulties caused by the peculiarities of the present time, such an extension of the preparation of the defense is untenable. Today the defendants are to be questioned whether they plead guilty or not. Without regard to the fact whether they consider themselves not guilty within the scope of a very general indictment, it does not meet the meaning and the gravity of such a trial if the indictment is made on the basis of facts which are described in a rough outline only, and which at the present hour cannot be realized by the defendants as to their actual and judicial importance.

If the defendants thus insist on the rights granted them by Ordinance No. 7, the following practical points of view might be important for speeding up the proceedings:

Considering the present form of the indictment, the individual defendant would become acquainted with the concrete facts against which he has to defend himself often after the proceedings had been going on for months already. The general phrasing of the indictment and the interlacing of the charges raised against the individual with those raised against the defendants as a whole necessitate regular attendance of the sessions by defense counsel. During the duration of the session defense counsel can therefore not do the work which has to be done in other places than Nuernberg. Thus we would have to request adjournments which would prolong the duration of the trial.

The lack of substantiation in the indictment might have the further result that reduction of the material of the trial by grant-

ing cancellation of some of the counts of the indictment could be made only at a later date when in the course of the proceedings arguments have already taken place which otherwise would not have had to be made; the material could, however, be reduced already at the present stage if some of the charges raised against individual defendants would be cancelled because of lack of substantiation.

In my capacity of speaker for the defense I restrict myself for the time being to these general expositions. The individual defense counsel—without claiming to give all of them—have raised their objections against the insufficient substantiation in individual written requests which I herewith submit to the Tribunal. I am, however, of the opinion that the shortcomings explained to the Tribunal from general points of view will give the Tribunal a sufficiently clear picture for the decision of my request. If this should not be the case it will be up to the individual defense counsel to make their objections according to the details resulting from their case.

[Signed] DR. KUBUSCHOK

b. Answer of the Prosecution to Various Motions of Defense Counsel on the Sufficiency of the Indictment, 29 December 1947

ANSWER OF THE UNITED STATES TO MOTIONS OF DEFENSE COUNSEL OF VARIOUS DATES RE SUFFICIENCY OF INDICTMENT ¹

[Stamp] Filed: 31 December 1947

1. Answer is herewith made to the motions of defense counsel for the defendants Keppler, Bohle, Erdmannsdorff, Rasche, and others,² of various dates, requesting that the indictment more specifically set forth particulars on certain charges against the defendants. It is to be noted that several motions of this type have been previously filed and answered.

Sufficiency of Particulars of Indictment

2. The indictment filed in this case is equally, if not more detailed than any of the other indictments which were filed before the Military Tribunals, and in many respects more detailed than

¹ U.S. vs. Ernst von Weizsaecker, et al., Case 11, Official Record, volume 69, pages 551-553.

² Counsel for defendant Rasche, acting as general spokesman for the defense, made a general motion which is reproduced immediately above. The various other individual motions are not reproduced herein. They appear in the Official Record, U.S. vs. Ernst von Weizsaecker, et al., Case 11, volume 69, pages 558-611.

the indictment filed in the case against Goering, *et al.*, before the International Military Tribunal. The prosecution takes the position that the indictment in this case more than complies with the requirements of Article IV of Ordinance No. 7 which provides that, "The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendants of the offenses charged."

3. It is fundamental that all that is required in the indictment is that the prosecution state the ultimate facts of the charge. The reading of the indictment as a whole leaves no room for argument that the ultimate facts upon which the charges are based are set forth to an extent that there is no ambiguity or misapprehension as to what is being charged. The defense are under a misapprehension as to the differences between evidentiary facts and ultimate facts. Their entire motion is predicated on the view that they are entitled to be furnished the evidentiary facts. That, of course, is foreign to all principles of pleading. The defendant is well aware of the activities in which he engaged on the basis of which it is charged that he participated in the commission of crimes specified in the indictment.

4. Attention is invited to the judgment of the case of the United States *vs.* Altstoetter, *et al.*, pages 10649 and 10650 of the official transcript, wherein the Tribunal stated:

[Here the answer incorporated the quotation from the judgment in the Justice case which is reproduced above in section IX K 3. A further quotation followed from that judgment but has not been reproduced herein.]

5. The prosecution is of the opinion that this indictment is sufficient in all charges against the defendants and in effect is in the nature of a bill of particulars in most instances. Accordingly, the prosecution respectfully prays that the motion of the defense be denied in its entirety.

Respectfully submitted,

[Signed] ALEXANDER G. HARDY,
Associate Trial Counsel

For: TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

29 December 1947

c. Order of the Tribunal Denying Defense Motions, 5 January 1948, and Tribunal Memorandum Thereon

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

[Stamp] Filed: 5 January 1948

United States of America
 against
Ernst von Weizsaecker, *et al.* } *ORDER**

A motion in behalf of all the defendants in this case was on 19 December 1947, filed by Dr. Kubuschok, defense counsel, praying that the indictment be declared insufficient on the ground that it does not meet the requirements of Article IV of Ordinance No. 7. Separate and individual motions were also filed in behalf of defendants von Erdmannsdorff, Kehrl, Bohle, Ritter, Rasche, Koerner, von Krosigk, and Keppler. Such individual motions likewise attack the sufficiency of the allegations of the indictment insofar as they relate to such individual defendants, and some of them pray that certain allegations therein be stricken, and that certain charges therein be made more specific and certain. The prosecution filed answers to the motions.

The Tribunal having examined said motions and having considered the arguments offered in support thereof and in opposition thereto,

IT IS ORDERED THAT SAID MOTIONS BE, AND THE SAME ARE HEREBY IN ALL RESPECTS DENIED.

Memorandum hereto attached is made a part of this order.
Done at Nuernberg, Germany, 5 January 1948.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge,
Tribunal IV

MEMORANDUM

The defendants by a general motion and by divers individual motions have attacked the sufficiency of the indictment and in some instances have filed motions asking that the same be made more definite and certain in respect both to the general charges and their individual connection therewith. These motions the court has considered.

Due protection of the rights of an accused requires that he be informed with reasonable particularity of the crime charged and

*U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 69, pages 542-545.

the acts committed by him before being called upon to defend himself.

The precise manner and the exact stage of the proceedings when he shall be so informed differs in the criminal procedure of different nations. Except insofar as specific procedure is provided by the organic and procedural law under which a court or tribunal acts it matters little how or when this is done if before the accused is compelled to make his defense, he receives the requisite information in time to prepare his case.

Article IV of Ordinance No. 7 sets up specific standards for the indictment in these cases, namely, that the indictment shall state the charges plainly and concisely and with sufficient particularity to inform the defense of the offense charged.

If the indictment meets these standards, the motions must be overruled; if it does not, then they must be sustained.

Even under legal systems and procedures most tender and considerate of the rights of the accused, it is not deemed essential that the evidence be pleaded or that more than the ultimate facts be alleged. It is unnecessary that the time and place on the alleged crime be stated with exactitude.

The indictment may allege that the crime was committed on a specified date and a conviction thereunder sustained by proof of its commission any time within the statute of limitations. Nor under modern criminal codes is it generally necessary to specify the locale of the crime other than a general allegation that it was committed within the territorial jurisdiction of the court. A defendant may be indicted as a principal and conviction sustained by proof that he acted as an accessory either before or after the fact. In most jurisdictions it is sufficient to charge that the named defendants committed the crime without specification as to whether they were primary actors, or aided, abetted in the same as accessories before or after the fact. Nor under many modern criminal procedure acts is it necessary that the particular means or manner whereby a given defendant participated in a criminal conspiracy or the substantive offense be alleged; it is sufficient that he is charged with participation therein.

The crimes charged against the defendants in this indictment do not consist of single or isolated acts but of a long and continuous series resulting from plans and schemes carefully laid out and matured long prior to their execution; they differ from usual offenses which are directed against the life, limb, property, or reputation of an individual. If the allegations of the indictment are true the defendants' plans and acts were designed to and did affect the national existence and the social and economic life of

peoples, as well as the life, liberty, and property of millions whose individual names and existence were not only unknown to the defendants but as to whose identity they were wholly indifferent.

The very nature of the crimes charged, the magnitude of the plans, geographic, economic, and social; the millions whom they were to affect, precludes as a practicability, the degree of definitive specification which could be utilized were the crimes addressed against the rights of an individual.

Therefore, if the indictment charges that the defendants as principals, aiders, or abettors made or participated in plans and schemes to commit specified offenses, so that he who reads can understand what they were; if it charges that the plans were carried into execution, by or with the concurrence and acquiescence of the defendants, it meets the test prescribed by Article IV of Ordinance No. 7, and the motions must be overruled and denied.

It may well be that an indictment of this kind may contain matters of inducement or description which in and of themselves would not sustain a judgment of conviction. Where these appear, they can be treated as surplusage and disposed of at later stages of the proceedings, without prejudice to the rights of the defendants. But their presence in the indictment furnishes no ground for attack. To require the indictment to allege each act of each defendant committed in making the plans or in the execution thereof would result in an indictment so prolix as to be impracticable and would in fact lead to confusion rather than clarity. Article IV merely requires that the charges be stated plainly, concisely and with *sufficient particulars* to inform the defendant of the offenses charged. This the indictment does. If anything, it particularizes far more than Rule IV requires and far more than would be required of indictments in many jurisdictions, including those of the United States and Great Britain, which involve concert in preparation and execution of crimes punishable as felonies.

It is necessary, therefore, that these motions and each of them be overruled, and an appropriate order to that effect will be entered.

5 January 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge

X. ARRAIGNMENT

A. Introduction

The earlier volumes of this series contain separate sections devoted to recording what transpired during the arraignment in each of the twelve Nuernberg trials under Control Council Law No. 10. Each of these sections may be found under "II. Arraignments" in the volumes containing the preliminary materials on the respective cases (see vols. I, II, III, IV, V, VI, VII, IX, X, and XII. Vol. IV contains an arraignment section on the Einsatzgruppen case, pp. 23-29, and on the RuSHA case, pp. 619-621).

The requirements of Ordinance No. 7 as to arraignment were simple, merely providing that the Tribunal, "shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads 'guilty' or 'not guilty.'" Whereas the Charter of the IMT directed that "The Indictment shall be read in court" as the first step in the prescribed order of trial, Ordinance No. 7 made no such requirement. Notwithstanding, the indictment was read in open court at the time of arraignment in seven of the twelve cases which followed the IMT trial. These seven cases included the first five trials (the Medical, Milch, Justice, Pohl, and Flick cases) and the eighth and ninth trials (the RuSHA and Einsatzgruppen cases). The indictment was not read in court in the other five "subsequent" trials (the Farben, Hostage, Krupp, Ministries, and High Command cases).

In no case did a defendant plead guilty at the time of arraignment. To the standard question as to whether a defendant pleaded "guilty or not guilty," the most frequent answer was the conventional "not guilty." However, there were some exceptions. In the IMT trial, Goering attempted to make a speech upon arraignment and after having been prevented from doing this, he proceeded to state: "I declare myself in the sense of the indictment not guilty." Hess, who was arraigned after Goering, simply answered "No," after which the President of the IMT declared: "That will be entered as a plea of not guilty" (Trial of the Major War Criminals, *op. cit.*, vol. II, p. 97). In the twelve cases which followed the IMT trial, there was considerable variation in the manner in which defendants pleaded not guilty, the answers including the following: "Not guilty"; "I am not guilty"; "I consider myself not guilty"; "I do not consider myself guilty"; "I took notice of the accusations against me, and I consider myself not guilty"; "On all counts not guilty"; "I declare that I am not

guilty"; "I do not feel guilty"; "I plead I am not guilty"; "I am innocent"; "Under no circumstances guilty"; and "Not guilty in the sense of the indictment."

During the general arraignment in the Einsatzgruppen case, the defendant Strauch ostensibly suffered an epileptic fit upon questioning by the Tribunal and was arraigned subsequently (see vol. IV, this series, pp. 26, 28 and 29). In the Ministries case, when it came time for defendant Meissner to plead, Meissner's counsel stated that Meissner was absent due to illness and that Meissner had requested his counsel and authorized him "to declare here on his behalf that he received the indictment more than 30 days ago, that it was read to him, and that he wishes to plead here that he is not guilty." After discussion on this point the Tribunal accepted the plea with the understanding that the defendant Meissner's plea would be taken from him personally as soon as he was able to appear in court (see sec. II, vol. XII, this series).

The only plea of guilty to a count of an indictment was made in the Ministries case after the prosecution's case in chief was nearing its end. Defendant Bohle, through his counsel, moved, among other things, to withdraw his plea of not guilty to count eight of the indictment and "pleads guilty as charged" (see subsec. D).

Preliminary to the question as to how the defendant pleaded, the Tribunals ordinarily asked questions as to whether the defendant had obtained counsel, when a German translation of the indictment had been served upon him, and related matters.

Since the arraignment was the first meeting in open court of the Tribunal and counsel for both the prosecution and the defense, the arraignment normally provided the scene of more action than the preliminary questioning of the defendants and the takings of their pleas to the indictment. For example, in the first of the twelve "subsequent" trials, the Medical case, counsel for defendant Schaefer objected that "the indictment does not conform to Ordinance No. 7" with respect to the particulars of the alleged offenses (see sec. II, vol. I, this series, pp. 19-21). After argument defense counsel was asked to file a written brief in support of his position (this motion and memorandum is reproduced in sec. IX K) and the arraignment proceeded. For other matters which arose during the arraignments, reference is again made to sections of the earlier volumes (sec. II, Arraignment) containing materials from the record on the individual cases.

This section includes the applicable provision of Ordinance No. 7 pertaining to arraignment (subsec. B); the "Notice of Arraignment" served upon the defendants in the Medical case (subsec. C); and the motion of defendant Bohle "to change the pleas originally

given to the indictment in this case," the prosecution's answer thereto, Bohle's response to the prosecution's answer, and the Tribunal's order thereon (subsec. D).

B. Article XI (a), Ordinance No. 7

Article XI

The proceedings at the trial shall take the following course:

(a) The tribunal shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty."

Comparable provisions of the Charter of the IMT are the following:

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

* * * * *

Article 24. The proceedings at the Trial shall take the following course:

(a) The Indictment shall be read in court.¹

(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty."

C. Notice of Arraignment to Defendants in the Medical Case, 14 November 1946

MILITARY TRIBUNAL I

CASE 1²

UNITED STATES OF AMERICA

against

KARL BRANDT, SIEGFRIED HANDLOSER, PAUL ROSTOCK, OSKAR SCHROEDER, KARL GENZKEN, KARL GEBHARDT, KURT BLOME, RUDOLF BRANDT, JOACHIM MRUGOWSKY, HELMUT POPPENDICK, WOLFRRAM SIEVERS, GERHARD ROSE, SIEGFRIED RUFF, HANS WOLFGANG ROMBERG, VIKTOR BRACK, HERMANN BECKER-FREYSENG, GEORG AUGUST WELTZ, KONRAD SCHAEFER, WALDEMAR HOVEN, WILHELM BEIGLBOECK, ADOLF POKORNY, HERTA OBERHAUSER, AND FRITZ FISCHER, *Defendants*

TO THE ABOVE NAMED DEFENDANTS:

You are hereby notified to appear for arraignment on November 21, 1946, at 10 o'clock a.m. before Military Tribunal I, at the

¹ There is no similar provision in Ordinance No. 7 which requires the reading of the indictment in court. However, see section X A.

² U.S. vs. Karl Brandt, *et al.*, Case 1, Official Record, volume 32, page 129.

Palace of Justice, Nuernberg, Germany, and to plead to the indictment filed with the Acting Secretary General on October 25, 1946.

Dated November 14, 1946.

GEORGE M. READ
Secretary General

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing notice of arraignment on each of the above-named defendants the 14th day of November 1946 by delivering to and leaving with each of them copies thereof, in the English and German languages.

Dated November 15, 1946

[Signed] CHARLES W. MAYS
Marshal, Military Tribunals
Palace of Justice, Nuernberg, Germany

D. Change of Plea by Defendant Bohle in the Ministries Case, Withdrawal of Charges against Bohle, Reply of Defendant Bohle to the Prosecution's Answer, and Tribunal Order in Connection Therewith, 27 March-4 June 1948*

I. MOTION BY DEFENDANT BOHLE, 27 MARCH 1948

To: The Honorable Judges of Tribunal IV,
CASE 11

[Stamp] Filed: 27 March 1948

Comes the defendant Ernst Wilhelm Bohle, by and through his counsel, Dr. Elizabeth Gombel, with the prior knowledge of the prosecution, and moves on behalf of said defendant to change the pleas originally given to the indictment in this case.

Point One: With respect to count one of the indictment, that the defendant Bohle be withdrawn therefrom.

Point Two: With respect to count two of the indictment, that the defendant Bohle be withdrawn therefrom insofar as the plans and enterprises charged affect count one of the indictment.

Point Three: With respect to count six of the indictment, that the defendant Bohle be withdrawn therefrom.

Point Four: With respect to count five of the indictment, the defendant Bohle withdraws his plea of not guilty and enters a plea

*U.S. vs. Ernst von Weizsaecker, et al., Case 11, Official Record, volume 75, page 2689.

of guilty as charged in the following paragraphs contained in count five:

A. Pleads guilty to paragraph 38 as charged, only with respect to—

“persecution on political, racial, and religious grounds.”

B. Pleads guilty to paragraph 40 as charged, only with respect to—

“secured evacuation of German nationals and racial Germans from the puppet and satellite governments through negotiations, treaties, and other arrangements made by them and their field representatives, in order that they be resettled in the incorporated and occupied territories.”

Point Five: With respect to count eight of the indictment, the defendant Bohle withdraws his plea of not guilty and pleads guilty as charged therein.

Point Six: Counts three and seven of the indictment do not charge this defendant.

Point Seven: Count four of this indictment has been stricken and does not require a change of plea.

Nuernberg, 27 March 1948

[Signed] DR. ELIZABETH GOMBEL
(Counsel for defendant Bohle)

[Handwritten] The above motion distributed in open court
27 March '48.

[Signed] J. C. KNAPP
Assistant Secretary General

2. ANSWER OF THE PROSECUTION, 27 MAY 1948

ANSWER OF THE PROSECUTION TO THE MOTION OF THE DEFENDANT BOHLE TO CHANGE HIS PLEA OF GUILTY TO COUNTS FIVE AND EIGHT AND TO DISMISS COUNTS ONE, TWO, AND SIX OF THE INDICTMENT *

1. The defendant Bohle has moved hereby to change his plea of “not guilty” to that of “guilty” under counts five and eight of the indictment and that counts one, two, and six be dismissed as against him. A conference took place between counsel for the defendant Bohle, counsel for the prosecution, and the members of this Tribunal, wherein the defendant’s proposal to change his plea and the withdrawal of certain charges on the part of the prosecution were discussed. Thereupon the Tribunal instructed counsel

*Ibid., pages 2687 and 2688.

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. Arriving at such a stipulation has proved to be impossible.

2. 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, and in order that the rights of the defendant Bohle shall not be prejudiced in any manner by representations made by the prosecution, the prosecution herewith respectfully moves that the name of the defendant Bohle be withdrawn from counts one, two, and six of the indictment. The prosecution will continue to press the charges set forth against the defendant Bohle in counts five and eight of the indictment.

WHEREFORE, the prosecution further requests that the motions of the defendant Bohle be set aside without prejudice to his right to file such further motions as he may deem desirable.

Respectfully,

[Signed] ALEXANDER G. HARDY
Associate Trial Counsel

For: TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

Nuernberg, 27 May 1948

3. REPLY OF DEFENDANT BOHLE TO THE PROSECUTION'S ANSWER, 1 JUNE 1948

[Stamp] Filed: 1 June 1948

REPLY OF THE DEFENDANT ERNST WILHELM BOHLE
TO THE ANSWER OF THE PROSECUTION TO DEFEND-
ANT'S MOTION TO DISMISS COUNTS ONE, TWO AND SIX
AND TO CHANGE HIS PLEA OF GUILTY TO COUNTS
FIVE AND EIGHT OF THE INDICTMENT *

Comes the defendant Ernst Wilhelm Bohle through his attorney

*Ibid., page 2686.

and referring to his motion dated 27 March 1948 and the prosecution's answer thereto dated 27 May 1948 respectfully moves the Tribunal with respect to pleas to the two counts of the indictment for which he now stands charged, namely, counts five and eight:

1. to maintain his plea of guilty under count eight of the indictment;

2. to withdraw his plea of guilty made to certain specifications under count five, namely, specifications 38 and 40, and enter a plea of not guilty under the whole count. Only insofar the defendant takes leave to make use of the option offered by the prosecution in the last paragraph of their answer dated 27 May 1948.

Respectfully,

[Signed] ERNST WILHELM BOHLE

[Signed] DR. ELISABETH GOMBEL

Defense counsel for the defendant Bohle

4. ORDER OF THE TRIBUNAL, 4 JUNE 1948

MILITARY TRIBUNALS TRIBUNAL IV, CASE 11

[Stamp] Filed: 4 June 1948

United States of America
against
Ernst von Weizsaecker, *et al.* } ORDER*

On 27 March 1948, defendant Ernst Wilhelm Bohle made and filed a motion to enter a change of plea to certain allegations in paragraphs 38 and 40 of count five of the indictment, and to count eight of the indictment, and also prayed that certain other counts against him in the indictment be withdrawn. Said motion was not formally acted upon by the Tribunal which, at the time, indicated that it would take the matter under advisement. Subsequently on said day, counsel for said defendant Bohle stated orally to the Tribunal that a plea of guilty was "being entered to count five of the indictment, specifications 38 and 40, and to count eight of the indictment, and that certain other counts be withdrawn," which counsel indicated was in conformity with the contents of the written motion theretofore filed. Counsel was again advised that the Tribunal would give the matter consideration.

On the first day of June 1948, and before any formal order or action had been taken by the Tribunal with respect to said motion

*Ibid., pages 2684 and 2685.

or plea of the defendant, counsel for defendant Bohle filed a motion to withdraw the motion and plea, as made on 27 March 1948, insofar as it relates to specifications 38 and 40 of count five of the indictment and to enter a plea of not guilty to all of said count five, and also indicated therein his intention and desire to adhere to his plea of guilty to the charges contained against him in count eight of the indictment.

On 27 May 1948, counsel for the prosecution in this case made and filed a motion which, among other things, prayed that the charges against defendant Bohle, as contained in counts one, two, and six of the indictment, be dismissed.

The Tribunal having considered said motions, and being fully advised in the premises, IT IS ORDERED :

1. That said motion, and plea of guilty, as made on 27 March 1948, insofar as they relate to the allegations of paragraphs 38 and 40 of count five, are hereby set aside and withdrawn, and a plea of not guilty as to all of said count five is hereby received and entered in behalf of said defendant Bohle.

2. That a plea of guilty as to count eight of the indictment is hereby received and entered against said defendant Bohle.

3. That pursuant to the motion of the prosecution, dated 27 May 1948, hereinbefore referred to, the charges against defendant Bohle as contained in counts one, two, and six, of the indictment are hereby dismissed.

Nuernberg, Germany
4 June 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

XI. GENERAL POWERS OF THE TRIBUNALS IN THE CONDUCT OF TRIAL

A. Introduction

Article V of Ordinance No. 7 is devoted exclusively to the general powers of the Tribunals (subsec. B). Provisions of other articles, while treating of specific problems or while imposing specific duties, likewise deal with powers of the Tribunals either in express terms or by implication. The practice of the Tribunals in the exercise of their authority to adopt rules of procedure not inconsistent with Ordinance No. 7 is shown by the materials reproduced above on the development of uniform rules of procedure (secs. IV and V). The judgments of the Tribunals, reproduced in the earlier volumes of this series, all contain some analysis by the Tribunals of their powers and how they exercised them, and some of the more pertinent conclusions from the judgments are reproduced in this volume in the section containing summary statements from the judgments on procedure, practice, and evidence (sec. VI). Most of the remaining sections of this volume, while treating of various topics, likewise show the Tribunals in action from day to day in the exercise of their powers. For example, see the sections on procedures to ensure fair trial for defendants (sec. XIII) and on rules and practice concerning various types of evidence (sec. XVIII). Accordingly, this section has been limited to this introduction and to the setting forth of the provisions of Article V of Ordinance No. 7 (subsec. B).

B. Provisions of Article V, Ordinance No. 7

Article V

The tribunals shall have the power

(a) to summon witnesses to the trial, to require their attendance and testimony and to put questions to them;

(b) to interrogate any defendant who takes the stand to testify in his own behalf, or who is called to testify regarding any other defendant;

(c) to require the production of documents and other evidentiary material;

(d) to administer oaths;

(e) to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission;

(f) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunal or by the committee of presiding judges as provided in Article XIII.

Comparable provisions of the Charter of the IMT are the following:

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17. The Tribunal shall have the power

- (a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,
- (b) to interrogate any Defendant.
- (c) to require the production of documents and other evidentiary material,
- (d) to administer oaths to witnesses,
- (e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

XII. THE ORDER OF THE TRIAL

A. Introduction

The order of trial in the IMT case was prescribed in general terms by Article 24 of the Charter of the IMT (sec. I C). Pursuant to Article 14 of the Charter of the IMT the Chief Prosecutors agreed upon a plan of presenting the prosecution case under which the respective prosecution staffs divided the principal responsibility for presenting the prosecution case under the different counts of the indictment. The IMT called a preliminary meeting with defense counsel, before the trial began, to discuss in general terms the proposed course of the proceedings. Before the defense case began, the IMT issued an order concerning the presentation of the defense case (sec. XIII J 3). Under this order the cases of the respective defendants were heard in the order in which the defendants' names appeared in the indictment. A defendant who elected to testify on his own behalf was required to do so during the presentation of the case on his behalf, and counsel for other defendants and the prosecution were likewise obliged to examine the defendant at that time.

The general course of the proceedings in the 12 Nuernberg trials before military tribunals established under Ordinance No. 7 was prescribed by Article XI of the Ordinance (sec. B). This article divided the trial into conventional phases of argumentation and the presentation of evidence and directed the order in which each phase should occur. In actual practice the Tribunals exercised considerable discretion, however, which allowed minor variations in the interests of accommodating special hardships and of facilitating orderly presentation and the expedition of the trial. For example, Article XI (*d*) provided that "The defense may make an opening statement" after the prosecution had presented its evidence. This was uniformly interpreted to mean that counsel for each defendant could make an opening statement. The practice differed, however, with respect to the coincidence in point of time of the defense openings. In some instances all the defense openings were presented consecutively at the beginning of the entire defense case. In other instances the respective defense openings were made just before the presentation of evidence on behalf of each defendant. In some cases the defense requested and was granted the opportunity of making a general opening statement for all defendants. An opening statement was made for all defendants in the Justice case, which is reproduced in full in section III, volume III, this series.

In some of the trials there was no hard and fast line between the close of the prosecution's case in chief and the case in chief of the defense, the prosecution resting its case subject to minor reservations, the most frequent being that prosecution affiants requested for cross-examination and who had not yet appeared could be cross-examined upon convenience during the defense case. This question and a number of other points bearing on the order of trial came up in a discussion in the Justice case near the end of the prosecution's case (subsec. C).

The order of trial during the defense case presented special problems. In all except two cases (Milch and Flick) ten or more defendants stood trial, and in all the trials large numbers of issues were joined. In most of the cases there were general topics which applied to all or a large group of defendants. Arrangements were usually made by defense counsel whereby different defense counsel or different defendants assumed primary responsibility in developing the defense along certain lines. This is illustrated by the discussion on the order of trial which took place near the end of the Justice case (subsec. C), when Judge Brand invited defense proposals concerning this matter. The defense in that case elected to have the defense statements and the submission of defense evidence proceed in the order in which the defendants sat in the dock, which was the order in which the defendants were named in the indictment. The question of the order in which the defendants were to be heard as witnesses was raised before the Committee of Presiding Judges. It was decided that no uniform rules of procedure should be adopted, but that the matter be left to the discretion of the individuals tribunals (subsec. D). In the Ministries trial, the largest case of all, the Tribunal prescribed the order of trial by written order just after the conclusion of the prosecution's case, and later amended its order so as to divide the presentation of the case for the defendant Keppler into two phases (subsec. E).

A number of questions which arose with respect to the order of trial and the testimony of defendants are covered later in section XVIII G, "Oral Testimony of Defendants," exclusive of affidavits and interrogations. Ordinarily the defense was not permitted to divide the direct examination of a defendant so that he could testify first on one group of topics and then later testify on other topics after an interval during which other defense evidence had been taken. An exception occurred in the Farben case when defense counsel was permitted to defer the testimony in chief of defendant ter Meer on one count of the indictment. Relevant extracts from the transcript are reproduced in a later section (XVIII G 10).

Of course there were occasional short interruptions of a defendant's testimony in chief because of various trial exigencies, such as the examination of a witness from some distance, who desired to return home.

Normally the rebuttal case of the prosecution was relatively short. In the Farben trial the defense case was interrupted for three short intervals near its end, without defense objection, so that the prosecution could offer rebuttal documents. The purpose of this arrangement was to permit the defense additional time to meet whichever of these documents were admitted in evidence and to prevent delay after the close of the defense case (subsec. F). In the Farben case there was no prosecution rebuttal apart from the offer of these documents.

Concerning final oral argumentation before the Tribunal, Article XI of Ordinance No. 7 originally provided that the defense closing statements should follow the submission of the defense evidence and, in turn, be followed by the closing statement for the prosecution. This was changed by Article III of Ordinance No. 11 (subsec. B) which left the order of the closing statements to the discretion of the Tribunal. Although there was no express provision in Ordinance No. 7 for rebuttal closing statements, it became the practice in the later trials to permit the party which made the initial closing statement to make a short rebuttal statement following the closing oral argumentation of the opposite party.

B. Provisions of Article XI, Ordinance No. 7, as Originally Issued and as Amended by Ordinance No. 11

Article XI

The proceedings at the trial shall take the following course:

(a) The tribunal shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty."

(b) The prosecution may make an opening statement.

(c) The prosecution shall produce its evidence subject to the cross-examination of its witnesses.

(d) The defense may make an opening statement.

(e) The defense shall produce its evidence subject to the cross-examination of its witnesses.

(f) Such rebutting evidence as may be held by the tribunal to be material may be produced by either the prosecution or the defense.

(g) The defense shall address the court.

(h) The prosecution shall address the court.

- (i) Each defendant may make a statement to the tribunal.
- (j) The tribunal shall deliver judgment and pronounce sentence.

**MILITARY GOVERNMENT—GERMANY
ORDNANCE NO. 11**

*AMENDING MILITARY GOVERNMENT ORDINANCE NO.
7 OF 18 OCTOBER 1946, ENTITLED "ORGANIZATION
AND POWERS OF CERTAIN MILITARY TRIBUNALS"*

* * * * *

Article III

Subdivisions (g) and (h) of Article XI of Ordinance No. 7 are deleted; subdivision (i) is relettered "(h)"; subdivision (j) is relettered "(i)"; and a new subdivision, to be designated "(g)," is added, reading as follows:

"(g) The prosecution and defense shall address the court in such order as the Tribunal may determine."

This Ordinance becomes effective 17 February 1947.

BY ORDER OF THE MILITARY GOVERNMENT.

Comparable provisions of the Charter of the IMT are the following:

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

* * * * *

Article 24. The proceedings at the Trial shall take the following course:

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each defendant whether he pleads "guilty" or "not guilty."
- (c) The Prosecution shall make an opening statement.
- (d) The Tribunal shall ask the Prosecution and the Defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.
- (f) The Tribunal may put any question to any witness and to any defendant, at any time.
- (g) The Prosecution and the Defense shall interrogate and may

cross-examine any witnesses and any Defendant who gives testimony.

- (h) The Defense shall address the court.
- (i) The Prosecution shall address the court.
- (j) Each defendant may make a statement to the Tribunal.
- (k) The Tribunal shall deliver judgment and pronounce sentence.

C. Justice Case—Discussion near the End of the Prosecution's Case Concerning the Further Order of Trial

I. DISCUSSION BEFORE TWO MEMBERS AND THE ALTERNATE MEMBER OF THE TRIBUNAL IN THE ABSENCE OF THE PRESIDING JUDGE

EXTRACTS FROM THE TRANSCRIPT OF THE JUSTICE CASE,
3 JUNE 1947¹

THE MARSHAL: Persons in the courtroom will please find their seats.

JUDGE BRAND: You may be seated.

THE MARSHAL: There will be order in the courtroom.

JUDGE BRAND: The judges who are present this morning have thought it advisable to come into the courtroom for a conference with counsel for the prosecution and for the defense.

The record will show that we are not sitting as a court this morning. We have come in for the purpose of conferring with the gentlemen for the prosecution and defense as individual judges, and with you as individual lawyers.

The reason for this procedure is that his Honor, the presiding judge, Judge Marshall, is in the hospital for, we trust only a few days, and we consider it important that we should not sit as a court in his absence. Our reason for that being that we desire to make it perfectly clear that he remains as the presiding judge, and that we are not sitting as a court in his absence.²

We will, however, expect the interpreters and the reporters to make a record of this conference, in the same manner as they would do if we were in open session.

¹ Extract from mimeographed transcript, Case 3, U.S. vs. Josef Altstoetter, et al., 2 June 1947, pages 3812, 3814, and 3815.

² Judge Marshall remained Presiding Judge until 19 June 1947, when, because of his continued incapacity due to illness, the Tribunal was reconstituted. At that time the former alternate member of the Tribunal, Judge Harding, who had been present throughout the sessions of the trial, replaced the incapacitated member, and Judge Brand was appointed Presiding Judge. Concerning alternate members, see sec. XXII).

[The discussion next following concerned the problem of cross-examining certain prosecution affiants who had been called for examination by the defense and who were then available. The defense agreed that in the absence of Presiding Judge Marshall, who was incapacitated due to illness, the two remaining members of the Tribunal and the alternate member sit as commissioners to take this evidence. The transcript of this discussion is reproduced in full in section XVII B.]

JUDGE BRAND, PRESIDING: I have two other matters about which we have also discussed.

The time is rapidly approaching when the defense will enter upon the presentation of its case. Expressing my very clear opinion, I would say that the Court, when it convenes, will have complete authority to determine the order in which opening statements shall be made and in which the proof shall be presented in behalf of the various defendants.

However, it seems very important and very proper that we should have from you in the very near future a statement from defense counsel, after they have jointly conferred, as to their wishes concerning the order in which opening statements shall be made and also concerning their wishes as to the order in which the various defendants shall present their testimony in their own defense.

I think it quite likely that the Court will consider the wishes of defense counsel so far as may be possible and proper as to this matter of the order of the making of opening statements and the order of proof. That is a matter which I think we should not ask you to express any opinion on at this time, but I suggest that when we gather tomorrow morning that you have a written memorandum, if you can do so, which will indicate your collective ideas on this matter of the order of proof.

I would also suggest to you that you give serious consideration to the manner in which the defense, speaking of it as a whole, will present such part of your testimony as applies to all of the defendants equally.

You have indicated rather clearly that there are some matters relative to your views of German law and the like which may be applicable equally to all, and it would surely be a misfortune to have fifteen separate presentations of matters which apply equally to all. Will you gentlemen give that your consideration and be prepared to indicate preferences when we meet tomorrow.*

*The further discussion was held on 5 June 1947, and this discussion is reproduced in the subsection immediately following.

2. DISCUSSION BEFORE THE COMMISSIONERS OF THE TRIBUNAL

EXTRACTS FROM THE TRANSCRIPT OF THE COMMISSION OF TRIBUNAL III, 5 JUNE 1947*

THE MARSHAL: The Commission is again in session.

MR. LA FOLLETTE (deputy chief counsel): May it please the Commissioners. The prosecution would like to state that the prosecution is advised that there are no more witnesses who can at this time be produced through the office of the Secretary General. The prosecution is suggesting that the taking of further testimony by the Commission be terminated, and states its position to the Commission, to be reported to the Tribunal, that any other witnesses, any other affiants who have not been produced for cross-examination may be, of course, produced as part of the defendants' case. And if it should develop that these affiants cannot be produced in person, then the prosecution anticipates that the Tribunal when it is in session, and the Commission may report the prosecution's position, may make such orders as to giving the defense an opportunity to test the veracity of those affidavits in such a manner as the Tribunal may then direct. There being no further testimony, or no witnesses or affiants to be produced, the prosecution respectfully petitions the Commission to end these proceedings at this time.

JUDGE BRAND, PRESIDING: Our understanding of the situation is that the Secretary General has produced all of the witnesses—I should say all of the affiants who were on the list of affiants requested by the defense counsel, with the exception of approximately four who are either sick or cannot be at this moment produced; that the proper procedure would be to go on before the full court with the presentation of the main case of the defense, with the reservation that those affiants who have not been cross-examined but who have been requested by defense counsel for cross-examination may be produced at a later time as and when they can be produced for cross-examination in the course of the defendants' principal case.

That seems to be, as I understand it, the suggestion that at this time it would be appropriate with the approval, by reason of necessity, of those of us who are sitting as commissioners at this moment.

Are there any objections from the defense counsel to that gen-

*Extract from mimeographed transcript, Case 3, U.S. vs. Josef Altstoetter, *et al.*, pages 4041-4047.

eral procedure? (No replies.) If there are none, I would suggest three considerations which should be discussed by you at this time. There seems to be no other procedure possible except the one which we have outlined. Then I suggest to counsel for both sides that at this time it would be appropriate that notice should be given which will go into the record as to what the desires of defense counsel are concerning:

1. The date at which the full Tribunal should convene for the purpose of hearing the opening statements of the defendants by their counsel;

2. The desires of defense counsel as to the order in which they will make their opening statements; and

3. The order of proof in the presentation of the evidence which the defendants will produce.

One would think, subject to other considerations which have not yet been suggested, that the order of proof would normally be the same as the order of the making of the opening statements. I take it that is not necessary, but would seem to be regular. I think I recall that when the Tribunal was in session, it was indicated, perhaps only by myself, that the order of proof is always a matter within the discretion of the Tribunal, but that the Tribunal would very likely be strongly influenced by the wishes of defense counsel in that respect.

Now as to the difficulties which are incident to the fact that we are sitting only as commissioners and that it is of course highly desirable that nothing should be done which could in any way be thought to disqualify Judge Marshall on his return, it has occurred to us that it would be proper for us as commissioners to adjourn until a specified date and to recall you to appear before us as commissioners on that date. When that date is determined, then the Tribunal will also, we think, there being two of us here present, make an order reconvening the Tribunal for the same date. In that way, it will be made very definite when we are to reconvene. The order as to the reconvening of the full Tribunal will be made in the future by the Tribunal and will be signed by Judge Marshall so that there will be no question as to the validity of the reconvening as a tribunal with Judge Marshall participating, as we devoutly hope.

Now what suggestions have defense counsel with reference to the three matters which we have discussed?

DR. KUBUSCHOK (general spokesman for the defense, and counsel for defendants von Ammon and Schlegelberger): First of all, I would like to refer to the last two points, and I wish to make this

statement: the defense is altogether in agreement that the opening statements as well as the submission of evidence should take place in the order in which the defendants have been put into the dock. That is to say, opening statements and submission of evidence would begin with the defendant Schlegelberger and would then continue in the same order in which the defendants are sitting in the dock.

JUDGE BRAND, PRESIDING: The front row first: Schlegelberger, Klemm—

DR. KUBUSCHOK: Schlegelberger, Klemm, Rothenberger, Engert, Lautz, Mettgenberg—

JUDGE BRAND, PRESIDING: I understand.

DR. KUBUSCHOK: Now, the second point: the date for the opening statements and immediately thereafter the submission of evidence. First of all, I wish to refer to the latter point. The Tribunal has already pointed out that in this trial there are a number of general topics which, for the purpose of saving time, should be dealt with in as uniform a manner as possible by one of defense counsel. That is what we wish to do. We believe, too, that it would be expedient if some of those general topics were to be mentioned already in the opening statement in part in connection with the witnesses which will be called and in part by experts.

The defense also intends to submit general document books; that is to say, document books which are arranged according to the subject matter and which have been compiled in co-operation with all defense counsel. To mention one example: "The Special Courts," "Historical and Legal Development and Practice." Those subjects could be submitted in one document book. We intend to submit those document books at the very beginning. Now at the beginning of a recess, the defense counsel intend to carry out that joint work. For that work, it has already become evident that the recess will have to take some time. For the individual defense counsel, too, an adequate recess is absolutely necessary. Even though the session has been interrupted by odd days, the defense in its work, by the continuous course of the sessions, has been limited to a considerable extent. Would you kindly bear in mind that the scrutiny of the evidence and the interrogations of persons who might be used as witnesses require that we should make contacts all over Germany. The trips take up a great deal of time nowadays. Consequently, those journeys, even though in some cases the assistants were sent on those trips, have not yet all been made. Furthermore, it is necessary to contact a large number of prospective witnesses who are in the prison here.

With respect to that, in the past there existed considerable

technical difficulties. If we wished to speak to a person in prison here and made out application, generally we had to wait for weeks until we received permission. Only a few moments ago, a colleague called my attention to the fact that since the 5th of May he had been waiting for a permission, which he has not yet received. Yesterday, a technical change was made which certainly will eliminate those technical difficulties. We now no longer need to examine those witnesses in the presence of a commissioner, who as far as I know had to carry the burden of all trials. From now on, we can submit our wishes immediately to the prosecution, and only if the prosecution deems it necessary, an official of the prosecution will attend the examination. I hope, therefore, that these difficulties will now be removed and that in a comparatively short while we will be able to finish the work which has gotten into arrears.¹

Finally, one must also consider that on the hearing of those witnesses and also the result of the cross-examinations of the affiants, which has just been carried out, that on that depended the further dispositions of the defense counsel.

After this we must now introduce various pieces of evidence, and we must make the necessary preparations. If I may briefly outline once again the way in which the defense imagines the trial will now continue. When the recess is over, the opening statements will be read out. After the opening statements we will call the experts on general questions. At the same time we will submit the general document books, and then we will start with the Schlegelberger case which, by nature of the subject, will be comparatively extensive. The matter itself makes it necessary for Schlegelberger to deal with the large number of questions which will emerge; and it is obvious that I personally, as defense counsel for Schlegelberger, will have special difficulties, of course. I would ask the Court to be good enough to consider that. All of us are, however, of the conviction that an orderly general preparation of the defense's case, the systematic introduction of the defense is only possible with exact preparation, and will make it possible for us then when we come to the individual cases to save enough time so that the recess which is being granted to us now will certainly be made up again as far as time is concerned. For all those reasons I would ask the Court to fix the recess at 3 weeks.² I

¹ Concerning the problem which Dr. Kubuschok raises with respect to the preliminary interrogation of prisoners in Nuernberg Jail, note the developments concerning Rule 23 of the Uniform Rules of Procedure, the applicable rule in such cases. Compare section III F, section V D, and section IV F. On 3 June, 2 days prior to Dr. Kubuschok's statement, the first amendment to Rule 23 took place (sec. IV D).

² The recess, as it turned out, amounted to 18 days. The opening statements of the defense began on 23 June 1947 and the first defense witness was called on 25 June 1947.

believe that on no account will we be able without such a recess being granted to us to carry out the plans for the defense in that way. If we can carry out the plans for our defense in that manner, if we are able to carry them out in an orderly manner, we are certain that at a later time, at one stage or another of the trial, we will not need again to ask the Court to grant us another recess.

If we first of all treat matters from a general point of view, and then go into the particulars, I am certain that for all the participants of this trial the work will be made easier, and in the last analysis time will be saved. Thank you.

JUDGE BRAND, PRESIDING: Sitting as commissioners, we will, when we recess in a few moments, recess until Monday morning, 16 June 1947, at which time counsel, officials of the Court, and the defendants will be present. The matter of setting the date at which the full Tribunal will reconvene will be submitted to Judge Marshall, and an order will be made by the Tribunal signed by Judge Marshall, and distributed to the interested parties in the usual manner in the immediate future.¹

D. Minutes of the Conference of the Committee of Presiding Judges, 16 March 1948, Concerning the Order of Testimony by Defendants

OFFICE OF MILITARY GOVERNMENT (U.S.)
SECRETARIAT FOR MILITARY TRIBUNALS
Office of the Secretary General

Palace of Justice
Nuernberg

No. 9

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES²
16 March 1948 1635

Judge Curtis G. Shake, Executive Presiding

MEMBERS OF THE COMMITTEE PRESENT:

Judge William C. Christianson, Tribunal IV

Judge John C. Young Tribunal V

Judge Michael A. Musmanno, Tribunal II

Colonel John E. Ray, Secretary General

MEMBERS ABSENT:

Judge Hu C. Anderson, Tribunal III

¹ By written order of 12 June 1947 (sec. XVII B 4), the Tribunal rescinded the statement that the Commission would meet on 16 June 1947 and set 23 June 1947 for the reconvening of the Tribunal to hear the opening statements for the defendants.

² Official Record, Tribunal Records, volume 5, pages 147 and 148.

GUEST:

Judge Johnson T. Crawford

* * * * *

2. *Defendants' Testimony*

A request submitted by Judge Anderson that a rule be adopted regarding the order in which defendants would testify as witnesses was considered. It was decided that the order in which defendants testify, and the time allowed them for presenting their testimony, is within the sound jurisdiction of the Tribunal trying the case and is not the proper subject of a uniform and binding rule.

* * * * *

[Signed] JOHN M. RAYMOND
Colonel, GSC
Associate Director

[Signed] JOHN E. RAY
Colonel, FA
Secretary General

Meeting Adjourned at 1720

E. Ministries Case—Tribunal Order on the Order of Trial During the Defense Case and Later Amendment to This Order

I. TRIBUNAL ORDER OF 29 MARCH 1948*

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

[Stamp] Filed: 29 March 1948

United States of America
against
Ernst von Weizsaecker, *et al.* } ORDER

From the indictment and from the evidence offered by the prosecution it has become apparent that included herein are a number of cases which, so far as the individual defendants are concerned are almost entirely distinct and which, in some instances, have little relation to each other, except that the crimes are of the same kind and nature.

While some of the defendants are named in every count, others are named in but two or three.

*U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 88, pages 159 and 160. This order was made two days after the prosecution had concluded its case in chief on 27 March 1948.

Although it is the desire of the Tribunal to hear itself as many of the witnesses called by the defense as is practicable, it is apparent from the statement of defense counsel that to do so in all instances would result in prolonging the trial beyond all reasonable lengths.

We are of the opinion, not only that from the evidence of the prosecution but from the indictment itself that the case against the various defendants and the presentation of the defense can be divided as follows:

1. Meissner
2. Schellenberg
3. Puhl
4. Berger
5. Weizsaecker, Steengracht, Woermann, Ritter, Keppler, Erdmannsdorff, Veesenmayer, and Bohle, of the Foreign Office.
6. Dietrich
7. Rasche
8. Koerner, Pleiger and Kehrl
9. Darré
10. Schwerin-Krosigk
11. Lammers, Stuckart

This classification of course is not absolute and in some instances there may be overlapping, but we do not believe it to be substantial.

Unless counsel for the defense shall agree upon and ask for a different order of procedure, the defendants will be heard in the above order.

This, however, does not apply to the testimony of witnesses other than the defendants themselves or to documentary evidence, which will be taken and received in such order as the Tribunal shall from time to time direct. It is therefore essential that the several defendants be prepared to present their cases at any time after 3 May 1948.

Unless otherwise ordered all documentary evidence will be taken before a commissioner or commissioners who will be appointed by the Court. The commissioners will in addition take the testimony of such witnesses as the Tribunal shall from time to time order.

Counsel for the respective defendants are hereby ordered and directed to submit to the Court on or before 3 May 1948, the names of all witnesses whom they desire or intend to call, the subject matter about which each witness will give testimony and the relative importance and order in which they desire to call the witnesses, to the end that the Court may determine before whom testimony will be taken and make appropriate orders relating to the same.

The Tribunal reserves the right to modify, alter, diminish, or enlarge this order.

Each defendant is directed to be prepared to proceed with his defense by 3 May 1948.

The Tribunal expects the defendants to close their respective cases on or before 1 July 1948.¹

29 March 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Military Tribunal IV

2. ORDER OF 8 JUNE 1948, AMENDING THE ORDER OF 29 MARCH 1948 ON THE ORDER OF TRIAL FOR THE DEFENSE CASE

MILITARY TRIBUNALS TRIBUNAL IV, CASE 11

[Stamp] Filed: 9 June 1948

United States of America
 against
Ernst von Weizsaecker, *et al.* } *ORDER*²

The Tribunal having reconsidered its order filed on 29 March 1948, fixing the order in which the various defendants in these proceedings are required to present their respective defenses, and being of the opinion that an orderly presentation of the defense requires that, as far as possible, such presentation be grouped according to the nature of the charges involved, and finding that defendant Keppler's case has two distinct aspects, namely diplomatic and economic, Now Therefore IT IS ORDERED that defendant Keppler be, and he is, hereby required to present the diplomatic phase of his defense immediately after that of defendant Erdmannsdorff and immediately before that of defendant Veesenmayer, and that defendant Keppler present the economic aspect of his case immediately after that of the defendant Koerner and immediately before that of defendant Pleiger.

IT IS FURTHER ORDERED that the said order of 29 March 1948,

¹ Actually, the defense case lasted for more than 3 months after 1 July 1948. The Tribunal held its last session for taking evidence on 8 October 1948, when it heard the concluding testimony of defendant Stuckart, the last defendant to testify. However, commissioners of the Tribunal held a number of sessions between 8 October and 8 November to take further evidence, oral and documentary, offered by both the defense and by the prosecution. Many of the witnesses heard were defense affiants who were called for cross-examination by the prosecution concerning their affidavits which had been introduced as defense exhibits. Concerning the taking of evidence on commission, see section XVII.

² U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 75, page 2744.

hereinbefore referred to, be amended by amending paragraphs 5 and 8 to read as follows :

“5. Weizsaecker, Steengracht, Woermann, Ritter, Erdmannsdorff, Keppler, Veessenmayer, and Bohle, of the Foreign Office.”

“8. Koerner, Keppler, Pleiger, and Kehrl.”

Nuernberg, Germany

8 June 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

F. Farben Case—Offer of Prosecution Rebuttal Documents before the End of the Defense Case

EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE,
29 AND 30 APRIL 1948*

(Afternoon Session, 29 April 1948—After Recess)

THE MARSHAL: The Tribunal is again in session.

JUDGE HEBERT: Just one moment, Dr. Siemers, before you start, I want to make a very brief announcement. The prosecution has distributed, I understand, or has had distributed, Book I containing certain documents which it proposes to introduce as rebuttal evidence. The English copy of that book is also available. Earlier in the week, some of the defense counsel spoke to us about having those documents available at the earliest possible time, and we think it would facilitate matters greatly if we could set aside about one-half hour tomorrow immediately after the noon recess, at which time the prosecution could offer those documents to the Tribunal and the Tribunal will, of course, take under advisement, the question of whether they are or are not proper rebuttal documents. So, if there is no objection, we will follow that procedure of setting aside one-half hour beginning at one-thirty tomorrow, for the presentment of those rebuttal documents.

* * * * *

(Afternoon Session, 30 April 1948)

THE MARSHAL: The Tribunal is again in session.

MR. SPRECHER (chief, Farben trial team) : Mr. President, as to your suggestion, specifically that of Judge Hebert, we now are in a position to make our presentation of those documents in Prose-

*Extracts from mimeographed transcript, Case 6, U.S. vs. Carl Krauch, et al., pages 12846 and 13013. These proceedings took place very late during the defense case.

cution Document Book 92, Rebuttal Book 1. I might say that the second rebuttal book will concern entirely Auschwitz, approximately 14 or 15 documents, and we have been told that those will be processed both in the German and English by next Tuesday and as soon as we have a clear indication as to that matter we will take it up with Judge Hebert and attempt to arrange it.

PRESIDING JUDGE SHAKE: Very well.

MR. SPRECHER: The third and last document book should not contain more than ten or a dozen documents and we will let you know about that on next Monday. Now, in selecting those documents we have attempted to restrict them to those which we think will be most helpful at this stage in assisting you in coming to a determination of the truth in regard to the matters covered by these documents. In most cases we have been able to avoid meeting explanations or new evidence put in by the defense through their witnesses and actually have been able to avoid calling a large number of defense affiants for cross-examination, by using most of these documents—most of the available contemporaneous documents—that we think are crucial during cross-examination. That has also given the defense a longer opportunity to consider these documents for whatever purpose they may desire. Now, with your permission I would like to have the individual prosecution lawyers, who have concentrated most on particular subjects, present the documents according to certain groups without any further introduction, and Mr. Van Street will begin with the documents which come at the end of the book under count three, slave labor at various Farben plants.

[At this and two later occasions, the prosecution offered rebuttal documents, many of which were rejected upon defense motion by the Tribunal. The prosecution presented no rebuttal case apart from the offer of these documents, and hence the prosecution's "rebuttal" was concluded before the last evidence in the defense case had been submitted.]

XIII. APPLICATION OF REQUIREMENTS TO ENSURE FAIR TRIAL

A. Introduction

Both the Charter of the IMT and Ordinance No. 7 contain separate articles prescribing specific procedure "in order to ensure fair trial for the defendants" (subsec. B). In the early pronouncements and discussions concerning the punishment of war criminals by invoking the judicial method, fair trial was taken up in connection with such closely related questions as the numbers of persons to be tried, the avoidance of mass reprisals, the prevention of unreasonable delays, and methods to expedite the trials. In this connection reference is made to the numerous documents reproduced in "Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945." This report reproduces in full all the documents preceding the London Agreement which are cited or quoted immediately below.

Concerning the trial of war criminals, President Roosevelt, as early as October 1942, declared that it was American and Allied policy "to see that when victory is won the perpetrators of these crimes shall answer for them before courts of law" and that there was no intention "to resort to mass reprisals" (Statement by the President, 7 October, 1942, see subsec. C). A few months later, in March 1943, the Senate and House of Representatives of the United States passed a Concurrent Resolution which concluded by stating:

"Resolved further, That the dictates of humanity and honorable conduct in war demand that this inexcusable slaughter and mistreatment shall cease and that it is the sense of this Congress that those guilty, directly or indirectly, of these criminal acts shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible."

The Declaration of German Atrocities (commonly referred to as the Moscow Declaration) was signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin, and released on 1 November 1943. It stated that Germans who had perpetrated atrocities would be sent back to the countries in which their deeds were done "in order that they may be judged and punished according to the law of these liberated countries," but that this declaration was "without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the governments of the Allies."

On 22 January 1945, the American Secretaries of War and State and the Attorney General submitted a memorandum to President Roosevelt entitled "Trial and Punishment of Nazi War Criminals." This memorandum devoted separate sections to the "Scope and Dimensions of the War Crimes Program," "Difficulties of an Effective War Crimes Program," and "Recommended Program" (these three sections are reproduced in subsec. D). Under the last-mentioned section, the following was stated:

"After Germany's unconditional surrender the United Nations could, if they elected, put to death the most notorious Nazi criminals, such as Hitler or Himmler, without trial or hearing. We do not favor this method. * * * We think that the just and effective solution lies in the use of the judicial method."

The proposals in the memorandum to President Roosevelt were closely followed in the American memorandum presented to the Foreign Ministers at the San Francisco Conference on 30 April 1945. This memorandum recommended against a purely political disposition of the Nazi leaders, stating: "Instead, it should be possible to determine upon a suitable judicial process in accord with the common traditions of the principal United Nations." Under "Procedures" the American memorandum states:

"Any military or executive agreement should include an undertaking to adopt and apply comprehensively in the trial of war criminals, to the greatest extent practicable, expeditious, fair, nontechnical procedures which would (in a manner consistent with the purposes of the agreement):

"a. provide each accused with notice of the charges against him and an opportunity to be heard reasonably on such charges;

"b. permit the court to admit any evidence which it considers would have probative value."

The "argument in favor of a swift but fair trial of the Hitlerite criminals" were set forth in detail.

The continued policy of the United States to see that Axis criminals were put to trial and not disposed of by political action was reaffirmed when President Truman, on 2 May 1945, appointed Associate Justice Robert H. Jackson as "Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes" against Axis leaders to be brought "to trial before an international military tribunal." In this first report (6 June 1945) to the President, Mr. Justice Jackson stated:

"The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.

“These hearings, however, must not be regarded in the same light as a trial under our system, where defense is a matter of constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons. But the procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials.”

The report “International Conference on Military Trials” reveals further the detailed consideration given to the problem of fair trial in its relation to various practical considerations during the deliberations which led up to the London Agreement and the Charter of the IMT.

Part IV of the IMT Charter was entitled “Fair Trial for Defendants” (subsec. B, along with the comparable provisions of Ordinance No. 7). Procedures related to fair trial were further set forth in the “Rules of Procedure of the International Military Tribunal (adopted 29 October 1945),” which is reproduced in section I D. To familiarize defense counsel still further with the general course and basic procedures of the trial, the IMT held a preliminary meeting with the defense counsel on 15 November 1945, a few days before the beginning of the trial (for transcript of this meeting, see subsec. E). Upon the opening of the IMT trial the president of the Tribunal made a short statement concerning the nature of the IMT proceedings as a public trial and the responsibilities of those participating in it. (For transcript of this statement, see subsec. F). The attention given by the IMT to the presentation of the defense case is further illustrated by the IMT order of 23 February 1946, reproduced in subsection J 3.

Concerning procedure and practice related to fair trial in the twelve Nuernberg trials before military tribunals established pursuant to Ordinance No. 7, it is essential to take up each of the six subdivisions of Article IV of Ordinance No. 7, since that article was devoted exclusively to procedures calculated “to ensure fair trial.” Materials from the Nuernberg records concerning each of these subdivisions are reproduced either in the remaining subsections of the present section (subsecs. G–L) or in other sections of this volume.

The first sentence of Article IV (*a*) provided that “A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands.” Rule 4 of the Uniform Rules of Procedure was entitled “Time Intervening Between Service and Trial,” and stated:

“A period of not less than thirty days shall intervene between

the service of the indictment upon a defendant and the day of his trial pursuant to the indictment.”

The requirement of a minimum of 30 days' notice of the charges before trial was taken from the Rules of Procedure of the IMT (see Rule 2, sec. I D) and this rule was in force with respect to all of the Nuernberg trials. For the actual time intervening in the various cases between the indictment and the opening statement of the prosecution, reference is made to the table reproduced in section XIV D. The indictments as served were all translated into the German language, which each of the defendants understood. (The defendants were all German nationals, except that in the Farben case the defendant Haefliger, originally a Swiss national who acquired German citizenship in 1941, established to the satisfaction of the Tribunal that he “relinquished” German citizenship after the war.)

The second sentence of Article IV (a) provided that “The indictment shall state the charges plainly, concisely, and with sufficient particulars to inform defendant of the offenses charged.” This requirement has already been dealt with in section IX K, “Requirements as to the Contents of the Charges.”

Article IV (b) stated that “The trial shall be conducted in, or translated into, a language which the defendant understands.” Materials concerning this provision are reproduced in section VII, “Handling of Language Problems Arising Because of the Bilingual or Multilingual Nature of the Nuernberg Trials.”

Article IV (c) provided that “A defendant shall have the right to be represented by counsel of his own selection, provided that 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. The Tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.” Extensive materials concerning the representation of the accused by counsel are reproduced in subsection G.

Article IV (d) provided that “Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the Tribunal defendant's interest will not thereby be impaired, and except further as provided in Article VI (c). The Tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.” Article VI (c) declared that the Tribunal should “deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the

charges." No defendant was found contumacious and none excluded from his trial for any disciplinary reasons whatsoever. Where defense counsel were excluded from further proceedings because of contempt of court (one principal counsel in the Justice case and one assistant defense counsel in the Krupp case), other defense counsel were provided. (See sec. XXI, "Contempt of Court and Reprimands.") On numerous occasions defendants were absent from the proceedings at their own request to prepare their defense or for personal or compassionate reasons and illustrative materials from the records on this type of absence is reproduced in subsection H. Absences due to illness or incapacity are dealt with in section XX, "Inability of Defendants to Stand Trial, Absences of Defendants from the Proceedings for Reasons of Illness, and Related Matters." Where, pursuant to Article V (e), evidence was taken before commissioners of the Tribunal at the same time that the Tribunal itself was in session, defense counsel on occasion protested that this violated the provision of Article IV (d) that each defendant "shall be entitled to be present at his trial." Defendants were given the opportunity of electing whether to be present at the session of the Tribunal or at the commission hearings, and the principal and assistant defense counsel had to work out measures between themselves as to which counsel would represent the defendant before the Tribunal and which before the commission. Materials concerning this question are reproduced in section XVII, "Taking of Evidence on Commission," particularly in the extracts from the records of the Krupp and Ministries cases (sec. XVII F and G).

Article IV (e) stated that "A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution." Counsel for all defendants did present evidence on behalf of their clients. The relative time devoted to the presentation of the defense case as compared to the prosecution case is shown by the table in section XIV C. All witnesses whom the prosecution called to the witness stand were subject to cross-examination by the defense. Where, pursuant to Article VII, the prosecution introduced affidavits in evidence in lieu of oral testimony, special problems arose with respect to cross-examination which are illustrated by the materials reproduced in section XVIII H-L. The provision that the defendant "through his counsel" could present evidence and cross-examine prosecution witnesses was construed in several instances, upon defense request, to permit a defendant himself to cross-examine witnesses. Appropriate extracts from the transcript of the Medical and Farben cases concerning this matter are reproduced in subsection I.

The last provision of Article IV, (f), provided that "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 defendants shall be given such aid in obtaining production of evidence as the tribunal may order." Materials concerning the production of witnesses and documents are reproduced in subsections J and L respectively. The Defense Center, operated by the Secretary General of the Tribunals, was the principal arm of the Tribunals in assisting defendants in the discovery and procurement of evidence. Concerning the activity of the "Defense Center," reference is made to the "Interim Report" of the Secretary General, reproduced in subsection VIII E, and the "Final Report of the Defense Center," reproduced in subsection VIII G 1.

The application of various principles of criminal trial, such as that a defendant is presumed innocent until his guilt has been established beyond a reasonable doubt, are discussed in a number of the summary statements from the judgments of the Tribunals reproduced in section VI.

There were a number of changes in the representation of defendants during the course of several of the trials. Usually these changes were made at the request of the defendant or upon request of the defense counsel involved; but in the Justice case a principal counsel, and in the Krupp case an associate defense counsel, were disbarred upon being found in contempt of court (for materials concerning these matters, see sec. XXI). Under Rule 26 of the Uniform Rules of Procedure (sec. V), a defense counsel was permitted to represent defendants in two cases concurrently being tried before separate Tribunals, provided that no adjournment be granted in either of the cases upon this ground. Multiple representation of defendants, however, did lead to a recess in the Hostage case under novel circumstances. Dr. Marx, counsel for defendant Engert in the Justice case and for defendant Dehner in the Hostage case, was found in contempt of court in the Justice case, disbarred, and sentenced to 30 days' imprisonment. When it was announced in the Hostage case that defendant Dehner desired a recess in order to obtain new counsel, the Tribunal recessed until new counsel could be obtained. Extracts from the transcript of the proceedings in the Hostage case pertaining to this matter are reproduced in section G 10.

B. Provisions of Article IV, Ordinance No. 7

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

(a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

(b) The trial shall be conducted in, or translated into, a language which the defendant understands.

(c) 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. The tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.

(d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI (c). The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.

(e) A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.

(f) 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.

Comparable provisions of the Charter of the IMT are as follows:

IV. FAIR TRIAL FOR DEFENDANTS

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the

Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

- (b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.
- (c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
- (d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.
- (e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

C. Statement by President Roosevelt, 7 October 1942, Concerning War Criminals and Their Punishment

Statement by the President*

[Released to the press by the White House, October 7, 1942.]

On August twenty-first I said that this Government was constantly receiving information concerning the barbaric crimes being committed by the enemy against civilian populations in occupied countries, particularly on the Continent of Europe. I said it was the purpose of this Government, as I knew it to be the purpose of the other United Nations, to see that when victory is won the perpetrators of these crimes shall answer for them before courts of law.

The commission of these crimes continues.

I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.

With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to cooperate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

The number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy populations. It is not the intention of this Government or of the governments associ-

*International Conference on Military Trials, *op. cit.*, page 9.

ated with us to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith.

D. Extracts from a Memorandum for President Roosevelt from the Secretaries of War and State and the Attorney General, 22 January 1945, concerning the "Trial and Punishment of Nazi War Criminals"

MEMORANDUM FOR THE PRESIDENT*

January 22, 1945

Subject: Trial and Punishment of Nazi War Criminals

This memorandum deals with ways and means for carrying out the policy regarding the trial and punishment of Nazi criminals, as established in the statements on that subject which are annexed.

* * * * *

III. Scope and Dimensions of the War Crimes Problem

The crimes to be punished. The criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany, in the satellite Axis countries, and in the occupied countries of Europe. This conduct goes back at least as far as 1933, when Hitler was first appointed Chancellor of the Reich. It has been marked by mass murders, imprisonments, expulsions, and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of "total" war, its prosecution with utter and ruthless disregard for the laws and customs of war.

We are satisfied that these atrocities were perpetrated in pursuance of a premeditated criminal plan or enterprise which either contemplated or necessarily involved their commission.

The criminals to be punished. The outstanding offenders are, of course, those leaders of the Nazi Party and German Reich who since January 30, 1933, have been in control of formulating and executing Nazi policies.

In addition, the Nazi leaders created and utilized a numerous organization for carrying out the acts of oppression and terrorism

*Ibid., pages 3-7.

which their program involved. Chief among the instrumentalities used by them are the SS, from the personnel of which the Gestapo is constituted, and the SA. These organizations consist of exactly screened volunteers who are pledged to absolute obedience. The members of these organizations are also the personnel primarily relied upon to carry on postwar guerrilla and underground operations.

IV. Difficulties of an Effective War Crimes Program

Difficulties of identification and proof. The names of the chief German leaders are well known, and the proof of their guilt will not offer great difficulties. However, the crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender's identity or to connect him with the particular act charged. Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offenses one of appalling dimensions. It is evident that only a negligible minority of the offenders will be reached by attempting to try them on the basis of separate prosecutions for their individual offenses. It is not unlikely, in fact, that the Nazis have been counting on just such considerations, together with delay and war weariness, to protect them against punishment for their crimes if they lost the war.

Legal Difficulties. The attempt to punish the Nazi leaders and their associates for all of the atrocities committed by them also involves serious legal difficulties. Many of these atrocities, as noted in your statement on the subject of persecution dated 24 March 1944, were "*begun by the Nazis in the days of peace* and multiplied by them a hundred times in time of war." These pre-war atrocities are neither "war crimes" in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished; and the interests of postwar security and a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.

V. Recommended Program

After Germany's unconditional surrender the United Nations could, if they elected, put to death the most notorious Nazi crim-

inals, such as Hitler or Himmler, without trial or hearing. We do not favor this method. While it has the advantages of a sure and swift disposition, it would be violative of the most fundamental principles of justice, common to all the United Nations. This would encourage the Germans to turn these criminals into martyrs, and, in any event, only a few individuals could be reached in this way.

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.

We recommend the following:

The German leaders and the organizations employed by them, such as those referred to above (SA, SS, Gestapo), should be charged both with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about. The allegation of the criminal enterprise would be so couched as to permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the prewar atrocities and those committed against their own nationals, neutrals, and stateless persons, as well as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war. Such a charge would be firmly founded upon the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other. Under such a charge there are admissible in evidence the acts of any of the conspirators done in furtherance of the conspiracy, whether or not these acts were in themselves criminal and subject to separate prosecution as such.

The trial of this charge and the determination of the guilty parties would be carried out in two stages:

The United Nations would, in the first instance, bring before an international tribunal created by Executive Agreement, the highest ranking German leaders to a number fairly representative of the groups and organizations charged with complicity in the basic criminal plan. Adjudication would be sought not only of the guilt of those individuals physically before the court, but also of the complicity of the members of the organizations included within

the charge. The court would make findings adjudicating the facts established, including the nature and purposes of the criminal plan, the identity of the groups and organizations guilty of complicity in it, and the acts committed in its execution. The court would also sentence those individual defendants physically before it who are convicted.

The above would complete the mission of this international tribunal.

Thereafter, there would be brought before occupation courts the individuals not sent back for trial under the provisions of the Moscow Declaration, and members of the organizations who are charged with complicity through such membership, but against whom there is not sufficient proof of specific atrocities. In view of the nature of the charges and the representative character of the defendants who were before the court in the first trial, the findings of that court should justly be taken to constitute a general adjudication of the criminal character of the groups and organizations referred to, binding upon all the members thereof in their subsequent trials in occupation courts. In these subsequent trials, therefore, the only necessary proof of guilt of any particular defendant would be his membership in one of those organizations. Proof would also be taken of the nature and extent of the individual's participation. The punishment of each defendant would be made appropriate to the facts of his particular case. In appropriate cases, the penalty might be imprisonment at hard labor instead of the death penalty, and the offenders could be worked in restoring the devastated areas.

Individual defendants who can be connected with specific atrocities will be tried and punished in the national courts of the countries concerned, as contemplated in the Moscow Declaration.

* * * * *

[Initialed] H.L.S. [HENRY L. STIMSON, Secretary of War]
E.S. [EDWARD R. STETTINIUS, Secretary of State]
F.B. [FRANCIS BIDDLE, Attorney General]

E. Preliminary Meeting of the International Military Tribunal with Defense Counsel, 15 November 1945, concerning the Proposed Course of the Proceedings of the IMT Trial*

THE PRESIDENT: The Tribunal has invited the defense counsel to be present here today as it desires that they shall thoroughly understand the course which the Tribunal proposes the proceedings at trial should take.

The Tribunal is aware that the procedure provided for by the Charter is in some respects different from the procedure to which defense counsel are accustomed. They therefore desire that defense counsel should be under no misapprehension as to course which must be followed.

Article 24 of the Charter provides for the reading of the indictment in court, but in view of its length, and the fact that its contents are now probably well known, it may be that defense counsel will not think it necessary that it should be read in full.

The opening of cases for the prosecution will necessarily take a long time, and during that time defense counsel will have an opportunity to complete their preparations for defense.

When witnesses for the prosecution are called, it must be understood that it is the function of counsel for the defense to cross-examine the witnesses, and that it is not the intention of the Tribunal to cross-examine the witnesses themselves.

The Tribunal will not call upon the defense counsel to state what evidence they wish to submit until the case for the prosecution has been closed.

As defense counsel already know, the General Secretary of the Tribunal makes every effort to obtain such evidence, both witnesses and documents, as the defense wish to adduce and the Tribunal approves.

The General Secretary is providing, and will provide, lodging, food, and transportation for defense counsel and witnesses while in Nuernberg. And though the living conditions provided may not be all that can be desired, defense counsel will understand that there are great difficulties in the present circumstances and efforts will be made to meet any reasonable request.

Defense counsel have been provided with a Document Room and an Information Center where documents translated into German are available for the defense, subject to the necessary security regulations. It is important that defense counsel should

*Trial of the Major War Criminals, *op. cit.*, volume II, pages 18-20.

notify the General Secretary as long as possible, and at least 3 weeks in ordinary cases, in advance, of witnesses or documents they require.

The services which defense counsel are performing are important public services for the interests of justice, and they will have the protection of the Tribunal in the performance of their duties.

In order that the trial should proceed with due expedition, it would seem desirable that defense counsel should settle among themselves the order in which they wish to cross-examine the prosecution witnesses and propose to present their defenses, and that they should communicate their wishes in this regard to the General Secretary.

I hope that what I have said will be of assistance to defense counsel in the preparation of their defenses. If there are any questions in connection with what I have said which they wish to ask, I will endeavor to answer them.

DR. ALFRED THOMA (counsel for defendant Rosenberg): Mr. President.

THE PRESIDENT: Will you come to the desk please, if you wish to speak. Will you state your name and for whom you appear here?

DR. THOMA: Dr. Thoma, defense counsel for the defendant Rosenberg.

THE PRESIDENT: Yes.

DR. THOMA: I should like to ask whether the defense will immediately get copies of the interrogation of witnesses.

THE PRESIDENT: Copies of the indictment? Those have been served upon each defendant. Do I understand that you want further copies for the use of defendants' counsel?

DR. THOMA: May I put my question more precisely? I presume that all the statements of the defendants are to be taken down in shorthand, and I would like to ask whether these will then be translated into German and given to the defense counsel as soon as possible.

THE PRESIDENT: If you mean a transcript of the evidence which is given before the Tribunal, that will be taken down, and if it is given in a language other than German it will be translated into German and copies furnished to defendants' counsel. If it is in German it will be furnished to them in German.

DR. THOMA: Will we get copies of the interrogation of all witnesses?

THE PRESIDENT: Yes; that is what I meant by a transcript of the evidence given before the Tribunal. That will be a copy, in German, of the evidence of each witness.

DR. THOMA: Thank you.

DR. RUDOLPH DIX (counsel for defendant Schacht): Your Lordship, gentlemen of the Tribunal, my colleagues of the defense have entrusted me with the honorable task of expressing our thanks for the words you have addressed to the defense counsel. We members of the defense consider ourselves the associates of the Tribunal in reaching a just verdict and we have full confidence in Your Lordship's wise and experienced conduct of the trial proceedings.

Your Lordship may be convinced that in this spirit we shall participate in the difficult task of reaching a just decision in the case before the Tribunal.

THE PRESIDENT: I assume that there are no further questions at the present stage which counsel for the defense wish to ask. They will understand that if at any stage in the future they have inquiries which they wish to make, they should address them to the General Secretary and they will then be considered by the Tribunal.

F. Statement of the International Military Tribunal upon the Opening of the IMT Case, 20 November 1945, concerning the Nature of the Trial*

THE PRESIDENT: Before the defendants in this case are called upon to make their pleas to the indictment which has been lodged against them, and in which they are charged with crimes against peace, war crimes, and crimes against humanity, and with a common plan or conspiracy to commit those crimes, it is the wish of the Tribunal that I should make a very brief statement in behalf of the Tribunal.

This International Military Tribunal has been established pursuant to the Agreement of London, dated 8 August 1945, and the Charter of the Tribunal as annexed thereto, and the purpose for which the Tribunal has been established is stated in Article 1 of the Charter to be the just and prompt trial and punishment of the major war criminals of the European Axis.

The signatories to the Agreement and Charter are the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics.

*Ibid., pages 29 and 30.

The Committee of the Chief Prosecutors, appointed by the four Signatories, have settled the final designation of the war criminals to be tried by the Tribunal, and have approved the indictment on which the present defendants stand charged here today.

On Thursday, 18 October 1945, in Berlin, the indictment was lodged with the Tribunal and a copy of that indictment in the German language has been furnished to each defendant, and has been in his possession for more than 30 days.

All the defendants are represented by counsel. In almost all cases the counsel appearing for the defendants have been chosen by the defendants themselves, but in cases where counsel could not be obtained the Tribunal has itself selected suitable counsel agreeable to the defendant.

The Tribunal has heard with great satisfaction of the steps which have been taken by the Chief Prosecutors to make available to defending counsel the numerous documents upon which the prosecution rely, with the aim of giving to the defendants every possibility for a just defense.

The trial which is now about to begin is unique in the history of the jurisprudence of the world and it is of supreme importance to millions of people all over the globe. For these reasons, there is laid upon everybody who takes any part in this trial a solemn responsibility to discharge their duties without fear or favor, in accordance with the sacred principles of law and justice.

The four Signatories having invoked the judicial process, it is the duty of all concerned to see that the trial in no way departs from those principles and traditions which alone give justice its authority and the place it ought to occupy in the affairs of all civilized states.

This trial is a public trial in the fullest sense of those words, and I must, therefore, remind the public that the Tribunal will insist upon the complete maintenance of order and decorum, and will take the strictest measures to enforce it.

G. Defense Counsel

I. INTRODUCTION

More than 200 principal, associate, and assistant defense counsel acted on behalf of the defendants in the 12 Nuernberg war crimes trials before military tribunals established pursuant to Ordinance No. 7. All were German nationals, except three, two of whom were American citizens and one of whom was a Swiss. Two official reports reproduced earlier in section VIII, deal at some

length with the Defense Center which was established to assist defense counsel. The first of these is the Interim Report on the Secretariat (sec. VIII E) to which is appended an order by Headquarters, United States Forces, European Theater, entitled "Support of United States Military Tribunals" (app. 11). Section 4 of that order, "Support of Indigenous Personnel," contains the basic authorization by Military Government for assisting defense counsel with respect to special rations, a separate mess, housing, offices and office equipment, telephone and cable service, transportation, cigarettes, etc. The second report is the final report on the Defense Center (sec. VIII G). In his "Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10," U. S. Government Printing Office, Washington, D. C., (15 August 1949), Brigadier General Telford Taylor devotes considerable discussion to the provisions of Ordinance No. 7 concerning defense counsel and to the defense counsel selected (pp. 29, 30, and 46-49). Appendix Q to this report contains an alphabetical list of 207 principal and assistant defense counsel and tabulated information on such matters as their professional background and political affiliations (pp. 297-344). Defense counsel in the Nuernberg trials were expected to take a greater initiative in the preparation of the defense case and in the questioning of witnesses and defendants than was the case in German criminal cases. A part of the general opening statement on behalf of all defendants in the Justice case discusses German criminal procedure and the role of defense counsel in German criminal cases. This statement is reproduced in 2 below. The fact that the German defense counsel were accustomed to different procedure was taken into account by the IMT when the IMT called a preliminary meeting with defense counsel before the beginning of the first Nuernberg trial. At that time the president of the IMT stated:

"The Tribunal is aware that the procedure provided for by the Charter is in some respects different from the procedure to which defense counsel are accustomed. They therefore desire that defense counsel should be under no misapprehension as to the course which must be followed."

The transcript of this preliminary meeting with defense counsel in the IMT case is reproduced in full in subsec. E. In each of the 12 later Nuernberg trials some of the defense counsel who had served in the IMT trial were members of the defense staff. In the Medical case, the first of the Nuernberg trials which followed the IMT case, 11 of the 19 main defense counsel had acted as principal or assistant defense counsel who addressed the Tribunal in the IMT case.

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. The Tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection." Rule 7 of the Uniform Rules of Procedure (sec. V) dealt further with the "Right to Representation by Counsel," and Rule 7 (c) stated that "The Tribunal will designate counsel for any defendant who fails to apply for particular counsel, unless the defendant elects in writing to conduct his own defense."

Prospective German defense counsel were required to file a questionnaire concerning their qualifications and political affiliations. No defense counsel was refused approval because of his political affiliations, and indeed over 60 percent of the principal and assistant defense counsel had been members of the Nazi Party and some had been members of affiliated organizations of the Nazi Party, such as the SA and the SS. When it appeared that one of the German attorneys petitioning to be approved as counsel in the Ministries case had falsified his questionnaire by denying membership in the Nazi Party, the matter was taken under advisement by the Committee of Presiding Judges. The Committee decided to approve the application with the statement that this approval would in no way affect the status of any charges later to be preferred against the counsel in question. Relevant materials concerning this matter are reproduced in 3 below. An informal understanding was worked out between the Secretary General of the Tribunals and the Bavarian authorities that no denazification proceedings should be brought against defense counsel while they were retained by any of the defendants in the Nuernberg trials. A special situation, however, arose with respect to Dr. Achenbach, main counsel for the defendant Gajewski in the Farben case, after the defense case was already well under way. While Dr. Achenbach was absent from Nuernberg on an official trip, the Bavarian authorities proceeded to his dwelling in Nuernberg in an attempt to serve a warrant of arrest upon him. The warrant was issued in connection with proposed proceedings concerning Dr. Achenbach's alleged activities as an official on the staff of Otto Abetz, German Ambassador to France during the war. Dr. Achenbach, upon learning of the attempt to serve this warrant of arrest, stayed away from Nuernberg and sent a letter to the Tribunal urging its intervention so that he could continue to represent his client in the Farben trial. The Tribunal directed the Secretary General to ascertain from the German authorities

whether service of the warrant for arrest could not be withheld until Dr. Achenbach had discharged his duties as defense counsel in the Farben trial, but the German authorities declined to agree. Dr. Achenbach did not return to Nuernberg and the former assistant defense counsel for the defendant Gajewski was appointed his main defense counsel. (For pertinent parts of the record concerning the warrant of arrest and related matters, see 4 below.)

In all of the trials there were associate or assistant defense counsel in addition to the principal defense counsel, and in several of the trials the number of assistants outnumbered the main counsel. In the Farben case the Tribunal stated in its judgment:

“Each defendant was represented by an approved chief counsel and assistant counsel of his own choice, all of whom were recognized and competent members of the German bar. In addition, the defendants, as a group, had the services of a specialist of their own selection in the field of international law, several expert accountants, and an administrative assistant to their chief counsel.”

An order of the Tribunal in the Farben case providing for the addition of eight persons “as members of the general staff of defense counsel” is reproduced in 5 below. In the Ministries case several former officials of the German Foreign Office were approved as additional special counsel for those of the defendants who likewise had been officials of the German Foreign Office. Because of the number of defense counsel in most of the Nuernberg trials, a general spokesman was often selected by the defense counsel themselves from among their own ranks. This general spokesman often presented the general defense view with respect to such questions as the order of trial or problems of trial administration.

Rule 7 (b) of the Uniform Rules of Procedure provided that “Application for particular counsel shall be filed with the Secretary General, promptly after service of the indictment upon the defendant.” The Secretary General provided defendants with a form entitled “Defendant’s Request for Counsel to be Entered of Record,” which the defendants normally used in making applications for specifically named counsel; and which stated, among other things, that the attorney in question was “qualified under existing regulations to conduct cases before the courts of my country.” A further form was supplied the prospective defense counsel which was entitled “Application for Approval as Defense Counsel.” The forms in question are shown by the request and application reproduced in 6 below.

The first application by a counsel of other than German nationality was that of Dr. Walter Vinassa, a Swiss attorney, who filed

his application on 22 May 1947 to be counsel for the defendant Haefliger in the Farben case. Haefliger filed his request for Dr. Vinassa as defense counsel on 28 May 1947. Since the application and request antedated the assignment of a Tribunal to try the Farben case, Judge Toms approved the applications as Executive Presiding Judge of the Committee of Presiding Judges (concerning the activity of this committee, see sec. XXIII). The defendant Haefliger, a Swiss citizen long employed as a director of the I. G. Farben concern, had acquired German nationality during the war; however, the Tribunal in the Farben case found in its judgment that he had "relinquished" German nationality after the war. Dr. Vinassa's application, defendant Haefliger's request, and the order approving the application are reproduced in 6 below.

In addition to the case of Dr. Vinassa and the Carroll case (discussed separately hereinafter), there were three other requests for a specifically named defense counsel of other than German nationality. In each of these three cases the attorney requested was an American. Two of these applications were approved, the third rejected. These three cases are taken up herein in the order of the Tribunal orders disposing of the applications.

Mr. Warren Magee became the first American approved as a defense counsel by order of the Tribunal in the Ministeries case on 29 December 1947. Mr. Magee filed his application to become associate counsel for the defendant von Weizsaecker on 12 December 1947; and Dr. Becker, principal counsel for the defendant von Weizsaecker, filed a "Motion for Leave to Retain Associate American Counsel," naming Mr. Magee, on 20 December 1947. In its order approving the application, the Tribunal stated its reasons and noted that the grounds set forth in the motion "in many respects are not valid" (for the application, motion, and order, see 7a below).

The Tribunal in the Farben case rejected the application that Mr. Thomas Allegretti become co-counsel for the defendant von Schnitzler on 28 January 1948. (For this order, see 7b below.) The defendant von Schnitzler's application, dated 25 September 1947, was made on the usual form. It stated that Mr. Allegretti's address was Johannesburg/Rhein and that Mr. Allegretti was "a person qualified under existing regulations to conduct cases before the courts of my country." On the same day Mr. Allegretti filed an application as well as a memorandum concerning his "Legal Experience." These applications were made after the defendant von Schnitzler had been represented for more than four months by Dr. Siemers, a German attorney. Mr. Allegretti, who was in Germany as an official of the European Exchange Service, U.S. Army, had been ordered to leave Germany by the American

authorities for reasons which do not appear of record in the Farben case. The Tribunal, in its order rejecting Mr. Allegretti's application, stated that it had informed Mr. Allegretti in chambers "that said application did not comply in form with the rules of the Tribunal; that it would be necessary for said applicant to establish to the satisfaction of the Tribunal that he was a member of the bar in good standing and that he was situated to assume and discharge the responsibilities of counsel in this cause"; and that Mr. Allegretti thereafter failed to amend his petition or furnish evidence concerning his professional standing or his ability to represent the defendant.

The second American attorney who acted as defense counsel was Mr. Joseph S. Robinson, who was approved by the Tribunal in the Krupp case on 26 February 1948 as additional counsel for the defendant von Buelow. The application was filed on 24 February 1948 by the defendant von Buelow. Von Buelow was already represented by two German attorneys, Dr. Pohle, main counsel, and Dr. Maschke, associate counsel. The application and the order of approval are reproduced in 7c below.

After the Krupp trial was under way a series of applications were made by the defendant Alfried Krupp von Bohlen und Halbach which, until the intervention of the Tribunal, did not disclose the name of the proposed counsel who was to appear. The first of these applications, filed on 8 December 1947, requested that "Messrs. Foley and Carroll" be entered as counsel of record, but a letter from the firm of Foley and Carroll which was attached to this application stated that "A competent associate to undertake the trial representation can be expected in Nuernberg within thirty days of the receipt" of the Tribunal's approval of the representation. A motion for a 30-day continuance of the trial was made at the same time. This application and the motion for a continuance were filed on the day of the prosecution's opening statement. For some time prior thereto Defendant Krupp had been represented by Dr. Kranzbuehler, main counsel, and Dr. Ballas, associate counsel. The Tribunal on 9 December 1947 denied the application for representation by the American firm as not complying with the rules. Thereafter, on 15 December 1947, Defendant Krupp filed a motion for reconsideration of his application for representation by the firm of Foley and Carroll, the new application still failing to disclose the name of the person who was to appear and participate in the trial. The Tribunal thereupon ascertained by questions addressed to Krupp's main counsel that the attorney in question was Mr. Earl J. Carroll, and the application was thereafter revised upon the Tribunal's instruction to state this fact. Mr. Carroll, who had been in

Germany for some time, had received an order from General Clay some months before to leave the theater upon the conclusion of certain courts martial in which he had already appeared, and meanwhile not to undertake any further activities. The Tribunal rejected the application on 19 December 1947, stating its reason in open court. Thereupon Dr. Kranzbuehler, counsel for Krupp, stated that the defendant Krupp did not wish to be further represented by any counsel if he (Krupp) could not be represented by Mr. Carroll, and that therefore he (Dr. Kranzbuehler) was "forced" to give up his representation of Defendant Krupp. The Tribunal directed Dr. Kranzbuehler to continue his representation until relieved by the Tribunal. The transcript of the proceedings containing the ruling of the Tribunal, the Tribunal's statements concerning the ruling, and the discussion with Dr. Kranzbuehler is reproduced in 8 below.

At all times the Secretary General of the Tribunals made available an American lawyer from his staff as a legal consultant to the defense counsel. (See "Final Report of the Defense Center," sec. VIII G 1.)

No instance has been found in the trials following the IMT case where the attention of the Tribunals was called to any intimidating remarks in the press or elsewhere concerning defense counsel. However, in the IMT case the Tribunal made an announcement concerning a German newspaper article which contained violent and intimidating language against one of the defense counsel, and stated that it had asked the Control Council for Germany to investigate the facts and to report to the Tribunal. (For the announcement by the IMT concerning this matter, see 9 below.)

2. STATEMENT FROM THE GENERAL OPENING STATEMENT ON BEHALF OF THE DEFENDANTS IN THE JUSTICE CASE, 23 JUNE 1947, CONCERNING GERMAN CRIMINAL PRO- CEDURE*

DR. KUBUSCHOK (counsel for Defendants Schlegelberger and von Ammon) : In order to discuss these questions ["the structure of the Special Courts and of the People's Court as well as the courts before them"] it will also be necessary to give the Tribunal a clear-cut, plastic picture of German criminal procedure. We hope to be able to achieve this by interrogating an expert on the characteristic features of German criminal procedure. Thus, we

*Volume III, this series, pages 115-117. The defense counsel elected Dr. Kubuschok, counsel for the defendants Schlegelberger and von Ammon, to make a general opening statement on behalf of all defendants before the individual opening statements were made for the individual defendants.

will be able to show the fundamental differences between German and Anglo-American criminal procedure. We will become acquainted with the preliminary proceedings as well as with the actual main proceedings. Preliminary proceedings are in the hands of the public prosecutor. The necessary investigations to ascertain the facts of the case must be carried out with the aid of the police and through its own or judicial interrogations. The public prosecutor is bound by law to an objective consideration of the matter. The prosecutor in so doing of course represents the instance which later on submits the indictment in court; yet he is under obligation to draw up the indictment not as an agent of an interested party, which he will represent later on in the main proceedings, but as a purely objective agent engaged in clearing up the facts of the case. He is also charged with procuring and submitting facts which serve the purpose of the defense. After the facts of the case have been established in this manner and the transcript of the interrogations of the defendant, the witnesses, and the experts as well as the record on any inspections, seizures, or searches have been recorded to the court, then the public prosecutor draws up a written indictment and submits to the court the documents which contain the entire material collected by him with the request that a date be set for the trial. In considering the question whether action should be brought, or whether proceedings should be quashed beforehand, he must take into consideration whether the findings are sufficient to justify the suspicion that a punishable act has been committed. This question will then be examined by the court, which has to decide on the opening date of the trial. If, in the opinion of the court, the findings as laid down in the documents are not sufficient to warrant a conviction of the accused, then the court may decide against instituting trial or it may request the public prosecutor to collect further material, which will be of an exonerating nature also. After the trial has been ordered, the proceedings are entirely in the hands of the judge, and in the case of the courts attended by several judges [Kollegialgerichten], in the hands of the presiding judge. By studying the documents, the court finds out how the preliminary proceedings were conducted as well as the results obtained. However, except in a few instances, the court may make use of the preliminary proceedings for informational purposes only, so to speak, only as a jumping-off point for the main proceedings, which alone are decisive for the final decision. In these proceedings the oral principle alone applies. Only that which is presented at these proceedings by the defendant himself, by witnesses, experts, and documents can be considered by the court in passing judgment but not the interrogation transcript of the

police or the public prosecutor. The presiding judge guides the proceedings. He examines the defendant who can make statements pertaining to the case in question, but who may not take the stand as a witness as is the case in American proceedings and who can also not be sworn in. Should the public prosecutor or the counsel for the defense desire to ask questions of the defendant, they may do so only through the presiding judge. The examination of the defendant is followed by the hearing of the witnesses and of the experts. This is also carried on by the judge. The public prosecutor and the defense counsel have the right to put pertinent questions to the witnesses and to the experts, which the judge must permit in accordance with the regulations within the framework of the code of criminal procedure.

The role played by the counsel for the defense must be described in detail. In comparison with his role in the Anglo-American procedure, he is not so important here. Whereas in Anglo-American procedures the prosecution as well as the defense, so to speak as two parties, submit their case for the decision of the court, in German procedures the investigation of the facts of the case in the trial, the rules concerning the extent of evidence to be collected, the serving of summons to witnesses for the prosecution and defense, without the prosecution or the defense filing any requests, are in the hands of the court. According to that, the public prosecutor and the counsel for the defense in reality only support the court in investigating the facts of the case, which is the duty of the court itself. Because of this role played by the counsel for the defense, it follows that in German criminal proceedings the defendant is represented by a counsel only in a comparatively small percentage of cases, and in all the other cases the defendant just does not employ a counsel for his defense.

3. DECISION OF THE COMMITTEE OF PRESIDING JUDGES, 2 DECEMBER 1947, APPROVING APPLICATION FOR DE- FENSE COUNSEL BUT WITHOUT PREJUDICE TO LATER CHARGES AGAINST THE DEFENSE COUNSEL FOR FALSIFI- CATION OF HIS QUESTIONNAIRE

- a. Memorandum of the Chief of the Defense Center, 20 November 1947, Notifying the Secretary General of the Falsification of Questionnaire *

*U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 69, page 469.

OFFICE OF MILITARY GOVERNMENT (US)
SECRETARIAT FOR MILITARY TRIBUNALS

Nuernberg, Germany

APO 696-A

Defense Center

20 November 1947

Subject: Dr. Hellmut Becker

To: Secretary General, Military Tribunals

1. The attention of the Presiding Judge is respectfully directed to the following in connection with this application:

a. On 10 November 1947, Dr. Becker submitted a Fragebogen [questionnaire] in accordance with existing regulations for screening such applicants. This Fragebogen was signed by the applicant and therein he stated that he was not a member of the National Socialist Party. The undersigned made the regular check at the Berlin Document Center and received the following information:

Party number: 4455499

Entered Party 1 May 1937

b. This clearly constitutes a violation of existing Military Government directives and is therefore punishable under current military regulations.

c. The above has been brought to the attention of Dr. Becker, who thereupon had a conference with his client, defendant Weizsaecker. Because of the fact that Dr. Becker has done extensive research and preparation on this case, Dr. Weizsaecker is reluctant to give up this counsel.

d. Dr. Becker has suggested that the Tribunal grant this application with the provision that any complications or punishment which may result from this falsification be postponed until the case is over with.

[Signed] ROBERT G. SCHAEFER
Major, Field Artillery
Chief

Telephone:61550

b. Further Memorandum of the Chief of the Defense Center,
21 November 1947*

OFFICE OF MILITARY GOVERNMENT (US)
SECRETARIAT FOR MILITARY TRIBUNALS

Nuernberg, Germany

APO 696-A

Defense Center

21 November 1947

Subject: Dr. Hellmut Becker

To: The Presiding Judge
Military Tribunals, Nuernberg

1. The undersigned has spoken with the Public Safety Officer, Nuernberg, Major De Martino, concerning the Fragebogen [questionnaire] matter. He stated that this situation was entirely in our hands.

2. As a matter of policy, however, it is the belief of this office that violation of Military Government directives by a German national should not be ignored. Major De Martino was then informed that we would recommend that the Tribunal approve the applicant, but with the stipulation that this approval would not prevent M. G. [Military Government] from preferring charges arising from the Fragebogen falsification. This would guarantee the rights of the defendant for counsel of his choice and also afford M.G. the opportunity for law enforcement. The Public Safety Officer concurred in this and requested that he be notified by this office prior to counsel's release from the Military Tribunals.

3. On the basis of the above, application of Hellmut Becker is recommended. It is requested, however, that a stipulation as outlined in paragraph 2 be made part of the approval.

[Signed] ROBERT G. SCHAEFER
Major, Field Artillery
Chief

Telephone: 61550

Copy to:

Col. John E. Ray,
Secretary General

*Ibid., page 468.

c. Extract from the Minutes of the Committee of Presiding Judges, 2 December 1947¹

OFFICE OF MILITARY GOVERNMENT (US)
SECRETARIAT FOR MILITARY TRIBUNALS

No. 2

Palace of Justice
Nuernberg

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES²

2 December 1947

1635

Judge Curtis G. Shake, Executive Presiding

* * * * *

4. *General*

* * * * *

Application of Dr. Hellmut Becker to serve as counsel for Ernst von Weizsaecker was approved with the proviso that such approval would in no way affect that status of charges that may be preferred against Dr. Becker by the Military Government for the falsification of his Fragebogen.³

The meeting adjourned at 1720.

[Signed] JOHN E. RAY
Colonel FA
Secretary General

Betty M. Low
Recorder

4. FARBEN CASE—REQUEST BY DR. ACHENBACH, DEFENSE COUNSEL, THAT THE TRIBUNAL DIRECT GERMAN AUTHORITIES TO WITHDRAW A WARRANT FOR HIS ARREST, AND RELATED MATTERS

a. Letter from Dr. Achenbach to the Tribunal in the Farben Case, 26 January 1948⁴

Essen, 26 January 1948
Zweigertstrabe 34 (Erzhof)

[Stamp] Filed: 5 February 1948

To Presiding Judge, American Military Tribunal in Case 6

¹ Official Record, Tribunal Records, volume 5, page 136.

² Concerning the activities of the Supervisory Committee of Presiding Judges, see section XXIII.

³ The order appointing Dr. Becker as defense counsel, which was issued on 3 December 1947 and signed by the Executive Presiding Judge of the Committee of Presiding Judges, stated: "This approval is upon the express reservation that the action of the Tribunals shall in no wise affect or influence any proceeding now pending or hereafter instituted against the said applicant for violation of any Military Government regulations."

⁴ U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 49, page 1353. This letter was written in the English language.

United States of America against Krauch and others
Your Honour,

May I with Your Honour's kind permission submit to the court in Case 6 the following facts:

By order dated 10 June 1947 I was appointed defense counsel for Dr. Friedrich Gajewski in Case 6.

The last session of the Court I attended took place on Friday, 16 January 1947. In the evening of this same day I left Nuernberg by train for Aachen in order to meet there a Belgian lawyer. An official travel order for this trip had been issued to me through the courtesy of the Defense Center. I planned to be back in Nuernberg on Sunday, 18 January 1948 and to attend the next session of the court on Monday, 19 January 1948.

In the early morning hours of 17 January 1948 two German policemen came to my Nuernberg apartment in order to arrest me. I was informed that they were in possession of a warrant of arrest issued by the Spruchkammer,* Nuernberg, itself acting upon an order received from the Bavarian Ministry for Special Tasks in Munich. It seems that the reason given for the warrant of arrest is the contention that in view of my allegedly reprehensible former activity as second secretary at the German Embassy in Paris I had to expect the imposition of sanctions by the Spruchkammer and therefore I could be suspected of wanting to flee. In fact by decision of Ribbentrop I was withdrawn from Paris in the spring of 1943 because of my being too friendly towards the French and dismissed from the Foreign Service altogether in 1944 the pretext being that I have an American wife.

Since 17 January 1948 I am therefore by the interference of Bavarian denazification authorities *not* in a position anymore to assure the defense of my client in a free and unhampered way.

There are no valid grounds for the issuing of the warrant of arrest against me by the Nuernberg Spruchkammer, nor are they indeed competent for such action. I am a lawyer in Essen, domiciled in that town and only temporarily in Nuernberg for the specific purpose of acting as defense counsel in two particular cases pending before the American Military Tribunals—an activity in which before its beginning I had to be and was approved by the Tribunals concerned. As can be seen from the enclosure I am denazified in the British zone.

When I was informed of the action taken by the Nuernberg Spruchkammer I immediately turned to the Minister of Justice

*The Spruchkammer was the agency which heard cases under the Denazification Law.

of North Rhine Westphalia and the British Military Government authorities—Legal Division, Ministry of Justice Control Branch—in Duesseldorf and Herford in order to put myself at their disposal. These authorities expressed their surprise that a lawyer admitted and domiciled in the British zone who goes temporarily to the American zone in order to act as defense counsel before an American Military Tribunal should, after having been duly admitted in that quality by this American Tribunal, be exposed to renewed denazification proceedings by the local authorities and thus be prevented from exercising his duties before the Tribunal. I understand that the British Legal Division will take this case up as a matter of principle with the competent American Military Government authorities. It would seem in fact to show a lack of respect for the Tribunal which admitted counsel, if in the midst of the trial some other authority without informing the Tribunal could interfere with counsel's freedom and thus make a proper defense impossible.

I have been advised by the British Military authorities to address myself to the Court and ask for its protection in the fulfillment of my duties as defense counsel. I therefore submit to Your Honour the petition that the Court instruct the Spruchkammer Nuernberg to withdraw the warrant of arrest and abstain from any interference with my personal freedom to go and stay wherever I wish and may lawfully do so.

If the Spruchkammer of the Bavarian Ministry for Special Tasks believe to have reasons to doubt the correctness of the decision taken by the competent authorities in the British zone concerning my status as a lawyer they are at liberty to pass on their information to the competent denazification authorities in the British zone for proper consideration and decision. In fact, these authorities will ask for this information. I shall gladly at the proper time and before the proper authorities answer any charges brought forward against me knowing that they are in no way justified.

During the trial of my client, however, it is my duty to concentrate all my efforts upon *his* defense. I cannot do this if I am called upon to give simultaneously time and thought to things my client is not concerned with.

I should be particularly grateful to Your Honour if Your Honour would kindly inform my colleague von Metzler, who will be good enough to give this letter to Your Honour, of the Court's decision in this matter.

Very respectfully,
[Signed] ERNST ACHENBACH

b. Order of the Tribunal, 5 February 1948, Directing the Secretary General to Inquire Whether Service of the Warrant of Arrest Could be Suspended

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY
5 FEBRUARY 1948

United States of America

vs.

Carl Krauch, et al.

Defendants.

} CASE 6

ORDER*

Since the opening of this trial, 27 August 1947, Dr. Ernst Achenbach has been chief counsel of record for the defendant Friedrich Gajewski. The Tribunal has noted, however, the absence of Dr. Achenbach from participation in the trial since 16 January 1948.

The Tribunal is now advised by Dr. Achenbach that he resides in Essen in the British Zone and only spends his time in Nuernberg on a temporary basis to discharge his responsibilities in this case and before another Tribunal where he is also counsel. Dr. Achenbach has further advised the Tribunal that he has information to the effect that the Bavarian Ministry for Special Tasks in Munich holds a warrant for his arrest which, however, has not been served upon him. The Tribunal has no information as to the nature of the charge upon which said warrant was issued. Said counsel has asked the Tribunal to intervene in his behalf so that he may be assured of the privilege of participation in this trial and in the discharge of his professional responsibilities to his client.

The Tribunal has interrogated the defendant Friedrich Gajewski and has ascertained from him that it is his preference to be represented in this trial by said Ernst Achenbach.

This Tribunal has no disposition to intervene with respect to the duties and responsibilities of other courts or agencies. It is the responsibility of the Tribunal, however, to see that defendants on trial are adequately represented by competent counsel. The Tribunal therefore directs the Secretary General to contact the Bavarian Ministry for Special Tasks and ascertain from said agency whether it would be compatible with its responsibilities in the premises to withhold service of the warrant for the arrest of

*U.S. *vs.* Carl Krauch, et al., Case 6, Official Record, volume 49, page 1352.

said Ernst Achenbach until such time as he has discharged his duties in the trial of the case now pending before this Tribunal.

[Signed] CURTIS G. SHAKE
Presiding

Dated this 5th day of February 1948.

- c. Report of the Secretary General, 16 February 1948, Stating that the German Authorities Declined to Withhold Service of the Warrant of Arrest¹

OFFICE OF MILITARY GOVERNMENT (U.S.)
SECRETARIAT FOR MILITARY TRIBUNALS
NUERNBERG, GERMANY
APO 696 A

[Stamp] Filed: 16 February 1948

Office of the Secretary General

CERTIFICATE

On the 6th of February 1948 I conferred with Mr. Camill Sachs, President of the Landgericht Bavaria, re the Achenbach Case. The order of the Tribunal VI, dated 5 February 1948, was read and discussed. Mr. Sachs stated definitely that his office must refuse the request of the Tribunal embodied in the above-mentioned order, to wit: to withhold service of the warrant of arrest of Ernst Achenbach until such time as he has discharged his duties in the trial of the case now pending before the Tribunal.

[Signed] JOHN E. RAY
Colonel, Field Artillery
Secretary General

- d. Letter from the President of the Landesgericht of Bavaria, 10 February 1948, concerning the Achenbach Case²

Munich
Koeniginstr. 11a
Telephone 74221-23, 74315, 81208
10 February 1948
[Stamp] Filed: 16 February 1948

¹ Ibid., page 1389.

² Ibid., page 1390.

Office of Military Government (U.S.)
Secretary for Military Tribunals
Office of the Secretary General

Attention: John E. Ray, Colonel, Field Artillery, Secretary General
Nuernberg

Re: Dr. Ernst Achenbach, attorney, Essen—2 Enclosures

1. On the ground of Article 40 of the Liberation Law of 5 March 1946, the order of arrest (Haftbefehl), a copy of which is enclosed* was issued by the Spruchkammer VI for the municipal district of Nuernberg. On the same day, the police quarters 17 Fuertherstr. 176 received the order to arrest Dr. Achenbach and to hand him over to the Nuernberg-Langwasser Camp. Dr. Achenbach, however, could not be found in Nuernberg. The order of arrest remains in force.

2. On the ground of Article 3 of the Liberation Law, every German has to fill in and to submit a questionnaire, if he has his residence or quarters or his occupation or assets in the American occupied zone of Germany. These persons have to report within two weeks after the fulfillment of the above conditions, paragraph 1 of the regulation of 4 April 1946 regarding the duty of reporting. The attorneys employed with the Military Tribunals have their quarters and their occupation in Nuernberg. As many of the attorneys did not comply with the regulations, I requested the president of the "Berufungskammer" Nuernberg in October 1947 to ask all German lawyers and assistants to submit a questionnaire or to submit the decision of the denazification board. On this, Dr. Achenbach submitted an authorization of the Military Government Legal Branch of Nordrhein-Westfalen, according to which he is authorized beginning 1 November 1946 to exercise the activity of an attorney with the "Land und Amtsgericht, Essen" and to appear as defense counsel before the Military Government Tribunals in the Duesseldorf/Muenster governmental district. This decision of the denazification board is not valid in the American Zone, as the classification into the groups I and V was not made by the competent office. Because of his stay and his activity it was Dr. Achenbach's duty to submit his questionnaire to the competent Spruchkammer. Dr. Achenbach did not comply with this duty. According to paragraph 10 of the first regulation regarding duty of reporting, he is subject to punishment.

3. Dr. Achenbach did not submit an appeal against the order of arrest. According to Article 52 of the Liberation Law, the Bavarian State Minister for special tasks or the cassation court in

*Not reproduced herein.

Munich appointed by him is competent as to a decision of an appeal.¹

4. Dr. Achenbach as an official of the German Embassy in Paris is suspected of having participated in the extermination plans for Jews in France.

[Signed] CAMILL SACHS
President of the Landgericht
Former State Secretary

5. FARBEN CASE—ORDER OF THE TRIBUNAL, 20 NOVEMBER 1947, PROVIDING FOR ADDITIONAL MEMBERS "OF THE GENERAL STAFF OF DEFENSE COUNSEL"

[Stamp] Filed: 21 November 1947

United States of America
vs.
Carl Krauch, *et al.*,
Defendants } CASE 6

ORDER²

To expedite the cross-examination of the witnesses of the prosecution and the presentation of the evidence of the defendants, the Tribunal finds it necessary to provide special assistance for defense counsel. It is therefore ordered that the following-named persons will, upon submission of formal applications and clearances of the Security Office, be accredited and approved as members of the general staff of defense counsel, to wit:

1.

- a. Dr. Karl Meyer, Troisdorf
- b. Fritz Naumann, Ludwigshafen
- c. Josef Niemann, Ludwigshafen
- d. Dr. C. O. Kuester, Grassau

It is further ordered that the following-named persons will, upon the same conditions, be approved as assistants to the above-named persons:

2.

- for Dr. Karl Meyer—Dr. Karl Hagemann, Essen
- for Herr Fritz Naumann—Dr. Adalbert Joppich, Emden
- for Herr Josef Niemann—Dipl. Ing. Karl Haeseler, Uerdingen
- for Dr. C. O. Kuester—Dr. Hermann Stradal, Uerdingen

¹ The official records disclose no further action in this matter. Dr. Achenbach did not return to Nuernberg and Dr. von Metzler, formerly associate defense counsel, was appointed main defense counsel for the defendant Gajewski on 1 February 1948.

² U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 48, page 883.

It is further ordered that each of the above-named eight persons may be assigned a secretary.

This order is made and entered for the purpose of enabling the defense to make an examination and analysis of certain documentary material and is subject to cancellation in the discretion of the Tribunal.

The proper military and administrative officers will make the necessary arrangements for the compensation, billeting, and accommodations of the above-named persons, in accordance with the prevailing regulations, while they are engaged in the performance of their duties pursuant to this order.¹

MILITARY TRIBUNAL VI

[Signed] CURTIS G. SHAKE
Presiding

Dated this 20th day of November 1947.

6. FARBEN CASE—APPROVAL OF DR. VINASSA, SWISS
ATTORNEY, AS DEFENSE COUNSEL FOR DEFENDANT
HAEFLIGER

a. Application for Approval as Defense Counsel by Dr. Vinassa,
22 May 1947²

MILITARY TRIBUNALS
United States of America
against

Nuernberg, Germany
Case No. 6
Mil. Trib. No. _____

Krauch, and others

APPLICATION FOR APPROVAL AS DEFENSE COUNSEL³

Comes now Dr. Walter Vinassa and states to the Tribunal that Paul Haeffliger one of the above-named defendants, has requested that he represent him in the matter of the United States of America vs. Krauch et al.

THEREFORE, Dr. Walter Vinassa makes application to the Tribunal for his approval as attorney for Paul Haeffliger to represent him with respect to the charges pending against him under the above-named indictment.

Dated: May 22, 1947

[Signed] DR. WALTER VINASSA

MT-Form 1-G
1 Nov 46-500

¹ This order was modified by an order of 14 January 1948, to change the names of two of the persons designated as members of the general staff of defense counsel, and to change the names of two of the assistants appointed to assist these members of the general staff.

² U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 46, page 196.

³ This application was made on the form provided for this purpose.

b. Request by Defendant Haefliger for Dr. Vinassa to be Entered
As Counsel of Record, 28 May 1947¹

_____, MILITARY TRIBUNALS
Nuernberg, Germany

United States of America

against

Krauch, and others

Case No. 6

Military Tribunal _____

Defendants

REQUEST FOR COUNSEL TO BE ENTERED OF RECORD²

To the Secretary General, Military Tribunals
Palace of Justice, Nuernberg, Germany

I, Paul Haefliger, of Steffisburg, Switzerland
a defendant in the above-styled cause, respectfully request that
the name of Lawyer Dr. W. Vinassa whose address is
Bollwerk, Bern (Switzerland), and who is a person qualified
under existing regulations to conduct cases before the courts of
my country, be entered and approved on the records of Military
Tribunals as my lawful attorney to represent me as a defendant
on the charges pending against me under the indictment filed in
the above-styled cause.

Dated at _____ this 28 day of May A.D. 1947.

[Signed] PAUL HAEFLIGER

MT-Form 1-G

1 Nov 46-500

c. Order of the Executive Presiding Judge Approving Dr. Vinassa
as Defense Counsel, 29 May 1947³

MILITARY TRIBUNALS

United States of America

against

Krauch, and others

Nuernberg, Germany

Case No. 6

Mil. Tribunal _____

ORDER APPOINTING DEFENSE COUNSEL⁴

Paul Haefliger, one of the above-named defendants,

¹ U.S. vs. Carl Krauch, *et al.*, Case 6, Official Record, volume 46, page 197.

² This request was made on the form provided for this purpose.

³ U.S. vs. Carl Krauch, *et al.*, Case 6, Official Record, volume 46, page 195.

⁴ This order was made on the standard form ordinarily used for orders appointing defense counsel.

having requested this Tribunal that Dr. Walter Vinassa whose address is Bern, Switzerland, be entered and approved on the records of Military Tribunals as his lawful attorney.

IT IS ORDERED that the said Dr. Walter Vinassa be, and he hereby is, approved as attorney for said Paul Haeffliger to represent him with respect to the charges pending against him under the indictment filed herein.

Dated: 29 May 1947

[Signed] ROBERT M. TOMS
Executive Presiding Judge¹

Form MT No. 1

7. THREE INSTANCES OF APPLICATIONS FOR SPECIFICALLY NAMED AMERICAN ATTORNEYS AS DEFENSE COUNSEL—MINISTRIES, FARBEN, AND KRUPP CASES

a. Ministries Case—Mr. Warren E. Magee

(1) *Application by Mr. Magee, 17 December 1947*²

Military Tribunals

Office of Military Government for Germany

Nuernberg, Germany

17 December 1947

Gentlemen:

Please be advised that I am willing and am immediately available to represent Ernst von Weizsaecker as associate counsel in Case 11, entitled The United States of America vs. Ernst von Weizsaecker, *et al.*, without cost to the United States.

I therefore request leave to enter my appearance in this proceeding as associate counsel for the defendant Ernst von Weizsaecker.

Respectfully,
[Signed] WARREN E. MAGEE
Attorney at Law
120 Munsey Building
Washington 4, D. C.

I certify that Warren E. Magee signed this statement in my presence.

[Signed] HELLMUT BECKER
Attorney
Nuernberg

¹ Judge Toms was at this time Executive Presiding Judge of the Supervisory Committee of Presiding Judges (sec. XXIII) and Presiding Judge of the Tribunal engaged in the trial of the Pohl case. A Tribunal had not yet been assigned to the trial of the Farben case. The indictment in the Farben case was served upon the defendant Haeffliger on 5 May 1947.

² U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 69, page 529.

(2) *Motion on Behalf of Defendant von Weizsaecker, 20 December 1947, for Leave to Retain Associate American Counsel**

20 December 1947

MOTION FOR LEAVE TO RETAIN ASSOCIATE
AMERICAN COUNSEL

Now comes Ernst von Weizsaecker and moves this court to permit this defendant to be represented by an American attorney, Warren E. Magee, of Washington, D. C., on the following grounds:

1. It is essential to a proper defense that this defendant be represented by American as well as German counsel, in that:

a. The Tribunal hearing these charges is a Tribunal of the United States of America.

b. The constitution and procedure of the Tribunal invokes the laws of the United States of America as well as the international law.

c. This Tribunal is composed exclusively of American attorneys.

d. The prosecutor is an American attorney.

e. The charges and specifications involve intricate questions of the national law, laws both of Germany and the United States of America as well as international law, and no adequate defense can be presented by the defendant if he is denied in the proper preparation and representation of his defense by American *and* German counsel.

2. The application made by the defendant is timely and in accord with the exercise of due diligence.

3. The application is necessary to secure to the defendant proper representation and a fair trial because his German counsel is unfamiliar with the application both to substance and procedure of American law before this Tribunal and upon the further grounds that the right to such counsel is guaranteed by the provisions of Title 18 of the United States Code, sec. 563, which provides as follows:

“Every person who is indicted of treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours.”

4. The right to counsel cannot be satisfied by a mere formal appointment of a lawyer that is not sufficiently familiar with the pertinent law. *Avery v. Alabama* (308 U.S. 444, 446).

5. The application is in accord with the fundamental principles

**Ibid.*, pages 527 and 528.

of international law and is not in conflict with any valid rule of procedure.

6. There is no obligation on the part of the United States Government or any of its agencies to pay Warren E. Magee or any of his associates.

7. In the event the application for American counsel is granted, this defendant hereby stipulates and agrees that no postponement of this trial will be requested by him by reason thereof.

8. Warren E. Magee is ready, willing, and able to undertake the immediate representation of this defendant before this Tribunal, without cost to the United States.

9. The Constitution of the United States guarantees to every accused the right to counsel of his choice. This principle of elementary justice should be applied here in fairness to the accused.

For and on behalf of the defendant
Ernst von Weizsaecker

[Signed] HELLMUT BECKER
Defense Counsel

(3) *Order of the Tribunal Approving Mr. Magee as Additional Counsel, 29 December 1947*

MILITARY TRIBUNAL IV
CASE 11

United States of America

against

Ernst von Weizsaecker, *et al.*

} [Stamp] Filed: 31 December 1947

ORDER*

The defendant Ernst von Weizsaecker moves that Warren E. Magee, Esquire, of Washington, D. C. be permitted to represent him as additional counsel. The prosecution has filed no objection to the allowance of this motion.

While the motion does not specifically so state, we assume, and shall assume, unless it shall hereafter appear to the contrary, that Mr. Magee is an attorney and counselor at law, duly and regularly admitted to the highest court of the jurisdiction in which he practices, that he is a member in good standing at the bar therefore and is otherwise a reputable member of the bar. If it shall at any time appear that these assumptions are erroneous, we reserve the right to rescind this order and take such action in the premises as may be proper.

The motion is based upon grounds stated which in many respects

*Ibid., pages 525 and 526.

are not well-founded. In order, therefore, that misunderstanding may not arise with respect to the reasons that have impelled the Tribunal to make this order, we deem it desirable that some observations be here made relative to the origin, jurisdiction, and procedure of the Tribunal. This is not a tribunal of the United States of America, but is an International Military Tribunal, established and exercising jurisdiction pursuant to authority given for such establishment and jurisdiction by Control Council Law No. 10, enacted 20 December 1945 by the Control Council, the highest legislative branch of the four Allied Powers now controlling Germany, namely the United Kingdom, the Union of Soviet Socialist Republics, the French Republic, and the United States of America. In the determination of this motion we consider it unimportant and immaterial that members of the Tribunal and the prosecution are American attorneys. The laws of the United States are not binding upon this Tribunal. Nor are those parts of the Constitution of the United States relating to courts of the United States applicable to this Tribunal. Trial procedure and matters relating to evidence are largely regulated for the Tribunal by provisions in Ordinance No. 7, issued by the Military Government pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany, and further pursuant to the powers conferred upon the zone commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945.

Although in our opinion the defendant is represented by able German counsel who is well qualified to adequately represent him and his interests, we believe that as far as practicable, a defendant should be represented by counsel of his own choice. We would not deprive defendant of this advantage and right. No such circumstances have been brought to the attention of this Tribunal as governed the decision of Tribunal III in Case 10 (U.S. *v.* Krupp, *et al.*) in which an application on behalf of the defendant Krupp for American counsel was, on 19 December 1947, denied on the ground that the counsel thus sought was ineligible to represent the defendant under pre-existing directives of the Military Governor issued because of such counsel's prior conduct in the American Zone of Occupation.

Now Therefore, IT IS ORDERED THAT THE SAID MOTION OF DEFENDANT ERNST VON WEIZSAECKER HEREIN, BE, AND THE SAME IS HEREBY GRANTED.

It will be necessary for Mr. Magee to obtain from competent military authority permission to enter and remain in this zone for the purpose of representing the defendant Ernst von Weizsaecker

in the trial of this case. This motion is being granted with the understanding that the defendant and his counsel have agreed, and do agree, that the United States of America and the other Allied Powers shall not be put to any expense by reason of Mr. Magee's attendance on this trial and his services to defendant. This order is further conditioned that the trial of this case shall not be postponed or delayed by reason of this order or Mr. Magee's appearance for the defendant Ernst von Weizsaecker.
Done at Nuernberg, Germany, 29 December 1947.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

b. Farben Case—Tribunal Order Denying Application of Mr. Thomas Allegretti for Appointment as Defense Counsel for the Defendant von Schnitzler, 28 January 1948¹

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY, 28 January 1948

United States of America

vs.

Carl Krauch, *et al.*,

CASE 6

Defendants

ORDER

On 25 September 1947, one Thomas Allegretti made application for approval of appointment as counsel for the defendant George von Schnitzler.² Promptly thereafter said applicant was advised in person by the Tribunal in chambers that said application did not comply in form with the rules of the Tribunal; that it would be necessary for said applicant to establish to the satisfaction of the

¹ U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 49, page 1299.

² This application was accompanied by a memorandum signed by Mr. Allegretti entitled "Legal Experience" which stated as follows:

"The undersigned, Thomas Allegretti, was admitted to practice in the State of Illinois in October 1935. He has practiced before the bar until February 1942, at which time he entered the armed services.

"He has been an investigator for the Provost Marshal, became an officer through OCS [Officers Candidate School], was Chief of Investigation for the State of Michigan with the Provost Marshal Investigation Section, and has had legal experience as a legal officer with Military Government.

"He has had legal experience as defense counsel for Major Lo Buono in the Litchfield trial, and as a legal officer with War Crimes as well as with the Legal Section of EES [European Exchange Service, U.S. Army].

"The above experiences together with other courts martial experience should enable him to properly handle the defense of Georg von Schnitzler.

"It is therefore requested that his petition to be appointed defense counsel by the Court be accepted."

Tribunal that he was a member of the bar in good standing and that he was situated to assume and discharge the responsibilities of counsel in this cause.

Said Thomas Allegretti having wholly failed to amend his petition, furnish evidence of his professional standing, and make a showing that he could and would if appointed be in position to represent said defendant, the Tribunal now, as of this date, dismisses said application.

[Signed] CURTIS G. SHAKE
Presiding

Dated this 28th day of January 1948.

c. Krupp Case—Mr. Joseph S. Robinson

(1) *Application by the Defendant von Buelow for Mr. Robinson as Additional Counsel, 24 February 1948**

Nuernberg, 24 February 1948

To: Military Tribunal III

Case 10

APPLICATION OF FRIEDRICH VON BUELOW TO BE REPRESENTED BY ATTORNEY JOSEPH S. ROBINSON, OF NEW YORK CITY, NEW YORK, AS DEFENSE COUNSEL OF HIS OWN CHOOSING IN ADDITION TO HIS PRESENT GERMAN COUNSEL

For reasons stated at various occasions to this Court by Rechtsanwalt Kranzbuehler German counsel are not in a position to give their clients adequate representation and this Court has repeatedly declared that it would consider favourably any application to admit a lawyer of the United States of America. The undersigned defendant Friedrich von Buelow therefore respectfully asks this Court for permission to be represented by counsel of his own choosing, Mr. Joseph S. Robinson of New York City. Mr. Robinson is requested in addition to and in collaboration with his German defense counsel, Dr. Pohle, and his assistant, Dr. Maschke.

So that this Court have some knowledge of the man sought to be brought here to represent the defendant von Buelow, a brief reference to his career as a lawyer is hereinafter set forth.

The undersigned defendant Friedrich von Buelow is informed and has every reason to believe that it is a fact that Mr. Robinson is a graduate of Fordham University Law School, and New York University Post Graduate Law School, and was admitted to the

*U.S. vs. Alfred Krupp von Bohlen und Halbach, et al., Case 10, Official Record, volume 37, pages 784 and 785.

Bar of the State of New York in 1927. Thereafter, he was admitted to practice before the Federal Court in the southern and eastern districts of New York and in 1933 was admitted to practice before the Supreme Court of the United States. Continuously since 1927 he has engaged in the active practice of law and maintained an office for that purpose in the Borough of Manhattan, City of New York. His civilian career was interrupted when in 1942 he entered military service and continued on active duty until September 1947, when he again resumed the practice of law.

During the early part of his military career he served in the Military Justice Division of the Judge Advocate General's Office in Washington, D. C. Upon transfer to the Pacific he served on the Board of Review, first under Lieut. General Richardson and then under General MacArthur in the Philippines. The undersigned is advised that the Board of Review is an appellate military court which sits in review of court-martial cases.

Prior to his coming under General MacArthur's command, and in his course of military duty he wrote extensively on the subject matter of the trial and punishment of war criminals and the competency and jurisdiction of military commissions to try offenses against the laws of war. The undersigned is advised that one of these articles which may be available in this theater, appears in the fall-winter 1945 edition of the Judge Advocate's Journal on pages 13 to 22.

After the conquest of Japan, having served almost four years, Mr. Robinson was returned to Washington and separated from service. Within a few weeks the War Department called him back to active duty, he having been personally requested by General Thomas H. Green, the Judge Advocate General of the United States Army. He was sent to Bad Nauheim, Germany and became the Chief Prosecutor of Colonel Killian, an American army officer and central figure of the Litchfield trials. Upon completion of that trial, although he was again eligible for discharge, by request of the War Department he remained in Germany to prosecute Colonel Jack W. Durant in the Kronburg jewelry case. In that case also he was the Chief Prosecutor or what is called at times, the Trial Judge Advocate.

Lt. Colonel Robinson has had extensive experience in trials and appeals and has appeared before both civil and military courts running back over a period of twenty years. There can be no question as to his competency, or his standing before the American Bar. Accordingly, it is respectfully asked that the application herein requested be granted.

[Signed] FRIEDRICH VON BUELOW

(2) *Order of the Tribunal Approving Mr. Robinson as Additional Counsel, 26 February 1948*¹

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY, AT A SESSION OF MILITARY TRIBUNAL
III, HELD 26 FEBRUARY 1948, IN CHAMBERS

United States of America

vs.

Alfried Krupp von Bohlen und Halbach, *et al.*,
Defendants

} ORDER
CASE 10

Upon consideration of the petition of the defendant, von Buelow, it is ordered that Mr. Joseph S. Robinson of New York City be and is approved as counsel for him in addition to his present counsel on the following conditions:

1. That it be made to appear that Mr. Robinson is an attorney and counselor at law duly and regularly admitted to practice in the highest court in the jurisdiction of which he is a resident, or that he has been duly and regularly admitted to practice in the Supreme Court of the United States as alleged in the petition, and that he is a member in good standing at the bar of either court;

2. That he is or will be available personally to act as said defendant's counsel in the trial of this case;

3. That liability of the compensation and expenses of Mr. Robinson will be exclusively that of the defendant, von Buelow;

4. That the trial of this case shall not be delayed by reason of this order or by Mr. Robinson's appearance for said defendant, von Buelow.

Done at chambers this 26th day of February.

[Signed] HU C. ANDERSON
Presiding Judge

8. KRUPP CASE—DENIAL OF APPLICATIONS BY DEFENDANT KRUPP FOR REPRESENTATION BY AN AMERICAN LAW FIRM, AND RELATED MATTERS

EXTRACT FROM THE TRANSCRIPT OF THE KRUPP CASE,
19 DECEMBER 1947²

PRESIDING JUDGE ANDERSON: There is a preliminary matter to be disposed of before we proceed further with the trial of this

¹ *Ibid.*, page 783.

² U.S. *vs.* Alfried Krupp von Bohlen und Halbach, *et al.*, Case 10 (*mimeographed transcript*), pages 769-777.

case. The question is the application of the defendant Alfred Krupp to have the Tribunal — I don't seem to have the switch on. Alright?

The question to be disposed of is the application of the defendant Alfred Krupp to have the Tribunal especially authorize one Earl J. Carroll, an alleged attorney, as additional counsel for him as substitute for his present counsel in the further trial of this case. The application is made under Article IV, section (c) of Ordinance No. 7, enacted by the United States Military Government for Germany, and Rule 7 (a) of the Uniform Rules of Procedure governing the military Tribunals sitting in Nuernberg.* The Tribunal desires to emphasize at the outset that it has no disposition whatever to deny to any defendant the right to be represented by counsel of his choice, whatever be the nationality of the one proposed. On the contrary, subject always to the pertinent regulations of the United States Military Government for Germany and the Uniform Rules of Procedure, we will, upon proper application, approve the ethical employment or choice by any defendant of any reputable counsel wherever domiciled upon any reasonable showing that the individual chosen is qualified to conduct the defense of said defendant and is and will be available for that purpose, provided the Tribunal is of the opinion that such defendant cannot receive a fair trial otherwise. The right of a defendant to choose his own counsel and the approval of his choice are regulated by Article IV, section c, of Ordinance 7, enacted by the Military Government for Germany. The provision is that the defendant shall have a 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 the defendant's country or any other person who may be especially authorized by the Tribunal. The Uniform Rules of Procedure contain substantially the same provision, and in addition the provision that application for particular counsel shall be filed with the Secretary General promptly after the service of the indictment on the defendant and a provision for the appointment of substitute counsel, on the condition that no delay will be allowed for making such substitution or association. They are necessary not only from a standpoint of fairness and expeditious trial but for reasons of security arising out of the nature and circumstances under which this and similar trials are being held. The circumstances surrounding the pending application require a full statement of the facts.

The indictment was filed on 16 August 1947. It was served on

*See section III F.

the defendant Krupp on 18 August 1947. Two days later the defendant Krupp made application to have Dr. Kranzbuehler represent him in the trial. On 25 August 1947, an application was made by Dr. Kranzbuehler to be allowed to represent the defendant. On the same day both applications were granted and the defendant Krupp has been continuously represented by Dr. Kranzbuehler since that time.

Dr. Kranzbuehler is a lawyer of established ability and reputation, having participated as counsel for one of the defendants in the trial before the International Military Tribunal and as counsel in at least one of the other trials held in Nuernberg.* In addition, it has been observed during the trial that Dr. Kranzbuehler understands and speaks the English language fluently and during the progress of the trial thus far, we have observed that rarely has he resorted to the use of the earphones in order to obtain a translation of the spoken English language.

On 25 September 1947, the defendant applied for the appointment of a specifically named additional counsel, [Dr. Ballas] to assist Dr. Kranzbuehler in the conduct of his defense. This application was promptly granted and since that time said assistant has been associated with Dr. Kranzbuehler in the representation of the defendant in the conduct of this case.

The defendant was arraigned and pleaded not guilty on 17 November 1947. On 8 December 1947, after the trial had opened, the defendant made application to have approved as his attorneys the alleged law firm of Foley and Carroll, represented as being domiciled in Haywood, California, or Hayward. The application was supported only by a letter dated 6 December 1947, purporting to be signed by Earl J. Carroll, for the firm of Foley and Carroll, followed by the designation "attorneys at law." The letter expressed the willingness of said firm to undertake the representation of the defendant Krupp and, in addition, recited the following: "Arrangements for the necessary passports and military entry permits will be commenced immediately upon receipt of notice of approval of the Tribunal of our representation." The letter continued: "A competent associate to undertake the trial representation can be expected in Nuernberg within 30 days of the receipt of the aforementioned notice of approval." The application was accompanied by a motion to delay the trial for 30 days pending the arrival of the proposed representative of Foley and Carroll. The name of the alleged associate who was to appear for Foley and Carroll in the representation of the defendant was withheld from this Tribunal.

*Counsel for defendant Burkart in the Flick case.

On 9 December 1947, the application was denied for the reasons stated by the Tribunal in the order disposing of the matter. On 15 December 1947 the pending written application was received. It is a renewal of the original application. The circumstances were such that the Tribunal thought it advisable to have the prosecution reply to the application and it was so ordered. The reply was seasonably filed under applicable rules and upon its receipt the Tribunal recessed until today to consider the matter, in order that it be finally and definitely settled so that the trial of this case not be again delayed.

The application, among other things, recited that on or about 7 December 1947, preliminary arrangements were concluded with said firm of American attorneys, Foley and Carroll, for the representation of this defendant. Unlike the original application, the renewal thereof concluded with the recitation that a member of the firm of Foley and Carroll is now present in the United States Occupied Zone of Germany and is able, ready, and willing to undertake the immediate representation of this defendant before this Tribunal. But, as was true of the first application, the name and identity of the individual expected to represent the defendant before this Tribunal was not disclosed. When this evasion appeared for the second time, the Tribunal in open session inquired of the defendant's present counsel, who had presented both applications, the name of the individual whom it was proposed to have appear and participate in or conduct the defendant's defense. From the response to this inquiry, the Tribunal for the first time learned that the proposed representative was Earl J. Carroll himself. It thereupon directed that the written application be so amended as to disclose that fact and this was done.

In the meantime, the Tribunal had been advised by the Secretary that as long ago as May 1947 there had been received in his office, through routine military channels, an official order by General Lucius D. Clay, Commander in Chief and Military Governor, and by his command circulated throughout the occupied area, relative to the activities of the said Earl J. Carroll, forbidding the granting to said Carroll permission to appear as counsel before courts martial for any accused person, except in those cases where he had theretofore appeared at the arraignment of such persons. This order was accompanied by a copy of letter from General Clay, dated 30 April 1947 [and] addressed to said Carroll. It appears from General Clay's letter that Carroll had been granted an entry permit expiring 16 April 1947, authorizing his entry into the occupied area in connection with five specifically named courts martial cases; that in addition to representing the accused in said cases Carroll had engaged in certain specified activities going

beyond the provisions of his entry permit and that while, as a result, he normally would have been called upon to show cause why his expulsion from Germany should not be directed, because such a course might be prejudicial to the accused whom he had been permitted to defend, that action would not be taken; and that accordingly Carroll's entry permit was extended on the express condition that he act as counsel only in the five specified courts martial cases, and in those in which he had theretofore appeared at the arraignment of the accused. General Clay's letter concludes as follows: "In all respects other than those cited above, you are directed to refrain from acting as attorney or counsel for any person in the United States Zone of Occupied Germany. Upon the completion of the cases in which you are permitted to appear, your authority to be present in Germany will terminate. Any violation of the conditions of the extension of your entry permit, as stated in this letter, will be cause for its immediate termination."

When General Clay's letter was brought to the attention of the Tribunal by the Secretary General, we directed that he inquire of Military Government Headquarters whether there had been any modification of the restriction placed upon Carroll's activities in the prohibited area. The response was a telegram from General Clay's deputy, Major General George Hayes, which is in the following language: "For your information, letter of Military Governor dated 30 April 1947 to Earl J. Carroll has not been modified in any respect and the prohibition and limitations contained therein are still valid." That telegram was dated yesterday.

On 17 December, while the present application was pending, the said Carroll filed, or attempted to file, with the Secretary General an instrument purporting to be a notice of his appearance as counsel for the defendant Krupp in the trial of this case before this Tribunal. This notice was given without any prior authorization to said Carroll to act as counsel for said defendant and was in and of itself a violation of the rules of this Tribunal. From what has been said, it is clear that even if the Tribunal were otherwise disposed to approve Carroll's representation of the defendant Krupp, he is not and will not be available for that purpose, a fact well known to him when he sought the Tribunal's authorization.

But far more important, it is a manifest fact that Carroll's negotiations with the defendant Krupp and with the latter's present counsel, and his attempt to obtain the approval of his appearance as counsel in this case, are in flagrant defiance of the order of the Commander in Chief and Military Governor of the

area in Germany occupied by the forces of the United States. It is needless to say that this Tribunal will not directly or indirectly countenance such conduct. Even if it appeared that Carroll was available to represent the defendant and was otherwise acceptable, it is our considered opinion that by reason of his aforesaid conduct he has disqualified himself to appear before the bar of this Tribunal for any purpose, as counsel or in any other capacity, and he will not be allowed to do so.

In their response to the defendant Krupp's application, counsel for the prosecution very properly has drawn attention to certain other directives of the Military Government regulating the entry of persons into the occupied area and their activities. It is unnecessary to consider or discuss these. It is sufficient to say that in the prevailing circumstances their necessity and wisdom were so obvious as to require no elaboration, and that this Tribunal under no circumstances will knowingly lend itself to an attempt to thwart or handicap the Commander in Chief and Military Governor in view of the very grave responsibilities which rest upon his shoulders. The following additional observations are made. The application, which is not signed by the defendant's present counsel but by the defendant alone, conveys the idea that unless additional or substitute counsel is allowed to represent the defendant or assist in his defense, the defendant will not receive the kind of trial to which he is entitled at the hands of this Tribunal. This is an utterly false and unwarranted assumption. As already pointed out, the defendant is, and since last August has been, represented by able and experienced counsel of his own choosing, who is thoroughly familiar with the rules and ordinances under which this trial is being conducted and fully competent to protect any and all rights the defendant has. This is not a court martial proceeding provided for by the Congress of the United States, but a trial by a military tribunal. The procedure is provided for by the ordinances of the United States Military Government for Germany, with which the defendant's present counsel has already had no little experience in other trials.

Moreover, apart from and in addition to the efforts of experienced counsel, this Tribunal conceives itself capable of seeing to it that the defendant Krupp and all other defendants at the bar, receive the kind of trial they are entitled to under applicable rules and regulations, and we intend to do so. The appointment of additional or substitute counsel is not necessary to the accomplishment of that end under the circumstances of this case. The circumstances connected with the present application furnish very good evidence of the reason for the rules hereinabove stated, and we may add, with emphasis, that they give rise to a strong

suspicion that the application before us was not made in good faith but for the purpose of attempting to put this Tribunal in the utterly false position of denying to the defendant Krupp the right to be represented by counsel of his choice. The result is that the application to have Earl J. Carroll appear before this Tribunal as counsel for the defendant Krupp is denied.

Judge Wilkins will preside over today's session.

JUDGE WILKINS, PRESIDING: You may proceed Mr. Thayer.

DR. KRANZBUEHLER (counsel for defendant Krupp): Your Honor. The decision of the Tribunal puts me into a great conflict. My client, Mr. Alfried Krupp von Bohlen, 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. He would rather that the record of this trial show that he is without any representative he himself has chosen. For this reason I see myself forced to lay down my mandate and to confine myself henceforth to defending Max Ihn.

JUDGE WILKINS, PRESIDING: You may put that statement in writing. But may I say, in addition, that you have been appointed to represent Mr. Krupp before this Tribunal and you will continue in that representation until relieved by the Court; so you will consider that you are continuing until the Court acts in the matter further, as Mr. Krupp's counsel during these proceedings.

You may proceed, Mr. Thayer.

DR. KRANZBUEHLER: May I just make a suggestion? In the Uniform Rules of Procedure it is provided that the Tribunal may only appoint a defense counsel if, I believe it says, the defendant fails to select his own counsel. Herr Krupp von Bohlen has chosen a defense counsel, that is, Mr. Carroll —

JUDGE WILKINS, PRESIDING: Dr. Kranzbuehler, I do not think we care to hear anything further on it at this time, except to say this: That you were appointed, upon Mr. Krupp's application and upon your own application, and you will continue to act as his counsel until relieved by the Court.

DR. KRANZBUEHLER: I am prepared to do so. But I only wanted to move that on this question a session of all tribunals be arranged in accordance with Ordinance No. 11, because I am of the opinion that this present ruling of the Tribunal is at variance with the Uniform Rules of Procedure.

JUDGE WILKINS, PRESIDING: You make that motion in writing,

Dr. Kranzbuehler, as provided by the rules.¹ In the meantime you will continue to act as his counsel.

You may proceed, Mr. Thayer.

9. IMT CASE—DIRECTION THAT THE CONTROL COUNCIL FOR GERMANY INVESTIGATE AND REPORT TO THE TRIBUNAL CONCERNING AN ARTICLE IN A BERLIN NEWSPAPER USING VIOLENT AND INTIMIDATING LANGUAGE AGAINST ONE OF THE DEFENSE COUNSEL

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
5 MARCH 1946²

THE PRESIDENT: I have an announcement to make.

The attention of the Tribunal has been drawn by Dr. Hanns Marx, one of the German counsel appearing in this case for the defense, to an article which was published in the newspaper *Berliner Zeitung* for 2 February, under the heading, "A Defense Counsel." The article, which I do not propose to read, criticizes Dr. Marx in the severest terms for an error in his cross-examination of a witness when he deputized for Dr. Babel on behalf of the SS. The article suggested that in asking the question he did he was behaving most improperly, that he was expressing private and personal views under the guise of acting as counsel, and that his proper course was to remain silent in view of the character of the evidence.

The matter assumes a graver aspect still because the article goes on to threaten Dr. Marx with complete ostracism in the future and does so in language both violent and intimidating.

The Tribunal desires to say in the plainest language that such conduct cannot be tolerated. The right of any accused person to be represented by counsel is one of the most important elements in the administration of justice. Counsel is an officer of the Court, and he must be permitted freely to make his defense without fear from threats or intimidations. In conformity with the express provisions of the Charter, the Tribunal was at great pains to see that all the individual defendants and the named organizations should have the advantage of being represented by counsel; and the defense counsel have already shown the great service they are rendering in this trial, and their conduct in this regard should

¹ Dr. Kranzbuehler filed a petition for a joint session of the Tribunals on 23 December 1947, in which he sought a decision on three questions. These questions are set forth verbatim in the order of the Committee of Presiding Judges, 12 January 1948, in which the petition was denied. This order is reproduced in section XXIV E 1, the section dealing with joint sessions.

² Trial of the Major War Criminals, *op. cit.*, volume VIII, pages 532 and 533.

certainly not leave them open to reproach of any kind from any quarter.

The Tribunal itself is the sole judge of what is proper conduct in Court and will be zealous to insure that the highest standard of professional conduct is maintained. Counsel, in discharge of their duties under the Charter, may count upon the fullest protection which it is in the power of the Tribunal to afford. In the present instance the Tribunal does not think that Dr. Marx in any way exceeded his professional duty.

The Tribunal regards the matter as one of such importance in its bearing on the due administration of justice that they have asked the Control Council for Germany to investigate the facts and to report to the Tribunal.

That is all.

10. HOSTAGE CASE—RECESS IN THE PROCEEDINGS UNTIL A NEW DEFENSE COUNSEL COULD BE RETAINED FOR DEFENDANT DEHNER

EXTRACTS FROM THE TRANSCRIPT OF THE HOSTAGE CASE, 5 AND 6 AUGUST 1947*

MR. DENNEY (chief prosecutor): At this time I am advised by counsel for the defense that the defendant Dehner is no longer represented by counsel, and requests that an adjournment until 1:30 be granted in order that an effort may be made by Dr. Laternser [general spokesman for defense counsel in the Hostage case] on behalf of the defendant Dehner to obtain counsel for him, and it is my understanding that if defense counsel are unable to obtain someone at that time a further adjournment until tomorrow morning may be requested. However, they hope to work something out between now and 1:30.

[Dr. Marx, until this time counsel for the defendant Dehner, had also been acting as counsel for defendant Engert in the Justice case. Multiple representation in two trials was allowable, with certain reservations, under Rule 26 of the Uniform Rules of Procedure. A few days earlier, on 31 July 1947, Dr. Marx had been found in contempt of court in the Justice case, disbarred from further representation in that case, and sentenced to 30-days' imprisonment. See the order of the Tribunal in the Justice case, reproduced in section XXI D 8. This fact, of course, was known to the Tribunal and counsel in the Hostage case at the time the prosecution made this announcement.]

PRESIDING JUDGE WENNERSTRUM: The request and application made by Mr. Denney will be granted. The Tribunal respectfully

*Extracts from mimeographed transcript, U.S. vs. Wilhelm List, et al., Case 7, pages 1441, and 1445-1447.

asks Dr. Laternser to make his contacts and to make every effort to have a representative of the defendant Dehner here at 1:30.

The Tribunal will now stand in recess until 1:30.

(Thereupon at 10:05 a recess was taken until 1:30 p.m.)

[New counsel for defendant Dehner was not obtained by the afternoon session, so that the trial was further recessed until the next day.]

JUDGE BURKE, PRESIDING: Is counsel for defendant Dehner present today?

MR. DENNEY: May it please Your Honors, Dr. Laternser yesterday was able to arrange for Dr. Gawlik to represent the defendant Dehner and it is my understanding that although, at least a formal notice to that effect has not been served on the prosecution, and I don't know about the Tribunal, that Dr. Gawlik is agreeable to representing the defendant Dehner and the defendant Dehner is agreeable to having Dr. Gawlik represent him. Perhaps Dr. Gawlik would like to make a statement for the record to that effect in order that Your Honors can be informed by him.

JUDGE BURKE, PRESIDING: If he cares to do so I'm sure the Tribunal will be glad to hear him.

DR. GAWLIK (counsel for defendant Dehner): Your Honors, if the Tribunal agrees. I have taken over the defense of the defendant Dehner. Of course it is extremely difficult for me to intervene in the process at this moment. I had refrained, so far, from asking for a postponement. However, I might have to ask for adjournment when the proper time arises—in the event that it is not possible for me to get the necessary evidence, when the turn for my case comes.

JUDGE BURKE, PRESIDING: I think the Tribunal is mindful of the difficulties involved in your coming into the case at this time, and we will try to suit the situation to the convenience of your client and yourself.

MR. DENNEY: It is believed that Dr. Gawlik will be able to obtain all of the document books which the former advocate for the defendant Dehner had; and I might say for the record that yesterday afternoon Dr. Gawlik came to the prosecution office and we made available to him for a cursory examination all of the documents which will be submitted today concerning his client. The other documents, of course, are in the record and if we can be of any help to him by spending time out of court over these documents we will be very glad to do it.

JUDGE BURKE, PRESIDING: I am sure the members of the Tribunal will appreciate any cooperation and assistance and help you may be able to furnish so as to prevent unnecessary delay.

H. Excused Absences of Defendants from Trial for Defense Preparation, Compassionate Leave from Prison, and Related Matters

I. INTRODUCTION

Materials concerning absences of defendants due to sickness are reproduced in section XX, "Inability of Defendants to Stand Trial, Absences of Defendants from the Proceedings for Reasons of Illness, and Related Matters." Defendants were occasionally excused from trial for other reasons than illness, mainly upon claims that temporary absence from the proceedings would facilitate defense preparation. A number of the defendants were also excused from trial for short periods to attend to family matters or for compassionate reasons.

During the course of trial defense counsel normally conferred with their clients in the evenings or on Saturdays and Sundays in the conference rooms located between the courthouse and the adjoining prison. At times, however, counsel desired additional time for consultation, particularly when the defendant was about to take the stand or when another crucial stage in the presentation of the defendant's case was imminent. In making a request for the temporary absence of his client from the proceedings on such occasions, counsel ordinarily stated that the interests of his client would be protected in his absence. If both main and associate counsel for the defendant likewise desired to be absent, arrangements were made informally for still another member of the defense staff to deputize at the proceedings. Moreover, both the defendant and his counsel could become advised of the details of the proceedings during their absence by later reading the mimeographed copies of the transcript and of the documents introduced in evidence. (An example of the application for, and the approval of, temporary absence for defense preparation is reproduced in 2 below.) This illustration is taken from the transcript of the Ministries case at a time when the presentation of the defense case was well under way.

An example of an order granting compassionate leave from the trial during the defense case is reproduced in 3 below. This illustration is taken from the Farben trial during the time of the presentation of the defense case.

Leaves from prison between the close of the evidence and the rendition of judgment were frequently granted so that defendants could attend to family financial affairs and other personal matters. In the Ministries case, for example, the defendant Woermann was

granted leave to be married to his assistant defense counsel, Dr. Marta Unger. The order granting this leave is reproduced in 4 below.

2. MINISTRIES CASE—APPROVAL OF TEMPORARY ABSENCE OF TWO DEFENDANTS FROM THE PROCEEDINGS FOR THE PURPOSE OF DEFENSE PREPARATION

EXTRACT FROM THE TRANSCRIPT OF THE MINISTRIES CASE,
29 JULY 1948¹

DR. FRITSCH (counsel for defendant Schwerin von Krosigk): I respectfully ask that my client be granted a leave of absence — that is, I ask that he be excused immediately, and be permitted to remain absent from the session all day today, as well as all day tomorrow. I ask that he be taken to room 57.² His interests here will be safeguarded.

JUDGE POWERS, PRESIDING: I assume it is for the purpose of preparing his defense?

DR. FRITSCH: Yes.

JUDGE POWERS, PRESIDING: Under those circumstances Herr von Krosigk will be excused as requested and taken to room 57.

DR. GRUBE (counsel for defendant Kehrl): Mr. President, I respectfully ask that the defendant Kehrl be likewise excused immediately and taken to room 57, just for this morning's session.

JUDGE POWERS, PRESIDING: Very well. He will be excused as requested.

3. FARBEN CASE—ORDER GRANTING DEFENDANT VON SCHNITZLER LEAVE OF ABSENCE FROM THE PROCEEDINGS TO VISIT HIS MOTHER³

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY, 28 FEBRUARY 1948

[Stamp] Filed: 1 March 1948

United States of America

vs.

Carl Krauch, *et al.*,

Defendants

} CASE 6

¹ Extract from mimeographed transcript, Case 11, U.S. *vs.* Ernst von Weizsaecker, *et al.*, page 14,023.

² Room 57 was a special defense conference or interview room in the courthouse where defendants, defense counsel, and defense witnesses could hold discussions.

³ U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 49, page 1417.

ORDER

It having been made to appear to the Tribunal that the mother of the defendant Georg von Schnitzler is 86 years of age and ill, and that she has expressed a desire to see her said son;

IT IS ORDERED by the Tribunal that said defendant is hereby granted leave to absent himself from the trial and to visit his said mother at Godesberg, near Bonn in the British Zone, for a reasonable time¹ or until the further order of the Tribunal, subject, however, to such conditions and restrictions as may be imposed by the military authorities for the purposes of security.

[Signed] CURTIS G. SHAKE
Presiding

Dated this 28th day of February 1948.

**4. MINISTRIES CASE—ORDER GRANTING DEFENDANT
WOERMANN LEAVE FROM PRISON TO BE MARRIED²**

**MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11**

United States of America
 against
Ernst von Weizsaecker, *et al.*)

[Stamp] Filed: 9 December 1948

ORDER

A joint application has been made to the Tribunal by defendant Ernst Woerman and Dr. Marta Unger, a member of his counsel,³ that a leave be granted the said defendant from 20 December 1948 to 2 January 1949, in order that said defendant and said Dr. Marta Unger may be married in her home at Heidelberg. Assurances have been given by counsel that the defendant will be returned to Nuernberg within the period of leave indicated.

The Tribunal having considered said request, and being advised in the premises, IT IS ORDERED that said defendant Woermann be, and he is hereby, excused from attendance at sessions of Tribunal IV, from 20 December to and including 2 January 1949, in order that he may visit Heidelberg for the purpose of being married.

Memorandum hereto attached is made a part of this order.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

Nuernberg, Germany
9 December 1948

¹ The defendant von Schnitzler, pursuant to this order, was absent from the trial sessions on 3, 4, 5, and 6 March 1948. Later, after the defendant's mother died, he was granted further leave of absence from the trial to attend the funeral, by Tribunal Order of 20 March 1948.

² U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 89, page 763.

³ Dr. Marta Unger had been approved as assistant attorney for the defendant Woermann by Tribunal order of 14 April 1948.

MEMORANDUM

The Tribunal recommends that permission for this trip be approved by proper military authorities. Defendant is a man of approximately 60 years of age, who has been continuously in prison since October 1945. The usual ground for leave, based on economic necessity of applicant's family,* is absent here, but the Tribunal feels that a consideration of all circumstances, such as defendant's age, the term of imprisonment he has already served, and the likelihood that the parole here sought will not be violated, and assurances of counsel as to defendant's return, justifies this recommendation.

[Initialed] W. C. C.

I. Occasional Provision for the Examination of Witnesses by Defendants in Addition to the Right of Examination through Counsel

I. INTRODUCTION

Article IV (e) of Ordinance No. 7 provided that "A defendant shall have the right through his counsel*** to cross-examine any witness called by the prosecution." In both the Medical and Farben cases, defendants were allowed to cross-examine directly one or more expert witnesses called by the prosecution. This first occurred in the Medical case (Case 1), where the defendants Ruff and Rose both cross-examined Dr. Ivy. Extracts from the transcript containing the discussion on this matter are reproduced in 2 below. In the Farben case this practice was allowed on several occasions, the first instance arising when the Tribunal permitted the defendant ter Meer to conduct the main cross-examination of Brigadier General J. H. Morgan. When later on the prosecution called Dr. Nathaniel Elias as an expert witness on chemical matters, the defendants Bueteffisch, Ambros, and ter Meer were allowed to put questions to Dr. Elias on cross-examination. (The statements of defense counsel and the Tribunal concerning these arrangements in the Farben case are reproduced in 3 below.)

The IMT, after an argument by counsel for defendant Goering and Mr. Justice Jackson, ruled that a defendant represented by counsel did not have the right himself to cross-examine witnesses. (The question as raised by the defense, the arguments thereon, and the IMT's ruling are reproduced in 4 below.)

*At this period of time (the recess between the close of the evidence and the final judgment) the Tribunal granted most of the defendants leave from prison to attend to domestic matters. Ordinarily the requirement was made that the defense counsel accompany the defendant and vouchsafe his return to the Nuernberg prison.

2. MEDICAL CASE—DISCUSSION IN CONNECTION WITH THE TRIBUNAL'S APPROVAL OF DEFENSE REQUEST THAT CERTAIN DEFENDANTS BE PERMITTED TO PUT QUESTIONS TO DR. IVY, AN EXPERT REBUTTAL WITNESS OF THE PROSECUTION

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE, 13 AND 16 JUNE 1947, CONTAINING DISCUSSION OF COUNSEL AND THE TRIBUNAL ARISING DURING THE TESTIMONY OF PROSECUTION WITNESS DR. ANDREW CONWAY IVY*

DIRECT EXAMINATION

[Dr. Ivy, vice president of the University of Illinois in charge of the College of Medicine, Dentistry, Pharmacy, and Nursing, had been selected by the Board of Trustees of the American Medical Association as an expert adviser to the Secretary of War. Dr. Ivy came to Nuernberg as a consultant for the prosecution and was called as an expert prosecution rebuttal witness concerning medical ethics and medical experiments. The Tribunal allowed Dr. Ivy's testimony to be given before the conclusion of the entire defense case because Dr. Ivy had to return to the United States. Dr. Ivy's complete testimony appears in the mimeographed transcript of the Medical case, pages 9029-9324. On the second day of Dr. Ivy's testimony, the prosecution proposed to read parts of the reports made by some of the defendants and others, and thereafter to obtain Dr. Ivy's expert opinion thereon. The defense objected that this was an improper time to adduce such testimony and that the defense counsel, not being experts in the field, were placed at a disadvantage, particularly because of their claim that they had not been advised sufficiently of the scope of Dr. Ivy's examination to become adequately familiar with the subject to cross-examine. The Tribunal overruled this objection. At this point the following discussion took place.]

DR. SAUTER (counsel for defendants Blome and Ruff) : Your Honor, in view of your decision I then make a new application and ask you for permission to make this application right now. Before I stated the reasons why for a legally trained defense counsel it is very difficult, without having a very thorough discussion with his client, to undertake a cross-examination or redirect examination about very difficult medical questions. These statements, which the expert has made today, I could discuss only in part with my clients, and what the expert will state today I shall not be able to discuss at all with my clients. Therefore it is absolutely impossible for me, during the cross-examination, to clarify everything that has to be clarified in our opinion. Therefore, I make the request to the Tribunal, in consideration of these special circumstances, without prejudice for other cases, that the Tribunal grant me permission that the necessary questions about these medical

*Extracts from mimeographed transcript, U.S. vs. Karl Brandt, *et al.*, Case 1, pages 9092-9094, 9099, 9100, 9106, 9107, 9178, 9179, and 9253.

matters, that these questions may be asked of the expert by [defendant] Dr. Ruff himself, as well as, at the same time, in the name of his coworker, [defendant] Dr. Romberg. This manner of treating the case seems to me expedient as an exception—

JUDGE SEBRING: Repeat that again, I did not understand fully the import of your request.

DR. SAUTER: I should repeat my request? I just stated that last night in the short period at my disposal, it was not possible for me to discuss all these medical questions with my clients adequately, which were brought up by the expert. Yesterday and today the expert, at the questioning of the prosecution, has discussed and possibly will discuss quite extensively a number of questions regarding the problem of altitude experiments. It is my duty immediately following the direct examination to ask the expert questions, and I am not able to do so; as I am a layman from a medical standpoint, I cannot do so without having discussed these questions for hours with my client, and without having clarified them to such an extent that I can ask the necessary questions and make the necessary representations. In consideration of the special circumstances in this case, I therefore ask the Tribunal that during the cross-examination that the questions which I should ask, that the defendant Ruff be permitted to conduct the cross-examination. The questions will be clarified and I believe it would also serve to expedite the trial if a specialist should ask, as a medical expert, the questions of another expert and clarify the medical questions. This should not create a precedent for other cases because this is an exceptional case.

PRESIDING JUDGE BEALS: Doctor, you mean by that that you request that as you examine the present witness your client may be allowed to come into the pit with you, sit with you at counsel table, and discuss with you the questions to be put, and if necessary put the questions himself to the witness who is now in the box; is that the point?

DR. SAUTER: Not quite, Your Honor. I would consider it best because the only medical questions which have to be clarified can be clarified during the cross-examination, and these questions should be clarified by having Dr. Ruff himself, on his own, ask the questions and conduct the cross-examination. He can formulate the questions, he can understand the answers better and evaluate them better than I as a lawyer. Whether this should be done from his place in the dock where the defendant Ruff is sitting, by having a microphone put in front of him, or whether this should be done from some place else, that is up to the President at this time.

MR. HARDY (associate counsel for the prosecution): Of course, Your Honor, the prosecution objects to this procedure. I might

point out in this connection, Your Honor, that the examination concerning high-altitude experiments will be very limited and defense counsel will have ample opportunity to study with his defendant, and perhaps Dr. Ivy will be here until Tuesday and the high altitude [testimony] will be postponed until Monday. He can spend Saturday afternoon and all day Sunday interrogating the defendant, and they can well prepare the cross-examination at that time.

PRESIDING JUDGE BEALS: The Tribunal sees no objection to the defendant Ruff coming down and sitting with his counsel and possibly asking some of the questions himself to the witness. The defendant Ruff, after the witness has testified concerning questions in which the defendant Ruff is interested, may be excused from the dock to consult with his counsel if his counsel desires, until the time for cross-examination arrives. In any event the defendant may leave his place in the dock and come down and take a position at the table with his counsel and sit with his counsel. If his counsel deems it necessary or advisable, defendant Ruff may ask the witness some questions himself, as the Tribunal desires to afford every possible opportunity for a thorough cross-examination of the witness, and that process might result in shortening the cross-examination and making it more direct and to the point. In any event, after the witness has testified concerning the matters in which the defendants Ruff and Romberg are interested they may be excused from the court if they desire, and consult with their counsel until the time cross-examination arrives.

DR. SAUTER: Thank you very much.

* * * * *

PRESIDING JUDGE BEALS (interposing): Just a moment. The Tribunal would like to advise counsel for defendant Romberg that if counsel would like his client to sit beside him at his table, his client may do so. (Pause.) It appears that defendant Romberg's counsel is not present. If defendant Romberg would like to choose some other counsel to act for him in this cross-examination, he may do so. Both of the defendants may come down and sit at table with their counsel while this examination is proceeding, now. Understanding the counsel desires that this procedure be followed, the Tribunal directs the defendant Ruff and defendant Romberg also, step from the dock and sit at the table with counsel.

DR. SAUTER: Your Honor, when quotations from the report are read, I would request Mr. Hardy to state the German pages of the document, too, because it is very difficult for me if I only hear the English page numbers, to find the quotation, and by the time I

have found the quotation, Mr. Hardy has already gone on to another question.

MR. HARDY: Your Honor, I will request the interpreters to refer to the page number. I am unable to read German.

PRESIDING JUDGE BEALS: The counsel's request will be complied with.

Now, in regard to the defendant Romberg's counsel not being present, I would ask him if he will choose any other counsel that is present to sit beside him, if he desires.

(No reply from defendant Romberg.)

I understand defendant Romberg is content to sit beside defendant Ruff without having any other counsel designated.

Counsel for the prosecution may proceed.

[The direct examination continued.]

PRESIDING JUDGE BEALS: Counsel, Court is about to recess. I would ask the defendant Romberg if he knows where his counsel is?

DEFENDANT ROMBERG: My defense counsel has been informed by telegram, but I don't know whether he can come back.* I expect him to come back today, but I am quite satisfied with being represented by Dr. Sauter.

DR. SAUTER: Your Honor, regarding representing Dr. Romberg. There will be no difficulties because, during the past week when I spoke every evening with Dr. Ruff I also discussed his case with Dr. Romberg in order to be able to represent the interests of Dr. Romberg during the absence of his defense counsel. Therefore, Dr. Romberg will not interpose any objection.

PRESIDING JUDGE BEALS: Very well, Counsel. Now Counsel understand, not only counsel for the defendants Ruff and Romberg, but other counsel as well, that if in connection with this examination counsel desires to consult with their respective clients, it will be arranged that they may do so at any time, at noon, or may be excused from the Tribunal for consultation with their clients if they desire, upon request of the Tribunal. Any such reasonable requests will be entertained. The Tribunal will now be in recess for a few minutes.

[Thereafter direct examination continued and cross-examination was begun by Dr. Sauter, counsel for defendants Blome and Ruff.]

DR. SAUTER: Mr. President, in that case I have no further

*In view of the fact that the conduct involved, in particular, charges usually related to more than one of the more than 20 defendants, and because of the number of defense counsel in the case, the Tribunal imposed no formal requirements as to how many or which defense counsel should be present at particular sessions. Defense counsel, by arrangement between themselves, ordinarily worked out measures to parcel out responsibilities both at the proceedings and in defense preparations outside the courtroom.

questions. I should like to permit the defendant Dr. Ruff to ask a few medical questions of the witness which he can settle more expeditiously and expediently than I can myself.

PRESIDING JUDGE BEALS: The defendant may propound medical questions to the witness.

DEFENDANT RUFF: Dr. Ivy, you reported yesterday and also this morning something about some fatalities that had occurred in American aviation research. Now, I should like to ask you that aside from these deaths, regarding which you have already testified here, do you know of any other in addition to the death of the Major who had a fatal accident when parachuting from a great height, and the five or six deaths that occurred during training?

[The principal part of the cross-examination following was undertaken by the defendant Ruff. However, defense counsel also asked questions.]

DR. FRITZ (counsel for defendant Rose): Your Honor, there is another matter I want to clear up. I have purely medical questions to ask of the witness and there was little time during the last few days to discuss this question with the defendant Rose. In order to utilize the time, and in order to be able to finish, I would like to ask your permission for the defendant Rose to ask the medical questions himself of the witness.

PRESIDING JUDGE BEALS: The defendant Rose may propound the medical questions to the witness on cross-examination. The defendant Rose may leave his place in the dock and assume his position beside his counsel.

[After only one question by Dr. Fritz, defendant Dr. Rose continued the cross-examination of Dr. Ivy. Thereafter still other defense counsel asked questions.]

3. FARBEN CASE—DISCUSSION IN CONNECTION WITH THE TRIBUNAL'S APPROVAL OF DEFENSE REQUESTS THAT SPECIALLY INFORMED DEFENDANTS BE PERMITTED TO CROSS-EXAMINE TWO EXPERT WITNESSES OF THE PROSECUTION

a. Cross-Examination of General Morgan by Defendant ter Meer EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE, 11 SEPTEMBER 1947, CONTAINING DISCUSSION OF COUNSEL AND THE TRIBUNAL ARISING DURING THE TESTIMONY OF PROSECUTION WITNESS GENERAL MORGAN*

*Extracts from mimeographed transcript. Case 6, U.S. vs. Carl Krauch, *et al.*, pages 747-750, 754 and 755.

DIRECT EXAMINATION

[The witness testified that he had been appointed Deputy Adjutant General with the rank of Brigadier General, by the British Government to serve on the Allied Control Commission for Germany after World War I, and that this Commission was established "to see to it that the disarmament clauses of the Versailles Treaty were carried out." He then testified about the difficulties encountered by the commission in attempting to prevent Germany from re-arming, particularly in the chemical field. The direct examination concluded with the question and answer which follows.]

MR. AMCHAN (associate counsel for the prosecution): General, did the Control Commission succeed in disarming the German chemical industry?

WITNESS MORGAN: No.

MR. AMCHAN: You may cross-examine.

DR. BERNDT (counsel for defendant ter Meer): Mr. President, may I ask you, first of all, to grant the defense a short recess because we would like to discuss a few questions before starting cross-examination?

PRESIDING JUDGE SHAKE: The Tribunal deems that a proper request, and we will recess for a few minutes. About how long do you think would be necessary?

DR. BERNDT: About a quarter of an hour.

PRESIDING JUDGE SHAKE: Very well, we will recess for that time.

THE MARSHAL: The Tribunal is in recess for fifteen minutes.

(A recess was taken.)

* * * * *

DR. BERNDT: Mr. President, this morning there were two interruptions when you emphasized how difficult it is to conduct this trial, due to the fact that we have to use two languages. We, the attorneys, find it very difficult, due to the same circumstances, to follow an examination of a witness, particularly when the examination covers a field which we legal men are not familiar with. Today the witness has touched upon certain technical chemical subjects, and it is remarkable how he, as a non-chemist, acquired the knowledge concerned. We should like to suggest that with regard to these questions which he has touched upon, we too should be permitted to put a few questions to him.

We ourselves, that is the defense counsel, cannot however do so, because we lack the expert knowledge, nor do we have the time to acquire the knowledge, because it was only this morning that we heard which technical and chemical questions this witness would be speaking about.

I, therefore, take the liberty of suggesting to the Tribunal that the questions be put by an expert, and I feel that the suitable

expert would be one of the defendants who has at his command the technical knowledge necessary to put the questions to the witness.

For this purpose the defendant, Dr. ter Meer, appears to be particularly qualified, since he was the chief of the Technical Committee [of the I.G. Farben concern]. I believe that if we were to adopt this procedure we should simplify and accelerate the proceedings. May I also emphasize that in another trial, the Medical case, the doctors [who were defendants] were permitted to put technical questions to witnesses. And may I finally mention that the prosecution told me that they, for their part, have no objections to this suggestion of mine.

PRESIDING JUDGE SHAKE: Does counsel for the prosecution desire to add anything to what has been said?

MR. AMCHAN: Just a word, that we appreciate the difficulties that defense counsel are laboring under, and that on our part we have no objections to this suggestion.

PRESIDING JUDGE SHAKE: The Tribunal is disposed to grant this request and will do so, but we feel that it is entirely possible that since the defendant who is to interrogate on this question is permitted to do so, or requested by his counsel to do so, because of his familiarity with technical questions, he may in turn find himself in some difficulty with reference to legal procedure; and we would admonish counsel as well as the defendant, Dr. ter Meer, that this is not his time to testify, and that it will be necessary for us to confine him to the established procedure with reference to limiting his examination to the field of cross-examination, and that he will be afforded a timely opportunity to testify later as a witness, and that this is not that occasion. If counsel has admonished the defendant in that regard, or will undertake to do so, and will cooperate with the Court in confining this cross-examination to the proper field, counsel's client may interrogate this witness on cross-examination.

DR. BERNDT: Thank you, Mr. President, and may I then ask that the defendant ter Meer be allowed to proceed to the rostrum.

PRESIDING JUDGE SHAKE: That may be done.

CROSS-EXAMINATION

DEFENDANT TER MEER: General, may I first of all ask when the Control Commission commenced its activities in Germany?

[The cross-examination proceeded without interruption by any objections or intervention by the Tribunal except for the following.]

DEFENDANT TER MEER: Sometimes plants for the production of concentrated acid were actually destroyed as far as they went beyond the needs of peacetime production in Germany. My ques-

tion, put briefly and precisely, means just this: you said earlier that in your opinion the nitrogen production in Germany during the '20s was considerably in excess of Germany's own needs, and I answered that not only Germany's requirements but considerable export requirements for nitrogen fertilizers had to be filled and that the danger that the large nitrogen industry in Germany might be used for war purposes or for forbidden rearmament was averted because the large plants for the production of concentrated nitric acid had in part been destroyed. Therefore, the fact that nitrogen fertilizer and ammonia production were destroyed and the prohibited production of high explosives, munitions, and so forth, in my opinion, must be kept separate.

PRESIDING JUDGE SHAKE: The Tribunal finds it necessary to remind the witness—pardon me, the defendant now questioning the witness—that he is not presently to testify. Neither is he to engage in a colloquy with the witness on the stand. He is privileged, however, to cross-examine the witness fully with respect to any subject matter concerning which the witness testified in chief.

WITNESS MORGAN: Thank you, Your Honor, I was going to observe, when I was about to answer that question, that apparently what the defendant was expecting me to answer was not a question but a speech.

b. Cross-Examination of Mr. Elias by Defendants Bueteffisch, Ambros, and ter Meer

EXTRACT FROM THE TRANSCRIPT IN THE FARBEN CASE, 30 SEPTEMBER 1947, CONTAINING DISCUSSION OF COUNSEL AND TRIBUNAL ARISING DURING THE TESTIMONY OF PROSECUTION WITNESS NATHANIEL ELIAS*

DIRECT EXAMINATION

* * * * *
MR. DUBOIS (deputy chief counsel for the prosecution): No further questions. The prosecution is finished with this witness.

PRESIDING JUDGE SHAKE: The defense may proceed with the cross-examination of the witness.

DR. DRISCHEL (counsel for defendant Ambros): Mr. President, there are a number of technical chemical questions and events before us, the treatment of which can only be successful in cross-examination if those questions are put to the witness by experts. According to an agreement made with the prosecution, we should, therefore like to ask you that in this case, too, as in the

*Ibid., pages 1397-1399.

case of the expert witness, General Morgan, the defense be permitted to call upon the technically informed gentlemen in the dock in order for them to put the questions to the witness. Of course, they will not be witnesses in their own case, but as it was emphasized by the President, at the time, they would only put the questions in order to alleviate the questioning. Three gentlemen have been chosen who will speak on behalf of the various spheres, Dr. Buetefisch in cases of questions on raw materials, Dr. Ambros for questions on intermediates, and Dr. ter Meer for questions which are connected with these two spheres.

With your permission, Mr. President, the defense would like to start the cross-examination with this aim in mind.

PRESIDING JUDGE SHAKE: Is it the understanding of the Tribunal that the cross-examination of this witness will be handled by the three named defendants rather than by counsel if permission is granted?

DR. DRISCHEL: The questions will naturally be put by the defendants in the presence of their defense counsel.

PRESIDING JUDGE SHAKE: The Tribunal has no objection to a witness being cross-examined by a defendant, and will permit that to be done. We do feel, however, that it is necessary for the Tribunal to admonish the defendants who will cross-examine the witness, and their respective counsel, that it will be necessary to restrict the cross-examination to the same extent as if it was conducted by counsel. Conceding that the defendants may be experts in scientific lines, we cannot be assured as to how familiar they may be with legal procedure. We shall therefore expect the cooperation of their respective counsel in restricting the cross-examination to the proper field.

With your helpfulness in that respect, you may proceed to call from the dock whatever defendant you have in mind first to cross-examine this witness.

[Defendants Buetefisch, Ambros, and ter Meer each directed questions to the witness, and several defense counsel also interrogated.]

4. IMT CASE—DEFENSE REQUEST THAT A DEFENDANT REPRESENTED BY COUNSEL BE ALLOWED TO PUT QUESTIONS DIRECTLY TO PROSECUTION WITNESSES, ARGUMENTS ON THE REQUEST, AND TRIBUNAL RULING DENYING REQUEST

EXTRACTS FROM THE TRANSCRIPT OF THE IMT CASE,
1 DECEMBER 1945*

*Trial of the Major War Criminals, *op. cit.*, volume III, pages 31–33.

DR. STAHLER (counsel for defendant Goering): I would like to ask the Court for a fundamental ruling on whether the defendant also has the right personally to ask the witness questions. According to the German text of the Charter, paragraph 16, I believe this is permissible.*

THE PRESIDENT: The Tribunal will consider the point you have raised and will let you know later.

MR. JUSTICE JACKSON: The United States prosecution would desire to be heard, I am sure, if there were any probability of that view being taken by the Tribunal.

THE PRESIDENT: Perhaps we had better hear you now, Mr. Justice Jackson.

MR. JUSTICE JACKSON: Well, I think it is very clear that these provisions are mutually exclusive. Each defendant has the right to conduct his own defense or to have the assistance of counsel. Certainly this would become a performance rather than a trial if we go into that sort of thing. In framing this Charter, we anticipated the possibility that some of these defendants, being lawyers themselves, might conduct their own defenses. If they do so, of course they have all the privileges of counsel. If they avail themselves of the privileges of counsel, they are not, we submit, entitled to be heard in person.

DR. STAHLER: I would like to point out once more that paragraph 16 (e), according to my opinion, speaks very clearly for my point of view. It says that the defendant has the right, either personally or through his counsel, to present evidence, and according to the German text it is clear that the defendant has the right to cross-examine any witness called by the prosecution. According to the German text there reference can be made only to the defendant—with respect to terms as well as to the contents. In my opinion it is made clear that the defendant has the right to cross-examine any witness called by the prosecution.

[The Tribunal took the matter under advisement during the ensuing recess.]

* * * * *

THE PRESIDENT: The Tribunal has carefully considered the question raised by Dr. Stahlmer, and it holds that defendants who are represented by counsel have not the right to cross-examine witnesses. They have the right to be called as witnesses themselves and to make a statement at the end of the trial.

*The pertinent provisions of Article 16 are the following:

"(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel.

"(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution."

J. Aid in the Production of Evidence for the Defense— Rules and Practice of the IMT. General Provisions of Ordinance No. 7 and of the Uniform Rules of Pro- cedure Adopted by the Tribunals Established under Ordinance No. 7

I. INTRODUCTION

Under the provisions concerning procedure to ensure fair trial, the Charter of the IMT provided that "A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defense" (Art. 16 (e)). Rule 4 of the Rules of Procedure adopted by the IMT on 29 October 1945 was entitled "Production of Evidence for the Defense," and this rule dealt exclusively with applications for witnesses and documents and the means of making them accessible to the defense (for Rule 4, see 2 below). Such a provision was recognized from the beginning as essential in view of the disrupted conditions prevailing in Germany and the fact that Germany, a vanquished enemy nation, was under the quadripartite control of the four nations signatory to the London Agreement. Rule 4 (b) provided that the Tribunal could request any of the signatory and adhering governments to the London Charter "to arrange for the production, if possible, of any such witnesses and any such documents as the Tribunal may deem necessary to proper presentation of the defense."

Before the prosecution in the IMT case had rested its case, the IMT made an order concerning the presentation of the defense case, which dealt, among other things, with defense applications for documents and witnesses. After reading this order, the President of the IMT called upon counsel for the defendant Goering to make a brief oral statement in support of his written applications, and upon the prosecution to reply thereto. This led to objections by the defense concerning the right of the prosecution to reply, and to an extended discussion between the Tribunal and defense counsel. Because this procedure influenced greatly the course of the later trials, the IMT order and the ensuing discussion of the IMT with defense counsel have been reproduced in 3 below.

Concerning the production of evidence for the defense in the Nuernberg trials following the IMT case, reference should first be made to two related subdivision of Article IV of Ordinance No. 7. Subdivision (e) of Article IV provided that "A defendant shall have the right through his counsel to present evidence at the trial

in support of his defense," and subdivision (f) provided that when the Tribunal granted an application for a witness or document "the defendant shall be given such aid in obtaining production of evidence as the tribunal may order." These provisions were supplemented by Rule 12 of the Uniform Rules of Procedure for the Nuernberg Military Tribunals, a rule entitled "Production of Evidence for a Defendant." Rule 12, which was not amended throughout the course of the trials, is reproduced in 4 below.

Rule 10 of the Uniform Rules of Procedure, initially called "Applications and Motions before Trial," at first provided that the adverse party had the right to make objections to any and all applications, including applications for witnesses and documents. (See sec. III F, which contains Rule 10 in its original form.) This rule followed the practice adopted by the IMT, a practice which the defense had objected to in the IMT case insofar as it allowed the prosecution to make objections to defense applications for witnesses and documents (3 below). In the trials following the IMT case, the defense urged that Rule 10 in actual practice worked out to the disadvantage of the defense. The argument made was to the effect the prosecution was in a position to acquire its evidence with few exceptions without the intervention of the Tribunal, while the defense on the other hand often needed the aid of the Tribunal, and hence the prosecution was in a position to object to defense applications for evidence at a preliminary stage and to become familiar with defense preparations well in advance of the actual presentation of defense evidence, a situation which did not apply in reverse. On 2 December 1947, the Supervisory Committee of Presiding Judges amended Rule 10 in a manner which disposed of the basis of these defense objections. Rule 10, as amended, was called "Motions and Applications (Except for Witnesses and Documents)." The defense thereafter made their applications for witnesses and documents under the provisions of Rule 12, "Production of Evidence for a Defendant," a rule containing no provision for service of the defense applications upon, nor for any objection to the applications by, the prosecution. Of course both before and after the revision of Rule 10 both parties could object at the proceedings to the offer of evidence, but this is a matter distinct from objection to the initial discovery or production of evidence.

To assist the defense in the production of evidence, the Secretary General established a separate section in the Defense Center called the Defense Witness and Document Procurement Section. (See the "Final Report of the Defense Center," sec. VIII G.)

The records of the trials abound with voluminous materials bearing on the production and discovery of evidence for the

defense. The materials reproduced herein, apart from the introductory materials in the present section, have been divided for purposes of convenience into two further subsections; the first (subsec. K) dealing mainly with the procurement of witnesses; the second (subsec. L) dealing principally with the discovery of documents. This separation for purposes of this publication is in some respects quite arbitrary, for many of the defense motions were framed to include questions of both witnesses and documents, as well as other points which overlap on materials treated in still other portions of this volume.

2. RULE 4 OF THE RULES OF PROCEDURE ADOPTED BY THE IMT ON 29 OCTOBER 1945*

Rule 4. Production of Evidence for the Defense

(a) The defense may apply to the Tribunal for the production of witnesses or of documents by written application to the General Secretary of the Tribunal. The application shall state where the witness or document is thought to be located, together with a statement of their last known location. It shall also state the facts proposed to be proved by the witness or the document, and the reasons why such facts are relevant to the defense.

(b) If the witness or the document is not within the area controlled by the occupation authorities, the Tribunal may request the Signatory and adhering Governments to arrange for the production, if possible, of any such witnesses and any such documents as the Tribunal may deem necessary to proper presentation of the defense.

(c) If the witness or the document is within the area controlled by the occupation authorities, the General Secretary shall, if the Tribunal is not in session, communicate the application to the Chief Prosecutors and, if they make no objections, the General Secretary shall issue a summons for the attendance of such witness or the production of such document, informing the Tribunal of the action taken. If any Chief Prosecutor objects to the issuance of a summons, or if the Tribunal is in session, the General Secretary shall submit the application to the Tribunal, which shall decide whether or not the summons shall issue.

(d) A summons shall be served in such manner as may be provided by the appropriate occupation authority to ensure its enforcement, and the General Secretary shall inform the Tribunal of the steps taken.

*The Rules of Procedure of the IMT are reproduced in full in section I D.

(e) Upon application to the General Secretary of the Tribunal, a defendant shall be furnished with a copy, translated into a language which he understands, of all documents referred to in the indictment so far as they may be made available by the Chief Prosecutors and shall be allowed to inspect copies of any such documents as are not so available.

3. IMT CASE—ORDER CONCERNING THE PRESENTATION OF THE DEFENSE CASE, AND DISCUSSION WITH DEFENSE COUNSEL CONCERNING OBJECTIONS BY THE PROSECUTION TO DEFENSE APPLICATIONS FOR WITNESSES AND DOCUMENTS

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
23 FEBRUARY 1946¹

THE PRESIDENT: With regard to paragraphs 2 and 7 of Dr. Stahmer's memorandum on defense procedure,² dated 4 February 1946, the Tribunal makes the following order:

1. The defendants' cases will be heard in the order in which the defendants' names appear in the indictment.

2. (a) During the presentation of a defendant's case, defendant's counsel will read documents, will question witnesses, and will make such brief comments on the evidence as are necessary to insure a proper understanding of it.

(b) The defendant's counsel may be assisted in the courtroom by his associate counsel or by another defendant's counsel. Such other counsel may help the defendant's counsel in handling documents, *et cetera*, but shall not address the Tribunal or examine witnesses.

3. Documentary evidence.

(a) Defendant's counsel will hand to the General Secretary the original of any document which he offers in evidence if the original is in his possession. If the original is in the possession of the prosecution, counsel will request the prosecution to make the original of the document available for introduction in evidence. If the prosecution declines to make the original available, the matter shall be referred to the Tribunal.

(b) Should the original of any such document be in the possession of the Tribunal, defendant's counsel will hand to the General Secretary a copy of the whole or relevant part of such document, together with a statement of the document number and the date upon which it was received in evidence.

¹ Trial of the Major War Criminals, *op cit.*, volume VIII, pages 159-165.

² The memorandum of Dr. Stahmer, counsel for the defendant Goering, raised various matters concerning the presentation of the defense case which are dealt with in the order.

(c) Should counsel wish to offer in evidence a document, the original of which is not in his possession or otherwise available to the Tribunal, he will hand to the General Secretary a copy of the whole or relevant part of such document, together with an explanation as to where and in whose possession the original is located and the reason why it cannot be produced. Such copy shall be certified as being correct by an appropriate certificate.

4. Each defendant's counsel will compile copies of the documents or parts of documents which he intends to offer in evidence into a document book, and six copies of such document book will be submitted to the General Secretary two weeks, if possible, before the date on which the presentation of the defendant's case is likely to begin. The General Secretary will arrange for the translation of the document book into the English, French, and Russian languages, and the defendant's counsel will be entitled to receive one copy of each of these translations.

5. (a) Defendant's counsel will request the General Secretary to have the witnesses named by him and approved by the Tribunal available in Nuernberg; such request being made, if possible, at least three weeks before the date on which the presentation of a defendant's case is likely to begin. The General Secretary will, as far as possible, have the witnesses brought to Nuernberg one week before this date.

(b) Defendant's counsel will notify the General Secretary not later than noon on the day before he wishes to call each witness.

6. (a) A defendant who does not wish to testify cannot be compelled to do so, but may be interrogated by the Tribunal at any time under Articles 17 (b) and 24 (f) of the Charter.

(b) A defendant can only testify once.

(c) A defendant who wishes to testify on his own behalf shall do so during the presentation of his own defense. The right of defense counsel and of the prosecution under Article 24 (g) of the Charter to interrogate and cross-examine a defendant who gives testimony shall be exercised at that time.

(d) A defendant who does not wish to testify on his own behalf but who is willing to testify on behalf of a codefendant may do so during the presentation of the case of the codefendant. Counsel for other codefendants and for the prosecution shall examine and cross-examine him when he has concluded his testimony on behalf of the codefendant.

(e) Subparagraphs (a), (b), (c), and (d) above do not limit the power of the Tribunal to allow a defendant to be recalled for further testimony in exceptional cases, if in the opinion of the Tribunal the interest of justice so requires.

7. In addition to the addresses of each defendant's counsel under Article 24 (*h*), one counsel representing all the defendants will be permitted to address the Tribunal on legal issues arising out of the indictment and the Charter which are common to all defendants, but in making such address he will be held to strict compliance with Article 3 of the Charter. This address will take place at the conclusion of the presentation of all the evidence on behalf of the defendants, but must not last more than half a day. If possible, a copy of the written text of the address shall be delivered to the General Secretary in time to enable him to have translations made in the English, French, and Russian languages.

8. In exercising his right to make a statement to the Tribunal under Article 24 (*j*), a defendant may not repeat matters which already have been the subject of evidence or already have been dealt with by his counsel when addressing the Court under Article 24 (*h*), but will be limited to dealing with such additional matters as he may consider necessary before the judgment of the Tribunal is delivered and sentence pronounced.

9. The procedure prescribed by this order may be altered by the Tribunal at any time if it appears to the Tribunal necessary in the interest of justice.

Now the Tribunal will deal with the application for witnesses and documents on behalf of the defendant Goering, and the procedure which the Tribunal proposes to adopt is to ask counsel for the defendant whose case is being dealt with to deal, in the first instance, with his first witness, and then to ask counsel for the prosecution to reply upon that witness and then, when that has been done to ask defendant's counsel to deal with his second application for a witness, and then for the prosecution counsel to deal with that witness; that is to say, to hear the defendant's counsel and the prosecution counsel upon each witness in turn.

That procedure will probably not be necessary when the Tribunal comes to deal with documents. Probably it will be more convenient for defendant's counsel to deal with the documents together and prosecuting counsel to deal in answer to the documents together. But, so far as the witnesses are concerned, each will be taken in turn.

I call upon Dr. Stahmer.

DR. MARTIN HORN (counsel for defendant von Ribbentrop): Before we go into these details, I ask to be informed why the Court has the intention of treating the defense in a fundamentally different manner from the prosecution. In Article 24 of the Charter it is stated that the Tribunal will ask the prosecution and the defense whether they will submit evidence to the Tribunal and, if so, what

evidence. This decision has so far not been applied by the Tribunal in relation to the prosecution. I am glad that today the defense has been granted the possibility to name to the Tribunal those documents and witnesses, which up to now have been difficult to obtain. I am prepared today to tell the Tribunal the essential points which establish the necessity of calling the witnesses and the relevancy of the documents. I ask the Court, therefore on the basis of past practice, not to allow the prosecution to take part in judging whether a document should be considered relevant or not. As defense counsel I am convinced that I would have to submit to a sort of precensorship by the prosecution which would impair the unity of my entire evidence. I may point out that the protests of the defense have constantly been postponed with the remark that the defense would be heard about these points at a later date. If selection of evidence, on the basis of objections by the prosecution, takes place here today the danger arises that protests which have been postponed will not be able to be treated later. For the reasons stated, therefore, I request the Court to proceed according to past practice, and decide as to the right of the prosecution to protest against the procurement of evidence.

THE PRESIDENT: Will counsel for Ribbentrop come back to the rostrum? The Tribunal is not altogether clear what motion you are making.

DR. HORN: I propose that the prosecution should not, at this stage of the trial, be entitled to make a decision about the calling of witnesses and the relevancy of documents.

Mr. President, I should like to plead further on that point. I meant by making a decision that the prosecution should not yet, at this time, have anything to say about the question of the admissibility or nonadmissibility of evidence.

THE PRESIDENT: The Tribunal considers that your motion cannot be granted, for this reason: It is true that the defense is being asked to apply for witnesses and documents now, in accordance with Article 24 (*d*).

One principal reason for that is that the Tribunal has got to bring all your witnesses here. The Tribunal has been, for many weeks, attempting to find your witnesses and to produce them here, and to produce the documents which you want. The relevancy of those witnesses and of those documents has got to be decided by the Tribunal; but it is obvious that counsel for the prosecution must be allowed to argue upon the question of relevancy, just as counsel for the defendants have been allowed to argue upon the relevancy of every witness and every document which has been introduced by the prosecution.

Exactly the same procedure is being adopted now for the defendants as has been adopted for the prosecution, with the sole exception that the defendants are being asked to make applications for the witnesses and documents and to deal with the matter at one time, rather than to deal with it as each witness or document is produced. The reason for that is that the Tribunal, as I have stated, have got to find and bring the witnesses here for the defendants and also to produce the documents.

Your motion was that the prosecution should not receive any possibility to decide on the calling of witnesses. The prosecution, of course, will not decide upon it; the Tribunal will decide upon it. The prosecution must have the right to argue upon it, to argue that the evidence of a certain witness is irrelevant or cumulative, and to argue that any document is not relevant.

And I am reminded that all of these documents have got to be translated for the purposes of the Tribunal.

DR. HORN: Mr. President, many of the defendants' counsel, myself included, have, so far, not been able to question decisive witnesses for the purpose of obtaining information. Therefore, in decisive points we often do not even know exactly what a witness can prove.

If, now, we already have to deal with the prosecution before we know definitely how far it is desirable to fight or not to fight for a witness, we are in an essentially worse situation than the prosecution, which, whenever the defendants' counsel made protests, knew exactly for what their witness or their evidence was important. In this regard the defense is, for the most part, in a considerably worse situation, and I am of the opinion that this situation will become even worse if here, besides the Tribunal, the prosecution can also make protests against the evidence at this stage of the trial.

THE PRESIDENT: It is true that it is impossible to decide finally upon the admissibility of any piece of evidence until the actual question is asked; and for that reason the Tribunal has already, in deciding provisionally upon the application for witnesses, acted in the most liberal way. If it appears that there is any possible relevancy in the evidence to be given by a witness, they have allowed that witness to be alerted. Therefore, if there is any witness whose evidence appears to be, by any possibility, relevant, the Tribunal will allow that witness, subject, of course, to the directions of the Charter to hold the trial expeditiously.

Subject to those limitations, the Tribunal will allow any witness to be called whose evidence appears to be possibly relevant. That is all the Tribunal can do because, as I have already stated, it is

the Tribunal who has to undertake the difficult task of securing these witnesses for the defendants, who cannot secure them themselves.

DR. HORN: Thank you.

THE PRESIDENT: Now, Dr. Stahmer.

DR. OTTO STAHMER (counsel for defendant Goering): Mr. President, I do not wish to repeat, but I believe that the objection of Dr. Horn has not been understood quite rightly. Dr. Horn wanted only to complain about the fact that the defense in no case has been asked previously whether an item of evidence that the prosecution has presented was relevant or not, but we have always been surprised when a witness was brought in and we had no possible opportunity to make any material objections relative to him.

Insofar as objections against documents were concerned, that is, as to their relevance, the defense has always been told that for such an objection the time had not yet come for the defense—

THE PRESIDENT: I beg your pardon, Dr. Stahmer, but you have misunderstood. The defense have never been told that objections to the admissibility of documents could be left over until later. Every objection to the admissibility of a document has been dealt with at the time. Observations upon the weight of the document are to be dealt with now, during the course of the defense. I don't mean today, but during the course of the defense.

There is a fundamental distinction between the admissibility of a document and the weight of a document, and all questions of admissibility have been dealt with at the time.

DR. STAHMER: Mr. President, I fully understood that distinction. Nor did I want to say that objections against admissibility were turned down, but rather objections against relevancy.

THE PRESIDENT: Objections to the relevancy of documents—that is to say, their admissibility—that is the governing consideration under this Charter as to the admissibility of documents. If they are relevant, they are admissible. That is what the Charter says. And any objection which has been made to documents or to evidence by defendants' counsel has been heard by the Tribunal and has been decided at the time.

Dr. Stahmer, the Tribunal wishes me to point out to the defendants' counsel that they have had long notice of this form of procedure, long notice that under Article 24 (*d*) they were going to be called upon to specify or name their witnesses and the documents which they wish to produce, and to state what the relevancy of the witnesses and the documents would be.

It seems to the Tribunal obvious that that procedure is really

necessary when one remembers that it is for the Tribunal, with very great difficulty and at considerable expense, to find these witnesses and to bring them to Nuernberg, and to find the documents, if possible, and to bring them to Nuernberg.

Now, as to your or to Dr. Horn's objections to the procedure which has been adopted with reference to the prosecution, it is open to defendants' counsel at any time, if they wish to do so, to apply to strike from the record any document which they think ought not to have been admitted. One of his objections, or possibly your objection, appeared to be that defendants' counsel have not had sufficient time to consider whether a particular document or a particular witness was relevant, and therefore admissible. You have had ample time now to consider the point and if now you wish to apply to strike out any document or to strike out any evidence, you will make that application in writing and the Tribunal will consider it.

As I have said, the object of the procedure is to help the defendants and their counsel. And it is a necessary procedure because the defendants are unable, naturally, and defendants' counsel are unable, naturally, to procure the attendance of witnesses here in Nuernberg, and in some cases to procure the production of documents.

In order that we should do so, on their behalf, it is necessary that we should know whom they want to have produced here, what documents they want to have produced here; and, in order that time should not be wasted and money should not be unduly wasted, it is necessary to know whether the witnesses and the documents have any shadow of relevancy to the issues raised.

DR. STAHLER: Then I shall begin with the naming of those witnesses whose interrogation before the Tribunal I consider necessary.

4. RULE 12 OF THE UNIFORM RULES OF PROCEDURE OF THE NUERNBERG MILITARY TRIBUNALS*

Rule 12. Production of Evidence for a Defendant

(a) A defendant may apply to the Tribunal for the production of witnesses, or of documents on his behalf, by filing his application therefor with the Secretary General of Military Tribunals. Such application shall state where the witness or document is thought to be located, together with a statement of the last known location thereof. Such application shall also state the general nature of

*This rule did not change from the time the rules of procedure were first adopted in the Medical case until the last revision of the Uniform Rules of Procedure. See sections III-V.

the evidence sought to be adduced thereby, and the reason such evidence is deemed relevant to the defendant's case.

(b) The Secretary General shall promptly submit any such application to the Tribunal, and the Tribunal will determine whether or not the application shall be granted.

(c) If the application is granted by the Tribunal, the Secretary General shall promptly issue a summons for the attendance of such witness or the production of such document, and inform the Tribunal of the action taken. Such summons shall be served in such manner as may be provided by the appropriate occupation authorities to ensure its enforcement, and the Secretary General shall inform the Tribunal of the steps taken.

(d) If the witness or the document is not within the area controlled by the United States Office of Military Government for Germany, the Tribunal will 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.

K. Procurement of Witnesses for the Defense

I. INTRODUCTION

Defense applications for witnesses were ordinarily made up on a form called "Defendant's Application for Summons of Witness." These forms contained entries for indicating the last known location of the desired witness, and information which might be helpful in locating the witness if his present location was not known. This form also contained entries under which the applicant was to indicate what facts the witness knew and why these facts were relevant to the defense case. If the application was approved, the Central Secretariat of the Tribunals (usually through the staff of the Defense Center) undertook to locate the witness and to bring him to Nuernberg. The Defense Center proceeded to communicate by telephone, telegraph, or letter with whatever authorities could produce or be helpful in producing the witness. The Tribunal had no jurisdiction to compel the attendance of witnesses outside the American Zone of Occupation, and relied principally upon the military authorities to accomplish or attempt to accomplish the procurement of witnesses. When German witnesses were brought to Nuernberg they were usually quartered in the "Witness House," which was established because of the scarcity of transient accommodations in Nuernberg. Witnesses who were under arrest were transferred either to the

prison adjoining the courthouse, or held in a nearby internment camp while they were needed in Nuernberg.

Often a person produced in Nuernberg pursuant to a "Defendant's Application for Summons of Witness" was not actually called by the defense to testify. Many times defense counsel had not been able to conduct preliminary interrogations before the person approved as a witness arrived in Nuernberg, and after preliminary interrogation the defense often elected not to call the person as a witness, or else elected only to introduce an affidavit in lieu of testimony in open court subject to the prosecution's right to call the affiant for cross-examination.

In some instances an application for a witness was granted with the limitation that only a deposition or an affidavit was approved. This was frequently done when the person requested as a witness resided outside Germany, or where the Tribunal desired to expedite trial and did not consider that the testimony sought to be adduced was of a type which made testimony before the Tribunal especially important. In some cases the Tribunal directed that the testimony of a witness be taken before a commissioner of the Tribunal (sec. XVII, "Taking of Evidence on Commission.")

The number of applications for defense witnesses was very large in each of the 12 cases heard before the Tribunals established pursuant to Ordinance No. 7. In the smallest of the 12 trials, the Milch case, in which there was only one defendant, there were 47 defense applications for witnesses. A table reproduced hereinafter (2 below) shows in graphic form the Tribunal's action upon these applications, the number of defense witnesses who appeared, and related information. Of the 47 applications, six were denied. Each of the six applications denied is reproduced in 3 below, the Tribunal's denial being entered in each instance without opinion upon the face of the application. Four of the applications denied were for witnesses who were former or present members of the Governments of Belgium, France, or Holland. Three of the applications were approved for deposition only. No depositions from the persons originally approved as deponents were offered, either because the persons could not be reached or because the defense did not elect to introduce any affidavits or depositions which may have been obtained. However, three of the witnesses approved to testify in person (Speer, von Neurath, and Raeder) were prisoners who had been convicted by the IMT, and the Allied Control Council would not approve their further appearance in public. Accordingly, their testimony was taken on deposition (sec. XVIII J 2). Thirty-one of the persons approved as witnesses appeared to testify in person or gave testimony by deposi-

tion, including an American doctor who was in Nuernberg as a consultant to the prosecution and who testified in person. Seven of the persons approved as defense witnesses were not called to the stand, although at least five of them were accessible for preliminary interrogations by the defense and for call to the stand at the election of the defense. The defense introduced in evidence a number of affidavits by persons who had not been requested as witnesses. The prosecution did not request the cross-examination of any of these affiants. A statement from the judgment in the High Command case concerning the procurement of defense witnesses is reproduced in section 4.

The procurement of defense witnesses from outside Germany ordinarily imposed insuperable difficulties, and the Tribunals encouraged the submission of interrogatories to or the procurement of affidavits from such persons. Where the defense desired an affidavit or deposition of a non-German and was unable to reach the witness through its own initiative or contacts, the Defense Center acted as the forwarding agency. The defense introduced numerous affidavits or depositions from persons residing outside Germany. In a few instances where the defense made a special point of the personal attendance of a witness, the Secretary General of the Tribunals was able to secure the attendance of the witness. In the Ministries case, for example, Bishop Berggrav of Norway was brought to Nuernberg to testify on behalf of the defendant von Weizsaecker (see the mimeographed transcript of the Ministries case, pp. 8514-8543); and in the High Command case Captain Russel Grenfell, who had served in the British Navy for many years, testified after having been brought to Nuernberg pursuant to an application on behalf of the defendant Schniewind. (Extracts from Grenfell's testimony are reproduced at pp. 718-721, vol. X, this series.)

Where the Tribunals could not compel the attendance of a witness, and the defense was not content with interrogatories or an affidavit, it was sometimes possible to arrange for the taking of testimony before a commissioner. For example, the defense in the Flick case applied for Albert Speer, one of the defendants convicted by the IMT. Speer was imprisoned in Spandau Prison in Berlin under the joint control of the four nations signatory to the London Agreement. Although Speer and two other persons convicted by the IMT had been procured as witnesses in the Milch case, it was not possible at the time of the Flick case to secure Control Council agreement to bring Speer to Nuernberg. The Tribunal, upon being advised of these circumstances, ordered that Speer's testimony was to be taken before a commissioner. (For this order, see sec. XVII C.)

The defense attorney who questioned Speer before the Commissioner had been Speer's defense counsel in the IMT case. The complete testimony of the witness Speer taken on commission is reproduced in section VII D, volume VI, this series.

Where a prospective witness was brought to Nuernberg and declined to testify on the ground that his testimony might tend to incriminate him, this refusal was honored. In the High Command case, for example, the Tribunal went to some pains to procure the presence in Nuernberg of the former Field Marshals von Manstein and von Rundstedt as defense witnesses. The Tribunal order directing special steps to be taken in this connection is reproduced in 5 below. Both von Manstein and von Rundstedt were British prisoners, and there had been recent press reports that the British were actively engaged in trial preparations against them. When these two prospective witnesses were finally brought to Nuernberg, the Tribunal made an order, a copy of which was served upon the proposed witnesses, concerning the privilege against self-incrimination. Thereafter von Manstein and von Rundstedt both informed defense counsel that they would claim this privilege, and defense counsel, therefore, did not call either of them as witnesses before the Tribunal. The statement of the Tribunal concerning the privilege against self-incrimination is reproduced in 6 below.

Extensive assistance was given to the defense in arranging travel within Germany. When the "Berlin blockade" was in effect arrangements were made, on occasion, for travel by the air lift to Berlin. During this period the Committee of Presiding Judges invited representatives of the administration, the defense, and the Secretary General to one of its conferences to discuss the travel difficulties for members of the defense staff. The minutes of this conference on this subject are reproduced in 7 below.

It was difficult to make travel arrangements for German defense counsel outside Germany, since German nationals were still classified as enemy aliens in most countries. However, in a few instances arrangements were made for a German defense counsel or a member of the defense staff to travel outside Germany to Austria, Czechoslovakia, England, Norway, and Switzerland. Where defense counsel of other than German nationality were approved (in the Farben, Krupp, and Ministries cases) these counsel did travel outside Germany with greater freedom. However, the defense constantly urged that they were at a disadvantage as against the prosecution in obtaining affidavits or witnesses from outside Germany. For example, near the end of the defense case in the Farben trial, the defense moved that the Tribunal

strike "all affidavits and testimonies of such prosecution witnesses as the prosecution secured during trips abroad of its members" because "the defense did not have the possibility to the same extent as the prosecution to make trips abroad in order to procure evidence." In its answer the prosecution took up the question of the relative advantages of prosecution and defense in various contexts and suggested that the defense indicate for the record the relative number of affidavits obtained by the prosecution and the defense from persons residing outside Germany. The Tribunal denied the defense motion. (For the motion, answer, and Tribunal order, see 8 below.)

The preliminary interrogation by defense counsel of persons confined in Nuernberg Jail presented special difficulties for the defense, the prosecution, and the authorities entrusted with the enforcement of military security. After Germany's surrender to the Allies numerous German civilians were confined by the Occupying Powers in internment camps at various places because of their position in the Nazi government, the SS, and other Nazi organizations; and, in addition, numerous high officers of the German armed forces were interned separately from the remainder of the prisoners for reasons of military regulations and military security. Many of the persons confined, whether civilians or military personnel, were suspected of war crimes, and investigations were pending as to whether they were to be tried. The security regulations surrounding confined persons involved restrictions upon visitors and censorship of mail. It was not the practice to grant counsel to such prisoners until and unless they were indicted. Most of the prisoners in the Nuernberg Prison were transferred there from various places of internment, either because the prosecution wished to interrogate them or because the prosecution was considering the filing of charges against them. On the other hand, many of the persons in Nuernberg Prison had relevant information of importance for various defendants, and questions arose as to the manner in which defense counsel could interrogate these persons prior to the time they were actually called as witnesses. The prosecution, particularly during the early stages of the trials, objected to the interrogation of these prisoners by defense counsel unless safeguards were established to see that the questioning was limited to relevant inquiries and that the existing requirements of military security were not evaded.

The Rule of Procedure covering this situation was Rule 23, a rule which was revised on 3 June 1947 and 8 January 1948. (See secs. IV D, IV F, and V.) As originally promulgated, Rule 23

provided that when a person confined in Nuernberg Jail had been approved as a witness for the defense, the "Tribunal shall thereupon appoint an impartial commissioner to represent the Tribunal at such interview, to the end that it shall be orderly, proper and judicial in character, and within the scope of the petition filed, and to the further end that there shall be no attempt to harass, intimidate, or improperly influence the witness in giving his answers" (sec. III F). It further provided that no representative of the prosecution was to be present at the interview. This arrangement did not work out in practice, principally because the number and length of the defense interrogations made it impossible to provide enough commissioners to keep up with the defense requests. After discussions with representatives of the defense counsel and the prosecution, the Secretary General of the Tribunals proposed that when a prisoner had been approved as a defense witness, and when thereafter one party wished to interrogate him, a representative of the other side had a right to be present during the interrogation. This recommendation was adopted by a revision of Rule 23 on 3 June 1947 (sec. IV D). The principal difficulties had developed where the prosecution had initiated the request that the prisoner be transferred to Nuernberg Prison, and hence the prisoner had become a "prosecution witness," in the sense under discussion, before he had also become a "defense witness." Later, on 8 January 1948, Rule 23 was further revised to make it clear that the practice of permitting a representative of the opposing side to be present in interrogations of prisoners in the Nuernberg Jail applied irrespective of whether they were prosecution witnesses or defense witnesses (sec. IV F). In practice both parties usually waived the right to have a representative present at these interrogations.

The security and other policy reasons which led to the rules with respect to the interrogation of prisoners in Nuernberg Jail had no application with respect to interviewing persons who were not in custody. Persons not in confinement were commonly referred to as "voluntary witnesses." Both parties were free to interrogate voluntary witnesses without any formal arrangements whatsoever and without special approval of the Tribunals. An effort was unsuccessfully made in the Farben case to have certain prospective witnesses not in custody classified as "defense witnesses" with the object of preventing their interrogation thereafter without the consent of the defense. This is illustrated by the defense application for Hermann Schwab and certain related matters which became of record in connection therewith. The defense application was made on the usual form of "Defendant's Application for Witness." However, under the entry "Other informa-

tion that may aid in locating the person named," the application stated: "Due to the fact that I am in touch with the witness, I kindly request you to abstain from taking any steps as to locating or summoning the witness." Defense counsel, several weeks previously, had already supplied Mr. Schwab with a letter stating that he had been "chosen by the defense" as a witness, and that "In case the prosecution should approach you, may I ask you to show this letter*** and to explain with reference to this letter that you are in no position to talk to the prosecution without the consent of the defense counsel." In answering the defense application for the summons, the prosecution attached a copy of this letter and stated that such a practice as the defense had in mind "would lead to a contest between the prosecution and the defense in attempting to be the first to apply for 'the summons' of dozens of witnesses." The Executive Presiding Judge denied the application for the summons on the ground that "This witness is not in custody, and his whereabouts is stated. He can be produced as a voluntary witness when needed, without assistance from the Tribunal. Application denied." The defense application, with the ruling appearing at the bottom, and the prosecution's answer with the attachment, are reproduced in section K 9 a. This matter arose in the interim between the service of the indictment and the setting down of the case for trial, some weeks before a Tribunal was assigned to the trial of the case. At this same period of time the prosecution in the Farben case stated its view of the freedom surrounding the interrogation of persons not in custody by a mimeographed memorandum to the Defense Center on 3 July 1947. This memorandum stated, among other things:

"Defense counsel is, of course, entirely free to interview voluntary witnesses whether or not the prosecution has already interrogated such witnesses * * *. This does not, however, mean that any such prospective witness thereby becomes a defense witness in the sense that the prosecution may not interrogate or continue interrogating such person. By the same token the mere fact that the prosecution has interrogated a person does not mean that such person thereby becomes exclusively a prosecution witness."

This memorandum is reproduced in full in section 9 b.

2. MILCH CASE—TABLE CONCERNING DEFENSE APPLICATIONS FOR WITNESSES

1. Total Defense applications for witnesses ¹	47
2. Applications granted without condition	34
a. Persons thus approved who testified	27
3. Applications granted subject to approval of the Allied Control Council for Germany or of the British Military Authorities	4
a. Persons thus approved who testified ²	4
4. Applications granted for deposition only	3
a. Depositions introduced in evidence from persons thus approved ³	0
5. Applications denied ⁴	6
6. Total number of defense witnesses testifying in person or by deposition ⁵	31

¹ The applications from which the entries in this table have been taken all appear in Case 2, U.S. *vs.* Erhard Milch, Official Record, volume 8, pages 22-148.

² These four witnesses were Constantin von Neurath, Erich Raeder, Albert Speer, and Karl Wolff. The first three had been convicted by the IMT and were imprisoned subject to the control of the Allied Control Council for Germany, and after they had been approved as witnesses in the Milch case the Control Council announced that it would not approve their further appearance at public hearings. Accordingly arrangements were made later for the taking of their testimony by deposition (sec. XVIII J 2). SS Lieutenant General Wolff was a prisoner in custody of the British military authorities in Italy when the application was made.

³ One of the applications was for Max Timm, imprisoned at Nuernberg and hence accessible to the defense. If Timm executed a deposition for the defense, the defense chose not to introduce it. It is not known whether the other two persons approved to give depositions were reached by interrogatories or otherwise made available to the defense. The applications alleged that they were prisoners of war in Russian custody.

⁴ Each of these applications, all denied without opinion, is reproduced immediately below.

⁵ See "List of Witnesses in Case 2," volume II, this series, pages 889 and 890, which gives the pages of the mimeographed transcript at which the testimony of both defense and prosecution witnesses may be found.

3. MILCH CASE—APPLICATIONS FOR DEFENSE WITNESSES WHICH WERE DENIED BY THE TRIBUNAL

a. Application of Defendant Milch for Pierre Cot¹

Military Tribunals
Nuernberg, Germany
Military Tribunal II

United States of America
against
Erhard Milch

Defendant's Application for Summons of Witness

To: The Secretary General, Military Tribunals:

I, Dr. Friedrich Bergold attorney for Erhard Milch,
(Name of defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:
Pierre Cot

Occupation and last known location:
French Air Minister 1937, Paris.

Other information that may aid in locating the person named:

The person above-named has knowledge of the following facts:
That the defendant did not agree on the war aims of the Nazi Party, that, on the contrary, he devoted himself to a final peaceful settlement between Germany, France, and Belgium, and offered his services as ambassador in Paris in order to reach a final peaceful settlement.²

These facts are relevant to the defense for the following reasons:

That the defendant was no absolute follower of

¹ U.S. vs. Erhard Milch, Case 2, Official Record, volume 8, p. 53.

² The defendant Milch was not charged with crimes against peace. See the indictment in the Milch case, pages 360-364, volume II, this series.

the NSDAP, and that he aimed at a just settle-
ment in Europe.

3 January 1947

(Date)

Signed: DR. BERGOLD

Signature of Defendant's Counsel

Decision of Tribunal

14 January 1947

Application denied.

[Signed] ROBERT M. TOMS
Presiding Judge

Prosecution notified, 14 January 1947

b. Application of Defendant Milch for Delbos*

Military Tribunals
Nuernberg, Germany
Military Tribunal II

United States of America

against

Erhard Milch

Defendant's Application for Summons of Witness

To: The Secretary General, Military Tribunals:

I, Dr. Friedrich Bergold attorney for Erhard Milch,
(Name of defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:

Delbos

Occupation and last known location:

French Minister of Foreign Affairs 1937; Paris.

Other information that may aid in locating the person named:

The person above-named has knowledge of the following facts:

That the defendant devoted himself to a final
pacification between France and Germany, in
particular tried to reach a complete cooperation
with France, as is now suggested by the former
English Prime Minister, Churchill.

These facts are relevant to the defense for the following reasons:

That the defendant did not identify himself with
the war aims of the Nazi Party, but wanted to
maintain peace in Europe.

3 January 1947

(Date)

Signed: DR. BERGOLD

Signature of Defendant's Counsel

Decision of Tribunal

14 January 1947

Application denied.

[Signed] ROBERT M. TOMS

Presiding Judge

Prosecution notified, 14 January 1947

*U.S. vs. Erhard Milch, Case 2, Official Record, volume 8, page 55.

c. Application of Defendant Milch for Count Kerkhoven
van Denterghem*

Military Tribunals
Nuernberg, Germany
Military Tribunal II

United States of America
against
Erhard Milch

Defendant's Application for Summons of Witness

To: The Secretary General, Military Tribunals:

I, Dr. Friedrich Bergold attorney for Erhard Milch
(Name of defendant)

hereby request that following person be summoned by the Tri-
bunal to give evidence in the defendant's behalf:

Name of person desired as witness:

Count Kerkhoven van Denterghem

Occupation and last known location:

Belgian ambassador in Berlin; Brussels.

Other information that may aid in locating the person named:

The person above-named has knowledge of the following facts:

That defendant Milch aimed at a final pacifica-
tion between Belgium and Germany in order to
prevent forever a war between Belgium and
Germany.

These facts are relevant to the defense for the following
reasons:

That defendant did not identify himself with
the war aims of the Nazi Party, but wanted to
maintain peace in Europe.

3 January 1947

(Date)

Signed: DR. BERGOLD

Signature of Defendant's Counsel

Decision of Tribunal

14 January 1947

Application denied.

[Signed] ROBERT M. TOMS
Presiding Judge

Prosecution notified, 14 January 1947

*Ibid., page 57.

d. Application of Defendant Milch for Flight General Kreipe*

Military Tribunals
Nuernberg, Germany
Military Tribunal II

United States of America

against

Erhard Milch

Defendant's Application for Summons of Witness

To: The Secretary General, Military Tribunals:

I, Dr. Friedrich Bergold attorney for Erhard Milch
(Name of defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:

Flight General Kreipe

Occupation and last known location:

Adjutant of defendant Milch in 1937.

Other information that may aid in locating the person named:

Prisoner of war of the Americans.

Last Address: presumably in prisoner-of-war camp, Berchtesgaden.

The person above-named has knowledge of the following facts:

That the defendant did not agree on the war aims of the Nazi Party, that, on the contrary, he devoted himself to a final peaceful settlement between Germany, France and Belgium, and offered his services as ambassador in Paris in order to reach a final peaceful settlement.

These facts are relevant to the defense for the following reasons:

That the defendant was no absolute follower of the NSDAP, and that he aimed at a just settlement in Europe.

3 January 1947

(Date)

Signed: DR. BERGOLD

Signature of Defendant's Counsel

Decision of Tribunal

14 January 1947

Application denied.

[Signed] ROBERT M. TOMS
Presiding Judge

Prosecution notified, 14 January 1947

*Ibid., page 61.

e. Application of Defendant Milch for van Zeeland*

Military Tribunals
Nuernberg, Germany
Military Tribunal II
United States of America
against
Erhard Milch

Defendant's Application for Summons of Witness

To: The Secretary General, Military Tribunals:

I, Dr. Friedrich Bergold attorney for Erhard Milch
(Name of defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:
Van Zeeland.

Occupation and last known location:
Belgian Prime Minister, 1937; Brussels.

Other information that may aid in locating the person named:

The person above-named has knowledge of the following facts:
That defendant Milch aimed at a final pacification between Belgium and Germany in order to prevent forever a war between Belgium and Germany.

These facts are relevant to the defense for the following reasons:

That the defendant did not identify himself with the war aims of the Nazi Party, but that he wanted to maintain the peace in Europe.

3 January 1947

(Date)

Signed: DR. BERGOLD

Signature of Defendant's Counsel

Decision of Tribunal

14 January 1947 Application denied.

[Signed] ROBERT M. TOMS
Presiding Judge

Prosecution notified, 14 January 1947

*Ibid, page 63.

f. Application of Defendant Milch for Reich Minister Backe*

Military Tribunals
Nuernberg, Germany
Military Tribunal II

United States of America
against
Erhard Milch

Defendant's Application for Summons of Witness

To: The Secretary General, Military Tribunals:

I, Dr. Friedrich Bergold attorney for Erhard Milch
(Name of defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:
Reich Minister Backe

Occupation and last known location:
At present in jail of Palace of Justice,
Nuernberg.

Other information that may aid in locating the person named:

The person above-named has knowledge of the following facts:
To prove that every year already in peacetime,
several hundreds of thousands of foreign workers
came to Germany of their own free will to do
harvesting.

These facts are relevant to the defense for the following reasons:
To prove that Sauckel's statement of March 1944
according to which only 200,000 foreigners came

*Ibid., page 112.

The prosecution filed an answer to this application which stated:

"There is an objection to this witness on the grounds that the facts of which the witness is stated to have knowledge, namely, that every year a number of foreign workers voluntarily came to Germany for harvest work, are irrelevant to the issues in this case. Furthermore, the migration of seasonal workers to Germany prior to the war has no bearing on the truth or falsehood of Sauckel's statement that during the war years only 200,000 workers came to Germany voluntarily."

to Germany of their own free will, was a
conscious untruth.

28 January 1947

Signed: DR. BERGOLD

Signature of Defendant's Counsel

Decision of Tribunal

4 February 1947

Application denied.

[Signed] ROBERT M. TOMS
Presiding Judge

4. HIGH COMMAND CASE—STATEMENT FROM THE JUDGMENT OF THE TRIBUNAL CONCERNING THE PROCUREMENT OF DEFENSE WITNESSES¹

PRESIDING JUDGE YOUNG: Insofar as lay within its power, the Tribunal directed and aided in procuring all the witnesses that defense counsel requested, that their testimony might be heard in open court.

One hundred sixty-five witnesses were ordered summoned for the defendants. One hundred five of those summoned it was possible to procure and they were brought to Nuernberg and were available for the defendants to call to the witness stand. Of these only 80 in fact were called by the defendants. That so many of those requested were in fact procured is a tribute to the efficiency and to the cooperation that the administrative officers of the courthouse have rendered in this trial.

5. HIGH COMMAND CASE—TRIBUNAL ORDER, 29 MAY 1948, DIRECTING SPECIAL STEPS BY SECRETARY GENERAL TO PROCURE FORMER FIELD MARSHALS VON MANSTEIN AND VON RUNDSTEDT AS DEFENSE WITNESSES²

UNITED STATES MILITARY TRIBUNAL V
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY
29 MAY 1948

[Stamp] Filed: 29 May 1948

United States of America

vs.

Wilhelm von Leeb, *et al.*,

Defendants }

CASE 12

ORDER

Upon the motions of the defendants Karl von Roques and Otto Woehler, by their respective counsel alleging that certain witnesses, namely, Gerd von Rundstedt, former Field Marshal in the German Army, and Erich von Manstein, former Field Marshal in the German Army, are vital witnesses in the presentation of their defenses and that such defenses cannot be adequately presented on testimony by affidavit or on written interrogatories or otherwise

¹ The entire text of the judgment in the High Command case is reproduced in volume XI, this series, pages 462-697.

² U.S. *vs.* Wilhelm von Leeb, *et al.*, Case 12, Official Record, volume 28, pages 924 and 925.

than by the personal testimony of said witnesses, the Court having considered the same,

IT IS HEREBY ORDERED THAT SAID MOTIONS BE GRANTED AND THAT:

The Secretary General will take all steps at his command to produce these two defense witnesses and cause them to appear before this Tribunal.

It is the understanding of this Tribunal that these two individuals are presently in the custody of the British War Office, London, England.

Excerpts from letters written from England and received by defense counsel, indicate that they are willing and physically capable of coming to Nuernberg to appear in court for the purpose of giving testimony.*

In addition to any other action which the Secretary General may like to take in order to produce these witnesses, the Tribunal orders that the following steps should be taken by the Secretary General to assure the most expeditious action in summoning these witnesses:

1. Secretary General should inform Legal Division, OMGUS, of the contents of this court order for the purpose of obtaining the assistance of that division and in turn they may contact the Office of the Political Adviser for any further help they may need.

2. Secretary General should inform Mr. W. H. Mercer, the British Liaison Officer with the Office Chief of Counsel for War Crimes, of the contents of this court order and try to obtain his assistance.

3. Secretary General should dispatch an urgent cablegram, through the Office of the American Military Attaché in London, addressed to the British Undersecretary of State for War acquainting him with the contents of this order and ascertaining when these witnesses can be expected in Nuernberg.

4. In the event these witnesses are physically incapacitated to appear in this Court, it would be most desirable to receive a certified medical report indicating their present state of health which would preclude a trip to Nuernberg.

*In the motion on behalf of defendant Woehler requesting von Manstein as a witness, defense counsel had stated: "I am in constant correspondence with the witness and can assure the Tribunal on the strength of this correspondence:

"(1) that Field Marshal von Manstein is prepared to appear as a witness here, and even attaches great importance to it;

"(2) that his state of health would permit his being transferred to Nuernberg;

"(3) that Field Marshal von Manstein is willing to come under the condition of safe-conduct, to wit, the assurance not to be arrested by U.S. authorities, nor to be put in prison but in a hospital, in case he should not be freed at all."

(See Case 12, Official Record, vol. 28, pages 926-927.)

5. Upon their arrival in Nuernberg, the Secretary General will make the necessary arrangements for their billeting consistent with their physical condition.

6. From time to time, the Secretary General will keep this Tribunal informed of the progress made in connection with this court order.

Done this 29th day of May 1948.

By the Tribunal:

[Signed] JOHN C. YOUNG
Presiding Judge

6. HIGH COMMAND CASE—TRIBUNAL ORDER CONCERNING THE PRIVILEGE OF FORMER FIELD MARSHALS VON MANSTEIN AND VON RUNDSTEDT TO CLAIM THE PRIVILEGE AGAINST SELF-INCRIMINATION, 26 JULY 1948

EXTRACT FROM THE TRANSCRIPT OF THE HIGH COMMAND CASE,
26 JULY 1948¹

PRESIDING JUDGE YOUNG: For the reasons that will appear from reading the order itself, the Tribunal felt that it was desirable and proper that this order should be contained in the record. I might say that two witnesses requested by defendants, Field Marshals von Rundstedt and von Manstein, are available.²

The Tribunal is informed, by way of the public press, that the witnesses von Rundstedt and von Manstein, summoned in behalf of certain defendants, are soon to be prosecuted by the United Kingdom for war crimes allegedly committed by them. We infer that their proposed testimony will relate to matters connected with the offenses with which they are to be charged. Anything they may say in this case may be used against them in their case. Consequently, the Tribunal thinks it proper to advise said proposed witnesses that it is their privilege to act upon the assumption they will be so prosecuted³ and accordingly if they conceive their testimony may tend to incriminate them or hamper or prejudice their defense in such anticipated prosecution, it is their privilege to refuse to be interviewed by counsel, and further, they may refuse to testify in the present case. Counsel for the defen-

¹ Extract from mimeographed transcript, U.S. vs. Wilhelm von Leeb, *et al.*, Case 12, pages 8461 and 8462.

² Pursuant to request by American authorities, the British had arranged that von Manstein and von Rundstedt be temporarily transported to Nuernberg for the purpose of acting as defense witnesses.

³ Both von Manstein and von Rundstedt were later indicted by the British authorities.

dants causing said witnesses to be summoned are allowed until tomorrow evening in which to interview said proposed witnesses, if they consent to such interview. Then they may be offered as witnesses, subject to their right to refuse to testify before this court. This will be done the morning of July 28th.¹

Each of said proposed witnesses will immediately be served with a copy of this order so they may be fully advised of their rights and privileges.

I may say that this order is entered because these witnesses are not present in court where the Tribunal can advise them personally, and the Tribunal feeling that they are entitled to this has, therefore, directed that this order be served upon them in lieu of their advice in open court which we have been giving in similar cases.

Mr. Secretary, a signed copy of this order will be given you for your records.

7. MINUTES OF THE CONFERENCE OF THE COMMITTEE OF PRESIDING JUDGES, 1 JULY 1948, CONCERNING TRAVEL BY MEMBERS OF THE DEFENSE STAFF²

OFFICE OF MILITARY GOVERNMENT (US) SECRETARIAT FOR MILITARY TRIBUNALS

Office of the Secretary General

Palace of Justice
Nuernberg

No. 15

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES
1 July 1948 1650

Judge Curtis C. Shake, Executive Presiding

MEMBERS OF THE COMMITTEE PRESENT:

Judge Hu C. Anderson, Tribunal III

Judge William C. Christianson, Tribunal IV

Judge John C. Young, Tribunal V

OTHERS PRESENT:

Lt. Col. Autrey J. Maroun, Executive Officer, OCCWC

Miss Mary A. Moore, Budget and Fiscal Officer, OCCWC

Lt. Joseph G. Gallagher, Adjutant, OCCWC

Dr. Hellmuth Dix, Defense Counsel, Spokesman, Case 6 [Farben case]

¹ Defense counsel conferred with von Manstein and von Rundstedt in Nuernberg and both prospective witnesses indicated that they would claim the privilege against self-incrimination. Accordingly they were not called as witnesses by the defense.

² Official Record, Tribunal Records, volume 5, pages 156-158.

Dr. Fritz Wecker, Defense Counsel [Ministries case]
Dr. Walter Siemers, Defense Counsel [Farben and Krupp cases]
Mr. Howard H. Russell, Secretary General
Lt. Col. Herbert N. Holsten, Executive Secretary General
Maj. Robert G. Schaefer, Chief, Defense Center

1. *Defense Counsel Travel*

Judge Shake read a statement from Dr. von Metzler [counsel for Gajewski and Haefliger in the Farben case] regarding the return to Berlin by air of two terminating indigenous secretaries to defense counsel. A general discussion followed concerning the approval of travel requests to and from Berlin for defense counsel and their assistants. Miss Moore and Col. Maroun explained that there was a lack of funds at present to cover air travel. However, it is anticipated that funds will be available some time after 4 July 1948, and that individuals who perform travel before this date may be reimbursed later.

Defense counsel Dr. Wecker requested information as to why certain requests for travel orders presented during the period between the closing of the case and the reading of the judgment were denied. He explained that counsel wished to return documents, arrange their financial affairs, and/or look after their private practices.

Lt. Gallagher said that travel orders are issued in the interest of Military Government and not for personal convenience. He further stated that most of the requests denied so far were for an unreasonable amount of time, namely, 20 to 30 days. At Judge Shake's request, Lt. Gallagher explained that travel orders authorized transportation at government expense, rations at government expense, and the payment of the individual while traveling. Col. Maroun added that any legitimate request to examine documents, to get evidences for possible clemency pleas, etc., would be granted. The presiding judges agreed that trips should be of reasonable length and properly justified. Dr. Russell said that all facilities necessary to assure a fair trial for the defendants would be made available. However, the United States Government could not be expected to finance travel for the personal convenience of the defense counsel. All reasonable, justified requests for facilities necessary to assure a fair trial will be approved.

* * * * *

[Signed] HOWARD H. RUSSELL
Secretary General

8. FARBEN CASE—DEFENSE MOTION TO STRIKE ALL AFFIDAVITS AND TESTIMONY OF PROSECUTION WITNESSES OBTAINED AS A RESULT OF TRAVEL OUTSIDE GERMANY BY MEMBERS OF THE PROSECUTION STAFF, PROSECUTION ANSWER, AND TRIBUNAL ORDER DENYING THE DEFENSE MOTION

a. Defense Motion, 11 May 1948¹

Nuernberg, 11 May 1948

To: Military Tribunal
Case 6

Since the presentation of evidence by the defense will be finished in the next few days the undersigned defense counsel, while referring to the difficulties the defense had to face in procuring evidence, in particular testimony of witnesses from abroad, deem it imperative to move that the Tribunal strike all affidavits and testimony of such prosecution witnesses as the prosecution secured *during the trips abroad of its members.*

To substantiate this motion, the defense respectfully refers to the following viewpoints:

As already pointed out in the course of its production of evidence (compare, among other things, motion by Dr. Boettcher, 4 Dec. 1947),² the defense did not have the possibility to the same extent as the prosecution to make trips abroad in order to procure evidence and, in particular, to locate witnesses and interrogate them. On the contrary, the prosecution had all the means and possibilities to make an unlimited number of trips abroad and to submit the results of such trips during its presentation of evidence. The inequality of the possibilities for the prosecution on the one hand and the defense on the other, seriously endangers the finding of the full truth about the events which constitute the basis for this trial. In the practice of the continental legal proceedings, the Tribunal has responsibility for the procurement of all evidence which is necessary to find the truth. According to the American procedure, which is at variance with this continental system, the responsibility for the procurement of the evidence is rested exclusively on both the parties in the trial, i.e., the prosecution on the one hand and the defense on the other. In view of this procedure, however, it is quite natural that the finding of the truth can be guaranteed only if the prosecution on the one hand and the defense on the other are given the same chances to locate

¹ U.S. vs. Carl Krauch, *et al.*, Case 6, Official Record, volume 51, pages 2616-2618.

² Not reproduced herein.

the required evidence, such as names and addresses of witnesses living abroad. Owing to the fact that the defense and the prosecution were in an utterly unequal position with regard to the trips abroad during the several months of preparation and conduct of this trial, the defense is forced in order to restore balance in the chances of both the parties to make the above request.

[Signed]

[Illegible signature] DR. HELLMUTH DIX
DR. HANS FLAECHSNER
DR. WALTER SIEMERS
DR. ERICH BERNDT
KARL BORNEMANN
DR. SEIDL

b. Answer of the Prosecution, 13 May 1948¹

ANSWER TO A MOTION TO STRIKE CERTAIN AFFIDAVITS AND TESTIMONY FROM EVIDENCE

TO: The Secretary General, Military Tribunals (Room 281)

1. Answer is made to a motion signed by defense counsel Bornemann, Berndt, H. Dix, Flaechsner, Seidl, and Siemers, dated 11 May 1948, requesting "that the Tribunal strike all affidavits and testimony of such prosecution witnesses as the prosecution secured *during the trips abroad of its members.*" The motion states that "the defense did not have the possibility *to the same extent* (our emphasis) as the prosecution to make trips abroad in order to procure evidence," etc. The motion, quite properly, does not make any effort to weigh the relative advantages of: (1) the activities abroad of such associates of the defense as Dr. Vinassa, a Swiss citizen who has formally been acting as counsel for the defendant Haefliger, and has engaged in defense work in foreign countries, including the United States; (2) the ability of the defense to reach and obtain a sympathetic hearing from such informed Germans as Ernst Rudolf Fischer and Dr. Julius Weeber, both who now assert an address in Switzerland;² (3) the ready "cooperation" of many persons who are not directly associated with Farben but involved collaterally to a greater or less degree with some of the transactions coming to light in the case.

2. In any litigation there are always certain advantages, inherent in the situation, which accrue to one of the parties or the

¹ U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 51, pages 2614 and 2615.

² Fischer and Weeber were Germans who fled to Switzerland after the end of the war.

other. If relative advantages in procuring certain types of evidence were a basis for deciding upon the admission or exclusion of a particular type of evidence, the prosecution might well make motions along the following lines: (1) that something like 2,000 defense affidavits be stricken from evidence on the ground that three score officially approved defense counsel or defense assistants (not to mention "unofficial" assistants) have had a completely one-sided advantage in obtaining affidavits from Germans sympathetic to the defense for a number of obvious reasons; (2) that most affidavits presented by the defense should be stricken from the record on the ground that the prosecution did not have anything like the same opportunity for cross-examination with respect to more than 2,000 defense affidavits which the defense had with respect to the approximately 250 affidavits offered by the prosecution; * (3) that after a certain stage of the case affidavit evidence should be stricken except as to specially relevant and non-cumulative matters, where the defense can show that contemporaneous documents were destroyed or not available to them, etc.

3. Although the prosecution thinks it unimportant to invest any of its time to make a comparative count of affidavits obtained from persons abroad by defense counsel and affidavits obtained abroad upon the initiative of the prosecution, perhaps the defense counsel making this motion would like to undertake this task in order to indicate for posterity just what the relative count is. It is our prediction, but we are not sure, that the defense will find they have offered more affidavits from persons abroad than the prosecution has. If it should develop that the defense has submitted the greater number of such affidavits, the prosecution will not move to strike the difference.

4. WHEREFORE, it is respectfully requested that this motion be denied.

By: [Signed] D. A. SPRECHER
Chief, Farben Trial Team

Nuernberg, 13 May 1948

For: TELFORD TAYLOR
Brig. Gen. U.S.A.
Chief of Counsel

*In this connection see section XVIII J 7.

c. Tribunal Order, 21 May 1948¹

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
21 MAY 1948

United States of America
vs.
Carl Krauch, *et al.*,
Defendants } CASE 6

ORDER

The joint motion filed by defense counsel Dr. Hellmuth Dix, Dr. Hans Flaechsner, Dr. Walter Siemers, Dr. Erich Berndt, Dr. Karl Bornemann, and Dr. Seidl, on 11 May 1948, to strike from the evidence all prosecution affidavits obtained during trips abroad by members of the prosecution staff is overruled by the Tribunal.

[Signed]
CURTIS G. SHAKE
Presiding Judge
JAMES MORRIS
Judge
PAUL M. HEBERT
Judge
CLARENCE F. MERRELL
Alternate Judge

Dated this 21st day of May 1948.

9. FARBEN CASE—DEVELOPMENTS CONCERNING DEFENSE INTERROGATION OF PROSPECTIVE WITNESSES WHO WERE NOT IN CUSTODY

a. Application for Summons of Defense Witness before Trial and Related Matters

(1) *Defense Application for Summons of Hermann Schwab, 19 June 1947*²

Military Tribunals [Stamp] Filed: 20 June 1947
Nuernberg, Germany

United States of America
against
Carl Krauch, *et al.*

¹ U.S. *vs. Carl Krauch, et al.*, Case 6, Official Record, volume 51, page 2613.

² *Ibid.*, volume 46, page 269.

Defendant's Application for Summons of Witness

To: The Secretary General, Military Tribunals:

I, Dr. Walter Siemers attorney for Georg von Schnitzler
(Name of defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:

Hermann Schwab

Occupation and last known location:

Merchant Frankfurt a.M., Vogelstr. 11

Other information that may aid in locating the person named:

Due to the fact that I am in touch with the witness I kindly request you to abstain from taking any steps as to locating or summoning the witness.*

The person above-named has knowledge of the following facts:

Acquisition of the Polish dye plant "Boruta"

Acquisition of shares of the Polish factory "Winnica"

Trusteeship administration of the Polish dye plant "Wola"

These facts are relevant to the defense for the following reasons:

The importance results from the indictment.

19 June 1947

(Date)

Signed: DR. SIEMERS

Signature of Defendant's Counsel

Decision of Tribunal

This witness is not in custody and his whereabouts is stated.

He can be produced as a voluntary defense witness when needed, without assistance from the Tribunal. Application denied.

8 July 1947

[Signed] ROBERT M. TOMS
Executive Presiding Judge

Prosecution and Defense notified, 16 July 1947.

*A number of similar applications were filed by other defense counsel in the Farben case at this same period of time.

(2) *Answer of the Prosecution, 23 June 1947, Attaching Letter from Defense Counsel to Mr. Schwab dated 27 May 1947 **

**ANSWER TO THE DEFENDANT VON SCHNITZLER'S
APPLICATION FOR SUMMONS OF WITNESS**

TO: The Secretary General, Military Tribunals (Room 281)

1. Answer is made to the application of Dr. Walter Siemers, attorney for the defendant Georg von Schnitzler, dated 19 June 1947, that Hermann Schwab be summoned by the Tribunal "to give evidence on the defendant's behalf," and stating further that "due to the fact that I am in touch with the witness I kindly request you to abstain from taking any steps as to locating or summoning the witness."

2. The prosecution objects to this application on the ground that it is premature, contradictory upon its face, and based upon a mistaken conception of the rights and privileges of both prosecution and defense to have access to persons who can give relevant information.

3. At this time it clearly cannot be determined whether or not such evidence will be cumulative or even relevant and in any event Dr. Schwab could not appear as an actual witness for the defense for several months. In the meantime the prosecution may wish to call Herr Schwab as a prosecution witness. Moreover, the application is contradictory upon its face, on the one hand being an application for summons and on the other hand requesting that no summons be made.

4. The defendant's application clearly arises from some mistaken notion as to a technical means of limiting the circumstances under which the prosecution may proceed for the purposes of getting information before trial. Attached is a letter from the defendant's defense attorney, Dr. Siemers to Herr Schwab, dated 27 May 1947, in which the real purpose of the defendant's attorney appears. In this letter, Dr. Siemers notifies Herr Schwab that he is required as a witness for the defense, that therefore Dr. Schwab is in a position to inform the prosecution that he is not in a position to talk to representatives of the prosecution without permission of the defense counsel, and requesting that Herr Schwab inform the defense attorney Siemers as soon as the prosecution approaches him.

5. If the prosecution were to take a similar position with respect to voluntary witnesses, this would lead to a contest between the prosecution and the defense in attempting to be the first to apply for "summons" of dozens of witnesses. The prosecution does not

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 46, pages 270 and 271.

intend to become involved in any such contest which could only serve to prevent a proper investigation by both the prosecution and the defense and to cover up the full truth from being disclosed.

6. This answer is in no way intended to indicate any objection to defense counsel now interrogating Herr Schwab either in Nuernberg or elsewhere, provided that (a) it is understood that any interrogation of this person by the defense is not construed as any limitation upon the prosecution's access to this person, or to the prosecution's calling this person as witness, or to the prosecution's introducing affidavits made by him during the case in chief; and (b) this answer is not construed to prejudice any right of the prosecution to object at a later and more seasonable time to the relevancy of a defense request for summoning Herr Schwab as witness during the defense case.

By: [Signed] D. A. SPRECHER
Chief, Farben Trial Team
For: TELFORD TAYLOR
Brig. Gen. U.S.A.
Chief of Counsel

Nuernberg, 23 June 1947

Enclosure to the Answer of the Prosecution¹

[Translation]

Dr. Walter Siemers

Defense counsel before the Military Court, Nuernberg

Nuernberg, 27 May 1947

Peyerstr. 44

Dear Mr. Schwab:

As defense counsel for Herr von Schnitzler in the I. G. Farben trial — to wit, the trial *vs.* Krauch, et al., — I take the liberty to inform you that I need you as witness concerning several questions and especially concerning the taking over of the Polish dye plants.² I inform you of this today to make it possible for you to inform the prosecution that you have been chosen by the defense. In case the prosecution should approach you, may I ask you to show this letter to the respective representative of the prosecution and to explain with reference to this letter that you are in no position to talk to the prosecution without the consent of the defense counsel. This procedure complies with the Anglo-Saxon procedural law [Prozessrecht], which is competent for the trial before the Military Court.

¹ *Ibid.*, page 273.

² See paragraphs 97 through 100 of the indictment, reproduced in section I, volume VII, this series.

In addition may I ask you to inform me if the prosecution should approach you.

With supreme esteem,
I remain your much devoted,
[Signed] DR. SIEMERS

b. Memorandum from the Prosecution to the Defense Center, 3 July 1947, concerning the Prosecution's View on Examination of Prospective Witnesses by Defense Counsel, and related Matters¹

OFFICE OF CHIEF OF COUNSEL FOR WAR CRIMES
APO 696A

3 July 1947

Subject: I. G. Farben — Furnishing of Documents and Interrogation of Witnesses

To: Mr. L. Wartena, Defense Administrator

1. I understand that during the past few weeks defense counsel in the I. G. Farben case have raised a number of questions with respect to obtaining documents and interrogating witnesses for the preparation of their defense.² It is the desire of the prosecution that defense counsel be furnished every reasonable facility to enable them to adequately prepare their defense. The following represents the views of the prosecution with respect to making available to defense counsel relevant documents and facilitating examination of prospective witnesses by defense counsel.

2. *Documents.* At the outset it should be made perfectly clear that under the rules of procedure which have been adopted for the trial of cases before the Military Tribunals, the defendants are not entitled, as a matter of right, to be furnished in advance of the trial with the prosecution's documentary evidence. Despite this fact and despite the further fact that the I. G. Farben indictment is more than sufficiently detailed to apprise the defendants of the nature and particulars of the charges against them, the prosecution shall nevertheless furnish positive assistance to defense counsel to enable them to adequately prepare their defense. The prosecution has already made specific documents requested by the defense counsel available to them, and will continue to furnish specific documents requested by defense counsel unless there are good and substantial security or other reasons for not doing so.

The prosecution also is prepared to furnish defense counsel,

¹ U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 47, pages 439 and 440.

² The indictment in the Farben case, reproduced in section I, volume VII, this series, was dated 3 May 1947, and by this time defense counsel had been active in defense preparations for some time. Tribunal VI was not assigned to the trial of the Farben case until 12 August 1947 and the arraignment did not take place until 14 August 1947.

beginning at once, with mimeographed German copies of documents which it is expected may be used in the trial. At this time these documents will have no special order or sequence other than that they are set forth in a numerical identification which conforms to the filing system in use here. Under separate cover we are sending you today approximately fifty documents and consistent with physical facilities we shall periodically furnish you with additional documents so that before the trial begins a substantial number of documents which will be used in the trial will have been submitted to defense counsel for examination.

In addition, as soon as document books are ready and the documents are arranged in the order in which it is expected that they will be presented by the prosecution at the trial, we shall furnish copies of such document books to defense counsel. It is hoped that in practically all cases these document books will be furnished defense counsel well in advance of the requirements of the 48-hour rule embodied in the rules of procedure.*

3. *Prospective witnesses.* Defense counsel is, of course, entirely free to interview voluntary witnesses whether or not the prosecution has already interrogated such witnesses, and may request that any such witnesses be brought to Nuernberg for interrogation here. This does not, however, mean that any such prospective witness thereby becomes a defense witness in the sense that the prosecution may not interrogate or continue interrogating such person. By the same token the mere fact that the prosecution has interrogated a person does not mean that such person thereby becomes exclusively a prosecution witness.

Any information obtained by the prosecution as to the location of a witness who may be desired by the defense will be placed at the disposition of the Defense Information Center upon request.

4. The procedure outlined above is submitted in the belief that it is in the interest of all parties that all relevant facts be fully disclosed and that defense counsel be given every reasonable facility for the preparation of their defense.

5. It might be added that the difficulties of obtaining relevant documents originating during the Nazi era is not an easy task for either the prosecution or the defense. In the case of the files of I. G. Farben, many have been lost or destroyed—in some cases upon the specific orders of some of the defendants.

FOR THE CHIEF OF COUNSEL FOR WAR CRIMES:

[Signed] JOSIAH E. DuBOIS, JR.

Deputy Chief of Counsel

*Actually the Uniform Rules of Procedure required that copies of prosecution exhibits be filed with the Defense Center 24 hours in advance of the offer of such exhibits in evidence. See Rule 17, Uniform Rules of Procedure, reproduced in section V.

L. Production of Documents for the Defense

I. INTRODUCTION

The matter of the production of documents for the defense in the Nuernberg trials is closely related to the fate of documents of the Nazi era both before and after the Allied occupation of Germany. Before Germany surrendered many documents were destroyed or concealed with the intent of preventing their discovery by the Allies. Moreover, considerable documentation of importance had been destroyed by the military operations preceding Germany's collapse. Notwithstanding this destruction a very considerable amount of contemporaneous documentation of the Third Reich survived, fell into Allied hands, and, in part, found its way into the records of the Nuernberg trials. The proof adduced by the prosecution in each of the cases was mainly of documentary nature. As the IMT stated in its judgment: "Much of the evidence presented to the Tribunal on behalf of the prosecution was documentary evidence, captured by the Allied armies in German army headquarters, government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls, and in other places thought to be secure from discovery." (Trial of the Major War Criminals, *op cit.* vol I, p. 173.) The defense, too, introduced large numbers of contemporaneous documents, although the defense cases were predominantly built upon the oral evidence of defendants and defense witnesses, or upon affidavits offered as defense exhibits.

The production of contemporaneous documents for the defense cannot be separated from the manner in which Allied authorities processed captured German documents and from the fact that military security disallowed unlimited access to captured documents by German nationals. The manner in which Allied specialists seized, analyzed, registered, and safeguarded captured documents thought to be of strategic, tactical, and historical importance is partly described in the materials reproduced in section VII D, "Captured German Documents—Discovery, Registration, Reproduction of Copies, Safekeeping." Summarized briefly, captured documents which were thought to be of some present or future interest by the analysts were collected in document centers, and as time passed a number of these document centers were consolidated. One of the most important collection centers was the Berlin Document Center under the joint administration of the American and British authorities in Berlin. Some parts of the surviving documentation eventually were removed from

Germany and deposited in the archives of various Allied agencies which were particularly interested in them, as for example, the U. S. Army in Washington, D. C. The Palace of Justice in Nuernberg itself became a collection center of considerable size and importance. Many Allied agencies forwarded original or certified copies of original documents to Nuernberg because they were considered of probative value in the trials. Investigators of the prosecution, moreover, were dispatched to the document centers and other points to discover relevant documentation and arrange for its transmittal to Nuernberg in original or duplicate form. Moreover, the entire IMT archive or duplicate copies of the documents therein were maintained in Nuernberg throughout the course of the trials, as were the official records of the later trials.

The general manner in which the IMT handled the production of evidence for the defense, both as to witnesses and documents, was the subject of the order of the IMT on 23 February 1946 concerning the presentation of the defense case and the ensuing discussion of the President of the IMT with defense counsel. The transcript of this order and discussion has been reproduced in subsection J 3. The IMT required the defendants to make written applications for documents, indicating where they might be found, what facts were sought to be established by the documents, and the relevance of such facts to the defense case. When an application for a document was granted, the IMT, through its Secretary General, attempted to procure the document or copies thereof from whatever sources might be in possession thereof.

The IMT practice was followed basically during the later trials with respect to the production of much of the defense evidence, although there were modifications as the defense became less reliant upon the tribunals. As some of the materials reproduced below will illustrate, the dependence of the defense upon the tribunals decreased as representatives of the defense were able to travel more freely and as arrangements could be made for greater direct access by the defense to document collections.

Quite apart from defense applications to the tribunals for the production of documents, the prosecution made large numbers of documents available to the defense in each of the trials before the commencement of the trial and special rooms were established in the Palace of Justice where the defense could have access to various collections of documents. In some cases it was possible to make arrangements for defense counsel to have access to important documentary collections even before a tribunal was assigned to the trial of a case. The general practice of the prosecution in delivering large numbers of relevant documents to the defense in advance of trial was stated by Brigadier General

Taylor, for example, at the arraignment in the Medical case (see pp. 21 and 22, vol. I, this series). The matter was discussed further in the Medical case during the informal session between the members of the Tribunal and counsel on a defense motion for a postponement of trial. (See transcript of this session, sec. XIV E 2 b.) Before a tribunal was assigned to the trial of the Farben case, the Defense Center made arrangements for defense counsel to examine the large collection of documents of the I. G. Farben concern under the control of the I. G. Farben Control Office. Two memorandums of the Defense Administrator concerning these arrangements are reproduced in subsection 2 a. Beyond this the prosecution began turning over copies of large numbers of relevant documents to the Defense Center more than a month before the arraignment in the Farben case took place. (See memorandum from the prosecution to the Defense Center, 3 July 1947, subsection K 9 b.) After the Farben trial was under way the Tribunal directed that arrangements be made for the defendant ter Meer to accompany his defense counsel to Frankfurt to examine the Farben documents there. The Tribunal order is reproduced in subsection 2 b. Arrangements were likewise made for a prospective defense witness who was in custody to examine these files.

In the Flick case many documents of the Flick concern had been brought from Berlin and other places to Nuernberg at the initiative of the prosecution. During the early part of the trial these documents were placed in a special room and made available to the defense. A still larger quantity of Flick documents were available to Berlin, where they had been under the custody of one of the defense counsel prior to his approval as assistant defense counsel in the Flick case. A discussion between the Tribunal and defense counsel in open court on this matter is reproduced in subsection 3 a. In the Flick case the defense later applied in writing for certain documents of the Reich Association Coal, asserting in its application that these files were "In the possession of the prosecution." In its answer, the prosecution stated that such of these documents as were in its possession would be made available to the defense in the same room in which files of the Flick concern had been made available. The answer further gave information as to where additional files on the Reich Association Coal might be found by the Secretary General of the Tribunal. The defense application, which contains the Tribunal's ruling on its face, and the answer of the prosecution to the defense motion are reproduced in subsection 3 b. Where substantial quantities of files of such agencies as the Reich Association Coal, the Hermann Goering Works, and the Dresdner Bank were brought to Nuernberg by the

prosecution, similar arrangements to those made in the Flick case were made for the "screening" of these documents by representatives of the defense staff in several of the later trials.

During the 12 trials following the IMT case defense applications for documents were ordinarily made upon a form called "Defendant's Application for Document." These forms contained entries for identifying the document and for indicating the last known location of the document, and any information which might be helpful in locating the document. These forms also contained entries under which the applicant was required to state the facts sought to be proved by the document and the relevance of these facts to the defense case. The nature of these application forms can be seen from the application on behalf of defendant Milch for a Hitler order which had been introduced as a defense exhibit in the IMT case. This application, together with the Tribunal approved thereof, is reproduced in 4 below. There were only four written applications for documents by the defense in the Milch case; each was for a specifically described document, and each was granted. Approved applications for specific documents in the various court archives in Nuernberg or in the files of the prosecution were easily handled, the Defense Center merely obtaining for the defense a certified copy (usually a photostat) which could later be introduced as a defense exhibit.

In the Hostage case, a special problem arose because a considerable amount of captured German records of various components of the German armed forces had been transferred to the files of the War Department in Washington, D. C. The prosecution introduced in evidence certified or photostatic copies of a number of these documents or of pertinent extracts thereof. The defense urged that it was not able to adequately prepare the defense case by particular requests for specific documents and moved that two defense representatives be authorized to proceed to the Pentagon in Washington, D. C., to work on the files stored there so the defense could be fully advised of the nature of the documentary material from which the prosecution evidence had been taken. In ruling upon the defense motion the Tribunal discussed both the motion and the prosecution answer thereto, and then directed "that the war diaries, documents, and instruments from which documentary evidence has been taken and offered in evidence by the prosecution be made available to the defendants (a) by permitting an examination of such documents by designated representatives of the defendants in Washington, D. C., or (b) by transporting such documents to Nuernberg for examination by the defense, or (c) for failure of the United States to do so, it will be presumed that the evidence withheld which could have been pro-

duced or made available to the defendants, would be unfavorable to the prosecution." Pursuant to this order a large quantity of captured documents was shipped by air to Nuernberg for defense examination. The defense motion, the prosecution's answer, and the Tribunal's order are reproduced in 5 below. Statements from the judgment in the High Command case which treat with a similar problem are reproduced in 6 below. Many of the captured documents sent from Washington to Nuernberg for defense examination in the High Command case had not been seen by members of the staff of the prosecution, and the Tribunal granted a prosecution motion that the prosecution likewise be permitted to examine these files.

In the Ministries case the Tribunal granted a defense motion, with certain limitations, authorizing defense representatives to screen files of the German Foreign Office under the joint control of British and American authorities in the Berlin Document Center. The Tribunal's order is reproduced in 7 a below. The United States State Department thereafter laid down certain conditions concerning the use of the German Foreign Office files in the Berlin Document Center (7 b below). The defense thereafter selected Dr. von Schmieden, whom the defense described in a subsequent motion as "one of the most experienced experts of the former German Foreign Office," to inspect these files on their behalf. A report by Dr. von Schmieden on the status of these files is reproduced in 7 c below.

In a number of the trials the defense made efforts to obtain general access to all documents in the possession of the prosecution, whether they were originals or certified copies thereof, which originated with offices or agencies with which the defendants had formerly been connected. The ruling of the Tribunals upon such general applications varied. In the Pohl case the only defense application for the production of documents which the Tribunal denied was a general defense application for access to all files in the possession of the prosecution originating with Division W of the SS Administrative and Economic Office, an office in which the defendants had all been officials. The defense application, the prosecution's answer, and the Tribunal's order denying the defense motion are reproduced in 8 a below. In the Ministries case, on the other hand, the Tribunal granted a defense application for the production of documents in the possession of the prosecution originating from agencies whose files (or the remaining parts thereof) were stored in the Berlin Document Center, even though the prosecution itself only had certified true copies of such documents as its representatives had discovered in the Berlin Document Center, and even though defense representatives had

been granted the privilege of examining the collection of files from which the prosecution had obtained its true copies. The defense application for general access to the prosecution's documents, the prosecution's answer, and the Tribunal's order are reproduced in 8 b below. More than 6 months after the Tribunal's order in the Ministries case, two defense counsel, during the closing arguments, made statements amounting to a charge that the prosecution had not complied with the Tribunal's order. An extract from the discussion which arose with the Tribunal when the second charge was made is reproduced in 8 c below. Shortly after the order in the Ministries case concerning the production of documents in the prosecution's files, the Tribunal in the Farben case granted a similar general defense application. The order of the Tribunal in the Farben case, however, was subject to the provision that the prosecution could withhold temporarily such documents as it in good faith intended to use in cross-examination provided it later made such documents available to the defense if it did not produce them during cross-examination. The defense motion, the prosecution answer, and the Tribunal ruling in the Farben case are reproduced in 8 d below. From the beginning the prosecution freely admitted that it had possession of documents or copies thereof which its representatives had discovered and which it proposed to retain for purposes of exposing perjury during the cross-examination of defendants and defense witnesses, subject always to the principle of making any document available which the defense specifically requested by written application pursuant to Rule 12 of the Uniform Rules of Procedure (subsec. J 4).

The defense also sought access to affidavits and the transcripts of interrogations in the possession of the prosecution. The prosecution generally opposed such applications as a matter of principle, although in practice it voluntarily turned over many affidavits made by defendants and the transcripts of many interrogations of defendants. The prosecution, in opposing such defense applications, argued that the documents sought were not contemporaneous documents, that the defense was free to interrogate the defendant or witness, and that the documents were part of the confidential files of the prosecution. The prosecution particularly urged that the premature disclosure to the defense of its affidavits and interrogation transcripts would limit the prosecution in dealing with the credibility of defendants and defense witnesses upon cross-examination. The controversy arising over applications of this type are illustrated herein by materials taken from the record of the Medical, Flick and Ministries cases. In the Medical case the defendant Brack applied for the production of

the transcripts of certain interrogations of him which had been made by a representative of the prosecution before Brack's indictment. These interrogations had formed the basis for the draft of an affidavit which was submitted to Brack and which Brack signed and executed after making alterations in the draft. Subsequently the prosecution introduced the affidavit in evidence. The Tribunal first granted the defense application, and then vacated its motion without prejudice to the defendant Brack's renewing the motion after he took the witness stand in his own defense. The defense application, the prosecution's answer thereto, the original Tribunal ruling, the prosecution's memorandum asking reconsideration of the ruling, and the final ruling of the Tribunal are reproduced in 9 a below. The defendant Brack upon testifying later, did not renew his application, although he did testify concerning the circumstances under which he was interrogated and under which he executed the affidavit in question. Defense applications for affidavits in the hands of the prosecution were made less frequently. In the Flick case the defense applied for the affidavit of one Heinrichsbauer, a German national who was readily available for interrogation. The Tribunal denied this application. The defense application, the prosecution's answer, and the Tribunal's ruling are reproduced in 9 b below.

In the Ministries case a defense motion requested "leave and authority to examine all interrogations made by the prosecution of former officials, members, agents, and employees of the German Foreign Office, and to use all, or such interrogations as counsel for the defense shall select in order to prepare their defenses and as evidence in this case." The prosecution, in its answer to this motion, cited rulings in several of the other cases. The Tribunal denied the defense application. The motion, answer, and ruling are reproduced in 9 c below.

2. FARBEN CASE—MAKING DOCUMENTS AVAILABLE TO THE DEFENSE BEFORE TRIAL AND AUTHORIZATION FOR A DEFENDANT TO EXAMINE DOCUMENTS IN THE I. G. FARBEN CONTROL OFFICE AT FRANKFURT, GERMANY DURING TRIAL

- a. Memorandums from the Administrator of the Defense Center to the Chief, I.G. Farben Control Office, and to the Defense Counsel in the Farben Case, 20 June 1947, concerning Examination of Farben Documents in Frankfurt, Germany by Defense Counsel

20 June 1947

Subject: Examination by Defense Counsel of Documents or Records of the I. G. Farben Company, Frankfurt

To: Colonel Richardson Bronson, I. G. Farben Control Office, OMGUS, APO 757, U. S. Army (Frankfurt)

1. Confirming our telephone conversation of 20 June 1947, the Defense Administrator has informed defense counsel that they will be allowed to look at documents or records in your possession provided they produce a letter of introduction addressed to you.*

2. Enclosed is memorandum to defense counsel outlining the conditions upon which they may look at documents or records, and to secure them for evidence.

3. The enclosed memorandum also states on what conditions they may interview prospective witnesses and secure witnesses to appear in Nuernberg.

L. WARTENA
Defense Administrator

Encl.

Ltr. dated 20 June 1947
addressed to Defense Counsel.

20 June 1947

Subject: Permission to look at Documents or Records of the I. G. Farben Company, Frankfurt

To: Defense Counsel, Farben Case

1. Defense counsel who wish to examine documents or records of the I. G. Farben Company, Frankfurt, must apply for clearance with the Defense Administrator.

2. The Defense Administrator will give a letter identifying defense counsel and introducing him to Colonel Richardson Bronson.

3. On the strength of that letter, Colonel Bronson will permit the defense attorney to look at the documents or records.

4. Employees of the plant may be interviewed as prospective witnesses without a letter from the Defense Administrator.

5. Defense counsel must know that persons interviewed in this manner do not automatically become defense witnesses but may be interviewed also by any member of the prosecution staff.

6. When defense counsel wish to bring one of the employees as a witness to Nuernberg, he must make application through the court as usual.

*Similar arrangements were made with the British and French control offices for Farben plants in the British and French zones of occupation.

7. When defense counsel wish to produce a document or record as evidence in court, application must be made in the regular manner.

L. WARTENA
Defense Administrator

b. Order of the Tribunal in the Farben Case, 29 October 1947, Approving Visit of the Defendant ter Meer and His Counsel to the Farben Offices in Frankfurt¹

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY, 29 OCTOBER 1947

United States of America

vs.

Carl Krauch, *et al.*,

Defendants

} CASE 6

ORDER

On considering the recent verbal request of defense counsel Dr. Erich Berndt, representing defendant Fritz ter Meer, that said defendant and his counsel be permitted to make a visit to the Farben offices at Frankfurt, at a time when the Court is not in session, for the purpose of making an examination of pertinent document material located there,

IT IS ORDERED that such proposed visit will have the approval of the Tribunal, provided satisfactory arrangements can be made with the military and prison authorities.²

[Signed] CURTIS G. SHAKE
Presiding

Dated this 29th day of October 1947.

[Handwritten] Subject of this order discussed in open court 31 October 1947.

[Signed] JOHN L. STONE
Asst. Sec'y. Gen.
Tribunal VI

¹ U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 47, page 828.

² The defendant ter Meer proceeded to Frankfurt, Germany, with his defense counsel without guard. An amusing incident arose when the defendant and his counsel returned from the Frankfurt trip late at night. The guard at main entrance to the Palace of Justice had not been informed of the defendant's leave and, according to ter Meer's counsel, was quite surprised when the defendant ter Meer, in very good English, told the guard that he was seeking readmittance to the prison which adjoined the courthouse.

On 15 March 1948, the Tribunal also made an order concerning a defense witness which stated as follows: "On considering the application of Dr. Werner Schubert, counsel for the defendant Ernst Buergin, for permission for defense witness Julius Franz who was approved [as a witness] for the defendant Buergin by the Tribunal on 24 January 1948, and who is under automatic arrest due to his formal membership in the SS, be granted a 5-days' leave for the purpose of examining documents in Griesheim, it is ordered that said application be approved, subject to decision of military authorities respecting security." Arrangements were made for Franz to examine the documents in question. Franz did not appear as a witness but three affidavits which he executed were introduced as defense exhibits.

3. FLICK CASE—MAKING DOCUMENTS AVAILABLE FOR DEFENSE EXAMINATION DURING TRIAL

a. Discussion between the Tribunal and Counsel Concerning Defense Access to Available Files of the Flick Concern

EXTRACTS FROM THE TRANSCRIPT OF THE FLICK CASE,
16 MAY 1947¹

MR. LYON (chief, Flick trial team): With respect to the statements which have been made in regard to witnesses, I would prefer to turn over to Mr. Ervin [deputy chief counsel for the prosecution] who is more familiar with the count one phase of the case.² I might say, however, first with respect to the statement that all the documents and evidence have been out of the hands of the defense for a year and a half, that the great bulk of these documents to which we have made reference have been located in the office of the Anhaltische Kohlenwerke in Berlin. They reposed there continuously after the close of the war until about four months ago. They were there under the custody of Dr. Streese who is assistant defense counsel,³ and who, I believe, was appointed custodian of these documents or trustee by the British authorities. I do not know of anything that prevented him from looking at the documents.

[At this point a further discussion concerning prospective defense witnesses transpired.]

DR. NATH (counsel for defendant Kaletsch): Mr. President, may I point out the following? Mr. Lyon mentioned just now that documents only left Berlin about four or five months ago. I think that there is some mistake here. On the 8th of December 1945, my client was arrested, and even before that, saw that between the 4th and 8th of December all documents in Berlin were transferred either by the prosecution or their representatives, so that they were not available. In addition, at that time no defense counsel had been appointed. Then the defense itself only obtained knowledge of these documents here in Nuernberg. I think perhaps Mr. Lyon made some mistake about the time when the documents were taken away.

¹ Extracts from mimeographed transcript, Case 5, U.S. vs. Friedrich Flick, *et al.*, pages 1731, 1732, 1736, and 1737.

² The defense had made charges that two prospective witnesses of the defense had been arrested upon the initiative of the prosecution.

³ Dr. Streese was approved as assistant defense attorney to the defendant Friedrich Flick on 10 April 1947. Streese, prior to the German collapse, had been an attorney of the Flick concern in Berlin. One of the documents signed by him which was introduced in evidence in the Flick case (Document NI-3337. Prosecution Exhibit 469), is reproduced in section VI-B, volume VI, this series.

PRESIDING JUDGE SEARS: These documents, for the most part, have been given, or at any rate shown to the defense, have they not?

MR. LYON: Yes, Your Honor. I think I mentioned the other day with respect, for example, to the Petschek documents, that they were encompassed in about 12 to 14 bundles, and they have been put in a room upstairs which is available to defense counsel. With respect to the matter just mentioned by defense counsel, I think I can say this: The bulk of the documents of the Flick concern in Berlin were kept at the offices of the Anhaltische Kohlenwerke, as I stated before. I understand that a portion of these, which we found to have been a very small fraction, were taken from Berlin by the Decartelization Branch of OMGUS and taken to Frankfurt. The vast bulk of the documents, however, which has been relied upon by the prosecution and introduced into evidence, remained in Berlin at the offices of Anhaltische Kohlenwerke, and they remained there continuously, I believe, until November of 1946—I may be mistaken by a few weeks there. At that time they were moved from those offices in the British sector of Berlin to offices of investigators and research analysts employed by the Office of Chief of Counsel in Berlin; they were moved to offices of the Office of Chief of Counsel in the American Sector of Berlin and there they repose at the present time. What I said previous—

PRESIDING JUDGE SEARS: Well, are they open to inspection?

MR. LYON: They can be made open to inspection at any time the defense would like to see them, the same as the documents that happen to be in Nuernberg. So far there has been no request by the defense. It is true, nevertheless, that up until nearly the end of 1946 these documents to which I refer did remain in the offices of Anhaltische Kohlenwerke in Lietzenburgerstrasse in Berlin, and I am informed reliably that they were there under the custody of Dr. Streese.

b. Defense Application for Records of the Reich Association
Coal, Prosecution Answer Thereto, and Tribunal Order

(1) *Defense Application, 11 June 1947, Together with
Tribunal Order of 30 June 1947 **

Military Tribunals

[Stamp] Filed: 16 June 1947

Nuernberg, Germany

United States of America

against

Friedrich Flick, *et al.*

*Case 5, U.S. vs. Friedrich Flick, *et al.*, Official Record, volume 33, page 323.

Defendant's Application for Document

To: The Secretary General, Military Tribunals:

I, Dr. Walter Siemers attorney for Bernhard Weiss
(Name of defendant)

hereby request that the Tribunal require the production of the following document to be used for the defense:

Identification of document:

Presidential transcripts of the Reich Association Coal (RVK) respectively, orders of the day of the RVK.

Last known location of document and information that may aid in its location:

In possession of the prosecution.

The document requested herein will be used to prove the following facts:

To refute the prosecution's assertion that the RVK [Reich Association Coal] committed crimes.

These facts are relevant to the defense for the following reasons:

See above

11 June 1947

(Date)

Signed: DR. SIEMERS

Signature of Defendant's Counsel

Decision of Tribunal

[Handwritten] June 30, 1947 Granted, subject to Sec'y. Gen. being able to procure documents.

[Signed] CHARLES B. SEARS
Presiding Judge

Prosecution and defense notified, 3 July 47.

(2) *Answer of the Prosecution, 18 June 1947**

18 June 1947

To: The Secretary General, Military Tribunals

1. The attached application is a request for document pertaining to the Reich Association Coal (RVK). It is filed by Dr. Siemers, attorney for the defendant Weiss.

*Ibid., pages 321 and 322.

2. At the concluding session of the case in chief, the prosecution pointed out that no charge of criminal responsibility is made against defendant Weiss with respect to the activities of the Reich Association Coal (RVK). However, the prosecution does not oppose the application on this ground, since it understands that a division of work has been agreed upon between defense counsel, and since an application of this type by Dr. Dix [counsel for the defendant Flick] could not be opposed by the prosecution.

3. Complete records of the Reich Association Coal (RVK) are not in the possession of the prosecution. Specifically, the prosecution does not have minutes of all the meetings of the Praesidium. To the best of our information additional files of the Reich Association Coal (RVK) may be in Ludwigslust, Mecklenburg. It is suggested that the Secretary General get in touch with the authorities at this address if the defense counsel so desire.

4. As to those documents concerning the Reich Association Coal (RVK) which are in the possession of the prosecution, they will be made available to defense counsel in Room 343 in accord with the usual practice which has been adopted in this proceeding.¹ It may not be possible to permit access to all of these files at one time since they are being screened by analysts for use in other cases now in preparation.

By: [Signed] THOMAS E. ERVIN
Deputy Chief of Counsel
For: TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

4. MILCH CASE—DEFENDANT'S APPLICATION FOR DOCUMENT AND TRIBUNAL APPROVAL THEREOF²

Military Tribunals [Stamp] Filed: 21 January 1947
Nuernberg, Germany [Signed] L. WARTENA
Military Tribunal II Administrative Officer
United States of America Office of Secretary General
against
Erhard Milch

Defendant's Application for Document

To: The Secretary General, Military Tribunals:

I, Dr. Friedrich Bergold attorney for Erhard Milch,
(Name of defendant)

¹ See discussion of counsel with the Tribunal, reproduced in section XIII L 3 a.

² U.S. vs. Erhard Milch, Case 2, Official Record, volume 8, page 71.

hereby request that the Tribunal require the production of the following document to be used for the defense:

Identification of document:

Hitler's order of 21 April 1944 to Speer.

Last known location of document and information that may aid in its location:

Speer Exhibit 34.

Documents of IMT, Palace of Justice.

The document requested herein will be used to prove the following facts:

That exclusively Himmler and Dorsch are responsible for the employment of Jews for the construction of underground factories.

These facts are relevant to the defense for the following reasons:

That Milch neither demanded nor ordered the employment of Hungarian Jews, nor is he responsible for this.

16 January 1947

(Date)

Signed: DR. BERGOLD

Signature of Defendant's Counsel

Decision of Tribunal

Application granted

22 January 1947

(Date)

[Signed] ROBERT M. TOMS
Presiding Judge

[Handwritten] Prosecution notified, 22 January 1947

5. HOSTAGE CASE—SHIPMENT OF CAPTURED GERMAN DOCUMENTS FROM FILES OF THE U.S. WAR DEPARTMENT IN WASHINGTON, D.C. TO NUERNBERG FOR DEFENSE EXAMINATION

- a. Defense Motion that Two Representatives of the Defense Be Authorized to Travel to Washington, D. C., To Inspect Documents, 25 July 1947 *

Nuernberg, 25 July 1947

To: Military Tribunal V

*U.S. vs. Wilhelm List, et al., Case 7, Official Record, volume 30, pages 279 and 280.

c/o The Secretary General
Nuernberg

Subject: Trip of two Defense Counsel to the Document Center of
the War Department, Washington

Defense counsel kindly request a trip to Washington be approved for two representatives to work for a short time in the Document Center of the War Department (War Crimes Branch, Civil Affairs Division, The Pentagon, Washington, D. C.).*

Justification

The entire documentary material which is essential for the trial is stored in the Pentagon Building in Washington.

Contrary to the prosecution, the defense has had no occasion so far to examine said documentary material or even study it thoroughly. The prosecution submitted a selection from all available documents which was naturally done partially under the special point of view of incriminating the defendants. Only those documents which incriminate the defendants came to the knowledge of the Tribunal till now. In the war diaries of the offices, the former holders of which are now indicted, and in the whole correspondence of Departments Ia and Ic of same offices, numerous reports and references are contained which, when considering the situation of that time, could prove the issuance of orders which now constitute criminal charges for the defendants as necessary or explain their origin. Moreover, further exonerating material, not known to defense counsel as to its contents nor its nature, will be found when examining these documents thoroughly. It is absolutely necessary the appropriate documents that are decisive for the issue of the proceedings be introduced into the trial and the defense should therefore be given occasion to study thoroughly the material mentioned, for the purpose of exonerating the defendants. Moreover, it is the task of the defense and its duty to do everything to facilitate or enable the Tribunal to discover the truth. The whole truth, however, cannot be found if only the incriminating material taken from documentary material, which at the same time contains evidence for the prosecution and the defense as well, is brought by the prosecution to the knowledge of the Tribunal, and if securing of evidence for the defense is made impossible. The defense should at least be in a position to accomplish its difficult task approximately under the same conditions as the prosecution that has been able by surely very

*As stated in the prosecution's answer to this motion, the documents referred to were in the files of the Military Intelligence Division and not the Civil Affairs Division of the War Department.

thorough and long-lasting work, while using a lot of auxiliary personnel, to elaborate on the whole material for their purposes. In this respect, the defense should also be given a chance. The presiding judge of the Tribunal assured the defense as well as the defendants in the opening session of 15 July 1947 (Tr., German, p. 19) that the Tribunal's decision will be made only, "after defense counsel and the defendants themselves have had an adequate and fair opportunity to submit all counterevidence that may refute the evidence introduced by the prosecution."

To give the defense this fair opportunity by approving this motion, is the request of the defense.

After approval of the request, the two members of the defense that will make the trip will be named.

Approximately 14 days will be required for the work to be done in the Document Center in Washington.

[Signed]

DR. HANS LATERNER	Counsel for List and v. Weichs
GERHARD RAUSCHENBACH	Counsel for Foertsch
DR. STEFAN FRITSCH	Counsel for Rendulic
acting for DR. MENZEL	Counsel for Kuntze
HEINZ MUELLER-TORGOW	Counsel for Felmy
DR. EDMUND TIPP	Counsel for von Leyser
acting for FROESE	Counsel for Dehner
Geitner for DR. SAUTER	Counsel for Lanz and v. Geitner

b. Prosecution Answer to the Defense Motion, 5 August 1947*

MEMORANDUM IN OPPOSITION TO THE APPLICATION BY DEFENSE COUNSEL FOR APPROVAL OF A TRIP TO THE DOCUMENT CENTER, WAR DEPARTMENT, WASHINGTON, D. C.

I

The motion papers submitted by defense counsel do not specify what information they seek or for what purpose that information would be used.

The reasons assigned for the proposed trip by representatives of defense counsel to the Document Center in Washington are so vague that it is impossible to determine the general nature of the evidence which defense counsel expect to have developed as a result of the proposed two weeks' search. Parenthetically, it must be stated that the Document Center of the War Department is part of the Military Intelligence Division of the War Department,

*U.S. vs. Wilhelm List, et al., Case 7, Official Record, volume 30, pages 276-278.

Washington, and is not, as defense counsel have stated in their motion papers, part of the Civil Affairs Division of the War Department.

Defense counsel have stated in their application:

"In the war diaries of the offices, the former holders of which are now indicted, and in the whole correspondence of Departments Ia and Ic of same offices, numerous reports and references are contained which, when considering the situation of that time, could prove the issuance of orders which now constitute criminal charges for the defendants as necessary or explain their origin. Moreover, further exonerating material, not known to defense counsel as to its contents nor to its nature, will be found when examining these documents thoroughly. It is absolutely necessary the appropriate documents that are decisive for the issue of the proceedings be introduced into the trial and the defense should therefore be given occasion to study thoroughly the material mentioned, for the purpose of exonerating the defendants."

The only references which contain a degree of particularity in the above are "war diaries," "correspondence of Departments Ia and Ic," "numerous reports and references," and "further exonerating material." From these general statements it is impossible to determine what defense counsel are seeking, or to determine to what use they would put the material that they might find.

It is, of course, essential that the defendants be given every opportunity to meet the charges in the indictment. The basic purpose of these trials would be thwarted if such opportunity were not given. But it is quite apparent from reading the motion submitted by defense counsel that they have been unable to state coherently any substantial reason for the proposed trip to Washington. The defendants themselves know quite well what sort of reports, orders, and other documents were issued by their several headquarters; if any adequate reason for further screening of these documents existed, they would have been able to state it.

II

Throughout the preparation for trial of this case it has been constantly emphasized to members of the prosecution's research staff in Washington that photostatic copies of all documents having any substantial bearing on the case, whether helpful or harmful to the defense, must be sent to Nuernberg. It was in Nuernberg that the documents were screened, evaluated, and translated. Throughout the presentation of the case in chief the prosecution has endeavored to present a full and accurate picture of what happened, and much material has been translated and

placed in the document books in order that the Tribunal might have the most objective presentation of the facts of the case which the prosecution is able to marshal.

It is submitted that the statement made by defense counsel in the application that "Only those documents which incriminate the defendants came to the knowledge of the Tribunal till now," is not in accordance with the facts.

Some 600 documents will be submitted by the prosecution. Further, the sections of the documents which have been read into the record do not comprise one tenth of the documents themselves which have been handed to defense counsel. In addition, the prosecution has made available to defense counsel a further 100-odd documents which it has had forwarded from the Document Center, Washington. As of this time, defense counsel has access to every document which the prosecution has in its possession other than those which have been withheld for cross-examination. From a volume standpoint, defense counsel has eight to ten times more material than has been offered in evidence.

The prosecution has translated all the material which has been received which was relevant to the case from the standpoint of the defense or the prosecution. It is submitted there will be no substantial dispute about the facts in this case when the prosecution has completed the submission of documents to the Tribunal.

III

For the reasons stated above, it is respectfully submitted that the Motion of defense counsel be denied.

For: TELFORD TAYLOR,
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

CLARK DENNEY
[Signed] THEODORE F. FENSTERMACHER
WALTER H. RAPP

Nuernberg, Germany, 5 August 1947.

c. Tribunal Order on the Defense Motion, 14 August 1947*

MILITARY TRIBUNAL V CASE 7

United States of America }
 against }
Wilhelm List, *et al.* }

*Ibid., pages 266 and 267.

*Order in re to the Application by Defense Counsel
for Approval of a Trip to Document Center,
War Department, Washington, D. C.*

The Tribunal has had under consideration the application of the defendants for permission to send two commissioners to Washington, D. C., for the purpose of examining original documents stored there from which excerpts and parts of documents have been offered in evidence in support of the allegations of the indictment by the prosecution.

We find that the statement of the defense is true to the effect that certain excerpts and parts of documents taken from the captured war diaries of the German Army have been tendered and received in evidence by the prosecution. We find also that the war diaries, or so much thereof as was captured by the American Army, have been transported to Washington, D. C., or its environs. We find also, as alleged by the prosecution, that a large number of documents in excess of those received in evidence have been made available to the defense.

It is the considered opinion of this Tribunal, however, that a right exists on the part of the defense to examine any or all of the portions of the war diaries and documents from which excerpts and portions of documents bearing upon the same subject matter have been taken, more particularly described as the war diaries of the 12th Army and the Army Southeast, Army Group F, Army Group E, 2d Panzer Army, and corps and divisions subordinate thereto; and that such right of examination is not adequately protected by the assertion of the prosecution that "it has been constantly emphasized to members of the prosecution's research staff in Washington that photostatic copies of all documents having a substantial bearing on the case, whether helpful or harmful to the defense, must be sent to Nuernberg."

The statement constitutes an insufficient answer to the application for two reasons: (a) the defense is not obliged to rely upon the judgment of the prosecution and its research staff as to whether any document or portion thereof has any substantial bearing on the case, and (b), that it would be impossible for the prosecution and its research staff to properly appraise the credibility and relevancy of such material without knowledge of the precise defense to be made to the charges of the indictment.

It is the order of the Tribunal, therefore, that the war diaries, documents and instruments from which documentary evidence has been taken and offered in evidence by the prosecution be made available to the defendants (a) by permitting an examination of such documents by designated representatives of the defendants

in Washington, D. C., or (b) by transporting such documents to Nuernberg for examination by the defense, or (c) for failure of the United States to so do, it will be presumed that the evidence withheld which could have been produced or made available to the defendants, would be unfavorable to the prosecution.¹

[Signed]

CHARLES F. WENNERSTRUM
EDWARD F. CARTER
GEORGE J. BURKE

Tribunal V

Dated: 14 August 1947

6. HIGH COMMAND CASE—STATEMENT FROM THE JUDGMENT OF THE TRIBUNAL CONCERNING THE PRODUCTION OF DOCUMENTS FOR THE DEFENSE AND THE DEFENSE UTILIZATION THEREOF²

PRESIDING JUDGE YOUNG: A huge mass of evidence has been submitted in behalf of the prosecution and defense. The trial was conducted in two languages—English and German—and all documents submitted were duly translated and given counsel. The defense was also furnished with photostat copies of the original captured documents.

The prosecution's case, including those introduced on cross-examination and rebuttal, was made in part by the introduction of 1,778 documents, the vast majority of which were taken from German records and documents captured by the Allied Armies. The defendants complained that the context of many of these documents was necessary to their proper understanding and evaluation and that other documents would tend to explain or refute any inference of criminality that might be drawn from the documents relied upon by the prosecution. The defendants requested that they be supplied with additional material for their defense specified by them in their application. To this end the Tribunal ordered the Secretary General to procure such thereof as it was possible to procure, and as a result of this order there were procured from Washington 1,503 document folders which filled 37 footlockers. These the defense counsel and the defendants were permitted to examine and they have used such thereof as they deemed necessary in the presentation of their

¹ Following this order, exchanges of telegraphic correspondence between Nuernberg and Washington, D. C., developed with greater particularity which of the available files the defense desired, and in September 1947 the pertinent documents were shipped by air to Nuernberg for examination and use of the defense.

² The full text of the judgment is reproduced on pages 462–697, volume XI, this series.

case either as new evidence or to supplement and explain the documents introduced by the prosecution.

The material used for such purpose by the defendants was taken from 259 different document folders and comprised 2,058 pages which were photostated and used as exhibits in the case. Such material was received at different times. The first shipment from Washington was received on 10 April, and the last on 27 May 1948. The case was not closed for the taking of testimony until 6 August 1948. In addition the defense counsel and the defendants were allowed access to all of the captured records and documents not yet sent over to the United States and still stored in the Court Archives in Nuernberg for the purpose of using such portions thereof as they might deem material. The defendants introduced a total of 2,130 documents and affidavits as exhibits in the presentation of their defense. The transcript of the record contains 10,000 pages.

7. MINISTRIES CASE—ORDER OF THE TRIBUNAL GRANTING DEFENSE REPRESENTATIVES AUTHORITY TO EXAMINE DOCUMENTS IN THE BERLIN DOCUMENT CENTER SUBJECT TO THE REGULATIONS OF THAT AGENCY, AND RELATED MATTERS

a. Order of the Tribunal, 2 February 1948 *

MILITARY TRIBUNALS TRIBUNAL IV, CASE 11

United States of America
 against
Ernst von Weizsaecker, *et al.*)

ORDER

On 14 January 1948, a motion was made in behalf of defendant Weizsaecker, praying that permission and authority be granted to the representatives of said defendant's defense staff to examine documents of the German Foreign Office, collected at FO/SD Document Unit in Berlin-Lichterfeld, McNair Barracks, Building E, and to obtain copies of documents deemed relevant by defendant's counsel for use as evidence in this proceeding. In this motion, defendants Woermann, Erdmannsdorff, Ritter, Steen-gracht, and Bohle joined. Subsequently defendant Bohle filed another motion, requesting that he be allowed to also examine the documents of the former NSDAP, specifically those relating to

*U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 70, pages 803-805.

the Auslands Organization of the afore-mentioned party. To these motions the prosecution filed an answer, and subsequently the defendants filed replies to such answer.*

Having considered the motions and the grounds given in support thereof and the arguments presented in the prosecution's answer thereto,

IT IS HEREBY ORDERED THAT SAID MOTIONS BE AND THE SAME ARE HEREBY GRANTED, subject, however, to such regulations and restrictions with respect to examinations and search as have hereinbefore or may hereafter be imposed by the agency or authority having responsibility for the custody and safekeeping of the archives and records sought to be examined.

Memorandum here attached is made a part of this order.

Nuernberg, Germany, 2 February 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Military Tribunal IV

MEMORANDUM

The motions here made are somewhat unusual, in that the defendants do not profess to have knowledge as to any definite documents or records sought to be examined. It is almost incomprehensible that the defendants seeking to search archives and records which, for the most part, seem to have emanated in departments in which the defendants were once active, now assert that they are unable to give any information as to either the *nature* or *type* of document which they seek and wish to examine. In view of the earnest contention of the defendants that they think there are in such document center some documents which may be valuable in their defense, the Tribunal grants the requests made in these motions, indefinite though the basis and arguments therefor are.

It is not reasonable or practicable, however, to grant the foregoing motions unqualifiedly. The documents, which defendants here indicate an intention to seek, are located and in the custody of an independent Anglo-American agency, the joint British Foreign Office and United States Department Archives Unit in Berlin. The Tribunal is advised that such search therein as has to date been made by the prosecution was made through application to such agency, and such search was granted, subject to strict

*The motions, answer, and replies, appear in the Official Record, *ibid.*, pages 806-818.

regulations and limitations.¹ It does not appear that greater freedom or latitude can be expected on behalf of the defendants, nor is it reasonable to relax the specific rules covering the production of such documentary evidence, namely Rule 12 of the Uniform Rules of Procedure for Military Tribunals, revised to 3 June 1947. Therefore, it will be necessary for the defense, if it wishes to actually procure documents from the documentary center mentioned, to submit a list of such documents as it believes are essential to its defense, whether ascertained as a result of the examination or without the examination sought in these motions, together with such identifying characteristics as nature, location, and purposes for which sought to be used, and otherwise complying with such requirements of the above-mentioned Rule 12 as may be necessary.

With respect to certain documents already in evidence, and which were objected to on the grounds of incompleteness, it is asserted in the prosecution's answer to the above motions that the prosecution will furnish to defense counsel complete copies of such documents. It is assumed that the defense, therefore, will, if it desires such documents, make request of the prosecution for same, and that, if available, such complete documents will be furnished. As to such documents, therefore, it should not be necessary for the defendants to make application through the Tribunal.

b. Conditions concerning the Use by Defense Representatives of German Foreign Offices Files in the Berlin Document Center

Conditions laid down by the State Department in Washington for the use of the files of the German Foreign Office by a representative of the defense²

Defense counsel may be permitted free access to volume of documents requested. These dox are to be read under supervision. Those dox involving vital security shall be withheld. Copies of examined dox should be made to defense providing they will be used solely as evidence and *not* used in any way if not received in evidence by Tribunal.

¹ The conditions set down by the United States State Department for the use of the German Foreign Office files by the defense are reproduced immediately below.

² U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, vol. 71, page 1367. These conditions were contained as appendix I of a later defense motion which requested, among other things, that the defense be given access to all the files of the German Foreign Office in the possession of the prosecution. The prosecution, which had only certified copies of a number of these documents, was directed by the Tribunal to make these copies available to the defense. (See order in 8 b below.)

c. Memorandum of Dr. von Schmieden, Defense Representative,
on the Archives of the German Foreign Office Kept at the
Berlin Document Center*

Nuernberg, 19 March 1948

*Memorandum on the Archives of the Foreign Office
Kept at Berlin Document Unit*

The Archives of the German Foreign Office taken over by the Americans and British are administered by a joint Anglo-American office called "Document Unit." The archives are housed in a wing of the former Telefunken Building in Berlin-Lichterfelde-Sued.

According to the information of the American office chief, Dr. Collins, their amount is estimated to be some 100,000 lbs.

Apart from small remains from the old period, the following files are existing from the years of [the] National Socialist regime:

1. Personal files of a number of leading officials, such as:
Reich Foreign Minister: Bureau Ribbentrop, both incomplete
(1937-1942)

State Secretary in the Foreign Office (1936-1943)

State Secretary and Chief AO

Under Secretary of State and Chief, Political Division (from about 1936)

Ambassador Ritter

State Secretary Keppler

Under Secretary of State Luther

A box of comprehensive memoranda by Interpreter Schmidt about conversations between Hitler and foreign statesmen. Some personal files are completely missing.

2. Besides this, the Files of Department Deutschland, later called Inland I and II; Political Division (Pol IM and Pol Ig), as well as the Sections Pol I to XV, appear to be almost complete.

Large files of the Economic Division, Legal Division, Cultural Division, as well as the salary files of the Personnel Division, are there.

Of the personnel files, only the collections made after the burning have been found.

3. The archives are being kept according to the original Foreign Office plan; new indices which, in general correspond to the original setup, give their general contents. There are no indices for the single file volume.

**Ibid.*, pages 1368 and 1369. This report was contained in appendix II of the later defense motion for access to all files of the German Foreign Office in the possession of the prosecution. (See Tribunal order, 8 b below.)

A superficial survey showed that several volumes are missing in various groups of personal files, as well as division files; these appear either to have been destroyed at an earlier date, or lost in the course of transfer.

4. A staff of German employees, under Anglo-American technical supervision, work on these archives. At present the files are being used by a number of Allied historians who compile special publications from them. The archives are also being examined by analysts of the Nuernberg prosecution.

[Signed] WERNER VON SCHMIEDEN

8. POHL, MINISTRIES AND FARBEN CASES—DEFENSE APPLICATIONS FOR PRODUCTION OF ALL DOCUMENTS IN THE POSSESSION OF THE PROSECUTION WHICH ORIGINATED FROM OR INVOLVED PARTICULAR OFFICES AND AGENCIES

a. Pohl Case—Denial of Defense Motions to Study all Records of Division W of the SS Economic and Administrative Office in the Possession of the Prosecution

(1) *Defense Motion, 29 April 1947**

Dr. Hans Gawlik
Defense counsel for defendants
Dr. Hans Bobermin, and Dr. Leo Volk

Nuernberg, 29 April 1947

Subject: Records and files of the Wirtschaftsverwaltungshauptamt

To: Office of the Secretary General, Military Tribunal IV,
Nuernberg

I hereby request that I be permitted to study all the records and all the files of Stab W des Wirtschaftsverwaltungshauptamt [Division W of the SS Economic and Administrative Main Office], which are in the possession of the prosecution.

It is necessary to study the above-cited records and files for the purpose of preparing the defense for the defendants Dr. Hans Bobermin and Dr. Leo Volk.

Yours respectfully,
[Signed] DR. HANS GAWLIK

*U.S. vs. Oswald Pohl, et al., Case 4, Official Record, volume 25, page 923.

(2) *Prosecution Answer, 1 May 1947**

MEMO TO: The Secretary General (Room 545)

FROM: J. M. McHaney

SUBJECT: Request of Dr. Hans Gawlik, 29 April 1947, Case 4,
Tribunal II

1. Dr. Gawlik, defense counsel for Bobermin and Volk in United States against Oswald Pohl, *et al.*, has requested, in the above application, that he be permitted access to all records and files of Staff W of the WVHA, which are in the possession of the prosecution. This memorandum is filed in opposition to that request.

2. What Dr. Gawlik requests, in effect, is a free hand to study the files of the prosecution. If such request is in order for Dr. Gawlik, it is also in order for all defendants before all military tribunals. This would mean that the prosecution would either have to go out of business itself while defense counsel are fishing through its files, or, on the other hand, it would be necessary for the prosecution to furnish a duplicate set of files to the Defense Information Center. Either of these steps is, of course, impossible.

3. Aside from the practical objections to defense counsel's request, it is also quite unheard of that a defendant has a right of access to the private files of the prosecution. The prosecution has submitted in evidence such documents as it deems pertinent to the case against the defendants who were members of Staff W. Defense counsel has no right of access to documents which were not put in evidence and which are held by the prosecution. Defense counsel has every right to request the Secretary General to produce a specific document and, if possible, the facilities of the prosecution are at the disposal of the Secretary General in processing such requests, but it is quite clear that such a right doesn't extend to permitting defense counsel to engage in a fishing expedition through the files of the prosecution.

4. It should be noted that a request, similar to that of Dr. Gawlik, was made of the International Military Tribunal, and denied. The prosecution submits that the request should also be denied in this instance.

[Signed] J. M. MCHANNEY
Director—SS Division

*Ibid., page 922.

(3) *Order of the Tribunal, 23 June 1947*¹

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY AT A SESSION OF MILITARY TRIBUNAL II
HELD 23 JUNE 1947, IN CHAMBERS

[Stamp] Filed: 3 July 1947

United States of America
vs.
Oswald Pohl, *et al.*,
Defendants } CASE 4

ORDER

On considering the petition of counsel for defendants Bobermin and Volk for leave to study all the records and files of Staff W of WVHA which are in possession of the prosecution, together with the objections of the prosecution to the granting of said petition,

IT IS ORDERED that said objections be sustained and said petition denied.

[Signed] ROBERT M. TOMS
Presiding Judge

b. Ministries Case—Tribunal Order, 29 March 1948, Directing the Prosecution to Make Available to the Defense Its Copies of Documents from the Berlin Document Center

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

United States of America
against
Ernst von Weizsaecker, *et al.* } [Stamp] Filed: 29 March 1948

ORDER²

Under date of 22 March 1948, defendants von Weizsaecker, von Steengracht, Keppler, Woermann, Ritter, Erdmannsdorff and Veesenmeyer filed a motion praying:

1. That an order be entered requiring the prosecution, on completion of its case in chief, to turn over to counsel for said defendants all documents, letters, memoranda, papers, and other material taken from the files of the Foreign Office by the prosecution and now located in the Document Center in the Palace of Justice at Nuernberg.

2. That a 6-months' recess be granted to defendants for the preparation of their defense.

3. That in the event the request for 6-months' recess be not

¹ *Ibid.*, page 921.

² U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case^o11, Official Record, volume 71, pages 1341-1343.

granted, a severance be entered and separate trial ordered, insofar as the Foreign Office defendants are concerned.

The prosecution filed an answer in opposition to said motion, and some objection was also voiced by other defendants against the granting of the motion for severance and separate trial for Foreign Office defendants.¹

The court having considered the arguments in support of said motion and those advanced in opposition thereto, IT IS ORDERED:

1. That all photostats and other copies of documents or records (taken or reproduced from documents or records in the Document Center in Berlin), and which photostats and copies thus taken are now in the Document Center in the Palace of Justice at Nuernberg, be made available immediately for inspection and study by defendants' counsel.²

2. It is further ordered that defendants' request for a 6-months' recess in which to prepare their defense, be and the same is hereby denied, and that, in lieu thereof, a recess from 27 March 1948 to 3 May 1948 at 9:30 a.m. be and hereby is granted.

3. It is further ordered that defendants' request for severance and separate trial of Foreign Office defendants be and the same is hereby denied.

Memorandum hereto attached is made a part of this order.

Nuernberg, Germany
29 March 1948

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

MEMORANDUM

1. The Tribunal is informed that photostats and other copies of all such documents and records in the Document Center in Berlin, as were procured for the prosecution, are now in the Document Center in the Palace of Justice at Nuernberg. It is the purpose and intent of this order that those chargeable with the care and custody of such photostats and copies at Nuernberg make such photostats and other copies available at once for inspection and study by defendants' counsel.

This order does not, however, contemplate the removal of such photostats or copies from the Document Center. It is assumed

¹ The initial defense motion, the prosecution's answer thereto, and two defense motions closely related to the initial defense motion are reproduced in section XIV H, since the greater part of the defense motions deal with the request for a recess of six months or more and hence fit better into the latter section (XIV) on expedition of trial and similar matters.

² Pursuant to a prior tribunal order defense representatives had already been given access to the original files in the Berlin Document Center. (See sec. XIII L 7 a.)

that whenever the defendants, as a result of inspection and study, desire that certain documents be produced for the purpose of their defense, they will make immediate request for same, with proper identification, pursuant to the rules for production of documents, as provided in the Uniform Rules of Procedure for Military Tribunals now in force.

2. The Tribunal considers that under all circumstances here prevailing, the period of recess granted is reasonable.

3. With respect to the request for severance and separate trial for the Foreign Office defendants, it is the opinion of the Tribunal that such request, if granted, might result in prejudice to some defendants, by reason of the pronounced change in the chronological order of proof desired in connection therewith, and it would be further detrimental to the expeditious conduct of the trial. The Court is presently issuing a separate directive pertaining to the order and presentation of the defendants' case.

[Initialed] W. C. C.

c. Ministries Case—Extract from the Closing Statement on Behalf of Defendant Lammers, 16 November 1948, concerning the Prosecution's Compliance with the Tribunal Order for the Production of Copies of Documents from the Berlin Document Center, and Related Matters

EXTRACT FROM THE TRANSCRIPT IN THE MINISTRIES CASE,
16 NOVEMBER 1948*

DR. SEIDL (counsel for defendant Lammers) : We also deny that the manner in which the prosecution presents its documents is suitable for the establishment of the basis for finding the truth and reaching a truly just verdict. It has been stated frequently and must be repeated again: the prosecution does not submit its documents in order to establish the actual facts and the historical truth, but makes its selection of the documents purely from the point of view of their suitability to point an accusing finger against the defendants.

Such a procedure would be unthinkable in a German trial. According to German law, the prosecutor is not only in duty bound to submit incriminating material, but he has also to find the facts which might lead to exoneration and to furnish such evidence material, the loss of which might be feared. The prosecution objected to the use of this principle already in the trial before the

*Extract from mimeographed transcript, Case 11, U.S. vs. Ernst von Weizsaecker, *et al.*, pages 27798-27802.

International Military Tribunal and without exception has refused during the following trials to act in accordance with this principle. It is clear that the finding of the truth, and thus the finding of a just judgment, is bound to be rendered impossible if the missing documents, the documents needed for exoneration, are not made available to the defense.

As a result of the hearing of the evidence we are bound to state: In the case of the defendant Lammers the defense has not left one stone unturned to find the missing documents in order to submit the document material in its entirety to the Tribunal. The defense was in this respect motivated by the fact that nothing would make it more impossible to find the truth and render a just verdict than the submission of incomplete document material wherein the historical events are not shown in successive order and the establishment of the original connections of the events is made impossible. The attempts made by the defense in this respect were unsuccessful. The defense had neither the possibility to study the documents of the Reich Chancellery and of the various Reich Ministries in the Document Center in Berlin, nor did the defense get the opportunity as yet to study in particular the most important documents which have not been made use of by the prosecution and which are located here in Nuernberg.

JUDGE MAGUIRE, PRESIDING: Now, Dr. Seidl, the Tribunal has no desire to interfere with the argument of counsel, but at the request of the defendants the Tribunal made orders that all documents here in Nuernberg should be opened to the inspection of the defendants. So far neither you nor any other counsel, with the exception of Dr. Froeschmann, has suggested that the prosecution didn't carry out that order. If you were not satisfied before the evidence was completed that the prosecution had permitted that, or that you had not had access to them, you should have taken it up with the Tribunal then.

We do not look with favor upon the statement at this time, particularly when it is not based upon the facts. No document, to which our attention has been called, has not been made available to the defense, and any failure on the part of the prosecution to have complied with the Court's order would have brought them up here for contempt. And to make the suggestion now that they didn't do that is hardly proper.

Now, the Tribunal has gone at all lengths in this case, far beyond those which ought to be permitted in any ordinary tribunal, to permit the defense and to enable the defense to get all the information and all the evidence that they felt might be relevant for their case. And I want to simply note for the record that this

statement you have made is not based upon the facts and is not justified by what has happened.

You may proceed.

DR. SEIDL: Mr. President, we fully recognize that Your Honors have done everything in your power to assist the defense in introducing their evidence in their cases in chief. However, I, on my part, tried to turn into real practice the ruling that your Tribunal issued, and at least I tried to get hold of those documents which formerly were held by the prosecution here in Nuernberg, documents which the prosecution stated that they wouldn't need any longer for themselves.

I, myself, personally applied to the responsible man in the Document Center, Your Honors, in order to induce him to make these documents available to us for our perusal. However, we were told that, in view of the filing system as it stands in this building, this couldn't be done unless we specified specific documents indicating their file reference; that is to say, we were obliged to say we needed document, for example, NG-3260 or document, let us say, 1720-PS. Of course, it wasn't possible for us to do that, Your Honors, and what we actually wanted to achieve and what Your Honors must have had in mind—and in which the Court tried to help us—but it wasn't possible to accomplish this because of difficulties that were beyond our control.

JUDGE MAGUIRE PRESIDING: Any difficulty as you now describe it was your duty to have brought to the Tribunal and you would have had immediate relief, and what I have said before on behalf of the Tribunal still stands. This thing of waiting for months before saying you did not have the opportunity is not justified by the facts, because you could have come to the Tribunal at any time and we would have taken any action necessary to get you any documents that were available for your defense. Further than that, as the record probably should show, all documents with their proper description either by number or by classification which were in the Document Center at Berlin were at your disposal.

You may proceed.

DR. SEIDL: As far as it was possible, the defense has tried to furnish exonerating evidence by means of hearing of witnesses. But evidence given by witnesses is characterized by the fact that the statements of the respective witnesses, in view of the time elapsed between the events and the hearing of their evidence, cannot be adequate enough to replace the exonerating documentary proof, which could be furnished if the allegedly incriminating but, mostly incomplete, documents could be countered by the exonerating and supplementary documents. One cannot, in

justice, expect these witnesses, without having examined the complete document material, to recall after five and more years all incidents in detail, which are the subject of the prosecution documents and, in part, are of a very complicated nature*.

d. Farben Case—Defense Application for Documents in Prosecution Files Originating from Farben Plants, Prosecution Answer, and Tribunal Order Granting Defense Motions with Limitations

(1) *Defense Motion, 5 April 1948*²

[Stamp] Filed: 7 April 1948

Motion of undersigned defense counsel for making available of all documents which the Prosecution still has and which have bearing upon the person and activity of the defendants represented by it.

On behalf of the defendants Krauch, Schmitz, Gajewski, Ambros, Haefliger, Oster, Wurster, von der Heyde, Kugler, Schneider, von Knieriem, Ilgner, Hoerlein, ter Meer, Mann, Duerrfeld, Lautenschlaeger, Jaehne, von Schnitzler, Kuehne and Buetefisch, we request the High Tribunal to rule:

The prosecution has until 20 April 1948 to enable us, counsel representing the above defendants, to examine all documents, papers, letters, notes, and other material in its possession and which originate from the files, archives, card registries, and other storing places of the former firm I.G. Farbenindustrie A.G., and from all other official or private archives or card registries, etc.

Substantiation: To substantiate our motion, reference is made to the application of counsel for the defendant Dr. Ernst Buergin, attorney Dr. Werner Schubert, dated 2 April 1948³ Reference is further made to the ruling of the Tribunal in Case 11 (U.S. *vs.* Ernst von Weizsaecker, *et al.*) by which this Tribunal directed the prosecution without delay to make available to the defense all documents of the German Foreign Office which it had in its possession.⁴

¹ Because of the charges concerning the production of documents made by Dr. Seidl and another defense counsel in the defense closing statements, the prosecution devoted the first part of its rebuttal closing statement to this question. The prosecution's rebuttal statement is reproduced in section XIII J, volume XIV, this series.

² U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 50, pp. 1802 and 1803.

³ This defense application was for documents originating from files of the Bitterfeld and Wolfen plants of the I.G. Farben concern, both plants located in the Soviet Zone of Occupation of Germany. In answer to this motion the prosecution stated that it possessed only true copies of certain documents obtained by its investigators and that, without any waiver of its rights, the prosecution would make available to the defense "our copies of documents originating from the Bitterfeld and Wolfen plants."

⁴ Reproduced in section XIII L 8 b.

Nuernberg, 5 April 1948

[Here follows the signatures of 18 defense counsel for the 21 defendants.]

(2) *Prosecution Answer, 15 April 1948**

ANSWER TO A "BLANKET" APPLICATION ON BEHALF OF
THE DEFENSE FOR COPIES OF DOCUMENTS IN THE
RESEARCH FILES OF THE PROSECUTION

To: The Secretary General, Military Tribunals (Room 281)

1. Answer is made to the motion of defense counsel filed 7 April 1948 (translation received on 12 Apr.), requesting that the Tribunal set 20 April as a date by which the prosecution should make available for examination by defense counsel "all documents, papers, letter, notes, and other material in its possession and which originate from the files, archives, card registries and other storing places of the former firm I.G. Farben-industries A.G., and all other official or private archives or card registries, etc"

2. This motion refers to a motion by Dr. Schubert for the defendant Buergin dated 2 April 1948 requesting the Tribunal to direct the prosecution to make certain documents originating in the Bitterfeld and Wolfen plants available to the defendant Buergin. In its answer of 12 April to that motion, the prosecution voluntarily made arrangements whereby Dr. Schubert has access to the copies of the limited number of documents originating from the Bitterfeld and Wolfen plants (in the Soviet Zone of Occupation) which are in our possession.

3. The prosecution opposes the motion of defense counsel of 7 April 1948 in its entirety. The motion can best be described as a "fishing expedition" operation. To grant a "blanket" application of this type would (1) lead to a reversal of long established precedents; (2) set aside practices as approved and applied since the IMT, which are well founded on good policy; (3) undermine the entire theory of privileged files of adverse parties; and (4) cause unnecessary burdens to the prosecution at a late stage in this case.

4. The general situation with respect to the availability of and accessibility to documents originating from Farben files and archives has been the subject of both formal and informal discussions in this case from the time the indictment was issued. The types of documents which the prosecution considered incriminating (or which might be considered as incriminating) was indicated to the defense by delivering hundreds of documents to the

*U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 50, pages 1796-1801.

Defense Center well in advance of the trial.¹ At the headquarters of the major Farben Works Combines at Leverkusen, Frankfurt-Hoecht, and Ludwigshafen (in the British, American, and French Zones of Occupation, respectively) and elsewhere, members of the defense staff (and German personnel, friendly to the defense) have been working officially for nearly a year on the preparation of the defense in this case. The Tribunal will recall that some early problems with respect to security regulations (which the defense then claimed restrained their full exploitation of the files in Frankfurt-Hoecht) were solved after conferences among representatives of the Secretary General, the Defense Information Center, and the American Control Officers in Frankfurt. This was more than seven or eight months ago. At Leverkusen (British Zone) it has even been reported to us that the German personnel in charge of the files informed the defense of all documents which had been reproduced at the request of investigators from Nuernberg. The Tribunal only recently became more familiar with the cooperation the defense received from German personnel (as well as the authorities) who have access to the files at Ludwigshafen. We know of no substantial complaints (even informal) since the original developments at Frankfurt many months ago. In our view there can be no question but that the defense has had ample opportunity to discover any documents helpful to the defense in the Farben files in these centers. With respect to the more stringent regulations applicable in the Soviet Zone, this has been discussed informally by both sides before the Tribunal. In this connection no specific applications for particular documents or other assistance were made in a timely manner for particular help from the Secretary General or other authorities. The documents procured from the plants of the former Works Combine Central Germany, Bitterfeld, by the prosecution (unfortunately a very limited number) have been made available to the defense. (See answer to the motion of Dr. Schubert, mentioned above in par. 2.)

5. Although this motion is entirely different from the prosecution's motion that the defense produce certain *original* documents *removed* from Farben files and archives without receipt (motion of 26 Feb. 1948),² etc., a study of the papers filed in connection with that motion have implications bearing on this "blanket" motion. The defense filed its answer to the prosecu-

¹ For an initial statement of the prosecution's policy in this connection, see the memorandum of Mr. DuBois (deputy chief counsel) to the Defense Center, reproduced in section XIII K 9 b.

² Reproduced in section XXI F. In this motion the prosecution charged a representative of the defense staff with removal of original documents from files of the Ludwigshafen plant contrary to regulations and to prevent their discovery by the prosecution.

tion's motion on 28 February 1948, opposing the prosecution's motion with respect to *original* documents. The prosecution's replication was dated 3 March 1948 (note particularly par. 7). The Tribunal's ruling denying the prosecution's motion was made in court on 8 March 1948 (Tr. pp. 8627-9).^{*} Although these formal papers and the pertinent "in chambers" discussions with both parties by the Tribunal indicate the general nature of the problem, the prosecution expressly invited the Tribunal to appoint one of its commissioners to make a study of the extant circumstances with respect to availability of documents (par. 14, prosecution's replication of 3 Mar. 1948). At that time the prosecution stated (par. 13) that, in its view, the most cursory investigation would indicate that the defense has had a far greater opportunity to analyze the documents in the archives of the Farben plants than the prosecution. If the Tribunal should have any doubts about the "fairness" of the situation, a very short investigation by a representative of the Secretary General's office (who might well be accompanied by a representative of the defense) should be most enlightening.

6. To avoid any misunderstanding, reference should again be made to the practice with respect to specific requests for specific documents or files of documents. No one is in a better position than these defendants to know about particular documents or groups of Farben documents which they feel may be helpful to their case. Not only the defendants, but numerous principal and assistant defense counsel and assistants, *who were or still are employed at the Farben plants*, are in a unique position to know what contemporaneous documents might be helpful to their case. Indeed, the prosecution would have been fortunate if in its preparation of the case it had had one-tenth of the specific knowledge of Farben documents possessed by the defense. Upon specific request for documents by the defense, the prosecution has again and again produced copies of documents specifically requested, since this saved time for the defense and was not in the nature of a "fishing expedition." This has been the historic approach to this problem by the prosecution in Nuernberg ever since IMT days. It might be pointed out that this is a quite different approach from that in the answer of the defense to the prosecution's motion of 26 February 1948 (the request for *originals* removed from the archives), in which the defense in effect said: "the prosecution should go back to the Document Centers and look for them" after the defense had returned the *originals* (excepting the revealing Auschwitz reports turned over to the Secretary General). The problem

^{*}The various documents referred to are all reproduced in section XXI F.

which the prosecution encountered *upon returning to Ludwigs-hafen* is another story, which might be of interest as one of many problems which a referee of the Tribunal could very quickly learn about. In several cases the prosecution procured files of original documents at the request of defense counsel so that they could be taken into conferences of the defendants and the defense counsel more readily and be screened by this means. On its part, the Tribunal has even allowed a defendant to accompany defense counsel to the Frankfurt-Griesheim center to examine and screen documents there.* This history with respect to specific requests for specific documents, whether originals or copies, has become a matter of course. This should be distinguished, however, from an effort to acquire access to copies of files of documents discovered by many separate Allied agencies as well as by the half-dozen divisions of the OCCWC.

7. Granting a motion of the "fishing expedition" variety would naturally cause tremendous confusion to the staff of the prosecution. Since the IMT trial, the document files in Nuernberg have been based upon the well-established theory that "an investigating agent cannot serve two masters," a statement which was made before the IMT under similar circumstances. There have come to be more than 30,000 photostatic copies of documents in various document series, such as "PS," "NI" (over 15,000), "NG," "NO," "EC," etc. Attached to each folder there is ordinarily a confidential analysis of the prosecution concerning the documents. Even if the prosecution's own research files were to be made into a public library, and even if additional staff were secured to segregate particular types of material, it would be impossible to extract from these thousands upon thousands of folder files all documents which someone might think related to Farben, and which someone might conceive as originating from files of Farben, "and from all other official or private archives or card registeries, etc." (*Sic*—defense motion.) The very nature and organization of these files indicate how inconceivable it was to the representatives of the American and Allied authorities, beginning with the IMT case, that these prosecution files should ever be made available to the defense upon a "blanket" motion, as distinguished from requests for specific documents otherwise not available to the defense. This motion was filed after the original date which the Tribunal set for the submission of all documents by the defense, except where the defense made specific application in unusual circumstances for processing further documents. After all these months, it seems to us rather

*See section XIII L 2 b.

strange and untimely that now a motion in the nature of a "fishing expedition" should be made with respect to the research files of the prosecution.

8. The defense cites the ruling (29 Mar. 1948) of the Tribunal in Case 11 (U.S. *vs.* Weizsaecker, *et. al.*). Although the prosecution in that case objected (24 Mar. 1948) to the much more limited motion made therein for some of the same reasons which are applicable here, the ruling is not in point. In the defense motion in that case (22 Mar. 1948), the defense requested the prosecution make available to the defense copies of all documents of the German Foreign Office originating from the Document Center in Berlin, which the prosecution had in its possession. The defense pointed out that *only one defense representative* had been allowed by the competent authorities to screen "approximately 100,000 pounds of files in the German Foreign Office in Berlin," particularly since the files did not have detailed indexes. The defense stated that under such circumstances it did "not have the necessary time to work through such files and obtain copies therefrom for the documents necessary to present the defense" to the Tribunal. It pointed to the restriction on communications and travel between Nuernberg and Berlin. Further, the defense requested a postponement of the trial because it had not had access to these basic documents. The difference in the grounds alleged in that much more limited motion from the "blanket" motion at hand are apparent. Apart from the numerous defense counsel and the assistant defense counsel approved by this Tribunal, this Tribunal is aware of the highly competent and far reaching assistance the defense has had in getting Farben archives. Secondly, the motion in the Weizsaecker case pointed out peculiar difficulties in respect to a specific document center, and hence is more comparable to the motion of Dr. Schubert for access to copies of the Bitterfeld and Wolfen documents (answered separately by the prosecution on 12 Apr. 1948).

9. Accordingly, the prosecution respectfully submits that the procedure which has been in existence throughout this trial and in the IMT should not be altered with the result of altering conventional rules, practices, and regulations with respect to procurement of evidence in adversary proceedings. It seems to us it would be quite as reasonable for the prosecution to request the defense counsel and the defense assistants produce any copies of documents (let alone *originals*) which any of them have cataloged or analyzed which they thought could possibly bear on the issues in this case. The prosecution will not oppose (and has not opposed) any reasonably definite request by the defense for

specific documents, but does oppose a motion in the nature of a "fishing expedition."

By: [Signed] D. A. SPRECHER
Chief, Farben Trial Team

Nuernberg, 15 April 1948

For: TELFORD TAYLOR
Brig. Gen. U.S.A.
Chief of Counsel

(3) *Tribunal Order, 22 April 1948**

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
22 APRIL 1948

United States of America
 vs.
Carl Krauch, *et al.*,
 Defendants } CASE 6

ORDER

Ruling of the Tribunal with respect to the motion, filed 7 April 1948, by counsel for the defense, regarding making available all documents which the prosecution still has and which have bearing upon the person and activity of the defendants represented by it.

The allegations of the petition are so broad and general that the relief sought cannot be granted or denied in terms of the petition. The Tribunal finds, however, that the petition is sufficient to challenge the obligation resting upon it to see that the defendants have reasonable access to documents of an evidentiary character which are within the control of the Tribunal.

The Tribunal has ascertained by way of independent investigation that such documents are kept and preserved in what is known as the Document Center of the Office of Chief of Counsel for War Crimes. Security requirements preclude counsel for either side having free and unrestricted access to these documents. The Tribunal does not feel free to assume the responsibility of relaxing these security regulations.

The Tribunal has further learned that as to each of the documents contained in said Document Center, the prosecution has what it has termed a "Staff Evidence Analyses," the first three headings of which are "Title and/or General Nature" of the document, the "Date," and the "Source." Said Staff Evidence

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 50, pages 1794 and 1795.

Analyses also contain other data of a confidential nature, to which counsel for the defendants are not entitled.¹

The Tribunal directs the prosecution to promptly supply defense counsel with copies of those parts of its Staff Evidence Analyses contained under the headings quoted herein, as to all documents in the Document Center that originated in the offices or plants of I. G. Farben, excepting, however, those pertaining to particular documents which the prosecution, in good faith, expects to use in cross-examination or in rebuttal. With possession of these Staff Evidence Analyses, counsel for the defense will be enabled to examine and make copies of any documents in said Document Center which they deem necessary in the trial of the case. When cross-examination or rebuttal has been concluded in any instance, the Tribunal will expect the prosecution to then make available to the defense any and all Staff Evidence Analyses pertaining to documents which were not offered in evidence by the prosecution.

The Tribunal feels that the relief herein granted will serve to make accessible to the defendants all documentary material within the control of the Tribunal to which said counsel are entitled to have access.

[Signed]

CURTIS G. SHAKE

Presiding Judge

JAMES MORRIS

Judge

PAUL M. HEBERT

Judge

CLARENCE E. MERRELL

Alternate Judge

Dated this 22d day of April 1948.

(4) *Staff Evidence Analysis of the Prosecution concerning
a Document from the Farben Files*

OFFICE OF CHIEF OF COUNSEL

FOR WAR CRIMES

APO 696-A

U. S. ARMY

STAFF EVIDENCE ANALYSIS²

By: G. S. Martin

Date: 12 August 1947

¹ An example of a staff evidence analysis concerning an I.G. Farben document is reproduced immediately below.

² A Staff Evidence Analysis (SEA) was made for every document considered to be of enough importance to be registered in the Document Center of the prosecution. The original or a photostatic or certified copy of the document was thereafter kept in the Document Center at all times, except when it had to be removed for the making of further copies. The SEA was the principal means whereby lawyers who did not speak German were advised in a general way of the contents of a document, since documents were not translated until after a lawyer decided that their contents were important enough to deserve burdening the overworked translation staff.

Document No. NI-9591

Title and/or general nature:

Minutes of the 75th meeting of the
Working Committee of IG's Vorstand
[Managing Board]

Date: 3 March 1933

Source (Location of original, etc.):

Folder 2, Arbeitsausschuss, Leverkusen,¹
Photostat of Pages 1 and 3 in
Document Control Branch, OCCWC,
Nuernberg

PERSONS, FIRMS OR ORGANIZATIONS INVOLVED:

NI-I. G. Farben
NI-IGF—BOSCH, Carl²
NI-IGF—WAIBEL, Hermann
NI-IGF—ter MEER, Fritz
NI-IGF—HOERLEIN, Philipp
NI-IGF—GAJEWSKI, Fritz
NI-IGF—KRAUCH, Carl

TO BE FILED UNDER THESE REFERENCE HEADINGS:³

As above. Also:

NI-IGF—Vorstand
NI-IGF—Minutes of Meetings
NI-IGF—TEA [Technical Committee]
NI-IGF—ZA [Central Committee]
NI-IGF—Verwaltungsrat [Administrative
Board]

SUMMARY:

1. Bosch reports on the meeting of the Central Committee [ZA]. Hoerlein, Gajewski and Krauch were elected unanimously into the ZA. The Verwaltungsrat approved. Bosch reports on various donations approved by the Verwaltungsrat (p. 1).

2. Ter Meer reports on the TEA meeting. Credits approved, including RM 3,300,000 for a new high-pressure installation in Hoechst (p. 3).

¹This indicates that the original document was in the files of the working committee of Farben's Managing Board at Leverkusen, the headquarters of the I.G. Farben Works Combine Lower Rhine, in the British Zone of Occupation.

²"NI" stood for "Nazi Industrialist" and "IGF" stood for the I. G. Farben Concern.

³This indicated the analyst's view of the files of the I.G. Farben trial team in which a copy of this Staff Evidence Analysis should be filed for reference purposes.

9. MEDICAL, FLICK, AND MINISTRIES CASES—DEFENSE APPLICATIONS FOR PRODUCTION OF TRANSCRIPTS OF INTERROGATIONS AND AFFIDAVITS IN THE POSSESSION OF THE PROSECUTION

a. Medical Case—Denial of Defense Application for Transcripts of Interrogations of Defendant Brack Made Before His Indictment by Representatives of the Prosecution

(1) *Application on Behalf of Defendant Brack, 25 January 1947*¹

Military Tribunals

Nuernberg, Germany

United States of America

against

BRANDT, and others

Defendant's Application for Document

To: The Secretary General, Military Tribunals:

I, Dr. Georg Froeschmann attorney for Viktor Brack
(Name of defendant)

hereby request that the Tribunal require the production of the following document to be used for the defense:

Identification of document:

The German transcripts on each of the inter-
rogations of Viktor Brack during the preliminary
interrogations together with stenographic notes
relative to them.

Last known location of document and information that may aid in its location:

In the hands of the prosecution.

The document requested herein will be used to prove the following facts:

To prove that the contents of Document NO-426,
Prosecution Exhibit 160, are untrue.²

These facts are relevant to the defense for the following reasons:

¹ U.S. vs. Karl Brandt, et al., Case 1, Official Court File, volume 34, page 1018.

² This exhibit was an affidavit of the defendant Brack which was sworn to before a representative of the prosecution before Brack's indictment. The affidavit, which was in German, concluded with the usual statement: "I have read the above statement in German, consisting of eight pages, and it is true and correct to the best of my knowledge and belief. I have had the opportunity to make any changes and corrections in the foregoing statement. This statement was given by me freely and voluntarily without promise of reward and I was subjected to no duress or threat of any kind."

To refute points II and III of prosecution.

25 January 1947

(Date)

Signed: DR. FROESCHMANN

Signature of Defendant's Counsel

Decision of Tribunal

[Handwritten] Granted

[Initials] JTC [Johnson Tal Crawford, Judge]

[Initials] HLS [Harold L. Sebring, Judge]

(2) *Memorandum in Support of Defense Application,*
25 January 1947¹

Nuernberg, 25 January 1947

Dr. Georg Froeschmann

Defense Counsel for defendant Viktor Brack

To the Secretary General of the Military Tribunal I
Nuernberg

The prosecution submitted Document NO-426, as Exhibit 160 of the prosecution. In the session of 10 January 1947 I raised objections against this document (German tr. p. 1522). The document was not drafted by defendant Brack himself, but was submitted to him by the prosecution as a summary of five or six previous interrogations which had been recorded by a stenographer.

An accurate study of this document showed for defendant Brack that, to the best of his recollection, in numerous points it essentially differs from the statements made in each of the interrogations, and that it contains dubious expressions and phrases which give an entirely different meaning to Brack's statements in each of his interrogations. Brack opposed this wording, but owing to his state of health at that time, which made it impossible for him to carefully check his statement, he was talked into approving and signing the document in the present form by Mr. Horlik-Hochwald.²

It is, therefore, the duty of the defense to furnish the proof that the contents of this document are untrue. This can only be proved by comparing the wording of the document with the statements which the defendant actually made during each of his interrogations. I, therefore, declare the transcripts on each of the interrogations of Brack, which were written in German, as evidence and request that the prosecution be directed to put these transcripts at my disposal for comparison.

¹ U.S. vs. Karl Brandt, et al., Case 1, Official Record, volume 34, page 1016.

² An associate counsel for the prosecution.

I also reserve the right to call Mr. Horlik-Hochwald as a witness for defendant Brack's assertions.¹

[Signed] DR. FROESCHMANN

(3) *Memorandum of the Prosecution, 3 February 1947,
Opposing Application*²

MEMO TO: Secretary General, Military Tribunal I
FROM: J. M. McHaney
SUBJECT: Request of Dr. Froeschmann for the Production of
Prosecution Interrogations of Defendant Brack

1. Dr. Froeschmann, defense counsel for Viktor Brack, requested on 25 January 1947 that the prosecution be required to surrender to him certain interrogations of the defendant Brack by the prosecution. This request is alleged to be justified on the ground that Document NO-426 (Pros. Ex. 160), which is an affidavit signed and sworn to by the defendant Brack, is not consistent with certain statements made by him in the aforesaid interrogations.

2. It is respectfully submitted that this application should be denied by the Tribunal. The affidavit is a document quite distinct from the interrogations and one does not rely upon the other. The affidavit contains a certification by the defendant Brack to the effect that he read the affidavit, consisting of eight pages in the German language, and that it states the full truth according to his best knowledge and belief, and further that he had the opportunity to make changes and corrections in it and that the statement was given freely and voluntarily by him.

3. The defendant Brack will have full opportunity to take the stand and deny any assertions made in the affidavit signed by him.³ The production of the interrogation reports would add nothing to such testimony since the interrogations simply contain answers given by the defendant Brack to questions put by the interrogator.

4. The prosecution in this case presented a number of affidavits and it would be extremely cumbersome and disadvantageous to require the prosecution to produce interrogations of the affiant. The request by the defense counsel is in effect asking that the files of the prosecution be made available to the defense for defense purposes.

[Signed] J. M. MCHANEY

¹ Mr. Horlik-Hochwald was not called as a witness by the defense.

² U.S. vs. Karl Brandt, et al., Case 1, Official Record, volume 34, page 1013.

³ Defendant Brack did testify and at that time he discussed the affidavit in question. Brack's testimony is recorded in the mimeographed transcript of the Medical case, 12, 13, 14, 15, 16 and 19 May 1947, pages 7413-7772.

(4) *Order of the Tribunal Approving Defense Application,
12 February 1947¹
Decision of Tribunal*

12 February 1947

The request of defendant's application for use of the transcripts of preliminary interrogation and stenographic notes pertaining to them in the case of Viktor Brack is granted under the following conditions:

(1) The commissioner and, if desired, a member of the prosecution staff, will be present during the examination of said transcripts.

(2) If the examination takes place in the Nuernberg Jail, the defense counsel may have a stenographer, translator, or whatever help he may need during the interrogation, under the supervision of the commissioner.

[Signed] WALTER B. BEALS
Presiding Judge

[Stamp] Filed: 12 February 1947

Prosecution and defense notified
12 February 1947

(5) *Memorandum of the Prosecution Requesting Reconsideration
by the Tribunal of Its Ruling, 17 February 1947²*

17 February 1947

MEMO TO: Walter B. Beals, Presiding Judge
Military Tribunal I

FROM: James M. McHaney

SUBJECT: Reconsideration of Motion by Dr. Froeschmann for
the Production of Prosecution Interrogations of
Defendant Brack

1. Military Tribunal I, by an order dated 12 February 1947, has granted the request of Dr. Froeschmann for the production of prosecution interrogations of the defendant Brack. The prosecution respectfully requests that the Tribunal reconsider its ruling on the grounds hereinafter set forth.

2. The request of Dr. Froeschmann was alleged to be justified on the ground that an affidavit signed and sworn to by the defendant Brack (Document NO-426, Pros. Ex. 160) contains statements which are inconsistent with certain alleged statements made by him in the requested pretrial interrogations. The prosecution urged in its memorandum of 3 February 1947 that the

¹ U.S. vs. Karl Brandt, et al., Case 1, Official Record, volume 34, page 1011.

² Ibid., pages 1009 and 1010.

aforesaid affidavit was duly executed by the defendant Brack in the German language, and that it contains a certification that he had opportunity to make changes and corrections in it and that it was given freely and voluntarily by him. It was further observed that the defendant Brack will have ample opportunity to make any explanations with respect to the affidavit when he takes the stand in his own defense. These arguments are hereby reurged in support of this motion for reconsideration of the motion by Dr. Froeschmann.

3. The prosecution is of the firm opinion that, assuming there are statements in the affidavit which are inconsistent with statements made by Brack during pretrial interrogations, the interrogations are inadmissible to prove such inconsistency because they are irrelevant and immaterial for the purpose. Proof of prior inconsistent statements may be used to impeach or contradict a witness, but we submit prior consistent statements are not admissible by the proponent of the witness to prove his veracity. Even though there be statements in the interrogations inconsistent with statements in the affidavit, this certainly does not tend to prove that the affidavit is in any way incorrect. Indeed, the assumption would seem to be that the affiant has had a change of heart and is certainly testifying truthfully when he makes admissions against himself. To prove that he has refused to make such admissions on an earlier occasion clearly does not vitiate the affidavit.

4. The prosecution further urges that, if the defendant Brack is in any way asserting fraud or duress in obtaining the affidavit from him, no sufficient groundwork has been laid in demanding the production of the interrogations. Brack has not yet testified. He cannot yet claim fraud or duress. This can be asserted by him only when and if he takes the stand in his own defense. Accordingly, we submit the application is premature.

5. There are also grounds of policy for denying the application of Dr. Froeschmann. The prosecution has in its files over 2,000 transcripts of interrogations of defendants, prospective defendants, and witnesses. If the Tribunal in this case is to open the door to these files to defendants simply upon the assertion of defense counsel that they contain something inconsistent with a statement in an affidavit, then indeed an enormous burden will be put on the prosecution. These interrogations, for the most part, have not been translated into the English language. Moreover, by giving defense counsel access to such interrogations the prosecution is deprived of the opportunity to impeach the interrogatee, if and when he takes the stand, by the use of inconsistent state-

ments in the interrogation. In the instant case, for example, defense counsel for Brack will be fully advised of any and all statements made by the defendant in the pretrial interrogations, and it is, therefore, to be expected that the defendant will be fully briefed with respect thereto before taking the stand. The prosecution is unaware of any instance in Case 1 before the IMT where the defendant was allowed access to the interrogation files of the prosecution.

6. In view of the foregoing reasons, the prosecution requests that the Tribunal reconsider its ruling with respect to the application made by Dr. Froeschmann. It is submitted that no compelling reason has been set forth by Dr. Froeschmann which justifies requiring the prosecution to make available to him pre-trial interrogations of the defendant Brack.

[Signed] JAMES M. MCHANEY
Director
SS Division

(6) *Order of the Tribunal, 24 February 1947, Vacating Prior Order and Denying Defense Motion**

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
AT A SESSION OF MILITARY TRIBUNAL I
HELD 24 FEBRUARY 1947, IN CHAMBERS

[Stamp] Filed: 24 February 1947

United States of America
vs.
Karl Brandt, et al.,
Defendants } CASE 1

ORDER

The defendant Viktor Brack, through his counsel, having requested leave to examine the stenographic notes taken at preliminary interrogations pursuant to which was prepared the affidavit which he signed 14 October 1946, and which has been admitted in evidence before this Tribunal as Prosecution Exhibit 160, being Document NO-426;

And the Tribunal having, by order bearing date 12 February 1947, directed that defendant Brack's request be granted pursuant to conditions set forth in the order;

And thereafter counsel for the prosecution having filed a written

*Ibid., volume 36, pages 87 and 88.

application bearing date 17 February 1947, for a reconsideration of the matter, asking that the order above referred to granting defendant Brack's application be vacated;

And it appearing to the Tribunal that the defendant Brack, on 14 October 1946, at Nuernberg, Germany, signed an affidavit in the German language, an English translation of which was admitted in evidence before the Tribunal as Prosecution Exhibit 160 as above stated;

And that at the time the matter was presented to the Tribunal by oral argument and by way of the written application filed by counsel for defendant Brack, above referred to, the Tribunal obtained the impression that the affidavit signed by defendant Brack was in the English language, and not in the German language;

And it further appearing that in that affidavit defendant Brack deposed that he had read the affidavit in the German language, that the same was true according to his "best knowledge and belief," and that he had an opportunity to make changes and corrections in the affidavit;

NOW, THEREFORE, IT IS ORDERED, upon reconsideration of the matter presented, that the order previously entered herein granting the application above referred to be, and the same is hereby, vacated and the application of defendant Brack for leave at this time to examine the stenographic notes taken at the time he was interrogated be, and the same is hereby, denied.

The denial of this application on the part of the defendant Brack is without prejudice to the right of defendant Brack, whenever he shall take the stand as a witness before the Tribunal, to renew his application for examination of the stenographic notes above referred to in open court, or otherwise; at which time, if such application be made, the Tribunal will announce its ruling on the matter.*

[Signed] WALTER B. BEALS
Presiding Judge

*The defendant Brack later testified for six days before the Tribunal. In his testimony, at several points, he discussed the circumstances under which the affidavit was made and the correctness of certain statements contained therein. The defendant testified that he had been undernourished for a considerable period before he was interrogated, that he was sick and under medical treatment at the time, that he allowed himself "to be persuaded again and again to accept the answer which the interrogator suggested as correct," and that "I made various corrections [in the draft of the affidavit], but in many cases I allowed myself to be persuaded that what was written down should be accepted." (Medical case, tr. pp. 7423-7425.) While testifying the defendant did not renew his request for an examination of the stenographic notes of his interrogations which were conducted before he executed the affidavit. During cross-examination the defendant was asked whether he was compelled to sign the affidavit, to which he answered: "Compel is certainly not the right expression. I felt innerly obliged to sign the statement without being conscious at that time that many of the things contained therein were either incorrect or incomplete. This only entered my mind later when, on the basis of the documents, I was able to ascertain that many of the things were not represented according to

**b. Flick Case—Denial of Defense Application for Affidavit
Given by a German to the Prosecution**

- (1) *Defense Application for Affidavit of Heinrichsbauer,
5 August 1947, Together with Tribunal Order Denying
the Application, 11 August 1947**

Military Tribunals
Nuernberg, Germany
United States of America
against
Friedrich Flick, *et al.*

Defendant's Application for Document

To: The Secretary General, Military Tribunals:

I, Dr. Rudolf Dix attorney for Friedrich Flick
(Name of defendant)

hereby request that the Tribunal require the production of the
following document to be used for the defense:

Identification of document:

Affidavit or statement on the Reich Association
Coal and the attitude of the German industry
towards the question of armament, given by
A. Heinrichsbauer, who was editor in chief of
the Mining Newspaper, prior to 1933 and arrested
witness in Nuernberg from 1946-1947.

Last known location of document and information that may
aid in its location:

Nuernberg, Palace of Justice (prosecution).

The document requested herein will be used to prove the follow-
ing facts:

For the presentation of evidence of the defense
re the question of the Reich Association Coal
and Armament.

the facts." When asked if he had been threatened with any disadvantages if he did not sign
the affidavit, the defendant replied "There were no threats expressed towards me" (Tr. p. 7726).

The charges against Brack were discussed at some length in the judgment of the Tribunal
(vol. II, this series pp. 277-281). Brack's affidavit was not mentioned in the judgment. Where
a defendant or a witness claimed that duress had been employed in obtaining an affidavit from
him, the prosecution ordinarily introduced the transcripts of the interrogations in evidence,
voluntarily delivered copies of them to defense counsel, or used them in cross-examination on
the point of alleged duress. One of the principal reasons why the prosecution opposed any
general rule requiring the delivery of interrogation transcripts to affiants was its claim that
the retention of these transcripts until the witness testified was an aid in warding off or in
exposing perjury. Where a part of an interrogation transcript was introduced in evidence, the
defense was given access to the entire interrogation transcript and was free to introduce the
remaining parts of it in evidence. See section XVIII K, "Affidavits and Interrogations of
Defendants made before Trial and Introduction in Evidence by the Prosecution."

*U.S. vs. Friedrich Flick, *et al.*, Case 5, Official Record, volume 34, page 464.

These facts are relevant to the defense for the following reasons:

See above.

5 August 1947

(Date)

Signed: DIX

Signature of Defendant's Counsel

Decision of Tribunal

[Handwritten] Denied August 11, 1947, for the reason stated in the prosecution objection.¹

The affidavit is not a "document" as that word is used in such an application as this.

[Signed] CHARLES B. SEARS
Presiding Judge

(2) *Prosecution Answer in Opposition to the Defense Application, 8 August 1947²*

OFFICE OF CHIEF OF COUNSEL FOR WAR CRIMES
APO 696A

8 August 1947

Memorandum For: Defendants' Information Center

Witness and Document Procurement Section

This office objects to the application of Dr. Dix for production of the "affidavit or statement" given by A. Heinrichsbauer, for the following reasons:

1. Affidavits, statements, or interrogations, prepared for and by the prosecution are not, in our opinion, "documents" which should be subject to being produced for the defense. It is quite understandable that in many instances the prosecution is in possession of original, irreplaceable documents which were prepared in previous years and which are necessary for a proper presentation of the case in chief of the defense. But it does not seem proper for the prosecution to be under the obligation to turn over to defense counsel statements or affidavits made by witnesses during the preparation of the prosecution's case, since such "documents" are not irreplaceable and, moreover, may contain confidential information which is only pertinent to other cases pending before this office.

2. Dr. Dix can contact A. Heinrichsbauer who is, to the knowledge of this office, available, and either request him to appear personally as a witness to testify on the Reich Association Coal or to prepare an affidavit which can be submitted to the Tribunal.

¹ The prosecution's answer is reproduced immediately below.

² U.S. vs. Friedrich Flick, et al., Case 5, Official Record, volume 34, page 453.

3. The institution of such a practice of permitting defense counsel to request the type of "documents" herein requested from the prosecution may very well result in a "fishing expedition" by defense counsel and, as a consequence, the imposition of additional work on the prosecution's staff.

[Signed] By: THOMAS E. ERVIN
Deputy Chief of Counsel
For: TELFORD TAYLOR
Brig. Gen., U.S.A.
Chief of Counsel

c. Ministries Case—Denial of Defense Applications for Leave to Examine all Interrogations Made by Prosecution Representatives of Former Officials of the German Foreign Office and of Other Persons

(1) *Motion on behalf of Defendant Weizsaecker, 13 January 1948**

Warren E. Magee and Hellmut Becker
Defense counsels for Ernst von Weizsaecker

[Stamp] Filed: 14 January 1948

TO: The Honorable Military Tribunal IV, Case 11

SUBJECT: Examinations of Interrogations by Defense Counsel

MOTION

Now comes the defendant Ernst von Weizsaecker and respectfully moves the Tribunal for leave and authority to examine all interrogations made by the prosecution of former officials, members, agents, and employees of the German FO [Foreign Office] and to use all or such interrogations as counsel for the defense shall select in order to prepare their defense and as evidence in this case, and for grounds in support thereof alleges:

1. The prosecution for a period of a year or more has been interrogating officials, members, agents, and employees of the German FO concerning facts relevant to this case. Such interrogations cannot be undertaken by the defense without great delay, expense, and vexation. These interrogations contain much relevant evidence and, in fairness and justice, should be made available to this Tribunal and the defense.

2. These interrogations are necessary to the preparation and presentation of the defense.

3. Appended to this motion is a list of the persons connected with the German FO who, defendant is informed upon informa-

*U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 70, page 835.

tion and belief, have been interrogated by the prosecution, and whose interrogations this defendant seeks in order to prepare his defense and for use as evidence in this case.¹ Other persons, also connected with the German FO, may have been interrogated by the prosecution, concerning matters relevant to this case, and such interrogations are also sought by the defense in order to prepare their defense and for use as evidence in this case.

4. The interests of justice require the granting of this motion.

[Signed] WARREN E. MAGEE

[Signed] HELLMUT BECKER

Defense Counsels

Nuernberg, Germany

13 January 1948

(2) *Answer of the Prosecution, 14 January 1948*²

[Stamp] Filed: 19 January 1948

ANSWER OF THE UNITED STATES TO MOTION OF
DEFENSE COUNSEL FOR THE DEFENDANT WEIZ-
AECKER RE: EXAMINATION OF INTERROGATIONS
OF THE PROSECUTION

The prosecution herewith answers the motion of the defendant Ernst von Weizsaecker for leave and authority to examine all interrogations of former officials, members, agents, and employees of the German Foreign Office made by the prosecution and to use all, or such interrogations as counsel for the defense shall select, in order to prepare their defense and as evidence in this case.

1. This motion is a demand for the production of confidential materials of the Office of Chief of Counsel or of other agencies now in its possession, and not a request for captured German documents. Additionally, it should be noted that the motion calls for the production of *all* interrogations of a broadly defined class of persons which necessarily includes the defendants themselves. Moreover, the motion does not specify any particular interrogations, nor does it allege that "relevant evidence" any interrogation report is said to contain. In final analysis, defense counsel ask access to the prosecution's interrogation files in order to undertake a "fishing expedition" for useful material. The prosecution submits that this is improper and unprecedented.

2. In other cases holden before these Tribunals similar motions have been denied. Moreover, in said cases the motions were limited to interrogations of defendants whereas this motion is not so

¹ This list, not reproduced herein, contained the names of 87 persons.

² U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 70, pages 831-834.

limited. In Case 1 (Medical case), Military Tribunal I on 24 February 1947 denied the motion of a defense counsel requesting pretrial interrogations of a particular defendant. In Case 9 (Einsatzgruppen case), Military Tribunal II ruled on 18 October 1947 that:

“In view of the fact that this interrogation transcript has not been introduced in evidence, and has not been used by the prosecution in the presentation of its case against Ernst Biberstein, the request is disapproved.”

Similar rulings have also been handed down in Case 3 (Justice case) and Case 6 (Farben case). In Case 6 the Tribunal said on 12 January 1948:

“There are also pending before the Tribunal motions by Dr. Gierlichs on behalf of the defendant Schmitz; Dr. von Metzler on behalf of the defendant Haefliger; and Dr. Hellmuth Dix on behalf of the defendant Schneider— to require the prosecution to produce for the examination and use of said defendants certain statements, affidavits, and interrogatories alleged to be in the hands of the prosecution. It will be recalled that when that matter was discussed orally the prosecution made the statement that if the motions were directed at all of the data in the possession of the prosecution, the prosecution might be required to produce some matters of confidential nature. In any event, the motions are not definite and specific as to particular documents. The Tribunal is now overruling those motions with this reservation: that if in the course of the trial it appears that any particular document is pertinent for the purposes of the defense and is in possession of the prosecution and available for production, upon a showing of its pertinency the Tribunal will rule with respect to the merits of whether or not the document ought to be made available. But in the general form of the motion and in view of the representations made by the prosecution, the Tribunal feels that it would not be justified in sustaining these motions as made, and they are now overruled with that reservation, that counsel for the defense or counsel for individual defendants may renew the motion at the proper time if there can be made a showing of the pertinency of a document available in the hands of the prosecution, so far as the defense is concerned.” (Tr. p. 5026)

The rationale of this ruling is peculiarly applicable to the instant motion. The Tribunal there reserved to defendants the right to renew the motion at a later time if a specific evidentiary situation arose as to which specified interrogation reports might be pertinent (e.g., use of duress or fraud), but the Tribunal

refused to grant defendants access to the prosecution's files for a "fishing expedition".

3. Many of the interrogations in question have been conducted for a variety of purposes other than for the procurement of evidence in connection with Case 11 and were conducted for purposes unrelated to this proceeding and are affected by security considerations.

4. While the domestic law of no single country is binding on this Tribunal, it may be observed in passing that it is well established in Anglo-American law that the accused is not entitled to gain access to pre-trial material collected by the prosecution:

People ex rel. Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84 (1927)

In this case, defense was denied right to see statements and memos collected by prosecution—murder charged.

Boehm v. U. S., 8th CCA, 123 Fed. (2d) 791 (1941):

Request for transcript of former testimony of witnesses made in secret investigation was denied.

People v. Parisi, 270 Mich. 429, 259 N. W. 127 (1935):

Robbery charged. Written statement, made before trial to the prosecutor by a witness, later demanded by the defense. Request denied.

5. Prior contradictory statements made by defendants and witnesses, including those contained in interrogation reports, are frequently used by the prosecution for purposes of impeachment. To require the prosecution to afford defendants access to these reports could only serve to destroy this universally recognized means of securing the truth.

6. Finally, it should be obvious that the defendants herein know better than anyone else their former associates in the Foreign Office who can offer relevant testimony in their behalf. The Secretary General stands ready to bring such persons to Nuernberg where they may be interrogated by defense counsel. It stretches one's credulity to assume that the proponents of this motion seriously intend to offer the prosecution's interrogations of such witnesses in lieu of their personal appearance or the offer of affidavits signed by them. The prosecution's interrogations could not possibly serve to advise defendants of the names of persons who can testify in their behalf; that is a fact well known to them without any assistance from the prosecution.

7. Insofar as the motion seeks to convey the message that all the interrogations have been done by the prosecution, it is completely inaccurate. Defense counsel and their representatives are and have been for a long time conducting a multitude of interro-

gations and interviews all over Germany and elsewhere. The prosecution should no more be required to turn over all of its interrogations than the defense should be required to turn over all of its correspondence and interviews with potential witnesses. WHEREFORE, the prosecution respectfully requests that this motion be denied.

[Signed] ALEXANDER G. HARDY
Associate Trial Counsel
[Signed] ROBERT M. W. KEMPNER
Deputy Chief of Counsel

(3) *Order of the Tribunal, 2 February 1948**

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

United States of America
 against
Ernst von Weizsaecker, *et al.* } [Stamp] Filed: 2 February 1948

ORDER

On 14 January 1948, a motion was made in behalf of defendant Weizsaecker for leave and authority to examine all interrogations made by the prosecution of former officials, members, agents, and employees of the German Foreign Office, in order that such interrogations might be made available for use in behalf of the defendant. In such motion, defendants Woermann, Steengracht, Ritter, Erdmannsdorff, and Bohle joined. Subsequently there was filed, on behalf of defendant Bohle, another motion requesting that he be allowed to also examine all interrogations made by the prosecution of former officials, agents, and employees of the former NSDAP, specifically the Auslands Organization of the NSDAP.

The Tribunal, having considered the arguments advanced in support of said motions and the arguments of the prosecution in opposition thereto,

IT IS ORDERED THAT SAID MOTIONS BE AND THE SAME ARE HEREBY DENIED.

Memo hereto attached is made a part of this order.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Military Tribunal IV

Nuernberg, Germany
2 February 1948
Prosecution and defense notified
2 February 1948.

*Ibid., pages 819 and 820.

MEMORANDUM

It is the opinion of the Tribunal that the answer filed by the prosecution in opposition to the motions here under consideration sets forth conclusive reasons why such motions must be denied.

[Initialed] W. C. C.

XIV. EXPEDITIOUS TRIAL, PREVENTION OF UNREASONABLE DELAYS, CONTINUANCES AND RECESSES FOR VARIOUS PURPOSES, AND RELATED MATTERS

A. Introduction

Article VI of Ordinance No. 7 (subsec. B) imposed duties on the Tribunals with respect to "an expeditious hearing of the issues," the prevention of "unreasonable delay," and dealing with any contumacy which might arise. Article 18 of the Charter of the IMT contained identical provisions. Article VII of Ordinance No. 7 and Article 19 of the Charter of the IMT both provided, among other things, that the Tribunals "shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure." Notwithstanding these and other provisions intended to achieve expeditious trials, the Nuernberg trials lasted much longer than had been thought before the trials began and before the various practical difficulties came fully to light. In the IMT case the Tribunal held sessions on 217 different calendar days, exclusive of three preliminary sessions on procedural matters and sessions before commissioners of the Tribunal. In the Ministries case, the longest of the 12 later trials, the Tribunal held sessions on 169 different days, and in all but three of the later trials the Tribunals held sessions on more than 100 different days.

In all 13 of the trials the defense case lasted considerably longer than the prosecution case, except in the Krupp case where the defense case was only 3 days longer. A table reproduced in subsection C shows the number of different days on which Tribunals in the last 12 cases held sessions, the relative number of days devoted to the prosecution and defense cases, and the days required for rendering the judgment. The prosecution's case (including opening and closing statements and the presentation of evidence) was shortest in the Einsatzgruppen trial, 3 days. In three of the trials the prosecution's case required between 50 and 55 days (the Justice, Farben, and Ministries cases). The defense case was shortest in the Milch trial, 28 days. In two of the trials (the Medical and Ministries cases) the defense case lasted 112 and 114 days respectively. The above figures are exclusive of hearings before commissioners of the Tribunals in the Justice, Farben, Krupp, and Ministries cases.

The time intervening between indictment and the beginning of the trial (prosecution's opening statement) varied from 31 days in the Flick case to 115 days in the Farben case. The Uniform Rules

of Procedure (Rule 4) required that not less than 30 days intervene between service of indictment and the beginning of the trial, but in most cases the interval was much longer because of delays in the arrival of judges from America, or the fact that it was impractical to begin still another trial in view of the overburdening of the translation and reproduction facilities.

In each of the cases there were recesses of varying duration, apart from the customary week end recess over Saturday and Sunday and recesses over American or German holidays. A second table (subsec. D) shows the number of days intervening between the indictment and the opening of the case, recesses for defense preparation taken at or near the end of the prosecution's case in chief, recesses for the preparation of the closing statements by both parties (the final oral argumentation), and recesses for the preparation of judgment. Recesses granted for preparation of the defense case at the end or near the end of the prosecution's case in chief varied from 5 days in the Einsatzgruppen case, to 37 days in the Ministries case. (In the Einsatzgruppen case there was a further recess of 13 days after the defense case had proceeded for 4 days.) There were additional recesses during the prosecution and defense cases in most of the trials when the translation or reproduction facilities could not keep up with the trials, or when other special reasons were shown to the satisfaction of the Tribunals.

In most of the cases the Tribunals placed a time limitation upon the presentation of the defense case either at the beginning of the defense case or after the defense case had been under way for some time.

In some of the trials the defense made motions for a postponement of the opening of the trial, alleging that initial defense preparations required more time, and in almost all the cases there were motions for recesses between the prosecution and defense cases for additional defense preparation. Some of these motions contained some of the most emphatic defense claims concerning the difficulties of defense preparation, the alleged bias of the prosecution, alleged advantages of the prosecution as compared to the defense in procuring evidence, and the alleged unfairness of the trial procedure. Subsections E through H contain materials from the records of the Medical, Farben, Krupp, and Ministries trials dealing with postponement of trial, recesses for defense preparation, and the duration of the cases. Separate introductions to these subsections summarize the materials included and note such things as dates and events which give context to the various motions, answers, and rulings.

To expedite trial, Tribunals in five of the 12 trials took advantage of the provisions of Article V (e) of Ordinance No. 7 which empowered the Tribunals "to appoint officers for carrying out any task designated by the Tribunals including the taking of evidence on commission." Materials concerning this aspect of the expedition of trial are reproduced separately in section XVII, "Taking of Evidence on Commission."

The application of measures calculated to expedite trial and prevent unreasonable delays were necessarily related to procedures intended to ensure fair trial (sec. XIII) and the rules and practice with respect to evidence (sec. XVIII).

B. Provisions of Article VI, Ordinance No. 7

Article VI

The Tribunals shall

(a) confine the trial strictly to an expeditious hearing of the issues raised by the charges;

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever;

(c) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Comparable provisions of the Charter of the IMT are the following:

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

* * * * *

Article 18. The Tribunal shall

(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

C. Table on the Length of the Twelve Nuernberg Trials before Tribunals Established Pursuant to Ordinance No. 7

<i>Case No.</i>	<i>Popular name of case</i>	<i>No. of daily sessions¹</i>	<i>Prosecution case (days)²</i>	<i>Defense case (days)²</i>	<i>Judgment (days)</i>
1	Medical	142	28	112	2
2	Milch	39	10	28	2
3	Justice	120	50	70	2
4	Pohl	102	18	84	1
5	Flick	127	38	90	1
6	Farben	149	55	92	2
7	Hostage	117	40	76	1
8	RuSHA	64	16	47	1
9	Einsatzgruppen	79	3	73	3
10	Krupp	100	48	51	1
11	Ministries	169	51	114	4
12	High Command	113	26	87	2
	Total	1,321	383	924	22

¹ A few sessions devoted to contempt questions in the Justice and Krupp cases have not been counted. Otherwise each different day on which the Tribunal convened has been counted as one daily session for the purpose of this table, regardless of the length of the session or the number of times the Tribunal convened on a particular day. Ordinarily the Tribunals held morning and afternoon sessions and the daily session averaged about six hours. Sessions held by commissioners of the Tribunal, even when the commissioners were members of the Tribunal, have not been counted. Tribunal members sat as commissioners only in the Justice case (four days at the end of the prosecution case) and in the Ministries case (five days during the defense case). See section XVII.

² In the columns "Prosecution Case" and "Defense Case" hearing days devoted to opening statements, the presentation of evidence and closing statements have been counted. Sometimes both parties presented evidence on the same day, and during the closing statements both parties occasionally delivered statements or parts thereof on the same day. This has required a number of arbitrary determinations to be made concerning how a few days in some of the trials were to be entered under these columns. The main difficulty in this connection arises with respect to the last stages of the presentation of evidence, since during that period a number of the Tribunals approved the proffer of evidence by both parties outside the normal order of presentation, and the last remaining evidence of the defense case in chief thus often became interspersed with offers of prosecution rebuttal and defense surrebuttal evidence. A witness called out of order, ordinarily meant an interruption of more than a few minutes duration, whereas the offer of documents did not. Accordingly, days devoted principally to the offer of evidence by one side near the close of the evidence: (1) have been counted in both columns when the break in normal order was for the taking of testimony; (2) have not been counted when the break in normal order was for the offer of documents, unless the offer of documents was very time-consuming. When the prosecution and defense both submitted closing statements or parts thereof on the same day, that day has been counted in both columns. A few days in one or two of the trials were devoted exclusively or almost exclusively to arguments and rulings on motions and to the discussion of the order of trial or other procedural matters. Such days have not been counted in either column. Similarly days devoted exclusively to arraignment have not been counted in either column.

D. Table Showing Length of Time between Indictment and Prosecution's Opening Statement and Showing Recesses for Defense Preparation, for Preparation of Closing Statements, and for Preparation of Judgment

Case No.	Popular name of case	Days between indictment and prosecution's opening statement ¹	RECESSES (in days) FOR PREPARATION OF Closing		
			Defense ²	statements ³	Judgment ⁴
1	Medical	44	10	10	35
2	Milch	49	11	3	21
3	Justice	59	17	16	45
4	Pohl	84	18	10	41
5	Flick	31	18	15	22
6	Farben	115	37	20	47
7	Hostage	65	17	11	9
8	RuSHA	110	9	10	19
9	Einsatzgruppen	65	5	10	54
10	Krupp	113	32	14	30
11	Ministries	65	37	31	143
12	High Command	68	29	3	76
	Average No. of Days	72.33	20.0	12.75	45.17

E. Medical Case—Motions, Arguments, Discussions and Rulings concerning the Postponement of Trial and Recesses during Trial

I. INTRODUCTION

In the Medical case the Tribunal decided to have an informal preliminary session to hear argument on a written defense motion for a 3 weeks' postponement of the trial. The defense motion,

¹ The day after the Chief of Counsel signed the indictment has been counted as the first day in all cases. In four of the 12 cases the indictment was served on the defendants the same day on which it was signed. In most of the other cases it was served on all defendants within two or three days after being signed. In the case of every defendant the indictment was served more than 30 days before the beginning of trial.

² Ordinarily this recess intervened between the time when the prosecution rested its case in chief and the opening statements of the defense. However, in several cases there were one or two further days of the prosecution's case just before the defense openings. Moreover, in the Farben and Krupp cases the recess was divided into two parts, the defense being required to make their opening statements after the first part of the recess and then have a further recess before being required to go forward with the defense evidence.

³ Ordinarily this recess intervened between the time when the taking of evidence was closed and the closing statements. However, in several cases the recesses were announced with the understanding that one or both parties could offer certain evidence at the close of the recess pursuant to previous reservations.

⁴ The day after the final statements by the individual defendants has been counted as the first day.

which was made 39 days after the date of the indictment, and the transcript of the informal session are reproduced in 2 below. The Tribunal denied the motion at the informal session without prejudice to appropriate motions during the course of the trial for reasonable recesses.

The prosecution's opening statement was delivered on 9 December 1946 and prosecution rested its case on 28 January 1947, hearings having been held on 25 different days during the prosecution's case in chief. Near the end of the prosecution's case in chief the Tribunal announced a recess of 10 days for defense preparation. The defense had not filed a motion for a recess, but when the Tribunal made this announcement the defense requested two additional days. The transcript of the Tribunal's announcement and the discussion thereon is reproduced in 3 below. A number of other recesses which occurred during the course of the prosecution and defense cases are indicated in footnotes to the text of 2 and 3. The defense case (exclusive of closing statements) required 106 different hearing days.

After the close of the evidence there was a recess of 10 days for the preparation of the closing statements. After the final statements of the defendants to the Tribunal there was a recess of 35 days before the Tribunal pronounced its judgment.

2. POSTPONEMENT OF TRIAL

a. Defense Motion for a Postponement of the Trial for Three Weeks, 3 December 1946¹

Nuernberg, 3 December 1946

To: Military Tribunal I
Secretary General

Subject: Application for Postponement

The undersigned defense counsel request that the first session, scheduled to be held on 9 December 1946,² be postponed for three weeks for the following reasons:

The defense are not yet in a position to further their work sufficiently, because the 100 documents made available by the prosecution, each in only three copies, do not make it possible to obtain information from 23 defendants in a short time.

Moreover the additional 150 documents as well as the list of

¹ U.S. *vs.* Karl Brandt, *et al.*, Case 1, Official Record, volume 32, page 193.

² The indictment had been served over 4 weeks before, on 5 November 1946.

documents promised by the prosecution have not yet arrived in the Defense Information Center.*

The consequence of this deficiency is that fundamentally no applications can be made to locate witnesses, documents, or experts, because it is not possible to become informed or to decide if proof is relevant or not.

According to the experience in the last case, the case before the International Military Tribunal, the time necessary to locate, for instance, a witness and to place him at the disposal of the defense in Nuernberg was extremely long. Even to get a sworn statement in answer to a questionnaire granted by the Tribunal usually took several months.

In this trial the work of the defense has to be done in a space of time much shorter than in the previous case. This cannot be accomplished without careful preparation, otherwise applications for recesses during the trial will not be avoidable.

The defense wants to point out the fact that in their opinion some experts for the defense must be present from the very beginning of the hearing. To select those experts and to bring them to Nuernberg will not be possible before 9 December 1946.

We wish to add that only today suitable offices in the courthouse, and typewriters, were promised to be available within a few days.

The purpose of this motion is to support an expeditious trial and to help to eliminate at the beginning difficulties which we are willing to avoid in order to save time.

[Signed by]
DR. SERVATIUS
DR. KAUFFMANN
DR. PRIBILLA
DR. SEIDL
DR. DR. NELTE
FLEMING
DR. WEISGERBER
DR. MERKEL

* At the arraignment on 21 November, the prosecution had stated its intention of delivering a large quantity of documents to the defense in advance of trial. The transcript of the arraignment is reproduced at pages 18-23, volume I, this series.

b. Argument in Chambers on the Defense Motion for Postponement and Tribunal Ruling Denying the Motion

TRANSCRIPT OF PRELIMINARY HEARING IN THE MEDICAL CASE,
5 DECEMBER 1946¹

PRESIDING JUDGE BEALS: Members of Military Tribunal I meet this morning informally in chambers to hear arguments upon the motion of certain defense counsel for a continuance of Case 1 pending before the Tribunal.² Counsel will be allowed 30 minutes, on each side, to present their arguments. Two counsel for the defendants may argue upon the motion. The defense counsel will open and close the arguments, and the defendants may divide their 30 minutes between the opening and closing as they please. You may proceed with the arguments upon the motion.

DR. SERVATIUS (counsel for defendant Karl Brandt): The counsel here for the defendants presented an application for the postponement of the beginning of the trial. They are the counsel who happened to be present at the time, those who drew up the application, and I am convinced that most of my colleagues who are not present also approve.³

There are technical reasons which lead to this application. It is the concern which we have as defense counsel that our witnesses cannot be here in time, since we are not able to make our application soon enough to have the witnesses brought here. The reason for this is that the material which can give us occasion to call a witness has not been in our hands long enough so that we can work on it. Only on Saturday afternoon were documents available, and others came in the next few days.⁴ For many of the defense counsel it is not possible with these few documents, in a short time, to speak to all of the defendants. Especially we still lack a list of the documents so that we can be able to select which

¹ Extract from mimeographed transcript, *U.S. vs. Karl Brandt, et al.*, Case 1, pages 026-039.

² Reproduced immediately above.

³ A complete list of defense counsel in the Medical case appears at page 7, volume I, this series.

⁴ At the time of the arraignment of defendants on 21 November 1946, Dr. Servatius had requested the Tribunal "to instruct the prosecution that the documents be submitted to the defense in time, the documents on which the charge is based. This would make the proceedings easier and give the defense an opportunity to examine the documents in time, and to obtain counterproof. In the first trial before the International Military Tribunal, we were given a list of documents with the indictment; although these documents were not enclosed, we could look at them and we could work on them. Up to now we have nothing on which we can build our defense. In other words, on the 9th of December [the day set for the opening statement of the prosecution], we will have proceeded no further than today, and we will not be able to advise our clients" (p. 21, vol. I, this series). At that time the prosecution replied that it intended to follow the same procedures as those used in the IMT Case and to supply to the Defense Center copies of the documents in advance of their offer in evidence. Between the arraignment and the hearing on the defense motion for a continuance, the prosecution had filed more than 200 documents with the Defense Center.

documents are significant for each individual. Therefore we have to look into the documents themselves to determine which are important; this takes hours. During this time other defense counsel, of course, cannot obtain information about these documents. In my application I stated the consequences of this condition. In order to get a witness here we would need several weeks. I as defense counsel for the first defendant must expect to have my witnesses called to the stand here first.*

General Taylor has been kind enough to say that he assumes that the prosecution's case will take two or three weeks. That would mean, if one includes the Christmas recess, that I must be ready by the beginning of January. According to the experience in the previous trial it will hardly be possible to get my witnesses here in that time, since I do not know where some of them are. There is the same difficulty with the experts. They would have to be here from the beginning of the trial. Whoever is inclined to appear as an expert and who is competent as an expert for the individual case must be discussed carefully, because the experts are supposed to help the Court. The same also applies for the witnesses. I do not want to call witnesses who will prove to be useless. It is my endeavor through sworn statements to replace the testimony of a number of witnesses and shorten the proceedings. That took a great deal of time in the previous trial [IMT case]—as far as I recall it took an average of two months until a sworn statement was available here. Then I cannot make my application yet, it will be unavoidable. In January there will be a recess after the prosecution has finished its case. That would be an interruption which should be avoided not only in the interest of the defense but in the interest of all. This interruption would be better at the beginning. I ask for 3 weeks, considering the possible one week Christmas holiday, that would in effect be 2 weeks. Perhaps there will be one week recess at Christmas, and that would be a delay of 2 weeks, and in this 3 weeks, I believe it would be possible to get the witnesses here. I do not want to go into all the minor difficulties which exist for the defense. I do not think this is the right place to present such matters. I have finished my statement.

PRESIDING JUDGE BEALS: Counsel for the prosecution.

GENERAL TAYLOR: The prosecution believes that this motion is entirely without foundation—without legitimate foundation. One of the principal points which appears to be made here is that some 100 documents have been made available to the defense, and that

*A list of the witnesses who eventually appeared for both the prosecution and defense is reproduced at pages 332-335, volume II, this series.

an additional 150 have not been made available. This motion was written on 3 December and was received by me yesterday afternoon. I checked with the document room and the Defendants' Information Center the moment I received this and was told that some 240 documents were already in the Defendants' Information Center. I am told that there is a list of 296 documents which has been furnished to the Defendants' Information Center. It appears, therefore, there were some 50 missing, so we put a special staff on last night and as of this morning 284 documents are in the Defendants' Information Center. So far as I know there is no rule or requirement that we furnish these documents. We are indeed bound by custom here to give them all documents 24 hours in advance of their use.* They have received these documents nearly a week in advance of the trial. This is just a privilege which we extend because we are in a position to do so and we think it will assist the trial. But this is not a matter of the right of the defendants. It is discouraging to see our attempt to extend this privilege as extensively as we can carried into an attempt to put the trial off. Furthermore, these documents in the Defendants' Information Center are all in German, a language which counsel understands and I, myself, in preparing this case have been unable to get most of the documents because it is difficult to get them translated into English for me to use them. In that respect the defense is in a much better position than the prosecution. The point about location of witnesses which Dr. Servatius makes is worthless and unspecified in his motion. We are not told that there is any particular witness he wants whom it is difficult to locate. He mentions his experience in Case 1 [IMT case]. I must point out this case is different from Case 1. The subject is more defined and the problems will be much easier and solve themselves. Until some substantial problem is brought to the Court's attention with respect to procurement of witnesses, it seems that there is no possible reason for us to postpone the trial for purely speculative difficulties. The same, I think, applies to the question of experts which the defense has raised. It does seem that surely they have had time to go into that matter fully. The indictment gives them the information as to what kind of expert they want to have here. If they have difficulty in getting him here by 9 December a transcript can be served to inform the expert of what was going on. It seems to us there has been sufficient time for them to get experts.

*The Rules of Procedure adopted shortly hereafter by the Tribunal in the Medical case required the prosecution to furnish the defense documents which it intended to offer in evidence 24 hours in advance of the time of offer (sec. III c). This rule became a part of the Uniform Rules of Procedure (sec. IV and V).

Some point is made in this motion about the rooms which have been furnished. We have done our best on that. Certain rooms were made available to defense counsel, and they found them unsatisfactory. As a result of their request, other rooms which are better have been made available as of yesterday and are set up, and working there is already possible.

As far as typewriters are concerned, it is difficult to procure German typewriters. We are today putting into this room a selection of English and German typewriters, and are doing all we can to aid counsel to perform their duties. In many respects, because of the language situation in this trial, I think their difficulties are no greater than our own on the prosecution side.

I must finally point out that a postponement of this trial means a postponement of other trials which are to follow this one. Under Ordinance No. 7, this is a continuing program, and if this trial does not start as scheduled it will result in postponement of those which are to follow.

I think that is all I have to say, Your Honors.

JUDGE SEBRING: General Taylor, are you in a position to say now how many documents will be used by the prosecution in its case in chief?

GENERAL TAYLOR: In its case in chief? It will come very close to the figure 300, Your Honor. I think Mr. McHaney [chief prosecutor in the Medical case] can answer that question in more detail than I can.

MR. MCHANEY [chief prosecutor]: If Your Honors please, we have made an effort to give them documents which we definitely plan to use. In other words, we have not sent to the Defendants' Information Center a mass of documents which we do not think that we will use. However, we have not sent them all of the documents which we plan to use for two reasons:

Firstly, we have obtained a rather substantial number of affidavits from certain of the defendants. These documents have not been made available in the Defendants' Information Center, and we do not plan to make them available until approximately 24 hours prior to the time that they will be used in court.

In the same category falls a number of charts showing the organization of various offices with which the Court will be dealing, such as the Medical Service of the Luftwaffe, the Medical Service of the Wehrmacht, the Medical Service of the SS, and so forth. Those charts have not been made available to them. They shall be on Saturday morning, since we plan to use them on Monday in our presentation here.

There are naturally other documents which will be used in the course of the trial in the case in chief which have not been sent to

the Defendants' Information Center as yet. I think that there are some documents dealing with euthanasia, which will be the last matter taken up in the case in chief, which have not been sent down because we have not as yet had the time to decide definitely which of those documents we plan to use. There are a rather substantial number of them, and we wish to select only those few that we would use here.

There are also, of course, those instances in which we will find documents in Berlin or in other places which we do not now have, which, of course, are not in the Defendants' Information Center, but a few instances will come up where we will find documents that we will want to use, but, by and large, I think that the 300 which we made available will pretty well cover the case in chief.

JUDGE SEBRING: By 300 documents, do you mean that those documents will also comprehend the affidavits?

MR. MCHANEY: No, we have now given them 280-odd out of the total of 294. Those are all photostatic copies of the original German documents. Now, in addition to that, I would say that we have, oh, in the neighborhood of 25, affidavits taken from the defendants. Additionally, we have at least an equal number of affidavits taken from witnesses.

JUDGE SEBRING: What equal number?

MR. MCHANEY: I say we must have at least 25 affidavits also, taken from witnesses; that is, people other than the defendants.

JUDGE SEBRING: So that, perhaps, you have 50 affidavits, altogether?

MR. MCHANEY: I should think so.

JUDGE SEBRING: Can you say at this time how much time will be taken in the introduction of documents, as you anticipate it?

MR. MCHANEY: You mean to put in our case in chief?

JUDGE SEBRING: So much of it as is comprehended by the documents.

MR. MCHANEY: Well, that is difficult to say. The manner in which we will present the case is more or less on a topical basis, in accordance with the order that we have set up in the indictment.* In other words, after the opening statement and certain procedural matters are taken care of, we will start introducing documentary evidence consisting of affidavits by the defendants and German documents on the high altitude experiments.

More or less at the conclusion of the introduction of documentary evidence on that topic, we will call certain witnesses to the stand to testify with respect to those matters. We will then proceed to the next experiment, which is the freezing experiment.

*See paragraphs 6-9 of the indictment, pages 11-15, volume I, this series.

In the high altitude experiments we have, roughly, 40 or 45 documents dealing with that matter. As far as I recall, we have only two witnesses. I should think that it would probably take us in excess of a day to put in those documents. Of course, the examination of witnesses may prove to be a rather time-consuming matter because there are quite a number of defense counsel here, and roughly half of the defendants, I think, are charged with the high altitude experiments, and I assume that there will be considerable cross-examination.

PRESIDING JUDGE BEALS: Defense counsel may proceed with the closing argument. Twenty-two minutes remain.

DR. SERVATIUS: I wanted to reply quite briefly to the argument made by General Taylor. It is a matter of fact that we have no right, no legal right, to expect that these documents be submitted to us now—prematurely. In practice, the situation is different. It is such that during the proceedings we will have to make our applications. I must be in a position to present my evidence, and the sooner the prosecution gives me those documents, the sooner I shall be ready. The purpose is merely to avoid an interruption of the proceedings, and I don't want to come in with continuous motions during the proceedings. It would be better if we could postpone the proceedings in the beginning so as to be able to go ahead afterwards.

As far as the practical use of the documents is concerned, I should like to point out that there is no list of documents so that, in practice, this pile of documents is of no use to me. I should have to look through each individual document in order to ascertain what it contains, and everybody else would have to do the same, so I should like to ask the Tribunal to convince themselves just how difficult it will be to carry this out in practice. In practice, we do not have the documents in our hands, and we cannot use them. If we had a list, we could have shared them out, and each defense counsel could have had 20 documents copied, which we would have had at our disposal.

I am convinced that the prosecution is doing everything to help us, but the situation is that even this morning we do not have a room in which to work. In practice, we are short the documents, we are short of the typewriters. I did not want to put this to the Tribunal because I did not think that this was a suitable place, but that is the situation. We do not have these things.

I should like to put the emphasis on the pertinent difficulties: namely, that witnesses and experts cannot be brought here in practice in time; and the postponement which I am requesting is in practice no more than a fortnight's delay. It would be to everybody's benefit, as subsequently we would be able to go ahead

with the proceedings at a greater speed. These are practical questions which cannot be overlooked.

JUDGE SEBRING: May I ask counsel a question, please?

I note that in your motion for a continuance, you say that it is necessary to have expert witnesses present during the entire course of the prosecution's case in chief. Can you tell me what there is in the prosecution's case that would require the presence of your expert witnesses throughout that phase of the prosecution?

DR. SERVATIUS: According to German legal procedure, the expert ought to be present during the entire proceedings, and the expert, in particular, ought to be in a position to judge from his own expert knowledge what the implication is and what the accusations are. During the proceedings, documents, too, will be presented and also witnesses will be appearing, and the expert will certainly have questions to put to the witnesses—probably very relevant and important ones. It is for that reason that it would be suitable, in my opinion, and also in accordance with German law if the expert were here in good time, but then, in particular, it would be difficult to obtain a suitable expert in time.

JUDGE SEBRING: You have merely said in your motion that you intend to produce certain witnesses—an expert to what facts or phase of knowledge?

DR. SERVATIUS: As to just what point the experts will have to speak, that will differ in the case of each individual defendant. We in our capacity of defense counsel will have to agree on which expert will cover the largest territory on the strength of his knowledge, so that we do not produce large numbers of experts here. Many experts today are not allowed to practice, since they no longer hold their professorships or are not appointed by a university. Others are busy and cannot get away, and it will be necessary to go and see them and ask them if they are able and willing to appear.

JUDGE SEBRING: I do not believe you understood my question. You are proposing to call experts in what field, the field of medicine and research?

DR. SERVATIUS: Yes, that is right.

JUDGE SEBRING: Do you know where potential expert witnesses are living or residing? Do you have that information?

DR. SERVATIUS: I have not dealt with that problem myself. My colleague, Dr. Nelte, will probably be able to answer that question.

DR. NELTE [counsel for defendant Handloser]: Gentlemen of the Tribunal, with reference to what my colleague, Dr. Servatius, has said I should like to add the following, and also as a reply to what has been said earlier; namely, that the difficulties we had were of a figurative nature and were not of a concrete nature.

May I please point out to you that on 26 November I had already submitted application, to which even today I am still without a reply. In that application, dated 26 November, I had named six experts and witnesses who are of general and great importance to this trial.* In consideration of the fact that the trial was scheduled to start as early as 9 December I had requested to be given the possibility of calling these doctors who reside in Heidelberg, Wuertzburg, Cologne, and as far as I knew, Tuebingen, and that I might be given the opportunity to visit there. I still have not received a reply to this application today. I have not been able to visit these important witnesses and I believe that the raising of the points which prosecution have submitted in today's letter cannot be applicable to my case. They state that the defense has had ample time to call experts. It might have been possible to visit these doctors in the course of this week, if my application dated 26 November had received an early decision.

I, also, on 2 December submitted an application to the high Tribunal, in which I referred to five experts capable of dealing not only with general medical questions but also with the limits and dividing lines of what might be considered legal and medically sound in each individual case, or not permissible. It has not been possible to have a decision made on this application up to the present time. What I was trying to express was that the time which was at the disposal of us defense counsel, considered from the point of view of advancing the proceedings, has been utilized in the best technical preparations for the purpose of expediting this trial, although as my colleague Servatius has described, we have been hindered. I hope that this high Tribunal will believe us, the defense counsel, when we say that everything we do and everything we apply for will be raised in the connection that with it and through it we act in the general best interest, not only of ourselves, but of the Tribunal and prosecution, since it is our aim and our ambition to assist in the greatest possible clarification of the real circumstances and material throughout this case. It is for that reason that the objection raised by the prosecution, namely, that there is no legal regulation according to which the

*On 26 November, Dr. Nelte had filed applications for seven documents, all of which had been approved by the Tribunal on 4 December 1946, the day before this session. There is no record of any applications for witnesses by Dr. Nelte at any time before 5 December, but Dr. Nelte filed four such applications on 5 December and two more on the next day. The Tribunal granted five of these applications on 13 and 14 December, as follows: for Prof. Dr. Kurt Gutzeit, who later testified (Medical case, tr. pp. 2692-2764), and also gave an affidavit which was introduced by the defense; for Dr. Paul Wuerfler, who later testified (*ibid.*, pp. 3104-3144), and who also gave an affidavit which was introduced in evidence by the defense; for Prof. Dr. Rodenwaldt, Prof. Dr. Frey, and Prof. Otto who did not testify but gave affidavits which were introduced by the defense. On 14 December the Tribunal denied a sixth application, for Prof. Dr. Wachsmuth, "without prejudice to further showing of necessity for witness." Wachsmuth later gave an affidavit which was introduced in evidence by the defense.

documents and any other material should be submitted in good time is not, I think, quite applicable in our case, because we, both the prosecution as well as the defense, have the mutual duty to contribute everything we can in order to elucidate and investigate the circumstances throughout and to place at your disposition, Your Honors, material as complete as possible as is necessary to find the truth.

PRESIDING JUDGE BEALS: The Court has a question to propound to the prosecution. I understand that counsel for defense, Dr. Servatius, I believe, has said that although many of these documents are now in the Defense Information Center, yet there is no list of the documents from which they can work adequately. Can you advise the Court about that, sir?

GENERAL TAYLOR: Prosecution furnished the Information Center with a list of these documents in numerical order. The list does not break the documents down into an index by subject, but it does list the documents by numbers. As far as I know there is no reason why the defense counsel could not have divided them among themselves and dealt them around so those applicable in each case would come into the hands of the lawyer in that particular part of the case. Such a list was forwarded to the Information Center. Furthermore, I stopped by there on my way to court and very cursorily looked around and saw the document file in a drawer in numerical order. I say that hesitantly because it was a cursory look, but that is what appeared to me to be.

DR. SERVATIUS: Mr. President, may I answer briefly. There is a list of documents, yes—but it does not correspond to what we had formerly. It is only a list of numbers and reads 001, 005, 200. I see the numbers but I do not know what they mean. I can't select what is of importance for me, since I do not see "Letter by Karl Brandt to Himmler," that is important to me. I only see "005," for "Euthanasia." I can't see that on the documents. A list of numbers is useless to me. It is only of use to the person in charge of the documents, as he knows which documents are there. I cannot trade with my colleagues because I do not know who has the important documents. The documents are all in a cupboard. I myself went through them on Saturday and with the assistance of Lieutenant Garrett I picked some out. It took an hour and a half to go through the documents—about 100 documents. As long as I was working there no one else could use them. In practice they are not really available to us.

GENERAL TAYLOR: I believe what Dr. Servatius has said confirms what I said about the list. That list is a check list. We are certainly, I believe, under no obligation to give the defense counsel an index from which they can determine a document's

importance. There is no way we can save them from work. They have to go through and see which document relates to each part of the case. I say again they are in a very much better position to review the documents because they can understand them. They do not have to deal with translators. Sometimes it is very late when they are translated. I have had access to very few documents.

May I make a comment while at the podium about Dr. Nelte's point regarding expert witnesses. I do not know of circumstances concerning two particular requests for experts that he has mentioned. All those requests come to the prosecution and I am informed that in every case, except two, we have indicated approval; that we have no objection to the requests and sent them back to the Information Center. Those two or three cases where we have not given consent was because we are expecting information about witnesses from London, Paris, or from some other distant point. In all cases we have said we had no objection to calling of witnesses in Germany. I cannot believe any objection by the prosecution has been put in against securing witnesses from Heidelberg, Cologne, or elsewhere.

PRESIDING JUDGE BEALS: The Marshal will clear the Court while the judges come to a decision of this motion. All persons remain at attention until summoned into the courtroom.

(Recess)

PRESIDING JUDGE BEALS: The Court has considered the briefs filed in connection with this matter and the argument of counsel; the Tribunal rules that the motion for a continuance will be denied without prejudice, however, to the rights of the defendants to present any appropriate motions during the course of the trial for any necessary reasonable recess, either to secure expert witnesses or consultants to be present during the course of the prosecution's case in chief; or to secure other witnesses or documents.* The Tribunal will attempt to dispose of all motions or applications for the presence of witnesses or production of documents no later than tomorrow. Will the counsel for the prosecution step to the podium? The Tribunal is interested, General, in whether or not you could supplement this list of documents which has been filed so that as to each document which is listed, there might be, in connection therewith, a short general statement as to the subject matter of that document.

*There were no further written requests for recesses. However during the prosecutions's case (9 Dec. 1946-28 Jan. 1947), there were two recesses of 10 or 11 days in addition to the usual recesses from Friday evening to Monday morning. The first recess, 11 days, was from 22 December 1946-1 January 1947; the second, 9 days, was from 18-26 January 1947. During the defense case (29 Jan.-3 July 1947), there were four recesses of 3 or 4 days' duration.

GENERAL TAYLOR: I will ask Mr. McHaney to answer that question.

MR. MCHANEY: If Your Honor please, would it be necessary that this descriptive list of documents be translated into German? I think that possibly we could get up such a list without too much difficulty in English, but our translation facilities at the present time are extremely burdened; and if possible, we would like to be relieved of the task of having this translated into German; or if defense counsel would also take considerable more time, we could provide it to them in English within, I think, 24 hours or 48 hours, I should think, at least.

PRESIDING JUDGE BEALS: It is not the idea of the Tribunal that the statement should be very long. I know nothing of your translation facilities. I would assume that if a brief statement in English were filed, it would probably materially assist the counsel for the defendants, just to give each one a brief notice of the contents and the nature of the document so that the defendants who are interested in certain specifications under the charges would know from that what documents did or did not concern them.

MR. MCHANEY: Yes, indeed, we shall do that.

PRESIDING JUDGE BEALS: I would like to ask defense counsel a question. Do you think, counsel, that the filing of a brief statement in English would be of material assistance to you and would be sufficient until possibly a German translation could be provided?

DR. SERVATIUS: It would be of great assistance to us. If a number of defense counsel have difficulties, we would be able to help each other. We would be very glad to get it soon. May I ask about the number of lists, if we could have 23 lists, one for each defendant? There are 23 defendants, if we could have 23 copies.

PRESIDING JUDGE BEALS: I would ask counsel for the prosecution to furnish that, if possible. You are excused.

JUDGE SEBRING: General Taylor, is it mechanically possible to do that?

GENERAL TAYLOR: Yes, Your Honor, I believe it could be done by stenciling it.

JUDGE SEBRING: Within what period of time?

GENERAL TAYLOR: Well, we will do our best to have it within 24 hours. Until I check with the clerical facilities I am a little reluctant to say definitely that we can do it in 24 hours, but we will shoot for that and I think we will certainly be able to have it in 48.

PRESIDING JUDGE BEALS: This informal session of the Tribunal will now adjourn.

(The Tribunal adjourned until 9 December 1946, at 1000 hours)

3. DISCUSSION OF THE TRIBUNAL AND COUNSEL CONCERNING A RECESS FOR PREPARATION OF THE DEFENSE CASE, 17 JANUARY 1947

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
17 JANUARY 1947¹

PRESIDING JUDGE BEALS: At this time the Tribunal will recess until Monday morning, 27 January at 9:30 o'clock. This recess is taken in order that the defendants may have suitable time within which to prepare their defense.² During the coming week, defense counsel will advise the Tribunal as to whether or not they have agreed upon the time to be allocated to each counsel for the purpose of making his opening statement. Defense counsel will be allowed two days to make their opening statements.

If defense counsel cannot agree upon the allocation of time, the Tribunal will allocate the time when the Tribunal reconvenes on Monday morning, January 27.

The prosecution will then continue its case until it is completed; defense counsel will then open. Are there any questions on the part of anyone?

I would like to ask the prosecution how long it anticipates it will take to close after the Tribunal reconvenes?

MR. MCHANEY (chief prosecutor): If the Tribunal please, I am quite sure that it will not take more than one trial day. I might state briefly what we have to do before we close our case. We have to present three documents with respect to additional proof on membership of the defendants charged in count four—

PRESIDING JUDGE BEALS: I was merely asking counsel for a general statement. Prosecution will not be limited. I desire that Tribunal and defense counsel have a general idea as to what to expect.

MR. MCHANEY: The only difficulty is the length of cross-examination of Leibbrandt, Professor Leibbrandt. I do not think examination will take more than an hour or an hour and a half. I am unable to say how long defense counsel plan to cross-examine

¹ Extract from mimeographed transcript, Case 1, U.S. vs. Karl Brandt, *et al.*, pages 1955-1959.

² The prosecution had rested its case subject to calling one witness, to showing a film, to offering 12 documents previously identified, and to offering several documents which had not yet been processed for introduction in evidence.

Professor Leibbrandt. Except for that open problem, I should think we certainly should finish on Monday.

DR. SERVATIUS [counsel for defendant Karl Brandt] : Mr. President, I have only a technical question in connection with the translations. The document books which we want to submit must be delivered to the Translation Division in advance. In the trial before the International Military Tribunal, this took from five to six days. That would mean that approximately on the 22d or 23d, we would have to submit all documents which we want to submit in evidence. The adjournment cannot be used to advantage for the defense.

The next question—

PRESIDING JUDGE BEALS: Let me answer your first question. Would it be necessary that all documents to be offered by all the defendants be submitted at that time?

DR. SERVATIUS: Yes.

PRESIDING JUDGE BEALS: The defendants will naturally present their cases separately. Could not the documents which will be required later, be submitted later?

DR. SERVATIUS: The first defendants are in a greater hurry than those whose cases come up later. Of course, the first defendants have the most extensive proof.

The second question, which refers to everyone, is whether opening statements have to be submitted for translation so they can be read by the interpreters and will be available in writing to the members of the Tribunal.

PRESIDING JUDGE BEALS: Do I understand that before the International Military Tribunal, the preliminary statements of counsel for the defendants were translated before they were delivered before the Tribunal?

DR. SERVATIUS: According to the Charter [of the IMT] such opening statements were inadmissible.* At that time, it only referred to document books and to the closing statements. If this is applicable here, it would mean that the adjournment, for technical reasons, would be too short.

PRESIDING JUDGE BEALS: It would seem if the opening statements by defense counsel will have to be translated, then that presents a new problem to this Tribunal.

DR. SERVATIUS: The Language Division asked me when I would submit these statements. I said it would take two or three days. It has yet to be written. It must be assembled and distributed. If Saturday and Sunday be excluded, there is not much time left, and I would have to be finished by Wednesday at the latest.

*See section XII-A.

PRESIDING JUDGE BEALS: Has counsel for the prosecution any suggestion in connection with this matter?

MR. MCHANEY: I should think that if defense counsel could prepare their opening statements, which I assume will not be too extensive, in time, and present them to the interpreters beforehand, so they can become familiar with them in order to give a coherent and logical interpretation here in court as it is read in German. I should think that would be satisfactory. But if they prepare these statements in German and then have them translated by the Translation Department in advance, I should think then there might be some difficulty getting them processed and ready in time. As far as getting the documents translated, I seem to have a fairly good recollection that the International Military Tribunal required something more than 5 days' notice be given to the Translation Department. I have in mind 2 weeks. Be that as it may, I can here and now advise defense counsel that as a practical matter they will not be able to get translations returned in 5 days, especially if there is to be a considerable number of documents.

PRESIDING JUDGE BEALS: Has not the defense already submitted documents which they desire translated to the Translation Department?

DR. SERVATIUS: So far as I have been informed, no documents have yet been submitted for translation. The affidavits are not yet available and in many cases we have not yet received them. We are in many cases concerned with affidavits or short excerpts of medical literature. If altogether we had a 12-day adjournment, we could well manage. We had really assumed that the prosecution would finish by the middle of this week. Then, of course, we could have managed by the 27th.

The Language Division suggested that if it were necessary they would work Saturday and Sunday so that the documents would be ready in time. If, for instance, we would start on the 29th, then we would have Wednesday, Thursday, and Friday. That could be taken up with opening statements, and then the following Monday we could start with the real submission of evidence. I think that could well be managed by the defense and also by the Language Division.

MR. MCHANEY: If it please the Tribunal, the prosecution certainly would not look with favor upon any delay beyond Monday, a week. I have stated that we will take up approximately one full trial day to close our case. It was made perfectly clear 2 weeks ago, at least almost that long, that this adjournment would take place and that it might be as little as one week.

The material which has been going in the last week approximately concerned four of the 23 defendants. I am at a loss to see any ground for further delay. These gentlemen say that they do not have any affidavits yet; they do not have any documents yet. Quite frankly, I do not know how it is all going to match together in these next 7 days but, be that as it may, I think we should attempt to get the defense under way and see how it goes.

DR. SERVATIUS: Mr. President, my suggestion was to have 2 more days, that is, I ask that you start on Wednesday instead of Monday. The way it would happen would be as follows: The prosecution would start for 1 day and then the defense. All we really want is an extra 2 days. That would give us Thursday and Friday.

PRESIDING JUDGE BEALS: I think it might be possible for defense counsel to be adequately prepared if the Tribunal would meet on Monday, January 27, at the closing of the case of the prosecution. Defense counsel might then be prepared to make their opening statements during the next two days. Then, if further time is required for the translation of the documents, a recess of 2 more days could be taken at that time.

DR. SERVATIUS: That is a suggestion which is acceptable, though we would prefer taking the time all at once.

PRESIDING JUDGE BEALS: The Tribunal understands the defense counsel would prefer the other method, but the Tribunal will follow the method just outlined. You may have this assurance: If it definitely appears that the defense will be prejudiced by this proceeding, they may have a further recess.¹

DR. GAWLIK [counsel for defendant Hoven]: Mr. President, I have another question. I stated that my most important witnesses are in Holland. I understood the Tribunal to say that I may make application for questionnaires to be sent to Holland by way of a commissioner.

PRESIDING JUDGE BEALS: That matter may be taken up informally before me in my office in the morning. We will consider it and see what can be done in order to satisfy defense counsel.²

¹ Apart from the usual recesses from Friday evening to Monday morning, the following recesses of three or four days were taken during the presentation of the defense evidence, 31 January-2 February; 14-17 February; 4-7 April; 24-26 May; 30 May-1 June. After the defense closed its case on 3 July, the prosecution introduced nine rebuttal documents on the same day and rested its rebuttal case. The Tribunal was then in recess for 10 days (4-13 July) so that both the prosecution and defense could prepare closing statements.

² After submitting interrogatories, Dr. Gawlik later introduced three affidavits in evidence from Dutch witnesses on behalf of the defendant Hoven: These affidavits were Document Hoven 13, Hoven Defense Exhibit 10 (affidavit of Philip Dirk, Baron van Pallandt van Eerde); Document Hoven 14, Hoven Defense Exhibit 12 (affidavit of Frederik Adrianen Hendrikus Schutlerinus van der Laan); and Document Hoven 18, Hoven Defense Exhibit 8 (affidavit of Leendert Seegers).

The Tribunal will now recess until Monday morning, 27 January 1947.

F. Farben Case—Motions, Arguments, Discussions and Rulings Concerning the Postponement of Trial, Recesses for Defense Preparation and Time Schedule for Completion of the Defense Case

I. INTRODUCTION

Two months after the filing of the indictment in the Farben case, the defense applied for a three months' postponement of the trial, and when the arraignment took place more than 3 months after the filing of the indictment, the defense applied for a 6 months' postponement of the trial. The defense motion for a three months' adjournment, dated 3 July 1947 and filed 7 July 1947, was made more than a month before a tribunal was assigned to the trial and hence it was passed upon by the presiding judges of the five Tribunals then functioning in Nuernberg. These judges constituted the Supervisory Committee of Presiding Judges. (Sec. XXIII.) The defense motion embodies one of the most emphatic arguments ever made in Nuernberg concerning the alleged unfairness of Nuernberg procedures and practice and the relative disadvantages of the defense in trial preparation. The defense motion, the prosecution answer thereto, and the order of the presiding judges denying the motion without prejudice are reproduced in section 2. The later motion for a 6 months' postponement was made orally at the arraignment before the Tribunal on 14 August 1947. It repeated substantially the arguments made in the earlier motion for a 3 months' postponement. (The transcript of the arraignment is reproduced in sec. II, vol. VII, this series.)

During the prosecution's case in chief (28 Aug.—2 Dec. 1947) there were 11 recesses of 3 or 4 days. Near the end of the prosecution's case in chief, the Tribunal held a discussion in chambers with defense counsel on the presentation of the defense case. The next day the Tribunal announced that after the conclusion of the prosecution's case there would be a recess of 14 days before the defense opening statements and then a further recess of 23 days before the defense would be required to go forward with its proof. The defense moved for a reconsideration of this ruling, arguing that it was entirely insufficient. This motion was denied a few days later. The transcript of the Tribunal's announcement of these two recesses, the defense motion and argument for recon-

11 of 17 February 1947. According to its composition, procedure, and derivation of its power of jurisdiction, it is an American court.

It results from this that the defendants have a right to the constitutional guarantees which, according to the 14th amendment to the American Federal Constitution, have been recognized for any legal proceedings, and which are usually summarized in the formula "Due Process of Law." It is correct, indeed, that the constitutional rights are destined in the first place for American citizens, but it has been recognized by the American administration of justice that they also apply to foreigners. So it says in *Yick Wo v. Hopkins*, 6 S. Ct. 1064, 1070 (1886): "The fourteenth amendment to the Constitution is not confined to the protection of citizens***These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color or of nationality." According to this, the only thing in doubt could be whether the constitutional guarantees of "Due Process of Law" also apply to such foreigners who are not living on United States territory. However, the judgments in which such a limitation is supported apply to cases in which someone is staying illegally in the United States, and not to a case like this one, where an American tribunal has jurisdiction over the inhabitants of the occupied territories in virtue of military occupation:

In accordance with Article II (a) of Ordinance No. 7, the Court is established by the United States of America in virtue of the powers of the Military Governor of the American Zone in Germany, as well as in virtue of the powers which have been entrusted to the zone commander, pursuant to Law No. 10 of the Control Council, and Articles 10 and 11 of the Charter of the International Military Tribunal. Before this Court the arraignment is made "in the name of the United States of America" by the Chief Public Prosecutor for War Crimes who has been appointed by the Military Governor, pursuant to paragraph 3 of the Executive Order 9679 of 16 January 1946 of the President of the United States.* In case of a death sentence, the verdict of the Tribunal has to be confirmed by the American Military Governor (Art. XVIII); the latter has the right to mitigate sentences pronounced by the Tribunal (Rights of Pardon, Arts. XV and XVII).

According to this, the defendants are subject to the jurisdiction of American courts, and therefore this prerequisite for the application of the constitutional guarantees of the administration of justice exists in this case. According to the laid-down jurisprudence and jurisdiction, "Due Process of Law" means that the per-

*Reproduced in section IX B.

sons concerned have a right to notice and hearing, which is known in the German jurisprudence as right to legal hearing. According to judicature, it comprises not only the right to expound the conception of the persons concerned which is different from that of the prosecutor, but also the right to prove this dissenting statement of facts and law. Justice Moody said in *Londoner v. Denver*, 210 U. S. 373, 386 (1908): "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and if need be, by proof, however informal." This statement referred to a statute which granted only one of both the rights.

The placing of the Nuernberg Military Tribunal under the constitutional guarantees of the United States has an important consequence. According to general conceptions, the right to notice and hearing does not grant the right to a second instance. A statute which explicitly denies the second instance—this happened also for the Nuernberg trial, pursuant to Article 15 of Ordinance No. 7, old version—can therefore in itself not be declared contrary to the Constitution. There is, however, the very far-reaching exception that the legal appeal, which refers to the contrariness to the Constitution of the trial, cannot be excluded. Mott, "Due Process of Law," Indianapolis 1926, page 238, writes: "There is however one significant exception in this power of the States in regulating their appellate system. An appeal on the question of constitutionality of either procedure or result must always be permitted when fundamental rights are involved. An attempt to curb the power of the courts over the constitutionality of statutes has been held void."

The above-mentioned Ordinance No. 7 of the American Military Government tries to do justice to these basic demands of the American constitutional law to a proper procedure. According to Article IV, the defendants shall be given a fair trial, i.e., that the guarantees of the legal state of the procedure remain secure, for the interpretation of which the American decisions are to be procured. But the defendants have a right to proper proceedings according to international law also. All civilized jurisdictions have been trying since most ancient times, in the same manner as the American jurisdiction, to realize the principle "*audiatur et altera pars*" [Listen also to the other side]. Here exists a general tendency of legal development, the results of which can without hesitation be regarded as belonging to the general principles of international law which have to be applied for lack of other criteria.

After all, the point in question is to ascertain in how far the

minimum prerequisites for a fair trial were preserved up to now, and to what extent they will be preserved in the future.

So far the preliminary proceedings [Vorverfahren] limited the defense in such a manner that reasonable doubt exists whether the defendants' basic rights have not been unduly violated:

1. Before the indictment was served, the defense of the accused was entirely impossible. It was forbidden and impossible for the accused to get in contact with a defense counsel. The attention of every attorney who tried to contact the accused or to make relevant statements to the prosecution before the indictment was served was called by the prosecution to the fact that every activity of defense counsel is forbidden as long as the indictment is not served.

It was, therefore impossible to display even the slightest preparation of the defense before the indictment was served, and it was likewise impossible—and this point of view is of at least equal importance with regard to the writ of habeas corpus—to convey to the accused moral assistance by making them understand that a defense counsel had decided to take the defense upon himself.

2. This shows obviously that no one was given access by the prosecution to even the most trifling evidence, prior to the indictment being served. But also after the indictment was served, the blocking of evidence by the prosecution, respectively the American Military Government, has been so effective up to now that the defendants were unable to secure material for their defense. This limitation is the more perceptible as the general conditions alone in Germany brought about an extraordinary advantage for the prosecution as compared with the defense.

II. General Position of the Defense

The managers of one of the world's biggest concerns have to account for their entire conduct of business during the last decades. It is not only the structure of the works of this concern in Germany, but also its international interlacements; not only the scientific preparation of the production, but also its carrying through and its commercial utilization; not only the relations of this concern to the state, but also the internal affairs of its management, in particular the labor policy, which are made the subject of weighty criminal proceedings which, according to the gravity of the counts of the indictment, endanger the defendants' lives. One may be of a different opinion about the value of worthlessness of such a huge accumulation of responsibility and means of production, as it existed within the framework of the I. G. Farben Corporation. This has absolutely one disadvantage: it is difficult for a man to gain a general survey of the whole and to master the

details. It is not in vain that it took the prosecution practically two years to prepare the indictment, despite the fact that it employed a tremendous number of investigators and in spite of the enormous use of all modern means of communication. In addition, the indictment in its tendency is carried by strong currents of public opinion which, especially in the United States, have been trying to defame the I G for about a decade. But above all, the prosecution disposed of all means of power of the victorious American Nation in Germany; you have only to think of the postal censorship which can inform the prosecution about each step taken by the defense.

As compared with the prosecution, the defense is in an extremely critical position which hardly enables it to take its responsible part in finding the truth. One has to be acquainted with the general living conditions in Germany, the effects of which can even be found in the scarcity of writing paper, to clearly realize the inequality of the weapons of prosecution and defense: shortage of room, also in the Palace of Justice, of typists, typewriters, motorcars, gas, blocking and limitation of telephone calls, no possibility to have telephone calls with foreign countries nor to send telegrams to foreign countries and the United States, money shortage, extreme restrictions of food and heating, the indescribable conditions on the German railroads—which are impediments, even hardly surmountable obstacles, for an effective defense.

It is our duty not only to convince the Tribunal that, in this case, bitter injustice is being done to the defendants, but to bear in mind the responsibility towards an estimated 300,000 shareholders of the I. G. Farben Corporation, the great social obligations of the company, especially towards the pensioners, and all the other consequences resulting from the General Order No. 2 of 5 July 1945,* that was justified with the same allegations which now constitute the subject of the criminal proceedings.

III. The Critical Condition with Regard to Evidence in Particular

What evidence has the defense at its disposal to refute the allegations the defendants are charged with?

1. *Documentary evidence.* Documentary evidence is of an overwhelming importance in this trial. The procurement of documentary material for the defense, however, turned out to be impossible under the hitherto prevailing circumstances. The state of affairs was characterized by the three following facts, the combination of which had an unprecedented effect:

*This order was included in the answer of the prosecution to this motion, which is reproduced immediately following this motion.

(a) All the documents of the IG Works have been confiscated, together with the Works, by Military Government of each of the different zones, so that the defendants are not in a position to dispose of them.

(b) Personal notes of the defendants have been confiscated in their private homes by commissioners from Military Government, after the defendants were arrested.

(c) The documentary material, mentioned under (a) and (b), has been compiled in Frankfurt a.M., Mainzer Landstrasse, and in Frankfurt a.M., Griesheim, and is to be found there in the hands of an American agency, which is assisted by officials of the IG to arrange and master the material and which even called upon the assistance of leading gentlemen who are indicted now. Threatened with criminal punishments, these officials of the IG were prohibited to give information to the defense about the documents administered by them. It was permitted—it is true—to file applications for securing and examining important documents with the General Secretariat, but the application had to be specified, i.e. the document which was requested, had to be identified very closely. The defendants, however, were and are not in a position to do so, because they do not know in which files these records are to be found, where these files are located.

The prosecution itself felt it impossible to maintain this situation which had practically paralyzed the defense. The defense had prepared an application asking for the right to obtain direct access to the Document Center, also without special identification of the exhibit, in order to elaborate the most important file volumes there and to secure copies.

This unbearable situation ceased through the letter of 20 June of the Defense Administrator,* and was altered to the effect, as the defense had wanted to request. Properly speaking, only now the time has come which can be used for the preparation of the defense. The elaboration of the material will be the more time-devouring as the files are, according to information received, in great disorder, owing to the searches carried through by the prosecution.

The expositions of the American law for criminal procedure do not give full justice to the importance of documentary evidence in the criminal proceedings, because in jury trials this evidence is naturally pressed into the background by the interrogation of witnesses. According to this, the administration of justice regard-

*This letter of the Defense Administrator to the defense counsel in the Farben case stated that the I.G. Farben control office would permit defense attorneys to examine documents of the Farben Concern at Frankfurt, the headquarters of the control office, upon presentation of a letter of identification from the Defense Administrator. The letter is reproduced on page 400.

ing adjournment and postponement of the proceedings deals only with those cases in which adjournment was requested because witnesses could not be reached. The principles developed in this connection must, however, apply accordingly to documentary evidence, if the evidence given by witnesses is replaced by documentary evidence. (Cf. Art. VII.)

It should be pointed out in this connection that, according to the German code of criminal procedure, defense counsel is entitled, after the indictment has been served, to look through the files, even through those of the public prosecution, in order to be able to prepare properly for the oral proceedings.¹ On this point the American law of procedure differs from the Continental legal conception; however, the limitation of the defense, as resulted hitherto from the combination of facts (a) to (c) in this case, exceeded by far the normal limitation to which a defendant is subject according to the American law of procedure. This was implicitly recognized by the Defense Administrator himself in another letter of 20 June 1947.

An adjournment of the trial for three months is therefore the minimum the defense must demand. We now have to work the entire documentary evidence through in an objective manner and check on its completeness and importance for the defendants' exoneration.

2. *Evidence of witnesses.* In a number of cases the prosecution has made use of its power to secure witnesses for the trial through arrest. The defense is therefore not in a position to contact them in the absence of an American official.² This constitutes a further limitation of the defense which is so much the harder to bear for Continental lawyers as the Continental codes of procedure do not provide the possibility to arrest witnesses. Moreover, with the majority of the arrested witnesses, the suspicion that they would flee from the trial might hardly be justified, so that these arrests have to be regarded by the defense counsel as aimed at limitation of the defense. Besides, silence has been imposed on other witnesses who were interrogated by the prosecution, but not arrested, so that the defense is also seriously hindered in this case.

3. The screening of the evidence by defense counsel is the more important as, according to American law of criminal procedure, the prosecution prepares only the incriminating material.

The defense is also especially harmed insofar as it has not the

¹ Concerning access of the defense to copies of documents in the prosecution's files which had originated with the I.G. Farben Concern, see the Tribunal order of 22 April 1948, reproduced on page 430.

² Concerning the rules on the interrogation of prisoners confined in Nuernberg Jail, see the discussion in section XIII K 1, and the references made therein.

opportunity, unlike the prosecution, to conduct inquiries abroad, either itself or by commissioners, in order to gain a picture of conditions on the spot. This would be of special importance in the Auschwitz complex, since it has been made public in press dispatches that commissioners of the prosecution secure evidence on the spot.

IV. The Nonfamiliarity with American Law of Procedure and the Impossibility to Overcome It Soon

1. True, Ordinance No. 7 has made certain concessions to the Continental law of procedure. However, on the whole, it stands on the ground of the American legal tradition. For the defense it is an unusually difficult task to solve in the light of its duties the questions of procedure also on a legal ground, because the only library for American law in Germany has been torn asunder and destroyed in its essential parts by war events. The library of the Kaiser Wilhelm Institute for foreign public law and international law in Berlin was evacuated to different places in the vicinity of the Reich capital during the last months of the war. The very decisions of the American Supreme Federal Court have burned to ashes in Kleisthoehe together with the castle where they were kept. The defense, therefore, has to request that one of its members be permitted to travel to Switzerland, in order to carry out the necessary studies in Geneva where perfect juridical material is on hand with the League of Nations.*

2. Apart from this possibility to procure the necessary knowledge of American law through studies in Switzerland, it seems nevertheless urgently necessary to have American lawyers or perhaps also lawyers from other countries as defense counsel. The Tribunal is therefore kindly requested to obtain from Property Control that the necessary funds for hiring an American attorney are made available from the confiscated assets of the I. G. defendants. With regard to its ideas, the indictment is strongly influenced by the American anti-trust movement with which German lawyers are not familiar at all. In view of the difficult task which arose for the defense from the necessity of coping with the anti-trust complex also, it would be an irresponsible increased difficulty for the defense if this request should be turned down.

According to Ordinance No. 7, Article IV (c), also persons who do not comply with the normal prerequisites, according to which they can act as defense counsel before German courts, may be admitted as defense counsel at the discretion of the Tribunal.

*On 29 May 1947, more than a month prior to this application, Dr. Walter Vinassa, a Swiss attorney from Bern, Switzerland, had been approved by the Executive Presiding Judge as defense counsel for the defendant Haefliger in the Farben case.

Discretion here means dutiful discretion, a concept which is also known in American law, as can be seen from the doctrine of "Abuse of Discretion." When, however, would a request be more objectively justified than in this case, where the aid of foreign attorneys is a peremptory necessity to make a fair trial possible?

Motions

I. It can be seen from all this that the request for a 3-month postponement of the trial is the minimum the defense must request in order to be in a position to prepare the trial.

II. This postponement will change the situation only if further decisions are reached by the Tribunal, out of which the following are requested as particularly urgent:

1. In order to make it possible that American or other foreign attorneys who enjoy our confidence can be called as defense counsel for a defendant, may the Tribunal please request the Property Control to make the necessary means available from the confiscated foreign assets of the IG and of one of the defendants.

2. To give one member of the defense, who is to be appointed, the opportunity to make inquiries abroad, either in person or through commissioners, and to make the means which are necessary for this purpose available.

3. To permit one defense counsel, who is to be appointed, to travel to Switzerland in order to visit the League of Nations library under escort, and to make the necessary means for this purpose available.

4. To enable one defense counsel to visit the Berlin libraries in order to examine and secure further material which might still be found there.

[Here follow the signatures of 14 defense counsel.]

b. Answer of the Prosecution

ANSWER OF THE UNITED STATES TO MOTION OF DEFENSE ATTORNEYS DATED 3 JULY 1947*

1. Answer is made to the motions by certain defense attorneys dated 3 July 1947, requesting a postponement of the trial for a minimum period of three months; that the Tribunal request the Property Control officer to make available funds for the employment of American or other foreign attorneys as defense counsel; that means be provided whereby one defense counsel be permitted to make inquiries abroad; that means be provided whereby one

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 47, pages 424-484.

defense counsel be permitted to visit the League of Nations library in Switzerland under escort; and that one defense counsel be permitted to visit Berlin libraries.

Date for Opening

2. The indictment in Case 6 was filed with the Secretary General on 3 May 1947, and all of the defendants were served with a copy of the indictment immediately thereafter, with the exception of the defendants Brueggemann (served on 18 June 1947), Wurster (served on 20 June 1947), and Buergin (served on 7 July 1947). Numerous defense counsel and assistants to defense counsel were retained immediately after the filing of the indictment in May 1947 and have been most active in the pretrial preparations ever since. The prosecution requests that the trial of this proceeding be set for August 6 or as soon thereafter as this Tribunal may order.* By that time the 30 days prescribed by the rules of this Tribunal will have elapsed from service of the indictment on the last defendant Buergin (served on 7 July 1947) and 3 months will have elapsed from the time the 19 defendants were served. This is three times more than is required by the rules of this Tribunal and, the prosecution submits, affords ample time for pretrial preparations, indeed considerably more time than the defendants had in Case 1 before the International Military Tribunal and in other war crimes cases before the American Military Tribunals. If after presentation of the prosecution's case it develops that the defense requires more time for its preparation, the question can then be raised more seasonably. Any substantial postponement at this time would be contrary to the spirit of Article VI, paragraphs (a) and (b), of Ordinance No. 7, which provides that the Tribunal shall "(a) confine the trial strictly to an expeditious hearing of the issues raised by the charges; (b) take strict measures to prevent any action which would cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever." A postponement would not be justified under the circumstances surrounding this case. Further comments in this connection are set forth hereinafter.

Request for Non-German Defense Counsel

3. Paragraph (c) of Article IV of Ordinance No. 7, provides that:

"A defendant shall have the right to be represented by counsel of his own selection, provided such counsel shall be a person

*Actually no tribunal had yet been assigned to the trial of the case. Tribunal VI was assigned to the trial of the case on 12 August 1947 and the defendants were not arraigned until 14 August. The prosecution's opening statement was delivered on 28 August and the introduction of evidence proceeded immediately thereafter.

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."

As the defense motion indicates, if the Tribunal should authorize non-German defense counsel to be employed, OMGUS or one of its agencies would have to make special arrangements to secure funds for payment of such non-German defense counsel.

In the case before the International Military Tribunal and in all the criminal cases heard so far before the American Military Tribunals under Control Council Law No. 10, it has been considered appropriate to approve defense counsel of German nationality. While the prosecution is anxious that the defense counsel be given every opportunity to prepare the defense, we believe that there has been no showing that competent German counsel is not available or the necessity for retaining non-German attorneys.

If, however, the defense counsel can show with respect to some particular aspect of the preparation of its case that it is necessary to employ a non-German attorney, it is suggested that the reasons be set forth specifically; that the name of the particular non-German attorney desired and his qualifications be submitted to the Tribunal. If and when defense counsel have set forth such specific information, the prosecution requests an opportunity to comment upon it.

Inquiries Abroad

4. It is not clear what defense counsel intends by motion II (2), requesting that one defense counsel be designated to make inquiries abroad, although the second part of this request for making funds available indicates a desire to have counsel go abroad in person. Under Article IV, paragraph (f) of Ordinance No. 7, a defendant is entitled to apply for either documents or witnesses, whether or not they are in Germany or abroad. This procedure has been followed appropriately in Case 1 before the International Military Tribunal and in other war crimes cases thereafter. No particular reason is shown why a departure from the prescribed practice, which has operated fairly in the other cases, is necessary in this case. If this request applies to German defense counsel going abroad, and presumably it would, an additional problem is raised, quite apart from special provision of funds, because of the restrictions on enemy citizens traveling abroad.

Defense motion papers do not indicate whether any applications have been made to this Tribunal pursuant to the rules, or whether the procedures set forth in the rules are inadequate to enable defense to adequately prepare for trial. If there are any impediments which unduly restrict the ability of the defense counsel to

communicate abroad (either by mail, telegraph, or telephone), for the purpose of obtaining necessary documents or witnesses, the prosecution has no objections to the conclusion of whatever arrangements are necessary to remove these impediments consistent with security considerations. However, prosecution does not believe that any showing has been made as to the necessity for defense counsel traveling abroad for this purpose.

Request for Defense Counsel to Visit Library in Switzerland

5. There are a number of libraries in Germany, such as the University of Heidelberg (American Zone) and the library of the Kaiser Wilhelm Institute for private international law at the University of Tuebingen (French Zone), which have complete collections of books on international law. There is no indication that any attempt has been made to exhaust such ready sources, nor that specific requests have been made unsuccessfully to the Tribunal for any publications unavailable in Germany. However, if defense counsel can show that the facilities of German libraries are inadequate for necessary legal research, the prosecution will have no objection to special arrangements permitting a German defense lawyer to go to Switzerland under escort in order to visit the library of the League of Nations. Since this proposal of the defense also involves unusual arrangements with respect to German nationals traveling abroad, it is suggested that it is reasonable that the defense first make some effort to exhaust the more obvious possibilities of legal research within Germany.

Request for Defense Counsel to Visit Berlin Libraries

6. In answer to motion II (4), the prosecution has no objection (see par. 5, above).

Special Comments on the Text of the Defense Motion

7. In the argumentation by the defense counsel under points 1 through 4 of the motion, the thirteen [sic] defense counsel and assistant defense counsel signing the motion raise a great variety of matters, some of which the prosecution feels compelled to comment upon specifically. Some of these points made by the defense render a completely unwarranted version of the circumstances prevailing and in some cases unwarranted legal conclusions are submitted.

Alleged Handicaps of Defense

8. A fair trial, of course, is of great concern to the prosecution. After it had come to the attention of the prosecution that many of the defense counsel in Case 6 were making inquiries concerning limitations surrounding defense preparations, the prosecution

addressed a memorandum to the Defense Administrator under date of 3 July 1947, entitled "I. G. Farben—Furnishing of Documents and Interrogation of Witnesses," a copy of which is attached hereto and made a part hereof.¹ Prosecution has already furnished the Defense Administrator for distribution to defense counsel approximately 100 documents upon which prosecution intends to rely. Arrangements have been made so that a considerable number of similar documents will be sent each week to the Defense Administrator. In all cases where the defendants have requested specific documents from Farben files, which were in the hands of the prosecution, the originals or copies of the originals have been made available to the defense by the prosecution. The prosecution has also given information concerning the location of files desired by the defense which are not in the hands of the prosecution. It should be noted that the defendants are not entitled to examine prosecution's evidence in advance of the trial, and the fact that the prosecution has already furnished defense with a substantial number of documents in advance of trial, indicates the extent of the unprecedented privilege which has been given to the defense. Since the indictment was filed, the prosecution has made no objection to defense counsel interrogating voluntary witnesses, whether or not the prosecution has first approached such persons.² In some cases where security regulations or other regulations of other agencies under Military Government apply in a way as to impose restrictions upon the defendants, the prosecution has joined with the Defense Administrator in attempting to remove some of these limitations which were established for good and sufficient reasons by other agencies.

To support its motion for a 3-month adjournment, the defense points to the size of the Farben organization and the wide scope of its activities. For this very reason the prosecution has earnestly attempted to limit and define carefully the issues in this trial. The prosecution would like to point out, however, that the complexity of the Farben combine, the magnitude of its operations, and their unbelievable scope has made the prosecution's task just as difficult as the defendants', if not more so. The defense charges that the documents of I. G. Farben were "confiscated*** so that the defendants are not in a position to dispose of them" nor do the defendants "know in which files these records are to be found, respectively where these files are located." The location of Farben files and the correlation of scattered, fragmentary documentation

¹ This memorandum is reproduced on p. 391.

² See the prosecution's answer of 23 June 1947 to the defense application for the witness Schwab, reproduced on p. 389 and the prosecution's memorandum of 3 July 1947 to the Defense Administrator, reproduced on p. 391.

has been the greatest of the prosecution's difficulties. By the admission of these very defendants, thousands of Farben records and innumerable incriminating files were destroyed in anticipation of the Allied occupation or at the direction of the defendants. An equal number of such records and documents were hidden by the defendants or shipped outside the country. It has been well nigh impossible for the prosecution to retrieve these from their secret caches.

Moreover, the prosecution has had the almost prohibitive burden of preparing its case in two languages. Practically all of the documentation is in German, the native language of the defendants and their counsel.

It has devolved upon the prosecution therefore, (1) to narrow and define the issues, and (2) to ferret out, select, and translate the documentary evidence which will be presented to support them. The defense has the advantage of being able to concentrate on specific issues and specific proofs. The defense has the further tremendous advantage of dealing with matters peculiarly within the knowledge and experience of the defendants, which do not cover "decades" as the defense suggests but are, for the most part, limited to events after 1933.

The fact that the defense have already been furnished with a substantial number of documents is a privilege which the prosecution has extended because of its desire to assist in the greatest possible clarification of the issues in the interests of a fair and expeditious trial.

Alleged Obstructions in Preparation of Defense

9. The defense motion indirectly implies that some rights of the defendants have been violated by virtue of their detainment. Under military law, the occupying power is entitled to detain prisoners of war and other persons where it is deemed necessary for the public safety and the proper administration of the occupied territories. As soon as the investigations of the prosecution reached a point where an indictment could be served, the indictment was served and the defendants have had access to counsel.

So far as the allegations with respect to the arrest and intimidation of witnesses by the prosecution are concerned, defense counsel are under serious and grave misapprehensions. Instead of vague generalities, the prosecution would like the defense to particularize. The prosecution has in no case intimidated witnesses or dissuaded them from testifying for the defense and has, in fact, leaned backwards to assure that its treatment and interrogation of witnesses would be beyond reproach.

Because of the lack of particularity in the defendants' motion,

the complaint about the impossibility of locating witnesses is worthless and would appear to be almost frivolous. The Secretary General of the Military Tribunals and the prosecution have assisted the defense as much as it can in order to ensure a fair trial. Rooms have been made available to defense counsel, and they have been supplied with furniture and typewriters and other facilities. The prosecution will continue to assist the defense; and at such time as the defense cares to define its problems, specify the witnesses required and indicate their peculiar indispensability, the prosecution will assist the Defense Administrator in their procurement.

Misconceptions of Legal Status of Military Tribunals

10. The entire reasoning of defense counsel in paragraph I of their motion entitled "The Legal Foundations," proceeds upon a basic misconception of the legal status of the Military Tribunals which have been constituted pursuant to Control Law No. 10. It is difficult to appreciate the relevancy of this academic discussion on a motion for a postponement of the trial. Because the defense attorneys have gone into the matter at such length, we feel compelled, lest our silence be taken to indicate concurrence in the views, to set forth the legal basis of this Tribunal. The Military Tribunals established under Control Council Law No. 10 are not United States courts applying the laws of the United States. A memorandum prepared by the Legal Division of OMGUS, dated 17 June 1947, concerning the "Petition of Erhard Milch to the Supreme Court of the United States" gives a complete background history of these Military Tribunals and Control Council Law No. 10, and sets forth clearly the nature of the jurisdiction and powers of these courts.

As stated in this memorandum:

"By the promulgation of Control Council Law No. 10, however, the four Zone Commanders recognized that, with respect to offenses delineated therein which include war crimes and other crimes against civilian populations, the prosecution of Germans for offenses committed by them prior to such occupation was a matter affecting Germany as a whole, and therefore within the proper authority of the quadripartite governing body of occupied Germany. The courts established by each Zone Commander to give effect to this quadripartite legislation are, therefore, occupation courts of special jurisdiction derived from quadripartite legislation, similar in status in all other respects to ordinary military government courts of general jurisdiction."

Concerning the fact that members of the Tribunal are United

States citizens and that the case is brought in the name of the United States, the memorandum states:

"In this view, the fact that the members of the Tribunal are citizens of the United States appointed by the Military Governor and the President of the United States is quite unimportant. The Military Governor might, for reasons of security or efficiency, appoint United States citizens to serve on strictly German courts, trying Germans for offenses against German law. Such appointment would not convert German courts into United States courts. The authority of the President and the Military Governor to appoint United States citizens to serve on Military Tribunal II has not and could not be challenged by petitioner.

"Similarly irrelevant is the fact that the case is brought in the name of the United States of America. The United States may bring suits in courts other than those under the jurisdiction of the United States. It may sue in the courts of any country by leave of the government concerned. It clearly could bring an action in the International Court of Justice, or other international tribunals having jurisdiction of suits between nations.

"The restraint of liberty of which petitioner complains is the result of the judgment of Military Tribunal II. Since that Tribunal is a court of occupied Germany established pursuant to legislation of the Control Council, and the conviction of petitioner is for violation of the laws of the Control Council, it would appear that, within the meaning of the statute, he is held under, and by color of, the authority of the Control Council for Germany and the Military Governor for the United States Zone of Occupation, rather than under, or by color of, the authority of the United States."

With respect to the law to be applied by these courts the memorandum states:

"Military Tribunal II is not required to apply the law of the United States in the trial of petitioner, nor even the law of nations as heretofore recognized by the courts of the United States. As a court of occupied Germany it is required to apply the laws of the quadripartite governing body for occupied Germany. The crimes specified in Control Council Law No. 10 have their basis in international conventions, and particularly in the charter annexed to the London Agreement of 8 August 1945, as interpreted and applied by the International Military Tribunal. Military Tribunal II was created for the purpose of bringing to trial persons indicted for these crimes."

Obligations of Defense Counsel and Prosecution

11. Defense counsel state in their motion: "It is our duty not

only to convince the Tribunal that, in this case, bitter injustice is being done to the defendants, but to bear in mind the responsibility towards an estimated 300,000 shareholders of the I. G. Farben Corporation, the great social obligations of the company, especially towards the pensioners, and all the other consequences resulting from the General Order No. 2 of 5 July 1945, that was justified with the same allegations which now constitute the subject of the criminal proceedings."

General Order No. 2 of the Military Government, referred to above, was issued on 5 July 1945. A copy of said order, and the Special Order signed by General Clay, is attached hereto as Exhibit A.* By that order all of the property within the United States Zone, owned or controlled, directly or indirectly by I. G. Farben, was seized by the Military Governor, United States Zone, and possession and control taken. It is difficult to appreciate how the administrative policies of the Military Governor relating to the property of I. G. Farben, is a subject that is relevant in a criminal prosecution against the officials of I. G. Farben.

Quite apart from the fact that this is a criminal case and not a civil case, it is difficult for the prosecution to understand how the defense can emphasize their alleged responsibility toward shareholders in arguing for a postponement of the trial. The charges which have been levied against the defendants in this case adversely affected the lives and happiness of millions of people all over the world. It is this fact, it would seem, that should be taken most into account by both the defense and the prosecution. This fact imposes a very heavy responsibility upon all involved to see that everything is done to insure that all the facts be clearly and unequivocally brought out. The prosecution would like to add that while we cannot let ourselves forget our obligation to these millions of people, at the same time we cannot and will not let the great seriousness of this charge affect our determination to do what we can to see to it that these twenty-some defendants are given a fair and impartial trial. An unfair trial would stultify the very basis of the proceeding.

Wherefore, it is respectfully submitted that the motion for postponement be denied and that the remaining requests of defense attorneys be disposed of as indicated above.

Respectfully submitted,

[Signed] TELFORD TAYLOR

Brigadier General, U.S.A.

Chief of Counsel for War Crimes

18 July 1947

*The general order referred to is reproduced herein (immediately following this answer) but the special order is not reproduced herein.

EXHIBIT A
MILITARY GOVERNMENT—GERMANY
UNITED STATES ZONE
General Order No. 2

(Pursuant to Military Government Law No. 52; Blocking on
Control of Property) *

I. G. FARBENINDUSTRIE A.G.

WHEREAS, it is the main objective of the United Nations to prevent Germany from ever again disrupting the peace of the world;

WHEREAS, I.G. Farbenindustrie A.G. played a prominent part in building up and maintaining the German war machine;

WHEREAS, through its world-wide cartel system and practices, I.G. Farbenindustrie A.G., as a deliberate part of Germany's bid for world conquest, hampered the growth of industry and commerce of other nations and weakened their power to defend themselves;

WHEREAS, the war-making power represented by the industries owned or controlled by I.G. Farbenindustrie A.G. constitutes a major threat to the peace and security of the post-war world so long as such industries remain within the control of Germany;

WHEREAS, it is essential to the objectives of the United Nations to take over the direction and control of I.G. Farbenindustrie A.G. and to seize possession of its property in order to bring about its destruction and the war-making potential which it represents; and

WHEREAS, it is intended that the property seized will be placed at the disposition of the Control Council (Germany), when such action is desired by the Control Council;

IT IS HEREBY ORDERED:

1. All the property within the United States Zone in Germany owned or controlled, directly or indirectly, by I.G. Farbenindustrie A.G., a corporation organized and existing under and by virtue of the laws of Germany with seat and head office at Frankfurt a/Main, is hereby specified under paragraph 1 (g) of Military Government Law No. 52 to be subject to seizure of possession, direction, and control by Military Government.

2. The direction and control of I.G. Farbenindustrie A.G. and the possession of all its property in the United States Zone are hereby seized by the Military Governor, United States Zone.

3. Pending the assumption of control of such property by the Control Council, or an agency thereof, all the powers of the Military Governor, United States Zone, with respect to the property

*U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 47, pages 435 and 436.

seized pursuant hereto and with respect to the direction and control of the corporation are hereby delegated to the Deputy Military Governor, United States Zone. Redelegating of any or all such powers is hereby authorized. In the exercise of such powers the Deputy Military Governor, United States Zone, or any person acting by or under his authority with respect to the property affected hereby shall not be subject to German law.

4. In the exercise of such powers the Deputy Military Governor, or any person acting by or under his authority with respect to such property, shall be guided by the general objectives stated in the preamble hereof and by the following specific objectives, and will take such measures as he deems appropriate to accomplish them;

(a) The making available to devastated nonenemy countries of Europe and to the United Nations, in accordance with such programs of relief, restitution and reparations as may be decided upon, of any of the property seized under this order and, in particular, of laboratories, plants, and equipment which produce chemicals, synthetic petroleum and rubber, magnesium and aluminum, other nonferrous metals, iron and steel, machine tools, and heavy machinery;

(b) Destruction of all property seized under this order and not transferred under the provision of (a) above, if adapted to the production of arms, ammunition, poison gas, explosives, and other implements of war, or any parts, components, or ingredients designed for incorporation in the foregoing, and not of a type generally used in industries permitted to operate within Germany;

(c) Dispersion of the ownership and control of such of the plants and equipment seized under this order as have not been transferred or destroyed pursuant to (a) and (b) above.

5. (a) The entire management of I.G. Farbenindustrie A.G. including but not limited to the supervising board (Aufsichtsrat), the board of directors (Vorstand), and directors (Direktorium) and all other persons, whether officeholders or not, who are empowered, either alone or with others, to bind or sign for or on behalf of I.G. Farbenindustrie A.G. are forthwith removed and discharged and deprived of all authority to act with respect to the corporation or its property.

(b) The rights of shareholders in respect of selection of management or control of I.G. Farbenindustrie A.G. are suspended.

6. Article IV of Military Government Law No. 52 shall not be applicable to any property or enterprise affected by this General Order.

7. This General Order shall become effective on 5 July 1945.

BY ORDER OF MILITARY GOVERNMENT

continuance of 3 months is premature and the necessity for such continuance does not appear. If, when the time comes for the defense to present its proof, it then appears to the Tribunal that a continuance is necessary, an application under the circumstances then existing will be considered.¹

In the application for the approval of non-German defense counsel, no specific attorney is designated. It is impossible to pass upon such a carte blanche application and to approve counsel whose identity is not known. If defense counsel desire to submit an application for the appointment of a specified non-German attorney and if, in addition, no obligation to pay for the services of such attorney falls upon the American Government, or any agency thereof, such application will be considered by the Tribunal.²

The request that a defense attorney be authorized to go to the United States for the purpose of investigating matters connected with the trial cannot be granted in view of the restrictions imposed by the United States Military Government and the Department of State upon the entry into the United States of German nationals.

If it becomes apparent later that it is necessary for defense counsel to use the library of the League of Nations in Switzerland or the library of International Law in Berlin, the Chief of Counsel assures the Tribunal that he will cooperate in making visits possible. In any event this request is not within the power of the Tribunal to grant or deny.

With reference to the petition to release a part of the property and funds of the I.G. Farbenindustrie from the General Order of the United States Military Government dated 5 July 1945, entitled, "Blocking on Control of Property," these Tribunals have no jurisdiction to modify or suspend such order or any part thereof. It is to be observed, however, that the property and funds blocked by this military order are those of the I.G. Farbenindustrie A.G., a body corporate, and are not the funds of the individual defendants in this case. The I.G. Farbenindustrie A.G., to whom the blocked funds belong, is not named in the indictment.

¹ On 26 November, near the end of the prosecution's case in chief, the Tribunal declared that after the conclusion of the prosecution's case in chief there would be a recess of 14 days before the defense opening statements, and that after these statements there would be a further recess of 23 days before the defense would be required to go forward with its proof. The defense requested the Tribunal to reconsider this ruling. The Tribunal took the defense motion for reconsideration under advisement and denied it on 2 December 1947. The transcript of the relevant proceedings covering these matters is reproduced immediately below.

² Concerning the later application for approval of Mr. Thomas Allegretti, an American attorney, see page 326. This was the only application in the Farben case for a specified non-German attorney, apart from the application for Dr. Vinassa, a Swiss attorney, which had already been approved on 29 May 1947. See page 321.

3. RECESS AFTER THE PROSECUTION'S CASE IN CHIEF

a. Statement of the Tribunal, 26 November 1947, and Defense Statement in Response Thereto

EXTRACT FROM THE FARBEN TRANSCRIPT, 26 NOVEMBER 1947¹

PRESIDING JUDGE SHAKE: The Tribunal would like to take a moment to make an announcement. After a conference with representatives of counsel last evening a schedule with reference to the future progress of this case was worked out. The prosecution has indicated that it will probably close its case on Monday, December 1st or Tuesday, December 2d, with the exception of producing certain witnesses [affiants] for cross-examination. The Tribunal has concluded that, as to those witnesses of the prosecution whose affidavits have been offered in evidence and who have not been cross-examined by that time, it will transfer the supervision of the cross-examination of those witnesses to its commissioner² and the Tribunal has in mind that at the conclusion of the prosecution's case in chief with that exception on Monday or Tuesday, December 1st or 2d, as the case may be, the Tribunal will then recess until Thursday, December 18th, and will set aside Thursday, December 18th, and Friday, December 19th, to hear the opening statements of the defense. At the conclusion of that session of Friday, December 19th, the Tribunal will again recess until Monday, 12 January 1948, at which time we shall expect to proceed with the orderly hearing of the defense case.

Now there is one very important thing that I should like to call to the attention of each and every member of the defense staff, and that is that it is necessary that you get into channels for translation and mimeographing your opening statements and your documents in ample time that we may not be delayed because of administrative difficulties. You gentlemen are as familiar as the members of the Tribunal are with the administrative problems, and you must positively take account of those matters in ample time to have your material processed so that there will be no occasion for delay with respect to the opening statements or the reception of the evidence of the defense. I make this statement so that it will be on the record of this proceeding and as a notice to all concerned.

Has the prosecution any preliminary announcements for the day?

DR. BOETTCHER (counsel for defendant Krauch): Mr. Presi-

¹ Extract from mimeographed transcript, Case 6, U.S. vs. Carl Krauch, *et al.*, pages 4388-4392.

² See section XVII, "Taking of Evidence on Commission."

dent, in regard to the results of yesterday's discussion, we were able to find out the attitude of other defense counsel last evening as far as they were available. I ask permission that Dr. Gierlichs be permitted to make a statement in English which we consider important.

DR. GIERLICH (associate counsel for defendant Schmitz) : May it please the Tribunal, I have been instructed by my colleagues to submit respectfully the following to Your Honors on behalf of the defense. The Tribunal has informed us during the conversation in chambers between representatives of the defense and of the prosecution that they propose to rule on the adjournment of the trial in such a manner that the opening statements of the defense should be held on 18 and 19 December 1947, and the case in chief of the defense then would begin on 12 January 1948. The representatives of the defense have passed on this information to all defense counsel who could be contacted within the short time available and who, after having carefully considered the situation arising from such an adjournment, have unanimously decided, bearing in mind their duty as defense counsel and officers of this Court in a trial of world-wide importance, to read the following statement with Your Honors' permission into the record. I may mention that this statement had been prepared to be read into the record before a definite ruling of Your Honors had been given, but I shall beg to ask for your permission to read it in the same way as it had been prepared.

Your Honors will remember the statement which the defense made at the arraignment* and which dealt with the disadvantages and difficulties which the defense has to cope with in this trial, in view of the exceedingly short period for the preparation of their cases. Your Honors will recall that in this statement we already anticipated the vast amount of evidence which the prosecution would introduce in this trial, and we must confess that these anticipations have been considerably surpassed by the evidence which actually has been put before Your Honors in the course of the prosecution's case. So far 91 document books have been introduced by the prosecution. The documentary evidence even exceeds the evidence which has been introduced by the prosecution in the IMT trial, and is nearly five times as great as the evidence which has been put in by the prosecution in the first case against German industrialists, namely, the case *versus* Flick and others, which now has arrived at its final state.

In addition to this incredibly vast amount of documents which has been poured upon the defense within the still more incredibly

*Reproduced in section II, volume VII, this series.

short period of approximately 3 months, about 60 witnesses have been heard as compared with 12 witnesses which have been heard in the afore-mentioned case. If Your Honors take into consideration the fact that the presentation of the prosecution's case in the I.G. Farben trial took a period which exceeds the duration of the prosecution's case in chief in the trial of Case 5 against Flick and others only by a couple of days, then, as the defense respectfully submit, the discrepancy between the difficulties which the defense have to overcome in preparing their presentation of their own evidence in both cases becomes even more evident.

In view of these facts which I took the liberty to outline before Your Honors, the defense feel that they are justified in stating most emphatically that they hardly had the time to follow the rapid presentation of the vast evidence presented by the prosecution in this case, that they hardly had the time to discuss this evidence with their clients, and that, therefore, there was definitely no time at all to prepare their own defense in such a manner as is required in a trial with the scope exceeding all other cases which have so far been tried in Nuernberg.

It may be mentioned, furthermore, in this connection that the period for the preparation of the defense will be even more shortened by the fact that during this period the cross-examination of the still outstanding witnesses of the prosecution has to be carried out before the commissioner of the Court as intimated by Your Honors during yesterday's discussions in chambers. Therefore, a considerable part of this period will be taken up for the defendants and their counsel by the necessity to prepare and attend these cross-examinations, which has not been the case in the trial *versus* Flick and others.

Considering the fact that the defense in the Case 5 *versus* Flick and others have been granted an adjournment of nearly 3 weeks before the beginning of their own case in chief, the defense feel that they have to point out with due respect to Your Honors that the adjournment which the Tribunal proposed to rule in this case is definitely inadequate, especially as, according to information which we just have received but which could not yet be ascertained, all activities in this Court will be suspended between 24 December and 4 January and, therefore, for instance, very probably the defense during these days will have no possibility to discuss their cases with their clients. In any case, the technical preparation of the defense cases, especially the translation and mimeographing of documents, is hampered to a considerable extent by the before-mentioned holidays.

The defense, therefore, feel justified to state that the actual period for the preparation of their own case is in view of this fact

considerably smaller than it may seem at first sight. Moreover, it seems to us that if the defense is not permitted to have sufficient time to prepare their cases on the general line which has been brought to the attention of Your Honors, and which aims at a concentrated and systematic presentation of the defense's evidence which undoubtedly will avoid repetition and thereby shorten considerably the period which is necessary for the presentation of all the individual cases, this advantage will be lost to a considerable extent if the defense start their case without a proper preparation.

The defense felt it to be their duty to draw respectfully Your Honors' attention to the more or less practical facts. However, they feel bound before their consciences as defense counsel to stress even more emphatically that this, in our minds, inadequate adjournment, if it really should be ruled, is incompatible with the principles of justice and fair trial which are governing also this case.

In concluding this statement I beg to draw Your Honors' attention to another point which we have carefully considered, to wit: the date which Your Honors intend to fix for the opening statements of the defense. Your Honors will bear in mind that the defense in presenting their own cases propose to deal at the beginning with several general subjects falling within the scope of this trial and forming a uniform basis for the defense of all, or at least most individual defense cases. In our minds, therefore, it would be impracticable to hear the opening statements for the individual defendants before these general subjects have been dealt with, and we think, therefore, that it will be more convenient also for Your Honors, if the opening statements for the individual defendants are held at the beginning of their cases after those general subjects have been covered. We think also that the opening statements for the individual defendants could be considerably shortened if they would follow the afore-mentioned general points because only if such an order is observed would defense counsel be in the position to avoid repetition.

PRESIDING JUDGE SHAKE: The statement of counsel for the defense is in the record. The Chair, I am sure, would not be expected to comment upon it without a conference with his associates. If there is any comment, it likewise will be on the record without too much delay.*

*A further statement by the Tribunal for the questions raised made a few days later is reproduced immediately below.

b. Statement by the Tribunal of Reasons for Refusing to Reconsider Defense Request for Additional Time to Prepare the Defense Case, 2 December 1947

EXTRACT FROM THE FARBEN TRANSCRIPT, 2 DECEMBER 1947¹

PRESIDING JUDGE SHAKE: The Tribunal has also under consideration a motion of defense counsel to reconsider the matter of the future trial schedule of this case,² and we now state for the record our views on that subject.

On 20 November 1947, the prosecution indicated to the Tribunal in open court that it would rest its case in chief, with certain reservations, on or before 3 December 1947. The Tribunal announced that when the prosecution had rested it would recess until 18 or 19 December 1947 to hear the opening statements of the defense, and that upon the completion of said opening statement it would again recess until 12 January 1948. The defense has objected to this schedule upon the ground that it does not provide sufficient time for the preparation of the case of the defendants. The Tribunal now makes the following statement with respect thereto.

The indictment in this case was filed on 5 May 1947, and the Marshal completed the service of the indictment on the defendants on 7 July 1947. The defendants were arraigned on 14 August 1947, and the opening statement of the prosecution was heard on 27 August 1947. The trial has been in progress since the last-mentioned date, but there have been frequent recesses,³ so that only 53 actual days have been consumed in the course of the trial.

For the most part the Tribunal has been in session for a 4-day week. This arrangement was made at the request of counsel for the defendants in order to provide them with more time for preparation. The Tribunal fully realizes the magnitude of this case and the burdens that rest upon counsel for the defendants. Keeping in mind, however, the positive obligations imposed by Article VI of Military Government Ordinance No. 7, that the trial shall be confined to an expeditious hearing of the issues, and that strict measures shall be taken to prevent any unreasonable delay, the Tribunal feels that it is in no position to make concessions with respect to the presentation of the defense.

The Tribunal deems it proper to state also that each of the defendants is represented by a chief and an assistant counsel, that

¹ Extract from mimeographed transcript, Case 6, U.S. vs. Carl Krauch, *et al.*, pages 4494-4495.

² No motion has been found except the statement by Dr. Gierlichs on 26 November 1947, reproduced immediately above.

³ From the time of the prosecution's opening statement (27 Aug. 1947) until the prosecution closed its case with minor reservations (on 2 Dec. 1947, the day on which this statement of the Tribunal was made), there had been 11 recesses of 3 or 4 days' duration.

the Tribunal has approved the appointment of an administrative aid to the defense counsel, that it has appointed an expert and an assistant in the field of international law for the defense, and that it has also approved the appointment of eight special counsel and assistants to aid the defense in the preparation of the case.

Under the circumstances, the Tribunal would not be justified in approving any further delay in the trial of this cause, and the motion is overruled.

4. ANNOUNCEMENT BY THE TRIBUNAL OF A TIME SCHEDULE FOR THE CONCLUSION OF THE DEFENSE CASE, AND RELATED MATTERS

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
27 FEBRUARY 1948¹

PRESIDING JUDGE SHAKE: Now gentlemen, before we recess Judge Hebert has an announcement to make on behalf of the entire Tribunal. At the conclusion of this reading of this announcement into the record I am going to ask him to hand a copy of it to the Secretary, so that if any of you are concerned about not having fully understood it it will be available for you before the transcript is distributed, perhaps.

JUDGE HEBERT: Thank you, Mr. President.

The Tribunal has given careful consideration to measures which must be adopted further to expedite the trial of the case.² During the current week the Tribunal conferred with representatives from the prosecution and the defense with regard to the necessity for adopting a definite time schedule to govern the presentation of additional evidence and to set the time for the closing arguments, briefs, and statements.

The Tribunal has also carefully considered a report submitted by Dr. Boettcher in regard to this entire subject and containing time estimates and suggestions made by counsel for the individual defendants. Based on these and earlier statements furnished by counsel of the approximate trial time to be required by each defendant, and taking into consideration the factor of the lengthened trial day adopted by the Tribunal,³ the following decisions are announced for the information and guidance of counsel:

¹ Extract from mimeographed transcript, Case 6, U.S. vs. Carl Krauch, *et al.*, pages 7920-7924.

² This announcement was made on the 86th trial day, the case in chief of the prosecution having lasted 52 trial days and this being the 34th trial day of the defense case. The defense case had begun on 17 December 1947, but there had been one recess of 23 days thereafter for further defense preparations.

³ On 24 February 1948 the Tribunal had announced that the trial day would be extended from 6 hours to 6 hours and 45 minutes.

1. All of the evidence to be presented, including the evidence on cross-examination, must be completed not later than the conclusion of the trial day, 19 May 1948. To achieve this objective, the Tribunal, after considering the estimates referred to, has assigned the following trial time to each defendant whose case has not yet been presented. Time allowed must be considered as the total allotted time for all purposes, including presentation of documents, examination of witnesses, and examination of the defendant, but excluding cross-examination. It will be the responsibility of counsel to stay within the allotted time and to make appropriate allowance for any questions which cocounsel for any of the defendants may desire to ask on direct examination of a witness or a defendant.

The time allotted for each defendant stated in hours, and its equivalent in trial days, is as follows:

For the defendant Ambros, that is, the time after the conclusion of today's session, time allotted is 24 hours, or 4 trial days.

For the defendant Gajewski, 10 hours, or $1\frac{2}{3}$ trial days.

For the defendant Buergin, 10 hours, or $1\frac{2}{3}$ trial days.

For the defendant Buetefisch, 20 hours, or $3\frac{1}{3}$ trial days.

For the defendant Haefliger, 10 hours, or $1\frac{2}{3}$ trial days.

The defendant Ilgner, 24 hours, or 4 days.

Defendant Jaehne, 15 hours, or $2\frac{1}{2}$ days.

Defendant Kuehne, 10 hours, or $1\frac{2}{3}$ days.

Defendant Lautenschlaeger, 15 hours, or $2\frac{1}{2}$ days.

Defendant Mann, 18 hours, or 3 days.

Defendant Oster, 6 hours, or 1 day.

Defendant Wurster, 15 hours, or $2\frac{1}{2}$ days.

Defendant Duerrfeld, 36 hours, or 6 days.

Defendant Gattineau, 18 hours, or 3 days.

Defendant von der Heyde, 10 hours, or $1\frac{2}{3}$ days.

Defendant Kugler, 16 hours, or $2\frac{2}{3}$ days.

The Tribunal will itself assume the responsibility for keeping the time required for cross-examination by the prosecution within proper limits. In fixing this schedule, which must be adhered to, the Tribunal deems it advisable to point out that counsel may at any time avail themselves of proceedings before the commissioner as a means of introducing any additional evidence which counsel may desire to have the Tribunal consider.* Outstanding matters have been allotted time in addition to the above as follows:

For outstanding evidence on behalf of defendant Krauch, to be presented by Dr. Boettcher, 1 trial day.

Outstanding evidence for the defendant Schmitz, $1\frac{1}{2}$ trial days.

*See section XVII, "Taking of Evidence on Commission."

Outstanding evidence for the defendant von Schnitzler, 1 trial day.

Outstanding evidence for the defendant ter Meer on count two of the indictment, ½ trial day.

For submission of outstanding documents by various counsel, 1 trial day.

Following the conclusion of evidence, the Tribunal will recess for 2 weeks, or until 3 June 1948, at which time closing arguments and statements will begin. The prosecution is allotted 2 days for its closing argument. Each defendant is allotted 1 hour for argument, and the total time so allotted may be divided among the defendants as they may desire. Additional arguments may be submitted in briefs or in the form of closing letters. After the conclusion of the arguments each defendant will be allowed 10 minutes for his personal plea or statement to the Tribunal. All documents which are to be introduced in evidence must be delivered to the Defense Center for processing not later than April 1. If, on account of unusual circumstances, counsel find it necessary to submit an additional document or documents, special permission must be obtained from the Tribunal before the same may be processed.¹

One additional matter should be noted: Counsel have not in all instances been complying with Rule 19 of the Uniform Rules of Procedure with reference to notice concerning witnesses to be called.² That rule requires the party who desires to use a witness at least 24 hours before the witness is to be called, to deliver to the Secretary General an original and six copies of a memorandum disclosing the name of the witness, his nationality, his residence or station, his official rank or position, whether called as expert, or to testify as to the facts. Hereafter the Tribunal will require compliance with that rule.

¹ The schedule of trial here announced was followed quite closely, although there were minor variations for a number of reasons. With minor exceptions, the receipt of defense evidence was concluded on 11 May, the 85th trial day of the defense case. Thereafter, the Tribunal was in recess until the closing statements, except for a special session on 1 June, the day before closing statements began. At the special session on 1 June, the Tribunal ruled upon a number of objections to defense documents previously offered and upon a few newly offered defense documents; received stipulations for the correction of translations and other matters; received the reports of, and discharged, the commissioners before whom testimony had been taken; ruled upon a number of outstanding motions of a general nature, and reserved until judgment its ruling on several motions that entire counts be dismissed. The prosecution neither called for cross-examination nor waived the cross-examination of a large number of defense affiants whose affidavits were introduced during the last 2 weeks of the defense case in chief, stating that the time limits imposed, the overburdening of the commissioners, and the late date at which the affidavits were offered made it impossible for the prosecution to cross-examine as many of the defense affiants as it otherwise would have done. The Tribunal permitted the prosecution to present its rebuttal documents some days before the defense case was closed during three short interruptions of the defense case, thus avoiding later delays for rebuttal and surrebuttal.

² See section V, "Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 8 January 1948."

G. Krupp Case—Statement by the Tribunal concerning Recesses for Defense Preparation and the Length of the Defense Case and Related Statements by Defense Counsel.

I. INTRODUCTION

The indictment was served on all defendants in the Krupp case on 18 August 1947, and 111 days passed before the opening statement of the prosecution on 8 December 1947. The prosecution's case in chief lasted until 24 February 1948, requiring 44 separate trial days. The prosecution's case was interrupted by sessions on three different days devoted to the question of contempt by certain defense counsel (sec. XXI E).

Shortly before the prosecution rested its case, subject to minor reservations, members of the Tribunal discussed with counsel in chambers the matter of a recess for defense preparation and the length of the defense case. On 24 February 1947, the day the prosecution rested its case in chief, the Tribunal announced that there would be a recess of 26 days before the defense opening statements, and thereafter a recess of 6 days before the presentation of defense evidence. At the same time the Tribunal announced that the defense would be allowed until 5 June, a period of 15 weeks, to present its evidence. This announcement and the related remarks of defense counsel are reproduced in 2 below. Early in the defense case the Tribunal granted a defense motion to dismiss count one (crimes against peace) and count four (common plan and conspiracy to commit crimes against peace), thus leaving only two counts (spoliation and slave labor) outstanding. Subject to minor reservations, the presentation of defense evidence was concluded on 4 June 1948, the defense opening statements and the presentation of defense evidence having consumed 46 trial days. Thereafter 2 trial days were devoted principally to rebuttal evidence of the prosecution, after which the Tribunal was in recess for 14 days before the closing statements. After the final statements of the defendants to the Tribunal, the Tribunal was in recess for 30 days before it pronounced its judgment.

2. ANNOUNCEMENT BY THE TRIBUNAL AND RELATED REMARKS OF DEFENSE COUNSEL CONCERNING THE RECESS AND THE LENGTH OF THE DEFENSE CASE

EXTRACT FROM THE TRANSCRIPT IN THE KRUPP CASE,
24 FEBRUARY 1948¹

JUDGE DALY, PRESIDING: Well, then the prosecution, subject to such reservations as are approved by the Court, has rested its case.² Now the next question comes as to what we will do after that, inasmuch as Judge Wilkins has discussed this matter with counsel for the defendants at some length, I think it would be better if he took up the matter, if it is agreeable to Judge Anderson.

JUDGE WILKINS: Dr. Pohle, did you want to make a statement?

DR. POHLE (counsel for defendant von Buelow): May I make a statement to the Tribunal on behalf of the defense? Your Honors, we have taken notice of the fact that the Tribunal has suggested that the case in chief by the defense should be concluded at a certain time, and that this term was approximately 14½ weeks, that is, until 5 June. The defense feels it cannot take the obligation to finish at this specific date, in particular because the time of presentation of the evidence will be influenced by circumstances which are beyond our control; for example, the period of time which the prosecution will require to cross-examine the affiants and the witnesses of the defense. However, we would like to state that we shall do our utmost in order to carry out this task within the limited time given to us, if the Tribunal is prepared to grant the defense a recess of 4 weeks. This recess is of the utmost importance in order for us to carry out our defense in the proper manner, or rather, it is the minimum time we need in order to enable us to prepare our defense properly. We have taken notice of the fact that the Tribunal will assist us in this by assisting us with certain measures. We therefore ask for a decision, and we ask the Tribunal to rule upon this matter.

JUDGE WILKINS: Judge Daly, perhaps it might be well if I make a bit of a statement for the purpose of the record. When we received the motion of the defense for a recess of 8 weeks,³

¹ Extract from mimeographed transcript, Case 10, U.S. *vs.* Alfried Krupp von Bohlen und Halbach, *et al.*, pages 4621-4628.

² This announcement was made by the Tribunal after 44 trial days had been spent by the prosecution in making its opening statement and in presenting its evidence. The reservations made by the prosecution principally concerned the examination, upon defense request, of certain affiants who had given affidavits which the prosecution had introduced in evidence as exhibits. Where affiants were not made available for cross-examination upon defense request, the affidavits were stricken from evidence by the Tribunal. The cross-examination of most of these affiants was conducted before commissioners of the Tribunal. See sections XVII F and XVIII J 11.

³ Defense Motion of 11 February 1948, not reproduced herein. This motion appears in Official Record, Case 10, volume 37, pages 611-619.

we then decided to look into the situation regarding the length of time granted by other Tribunals. We were able to find from the investigation—so far as we were able to determine—that no Tribunal had recessed for a period in excess of 2 weeks with the exception of the Farben case which is still on trial. We learned that in the Farben case a recess had been granted from 2 December to 12 January, but within that period were the 2 weeks' Christmas holidays which we have also granted as a recess during the course of this trial; and the other exception that on either 17 or 18 December defense came into court for 2 days and made their opening statement. So we determined that the length of time that could probably be granted as a recess was about 3 weeks, realizing that in the Farben case there are either 20, 21, or 22 defendants, I'm not certain, but considerably more than we have in this case. Of course we considered that fact. Then it was brought to our attention that in one or two of the Tribunals the defense themselves had stated that they would prefer to have a definite length of time designated in which they should complete their defense. We have in mind particularly the RuSHA case, I believe that is the name of the case, in any event it's the case upon which Judge Wyatt, Judge O'Connell, and Judge Crawford are sitting, and the defendants themselves had agreed to the length of time they wanted and, of course, divided the time amongst themselves and the Court approved it.*

In the Farben case we learned that the length of time planned by the defense was somewhat the same length of time as taken by the prosecution, and that some sort of an agreement of some kind had been reached. So we understood from those Tribunals that

*The announcement of the Tribunal in the RuSHA case of the agreement and matters related thereto was made on 8 December 1947, the 11th day of the defense case, and reads as follows:

"PRESIDING JUDGE WYATT: As a result of the written request received by the Tribunal this morning and as a result of a conference just completed with both defense counsel and counsel for the prosecution, an agreement has been reached with reference to the time to be allotted for the remainder of this trial. On behalf of this Tribunal, I will now read the agreement into the record, which is as follows:

"At the request of the defense counsel and upon their agreement, the taking of evidence in the trial of this case from this point will be limited as follows: For the remaining defendants of the Main Staff Office—Creutz, Meyer-Hetling, Schwarzenberger, and Huebner—10 trial days. For the defendants, Lorenz, Brueckner, of VoMi—6 trial days. For the defendants of RuSHA Hofmann, Hildebrandt, and Schwalm—12½ trial days. And for the defendants of the Lebensborn, Sollmann, Ebner, Tesch, and Viermetz—9 trial days.

"The above limitation as to time includes the time consumed by the cross-examination with the provision that the prosecution will be limited to 10 minutes' cross-examination of each witness and to 30 minutes' cross-examination of each defendant. The prosecution will be allowed 6 hours for rebuttal testimony at the conclusion of the above periods of time.

"This concludes the reading of the agreement reached between counsel for defense and counsel for prosecution.

"Now, on behalf of the Tribunal, may I state that very largely counsel will be permitted to use this time in such a manner as they deem to be in the best interest of their clients. The Tribunal would, however, request counsel, so far as they are able to do so, to confine themselves to material matters. However, it will be largely your judgment as to whether you do that or not."
U.S. vs. Ulrich Greifelt, et al., Case 8 (tr. p. 2060.)

that seemed to work out better, that is, the defense preferred to have a definite time set and then within that time to give them more or less freedom to present their case as they felt best suited to their convenience. So, with that in mind, I was designated by Judge Anderson and Judge Daly to confer with the defense and with the prosecution to ascertain their desires or wishes in the matter. I, therefore, communicated the wishes of the Tribunal to Dr. Wecker [associate defense counsel for defendant Krupp], Dr. Pohle [counsel for defendant von Buelow], Mr. Ragland [deputy chief counsel for the prosecution], and Mr. Thayer [chief, Krupp trial team] as a result of which the five of us met last Saturday and on Monday, yesterday, and again today.

It's rather interesting to note, but I want the record to show it, before I indicated to Dr. Wecker and Dr. Pohle the length of time that the Tribunal thought would be reasonable under the circumstances for the defense to take, they suggested that a period—they felt they could present, adequately present, their defense within a period of 16 weeks provided, however, that they would be given a recess of such an extent, or perhaps I should say a recess of approximately 4 weeks.

I explained, that a recess of that length of time was quite unusual, quite an unusual request under our procedure at home, but that nevertheless we understood their desire; and after stating that we wanted to know whether or not the defense would prefer to have a definite time set, Dr. Wecker and Dr. Pohle, on behalf of their colleagues, both felt that that would be a better arrangement than merely to give a shorter recess and require the defense to proceed.

Now, it is rather interesting that prior to the meeting, in our discussions—and I think I am at liberty to state this—we had concluded that perhaps a period of about 14 weeks would be sufficient, but after having met again on the two occasions I have mentioned, and then again today, we sort of all came to this feeling that the defense desiring a period of 16 weeks and we having thought that a period of 14 weeks was sufficient, as we now view the situation, that it would be well to grant a period of 15 weeks from the time that the prosecution was supposed to have rested, which was last Friday night or last Saturday night, let me put it that way.

Now, perhaps a word of explanation. It might be necessary to show that 15 weeks will be granted to the defense because we would ordinarily have had the commissioner sit last Saturday, but when we found Friday night that prosecution was not in the position to rest, we ran over to Tuesday morning instead.

Now, while the commissioner is sitting tomorrow we should

bear in mind that these witnesses are really called on behalf of the defense for cross-examination, even though we consider that the prosecution hasn't completed its case until tomorrow evening. Tomorrow can really be balanced up against last Saturday, when the commissioner should have sat, because that day was available to defense counsel. It might be said, too, that yesterday being a holiday for us that it's safe to assume that the defense utilized that day in the preparation of their case, so that really we just had 1 day of court this week.

Considering this is the first week, the 15 weeks would terminate with Saturday, 5 June. Now, Dr. Wecker and Dr. Pohle were very anxious under an arrangement of this kind to have quite an extensive recess because they felt that more time granted at this time for a recess would afford them a better opportunity in the preparation of their case, and in the end would utilize less time of the Court than if they only had, for example, 2 weeks' recess at this time. We understand their position in this regard.

Now, I think I can say, Judge Daly, that after the meeting of the three of us with Dr. Wecker and Dr. Pohle, and Mr. Ragland and Mr. Thayer, of the prosecution, and after the statement that Dr. Wecker made to us that if we would grant a period of 15 weeks for the defense in which to present their case which would terminate Saturday, 5 June, they would like us to grant a period of 4 weeks' recess, which would mean a recess until Thursday, 27 March—excuse me, I'm not looking at the calendar correctly, until Thursday, 25 March. So we suggested to Dr. Wecker that it might be better, that being the day before Good Friday, to recess until Monday, 22 March, at which time they would come into Court and make their opening statements on Monday, 22 March, and Tuesday, 23 March, and then we would adjourn for the rest of that week. So in effect we would be adjourning now until 29 March, which is more than the time asked for, except that the defense would come into Court and we would convene Court on the 22d and 23d for the purpose of hearing the opening statements.

There was one other thing that I think I should discuss, and that is that we have advised the defense that we stand ready to be at their convenience in the matter of hours which the Court will be in session during the period they are presenting their case. In other words we stand ready to extend our court hours or shorten them, to extend the days of court or to shorten them. If each week the defense will advise us if they want to not have a court session 1 day of the week in order to discuss the case with their clients, we would be glad to accommodate them in that regard. If they desire the commissioner to sit more often than he has been

sitting, or desire us to have one or two more commissioners, we will be very glad to accommodate the defense in that regard.

Dr. Wecker has just called my attention to a matter and I thank you, Doctor, for it. We had discussed this when the three of us members of the Tribunal were with the defense and the prosecution. It seems that the day following Easter Sunday, Monday the 29th, is a German holiday, so we had decided to adjourn until Tuesday, 30 March, of course, with the exception that we would be hearing the opening statements on the 22d and 23d, so that it is considerably more than the 4 weeks requested.

I think the defense understand perfectly that as they begin to approach this final date which we are setting as June 3, that a week or two in advance of that, if it begins to appear to them that their witnesses or their case has not been presented as speedily as they expected, that they will then let us know even in advance of that so that we may again sit longer hours or have the commissioner sit more often, or more commissioners, so that they will be able to keep within that deadline without any difficulty.

PRESIDING JUDGE ANDERSON: Excuse me, Judge Wilkins, may I interrupt you? You said June 3. You meant June 5, didn't you?

JUDGE WILKINS: June 5, thank you. And I am sure Dr. Wecker and Dr. Pohle, while we are setting this particular time, have agreed upon it; nevertheless we stand ready to facilitate the preparation of the case and the presentation of the evidence by the defense to all possible extent.

Now, I believe, Judge Daly, that is pretty much the full picture of our conversations, but I would like Dr. Wecker and Dr. Pohle to state for the record whether or not what I have said is substantially correct.

DR. POHLE: I believe, Judge Wilkins, that I can corroborate this statement, that this is a true picture of the discussions, and Dr. Wecker is of the same opinion; he has just told me.

May I add two further brief statements here. The first is a reservation. Recently we have talked about the sufficiency [Schlussigkeit] of the prosecution's proof, especially as to count one [crimes against peace]. I would like to tell the Tribunal that the defense reserves the right to make a written motion for dismissal of count one. The reason is that the prosecution's evidence is not sufficient as to count one. Whether this happens depends on deliberations still going on. We can already inform the Tribunal that we will probably make such a motion within the next few days.*

*On 12 March 1948 the defense moved for a judgment of not guilty on counts one and four of the indictment (crimes against peace and common plan or conspiracy to commit crimes against peace.) The Tribunal granted this motion on 5 April 1948, thus eliminating early during the

The second point I wanted to announce is an application by my client, Herr von Buelow, who is to ask for an additional American counsel which he chose to represent him. This is Mr. Robinson from the firm of Henningson & Robinson Company in New York. I believe I need not give any details about this because I have made a written motion about this in writing to the Tribunal, and it will be handed to the Secretary General tomorrow morning.*

H. Ministries Case—Motions, Answer, and Ruling Concerning a Recess for Defense Preparation, and Related Matters

I. INTRODUCTION

The Ministries case involved 21 defendants and eight counts, although not all defendants were charged under any one count. With the exception of the IMT case, the Ministries trial was the longest, largest, and most complicated of the Nuernberg trials. The Tribunal held sessions on 169 different days over a period of approximately 15 months, although there were numerous recesses, including 16 days between arraignment and the prosecution's opening statement, 37 days between the prosecution and defense case, and 143 days between the closing statements and the judgment. The Tribunal held sessions on 49 different days during the prosecution's case in chief and on 107 days during the defense case, exclusive of the defense closing statements.

No application for a postponement of the trial was made in the Ministries case. However, on 22 March 1948, about 1 week before the close of the prosecution's case, seven of the defendants who were former officials of the German Foreign Office applied for a 6-months' recess for defense preparations, or, in the alternative, for a severance of the case as to these defendants and their trial after the conclusion of the case against the other defendants. In

defense case the necessity of submitting counterproof on two of the four counts of the indictment. Most of the basic materials concerning this dismissal are reproduced in vol. IX, this series as follows: defense motion for a judgment of not guilty on counts one and four (pp. 356-364); extracts from the prosecution answer to the defense motion (pp. 364-389); Tribunal order granting the defense motion (p. 390); opinion of the Tribunal concerning the dismissal of these two counts (pp. 390-401); concurring opinion of Presiding Judge Anderson on the dismissal (pp. 401-455); and special concurring opinion of Judge Wilkins on the dismissal (pp. 455-466). The Tribunal did not reduce the time for the defense case because of the dismissal of these two counts. The presentation of evidence for the defense, with minor reservations, was concluded before the Tribunal on 4 June 1948, the 46th trial day of the defense case. Thereafter, on 2 trial days the prosecution presented rebuttal evidence. The Tribunal was then in recess for 14 days before the closing statements began.

*Mr. Robinson was approved as cocounsel for the defendant von Buelow on 26 February 1948. See section XIII G 7c.

the same motion, the defendants also petitioned for the production of certain documents. In a separate motion counsel for defendant Lammers petitioned for a recess of 8 months. Counsel for still other defendants concurred by separate motion in the motion for a 6-months' recess, but objected to severance. The Tribunal granted the request for the production of documents, denied the requests for a recess of 6 months or longer and for severance, and granted in the same order a recess of 5 weeks. The initial defense motion, the prosecution's answer, and the two related defense motions above-mentioned are reproduced in section XIV H 2-5 respectively. The Tribunal's order is reproduced on p. 419, since it also dealt with the production of documents.

The Tribunal granted a recess of 31 days between the last session for the taking of evidence and the closing statements. After the final statements of the defendants the Tribunal was in recess for 143 days before it convened again to read its judgment.

To expedite trial, the Tribunal in the Ministries case relied more upon the taking of evidence on commission than did the Tribunals in the other four cases in which evidence was taken on commission. (See sec. XVII, "Taking of Evidence on Commission.")

2. MOTION OF SEVEN "FOREIGN OFFICES" DEFENDANTS, 22 MARCH 1948*

MOTION OF THE DEFENDANTS VON WEIZSAECKER, VON STEENGRACHT, KEPPLER, WOERMANN, RITTER, ERDMANNSDORFF, AND VEESENMAYER FOR THE PRODUCTION OF DOCUMENTS, A RECESS FOR A PERIOD OF AT LEAST SIX MONTHS, AND ALTERNATIVE REQUEST FOR A SEVERANCE AND SEPARATE TRIAL OF THE PROCEEDINGS AS TO THESE DEFENDANTS TO BE HELD AT THE CONCLUSION OF THE PROCEEDINGS RELATIVE TO THE REMAINING DEFENDANTS

Now come the defendants Ernst von Weizsaecker, Gustav Adolf von Steengracht und Moyland, Wilhelm Keppler, Ernst Woermann, Karl Ritter, Otto von Erdmannsdorff, and Edmund Veese-mayer, by their attorneys, and respectfully move that this honorable Tribunal:

1. Enter an order requiring the prosecution, immediately upon the completion of the prosecution's case in chief, to turn over and deliver to counsel for these defendants all documents, papers, letters, memoranda, and other material taken from the files of the Foreign Office or any of the members and employees thereof now in the possession of the prosecution at Nuernberg, and which is located, according to the information of the defendants, in the Document Center of the Evidence Division of the prosecution, or that all of the foregoing documents et cetera, be made available for inspection and copying to counsel for these defendants and to these defendants immediately upon the completion of the prosecution's case in chief.

2. Grant a recess for a period of at least 6 months in order to afford these defendants a reasonable opportunity to properly prepare their defenses for presentation to the Tribunal, and particularly to afford the time necessary for the examination and production of documents from the document unit in Berlin pursuant to the terms of the order of this Tribunal entered on 2 February 1948.

3. In the alternative, should the Tribunal decide that it does not desire and does not feel that a continuance of the entire case for a period of at least 6 months is justified, then and in that event, because of the peculiar situation of the charges involving the Foreign Office and these defendants, as it is now quite apparent from the evidence adduced that the charges involving the Foreign Office and these defendants are distinct and separate from the charges involving the other groups and defendants described in

*U.S. vs. Ernst von Weizsaecker, et al., Case 11, Official Record, volume 71, pages 1357-1366.

the indictment, sever and separately try, after the conclusion of the trial against the other groups and defendants described in the indictment, the charges involving the Foreign Office and these defendants.

And for grounds in support of this motion, these defendants allege the following:

I

By decision of 2 February 1948 this honorable Tribunal has granted permission to the defendants of the former German Foreign Office to inspect the files of the Foreign Office kept by the document unit in Berlin.¹ Thereupon the Secretary General immediately took the necessary steps and after a while succeeded in procuring permission from Washington for a representative of the defense counsel to inspect the files and obtain copies of selected documents under the conditions set out in appendix I.²

In order to accelerate the proceedings, the defense has sent to Berlin for this purpose one of the most experienced experts of the former German Foreign Office, Counselor Dr. von Schmieden. The assistant of Dr. von Schmieden, also appointed and approved by the Tribunal for this purpose of inspection, has been refused by Berlin on the ground that only one representative of the defense can be admitted to the Document Center.

Since 11 March 1948, Dr. von Schmieden has had opportunity to work in the document unit. There are approximately 100,000 pounds of files of the German Foreign Office in Berlin. The attached report of Dr. von Schmieden lists the several departments, the files of which are almost completely preserved (app. II). The work in these files is rendered difficult by the non-existence of detailed indices. From nearly all these files the prosecution has submitted documents in the present trial. The prosecution has been working in the document unit for almost two years with a large staff of research analysts. A fair trial is guaranteed only if the defense has the same opportunity to make real use of the files of the Foreign Office. The admission to the files granted by the Tribunal will be farcical and without meaning if the defense does not have the necessary time to work through such files and extract and obtain copies therefrom of the documents necessary to present the defenses of these defendants to the Tribunal.

II

It seems necessary to add a word about the nature of a diplo-

¹ Tribunal order of 2 February 1948, reproduced on page 413.

² The two appendices to this motion are reproduced separately on pages 415-416, since both pertain to the examination of documents in the Berlin Document Center pursuant to the earlier Tribunal order of 2 February 1948.

matic document. If there are any documents at all which do not speak for themselves, they are diplomatic documents. They are the expression of a tactical situation, and very often they may appear in a completely new light if preceding or subsequent documents, or an entirely different group of documents, are considered. So, for instance, a document presented as proving an incentive to war, in reality can very well express opposition to a menacing war, and in fact may have exercised a restraining influence, if a determined political situation can be proved by other documents. If this is true of diplomatic documents generally, it is especially true of diplomatic documents of a *totalitarian* regime, in which a document does not only show the tactics towards other countries, but is also peculiarly styled because of the necessity of camouflaging its real meaning from the political chiefs and different organizations.

III

This being the nature of a diplomatic document, it is evident that you can prove anything by diplomatic documents torn out of their context. This is demonstrated with great clarity by the recent American and Soviet publications from the files of the German Foreign Office. The American publication, "Nazi-Soviet Relations 1931-1941 (Department of State, 1948)" endeavors to prove the coguilt of Soviet Russia in National Socialist aggression. On the other hand, the official Russian publication made by the Information Bureau of the Council of Ministers of the Soviet Union (U. S. S. R.) attempts to prove the guilt of the Western powers in the strengthening of Nazi Germany by the policy of appeasement and the tendency of the Western powers during the war to conclude a separate peace without Russia (see the publications of the Soviet-licensed Berlin press, which can be submitted if the Tribunal so desires). Significantly, both publications refer to documents, among others, from the files of defendant von Weizsaecker. (See above-mentioned American publication, page 133 *et seq.*, and the Russian publication in the newspaper "Neues Deutschland," Berlin, of 18 February 1948, p. 4.)

This simple comparison between the publications of two of the signatories to the London Agreement and Charter shows that diplomatic documents can be correctly understood only if the complete diplomatic material relating thereto is used in connection therewith. Of course, often only witnesses can explain many of them, but one cannot forego knowledge of all the documentary evidence relative to the case. Moreover, in a *totalitarian* state, diplomatic documents are very often used to camouflage a completely different political situation, as we have shown hereinbefore.

IV

This is the first time in modern history that leading diplomats have been tried. It is not those men who have made the political decisions who are now under indictment, but permanent and career officials are sought to be made responsible for the execution of the policies of their government. The novelty of this type of indictment is also indicated, for instance, by the fact that defendant von Weizsaecker, whose political activity was of course well known throughout the entire world, had, after his return from the Vatican, been living in full liberty in the French Zone, after clearance by and with the authorization of both the American and French Military Governments, until shortly before the return of this indictment. Furthermore, the defendant von Erdmannsdorff has even occupied an official position in the British Zone, although the British Military Government was fully acquainted with his political activities.

Unlike the IMT trial, the prosecution has not worked with a few key documents, but with some 1,600 different documents which have to be discussed in detail by the defense; it has tried to give as complete a picture as possible of what they consider as knowledge and consenting part of the defendants in crimes against peace and humanity. About half of those documents are being submitted against these defendants on the charge of planning, preparing, initiating, and waging wars of aggression. Only by a thorough examination of the entire material can the manifold activities of the defendants be properly understood and the real facts established.

This indictment cannot, therefore, be answered with a few affidavits and witnesses. It requires a careful examination of all official documents. One cannot possibly assume that the defendants remember all the material concerning them and have no need to collect it and search for it like the prosecution. Who could keep in mind the contents of 100,000 pounds of involved diplomatic documents? The details of the documents can only be proved by the documents.

V

After very careful examination of the facts, these defendants contend that they will need a minimum of 6 months for the examination and presentation of appropriate material from these files.

This period represents only a small part of the time needed and used by the prosecution, although, in contrast to the great staff of the prosecution, the defense is represented by only *one* person in the document unit. The defense hopes to make up for this lack of

personnel by particularly intensive work. In making this estimate, the defense assumes that after the end of the prosecution's case, the Tribunal will order the prosecution to make available to the defense photostatic copies, with available translations, of those documents which were not submitted as exhibits in the prosecution's case in chief. According to indications of the prosecution, there are some 3,000 or more documents of the Foreign Office in the possession of the prosecution at Nuernberg—that is only a very small part of the Berlin material. Under such circumstances these defendants need not less than 6 months, and respectfully move that the Tribunal issue an order to that effect. It is assumed by the defense that the prosecution, which is acquainted with the Berlin material, must concur in our contention that 6 months is a very short period for the examination of these files for the purpose of selecting and copying relevant documents for use as evidence before this Tribunal.

Defense counsel for the defendants of the Foreign Office are fully aware of the fact that the granting of a sufficient period for the examination of the diplomatic files will place the Tribunal in a very difficult situation. It has decided to present this motion only because the facts leave no choice.

If it be suggested that these defendants' request involves too much time, the attention of the Tribunal is again respectfully called to the fact that far more time and preparation has been consumed by the prosecution. Our information is that the prosecution has employed scores of lawyers, research analysts, clerks, etc., and has been engaged for more than two years in preparing this involved and complicated case for trial.

Even in preparing far simpler cases than this case, much more time has been consumed by the prosecution than is asked for by the Foreign Office defendants in the Ministries case. The so-called Southeast Generals case, No. 7 [Hostage case], is a far simpler and much less extensive case than the Ministries case, No. 11; yet even in Case 7, according to a statement made in open court by the prosecution (Tr., 16 July 1947, morning session), ten analysts were employed by the prosecution and worked 6 months in Washington, D. C., examining German military files seized during and after the war, which had been transmitted to the War Department in Washington, all for the purpose of sending selected documents desired by the prosecution to Nuernberg. Further time was consumed by the prosecution's legal staff and its numerous analysts and experts at Nuernberg in studying, assembling and selecting documents from the documents shipped to Nuernberg by the ten Washington analysts. This statement of the prosecution

illustrates clearly how much time was required for the preparation of that case—much more limited and uniform in nature—the trial of the German generals commanding German forces in the South-east European theater of war only—whereas our case involves not only numerous military decisions, but world-wide activities in diplomacy, the whole course of global military operations, and involves various ministries of the German Government and their activities, not only in the fields of diplomacy, but in the fields of propaganda, finance, economics, labor, etc.

According to General Taylor's opening Statement (English tr., p. 17), this case is far more involved and important than any case heretofore tried and any on trial before these tribunals at Nuernberg, and parallels in charges and world-wide interest the original International Military Trial, in which all four of the conquering powers participated (English tr., p. 19).^{*} Such an important case, with such involved issues, of necessity requires time. In this connection this Tribunal must bear in mind that in many respects, in the preparation of their defense, these defendants occupy a much less favored position than the prosecution. The prosecution has had and has at its disposal millions of dollars for use in these cases, whereas all of the defendants' funds are blocked, their staffs are limited, and they and their counsel are restricted in their use of American means of communication such as mails, cable service, and telegraph and telephone systems. Transportation also presents serious difficulties to the defense. The defendants therefore must rely upon the protection of this Tribunal and upon the Tribunal to take the necessary steps to somewhat equalize their position in the preparation of their defenses. Defendants should not be deprived of the time necessary to prepare their defense for reasons of convenience to the occupation authorities. Speed and dispatch have never been considered as essential, or even desirable, in international proceedings. It would not be in harmony with the great importance of this case, as expounded by General Taylor, nor with the particular dignity and importance of this Tribunal, which the prosecution claims is international, operating above and beyond the laws of the powers creating it, to permit elements of time and money to interfere with a calm, unhurried and thorough consideration of this important case. Such thoroughness is essential to a fair and impartial international trial.

In the alternative, these defendants respectfully leave to the decision of the Tribunal the severance of the proceedings against the seven above-mentioned defendants of the Foreign Office from

^{*}The prosecution's opening statement in the Ministries case is reproduced in section V B, volume XII, this series.

the main trial. This Honorable Tribunal has perceived that the indictment contains several groups of charges less closely related to each other than some other proceedings which are being tried separately in Nuernberg, and that a severance of the Foreign Office case may well be the proper solution of the problem of adjournment now facing the Tribunal.

VI

The defense is obliged to move for an adjournment for 6 months for the following reasons: (1) For the reasons set forth above, this is the only way to guarantee that the interests of these defendants will be protected. This does not take into consideration that in the question of wars of aggression (count one), the inaccessibility of the files of the Allied Foreign Offices presents an almost insurmountable obstacle for a fair and impartial judgment. (2) The defense does not only bear responsibility for the Foreign Office defendants indicted here, because after the end of the present trial proceedings against other members of the former German Foreign Office are planned to be held before German courts whose decisions will depend mainly on the opinion and judgment of this Tribunal in the present case. (3) In the present proceedings the questions of criminal guilt cannot be decided unless the full historical truth is definitely established. In this connection, the defense carries a particularly heavy responsibility because the proceedings do not concern single political leaders, but an entire class represented by the defendants. It is exceptionally difficult to judge historical facts when rendering a verdict in the case of persons who did not decide political questions. This became evident in the lively criticisms of this proceeding raised by the world press at the beginning of the trial. In the IMT trial, political chiefs, i.e., the makers of policy, were on trial; whereas these defendants, who did not make policy, find themselves confronted with an indictment designed to accuse Germany in a representative class. See, for instance, General Taylor's opening statement (English tr., 6 Jan. 1948, pp. 31 and 32).

VII

The defense is convinced that the adjournment now requested could have been avoided if, at the beginning of the trial, the entire files of the Foreign Office had been at the disposal of the defense. The Tribunal has been able to convince itself how difficult it is, even now, 3 years after the end of hostilities, to procure document material. Thus even now the photostats for the defendants are still not available.

The defense is not responsible for the initiation of these trials. The point of view of the time needed and costs involved by the

trial must be examined by the persons who initiate a trial, and is their responsibility, and *not* that of the Tribunal or the defense. The corresponding trials being held in Japan have been dismissed for such reasons (see "Stars and Stripes" (European Edition), 15 Jan. 1948) :

"Tokyo, Jan. 14 (AP).

The dismissal of war crimes charges against 20 Japanese, including five ministers of the Tojo cabinet, has been recommended by Chief Prosecutor Joseph B. Keenan * * * Keenan's reasoning is that the trial of the 20 defendants would be anti-climatic, lengthy, and expensive * * * ."

Once a trial is in course, it may be carried on only in accordance with principles of fairness and justice. The length of such a trial therefore cannot be decided on irrelevant considerations of time and money. The period of time to be considered is only that which is necessary to establish the facts. The defense contends with great earnestness that it would be political deception, historical falsehood, and juridical wrong to pass judgment on the activities of the career diplomats indicted here without having previously examined and submitted all relevant documents from the files of the Foreign Office. This is why the defense for the seven named defendants of the Foreign Office ask for an adjournment for at least 6 months.

This motion is presented on behalf of seven defendants who have been joined by the prosecution in their presentation of documentary evidence against the Foreign Office. Defendant Bohle has not joined in this motion because he has always been treated separately in special document books by the prosecution. He was only formally a member of the Foreign Office and has been indicted, we submit, because of his activity as leader of the Foreign Organization of the Nazi Party [AO]. He has, therefore, not joined in this motion of the seven Foreign Office defendants, and a severance and separate trial as to him is not necessary from his point of view.

Respectfully submitted,

[Here follow eight signatures of defense counsel for seven defendants.]

22 March 1948

3. ANSWER OF THE PROSECUTION, 24 MARCH 1948¹

ANSWER OF THE PROSECUTION TO THE MOTION OF THE DEFENDANTS VON WEIZSAECKER, VON STEENGRACHT, KEPPLER, WOERMANN, RITTER, ERDMANNSDORF, AND VEESENMAYER, FOR THE PRODUCTION OF DOCUMENTS, A RECESS FOR A PERIOD OF AT LEAST SIX MONTHS, AND AN ALTERNATIVE REQUEST FOR A SEVERANCE, AND SEPARATE TRIAL OF THE PROCEEDINGS AS TO THESE DEFENDANTS TO BE HELD AT THE CONCLUSION OF THE PROCEEDINGS RELATIVE TO THE REMAINING DEFENDANTS

The above-named defendants have filed a motion asking for the following relief:

First, that an order be entered requiring the prosecution, immediately upon completion of the prosecution's case in chief, to turn over to counsel for the said defendants all the documents, papers, letters, memoranda, and other material taken from the files of the Foreign Office and in the possession of the prosecution in Nuernberg, allegedly located in the Document Center of the Evidence Division of the prosecution.

Second, that a 6-month recess be granted for the preparation of the defense of these defendants and to afford defense the opportunity to adequately exploit the Foreign Office files in the Document Center at Berlin.

Third, that in the event a 6-month recess is not granted, a severance be entered and separate trial ordered insofar as the Foreign Office defendants are concerned.²

The prosecution desires to state the following with respect to these three points, in the order enumerated above:

1. The prosecution is not in possession of original documents taken from the German Foreign Office files at the Foreign Office-State Department [FO/SD] Document Center in Berlin. What the prosecution has here in Nuernberg are photostats of various documents which were selected from the FO/SD Document Center. The original documents from which the photostats were made are still in the FO/SD Document Center and available to the defense. With respect to the photostats in the possession of the prosecution, the prosecution will undoubtedly have occasion to offer some of these photostats during cross-examination and in rebuttal.

¹ U.S.*vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 71, pages 1347-1350.

² The prosecution's answer does not mention a related defense motion filed on 23 March 1948 on behalf of defendant Lammers, since this motion had not yet been translated and served upon the prosecution when this answer was filed. The Lammers motion is reproduced below, immediately following this answer.

Accordingly, the prosecution opposes turning over its collection of photostats to the defense *en masse*. However, as a matter of convenience, if the defense desires a specific document and complies with the provisions of Ordinance No. 7 and the Uniform Rules of Procedure concerning the production of documents,* the prosecution will gladly cooperate in making the photostat available to the defense, if such photostat is in the possession of the prosecution in Nuernberg. The necessity of the defense examining these documents in Berlin will thereby be avoided.

With respect to the statement of the defense that they are represented by only one person in the Document Center in Berlin, the prosecution sees no reason why arrangements should not and could not be made so that a larger staff of defense counsel and their assistants have access to the documents in the FO/SD Document Center. Nor, indeed, do defense counsel allege they have attempted to remedy the situation about which they complain.

2. The prosecution takes no position concerning the exact amount of time which this Tribunal should allow defense counsel in preparing the defense. However, the prosecution would like to call the following facts to the attention of the Tribunal:

(a) This trial is not, as is suggested in the motion of the defense, a proceeding against "an entire class, represented by the defendants." This trial is a trial of 21 individuals for the criminal activities which they engaged in over a period of years. The gratuitous undertaking of responsibility by the defense counsel for the salvation of members of the Foreign Office, other than those indicted here, is praiseworthy, but not sufficient to substantiate the allegations set forth in the motion. No one should know better than these defendants what they did and why they did it. These defendants, through their defense counsel, are in a unique position to know what documents exist which will reveal the truth insofar as their activities are concerned. Presumably the defendant von Weizsaecker and the other Foreign Office defendants themselves prepared, signed, initialed, or examined the bulk of the Foreign Office documents relevant to this case, and as stated by the Tribunal in its order dated 2 February 1948, granting defense's motion to examine documents in the FO/SD Document Center, "it is almost incomprehensible that the defendants seeking to search archives and records which, for the most part, seem to have emanated in departments in which the defendants were once active, now assert that they are unable to give any information as to either the nature or type of document which they seek

*See section XIII L, "Production of Documents for the Defense."

to examine." * As a matter of fact, with the knowledge which these defendants have as to their activities during the period of time in question, it should not be a difficult task for German speaking defense counsel to ascertain what documents in the FO/SD Document Center are important in shedding light on the issues in this case. The prosecution during its preparation of the case in chief have never been graced with such specific knowledge of the documents as possessed by the defense.

(b) The document books pertaining to counts one and two and often with relation to other counts have been presented first against the Foreign Office defendants. Insofar as count one is concerned, the defendants have had these document books since early January 1948. The Tribunal has been very liberal in permitting the absence of defendants whenever requested by them for the purpose of preparation of their defense. Needless to say, the indictment, which is in the nature of a bill of particulars, was filed on 15 November 1947.

(c) It should also be noted that it is not necessary that the defense have all defense documents ready for presentation in court on the opening of the defense's case. The defense will be allowed to introduce documents into evidence up until the close of their case.

3. The motion for a severance and separate trial is merely a device to obtain a long delay in hearing the evidence against the Foreign Office defendants, as distinguished from the other defendants in the case. There is obviously no basis for such a procedure. The issues presented in the indictment involve all the defendants. Their acts to a large extent are inseparably woven together, as a cursory examination of the evidence will clearly indicate.

Although the prosecution sees no basis, therefore, for a severance and separate trial of the issues concerning the Foreign Office defendants, the prosecution, of course has no objection to any order of presentation of proof which the defense counsel among themselves should decide upon. The prosecution does not wish, however, to take issue with political statements made in the motion, but it must be stated that the defense is responsible for the initiation of these trials, as has been established by the judgment of the International Military Tribunal.

Nuernberg, 24 March 1948

Respectfully,
[Signed] ALEXANDER G. HARDY
Associate Trial Counsel

*This order is reproduced in full in section XIII L 7.

4. MOTION ON BEHALF OF DEFENDANT LAMMERS.
22 MARCH 1948*

Nuernberg, 22 March 1948

Attorney Dr. Alfred Seidl,
Counsel for defendant
Dr. Lammers

[Stamp] Filed: 23 March 1948

To: Secretary General
Military Tribunal IV
Nuernberg

Subject: Motion of Counsel for the Defendants of the Foreign
Office, dated 22 March 1948

1. On behalf of the defendant Dr. Lammers [formerly Chief of the Reich Chancellery] I concur with and join in the motion of counsel for the defendants of the Foreign Office, dated 22 March 1948, to grant a 6-month interval in the trial. As set forth in detail below, I need a period of 8 months to prepare the defense for Dr. Lammers. If, after a 6-month interval in the proceedings, the cases of the defendants of the Foreign Office will be tried first in the proper order which will take approximately 2 months, then the necessary time of 8 months will be available to me.

2. If, upon the motion of counsel for the defendants of the Foreign Office, the high Tribunal should decide to alter the order or sever the proceedings against the defendants of the Foreign Office altogether, then I have to request now:

(a) That an 8-month interval in the trial be approved in order to prepare the defense for Dr. Lammers, or

(b) In case this interval in the trial should not be granted, the case of the defendant Dr. Lammers be tried after completion of the proceedings against all the other defendants, or his case be severed altogether.

Substantiation

In view of the great number of document books offered by the prosecution in general and against the defendant Dr. Lammers in particular, and of the accelerated course of introducing and accepting prosecution documents in this trial, it was utterly impossible besides attending the sessions of the Tribunal to read only this abundance of documents, not to mention a detailed examination of same or a discussion with my client on them. Owing to the peculiarity of his position, the latter concerned himself only incidentally and in an administrative *technical* manner with the documents which have now been offered against

*U.S. vs. Ernst von Weizsaecker, et al., Case 11, Official Record, volume 71, pages 1851-1858.

him; now he has to concern himself for the first time with the matter itself which is the more difficult and time-devouring since the spheres are of a most heterogeneous nature. The study of the documents and their discussion with the defendants will be the primary task of the defense after the prosecution rests its case.

It is only then that the real preparation of the defense itself can be tackled. The prosecution having offered documents covering a very extensive field, the defense on its part is forced to submit voluminous exonerating material. Again and again I called attention to this in numerous objections when prosecution documents were offered. It can therefore not be the fault of defense counsel if much time is needed now for this purpose.

The Tribunal has approved my previous request and permitted me to examine all the captured files of the Reich Chancellery in the Document Center, Berlin. It need not be proven that so far the documents could not be examined since the sessions of the Tribunal have to be attended first and the documents offered by the prosecution have to be read at least superficially. This examination of the files, amounting to several tens of thousands of pounds of documents, can only be made by myself and the only assistant at my disposal for this and all the other work. A comparison with the period of almost 3 years and with the big staff of qualified personnel who were at the disposal of the prosecution for the preparation of the indictment obviously shows the extremely prejudiced position of the defense; if defense counsel would now be forced to conduct the defense within the next few weeks without an approximatively sufficient preparation, then the orderly observance of the defendants' rights would be altogether out of the question. The approval given by the Tribunal to examine the captured files would become completely illusory if the requested interval in the proceedings should fail to materialize.

[Signed] DR. ALFRED SEIDL
Attorney at Law

5. STATEMENT ON BEHALF OF OTHER DEFENDANTS, 25 MARCH 1948*

Dr. Egon Kubuschok
Speaker for Defense Counsel in Case 11

Nuernberg, 25 March 1948

TO: The Military Tribunal IV
Through: Secretary General

*Ibid, pages 1344-1346.

Defense counsel of seven defendants who were officials of the German Foreign Office have filed a motion on 22 March with the request to adjourn for at least 6 months before the beginning of the case in chief of the defense.

This motion for adjournment is also joined by the other defense counsel—with the exception of counsel of Bohle and Meissner who are in a more favorable position concerning their possibilities of work—and in doing so they are referring to the reasons emphasized in this motion and in that which was filed separately for the defendant Lammers, as far as these reasons concern the trial in general.

However, they find themselves compelled to object most seriously to the possibility which is now going to be discussed in regard to changes in the chronological sequence of presentation of evidence for the individual defendants.

In presenting their evidence the prosecution essentially maintained the sequence which they had chosen by naming the defendants in the indictment. This sequence was based on reasons of logic and systematical order. These reasons compelled them to deal with the problem of aggressive war at first, for which the evidence submitted against the officials of the German Foreign Office is predominating in numbers. Accordingly, the case in chief of the defense can also only be presented systematically in the sequence hitherto chosen. As all defendants with a few exceptions are charged with participation in aggressive war this question has to be dealt with in the beginning of the defense case in chief, unless the defense case is to lose its coherence and thus its clearness and effectiveness. In order to achieve this end, each defendant charged with the problem of aggressive war would have to take up the same tedious difficulties which are now facing counsel for the officials of the Foreign Office in checking the documents and files. As regards the case of a defendant who is not an official of the Foreign Office, the difficulties in processing these documents would even increase.

Furthermore it must not be failed to understand that the defense of almost every single defendant requires a very thorough preparation and the checking of a tremendous mass of documentary material. It is just the peculiarity of this trial that persons of most different professional and service positions have been connected by the indictment. Almost every individual defendant according to the prosecution case—and thus also to the defense—is representing an entire sphere of political, administrative, or economic life of the German Reich during a period of 12 years. In order to stress just some examples: the defense of defendant

Darré—apart from dealing with ideological and political questions—requires [us] to go into the entire German food economy; the defense of defendant Count Schwerin von Krosigk requires [us] to deal with the entire German finance policy and finance administration; that of defendant Stuckart requires [us] to go into the entire inner German administration. The entire activity of the Hermann Goering Works covers only one part of the questions to be discussed in the case of defendant Pleiger, and already regarding this part it does not stay behind the mass of problems, which in the cases of Krupp and I.G. Farben are dealt with in special trials, the duration of which might be estimated today as being at least one year. The defense of defendant Kehrl requires us to go into the entire German planned economy; that of defendant Puhl, to go into the public monetary system; that of defendant Rasche, to deal with the broad ramifications of business activities of a very important bank. As regards the defense of defendant Koerner, the entire management of economy as such is subject of the indictment. In all these cases a tremendous mass of documentary material from which the prosecution has selected only a very small part has to be checked and thoroughly processed. It is of the highest importance for the findings of the Tribunal to establish methods, aims, and motives of the defendants. A sufficiently clear picture can only be gained from the total evaluation of the entire material. The tedious task of a conscientious examination of this material, which is mostly kept at different places, is the absolute duty of the defense. Defense counsel of those defendants which are indicted only because of their sphere of work, thus are facing a tremendous but absolutely necessary task requiring an adequate period of time.

From the fact that persons of the most various spheres of work have been connected by the indictment as a consequence not desired by the defense, too, results that a period of preparation is necessary for the defense which by far exceeds the period of time deemed necessary in the previous trials.*

Respectfully,
[Signed] DR. KUBUSCHOK
Attorney at Law

*The Tribunal granted the defense a recess of 5 weeks for further defense preparations before the opening of the defense case. See the order of 29 March 1948, which also dealt with the production of documents and which is reproduced on page 419.

XV. EFFECT OF CERTAIN FINDINGS AND STATEMENTS IN THE JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL UPON LATER NUERNBERG TRIALS BEFORE THE MILITARY TRIBUNALS ESTABLISHED PURSUANT TO ORDINANCE NO. 7

A. Introduction

Some of the materials reproduced in the two preceding sections on "fair trial" and "expedition of trial" have touched upon the plan for two stages in the process of adjudicating the guilt of war criminals, criminal organizations, and the members of criminal organizations. This "two stage" process, intended as a principal means for reaching large numbers of offenders without numerous elaborate trials in which evidence would be heard repeatedly upon the same general issues, was perhaps the principal feature calculated to expedite the war crimes program as a whole. This plan made its first concrete appearance in official documents when it was suggested in a memorandum to President Roosevelt on 22 January 1945 by the American Secretaries of War and State, and the Attorney General. In a section of this memorandum headed "Recommended Program," it was recommended that a first and major trial be followed by a series of trials. In the later trials certain findings made by the judgment in the first trial would, with express limitations, be binding and unchallengeable. The first and major trial was to be before an international military tribunal and the indictment in that case was to accuse both persons and organizations which played a leading part in carrying out the criminal Nazi program. The subsequent trials were to be conducted before occupation courts. In these later trials it was proposed that the findings of the international tribunal in the first trial "should justly be taken to constitute a general adjudication of the criminal character of the groups and organizations referred to, binding upon all members thereof in their subsequent trials." (The pertinent section of this memorandum is reproduced in sec. XIII D.) A few months later Mr. Justice Jackson was appointed Chief of Counsel for the United States in the prosecution of Axis criminals. In his first report to President Truman, dated 6 June 1945, Mr. Justice Jackson developed further the proposal to establish "the criminal character of several voluntary organizations" in a first and major trial and set forth a comprehensive plan concerning the suggested nature and course of subsequent trials of members of any organi-

zations declared criminal in the first trial. The principal section of this report, which discusses such questions as of the notice of the charges and the right to defense by members of the accused organizations, is reproduced in subsection B. The record of the negotiations leading up to the London Agreement (see Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 *op. cit.*) reveals that the proposals for the trial of criminal organizations and the members thereof were much deliberated before the signatories incorporated into the Charter of the IMT the articles concerning criminal organizations. (Subsec. C 1.)

The indictment lodged on 18 October 1945 with the International Military Tribunal named 24 individuals and seven organizations as defendants. The manner in which they were charged is shown by extracts from the indictment reproduced in subsection C 2. On 1 October 1946, after a trial lasting many months, the IMT pronounced its judgment both upon the individual defendants and the organizations accused as criminal. Important extracts from the IMT judgment on the accused organizations are reproduced in subsection C 3. Of the seven groups or organizations accused as criminal, the IMT made declarations of criminality as to four: the Leadership Corps of the Nazi Party; the Gestapo; the SD; and the SS. Concerning its declaration as to the criminality of these organizations, the IMT stated (trial of the Major War Criminals, vol. I, p. 256) :

“Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.”

Concerning this ruling, Brigadier General Taylor, United States Chief of Counsel for War Crimes during the later Nuernberg trials, stated the following in his report. (Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10, *op. cit.*, pages 16 and 17) :

“This ruling opened up issues of fact and, together with the necessity of determining comparative degrees of guilt as the basis for sentencing, eliminated all possibility (in view of the large number of members of these organizations) of trying any substantial portion of them before American tribunals, at Nuernberg or elsewhere.”

While the IMT was still taking evidence in the major trial, the Allied Control Council for Germany made provision by Control Council Law No. 10 of 20 December 1945, for the conduct of further war crimes trials before tribunals constituted by the commanders of the respective occupation zones of Germany. Law No. 10 declared that its purposes were "to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." Among the acts recognized as a crime by Law No. 10 was "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." (Art. II, par. 1 (d)).

Less than 3 weeks after the IMT pronounced its judgment, Military Government for the American Zone of Occupation of Germany issued Ordinance No. 7. This ordinance, in Article I, provided for the establishment of military tribunals in the American Zone to try and punish persons "charged with offenses recognized as crimes in Article II of Control Council Law No. 10", thus including in the jurisdiction of these tribunals the trial of the crime of membership in one of the four organizations declared criminal by the IMT. Article II of Ordinance No. 7, in speaking of the powers pursuant to which military tribunals were being established in the American Zone, expressly mentions "the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal."

Most of the "membership cases" were handled as a part of the denazification program and not before military tribunals of the occupation authorities, and as General Taylor stated in his final report (p. 70): "The punishment of membership in these organizations (within the limits of the IMT declaration) was, therefore, only an incidental purpose of the Nuernberg trials." In eight of the twelve trials brought before tribunals established under Ordinance No. 7, one of the counts charged some or all of the defendants with membership in one or more of the criminal organizations. The trials with such charges were the Medical, Justice, Pohl, Flick, Farben, RuSHA, Einsatzgruppen, and Ministries cases. The indictment in the first of these trials, the Medical case, charged in count four that 10 of the defendants were guilty of membership in the SS within the meaning of the IMT declaration. All of those accused were found guilty of this crime in the judgment. Extracts from the judgment in the Medical case con-

cerning these charges are reproduced in subsection D. The next trial in which charges of membership in a criminal organization were made was the Justice case, the indictment therein charging four defendants with membership in the SS, four with membership in the Leadership Corps of the Nazi Party, and one with membership in the SD. Only three of those accused were found guilty under the membership count in the Justice case. The judgment in the Justice case devotes one section to a general discussion of "Membership in Criminal Organizations," and later treats separately the membership charge in its discussion of the case as to each of the accused defendants involved. The pertinent extracts from the judgment are reproduced in subsection E. For the detailed development of "membership cases" in the later Nuernberg trials, reference is made to the judgments in the eight cases involved, which are all reproduced in full in earlier volumes of this series.

Quite apart from the provisions concerning the so-called "membership cases," Ordinance No. 7 sought further to expedite the later trials by giving far-reaching effect to certain determinations and factual statements made by the IMT in its judgment. Article X of Ordinance No. 7 stated:

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

The text of the IMT judgment runs to more than 170 pages (Trial of the Major War Criminals, *op. cit.*, vol. I, pp. 171-341). This judgment made numerous determinations and statements concerning the history of Hitler's Third Reich. Before setting forth the reasons why the individual defendants were found guilty or innocent, the IMT judgment devoted numerous preliminary sections to such topics as the following: the origin and aims of the Nazi Party; the seizure and consolidation of power by the Nazi Party; the preparation and planning of aggression; the German seizure of Austria and Czechoslovakia; the aggressions against various countries; violations of international treaties; the murder and ill-treatment of prisoners of war and civilian populations; the pillage of public and private property; the Nazi slave-labor policy; persecution of the Jews; and the nature and activity of

various organizations and agencies of the Nazi Party and the Third Reich accused as criminal. Further statements of fact were made in the findings concerning the guilt or innocence of the defendants, and in the discussion of the accused organizations. The applicable law was discussed in considerable detail.

In the 12 later Nuernberg trials both the prosecution and the defense frequently cited portions of the IMT judgment, both in connection with the applicable law and the facts. Each of the judgments by the Tribunals established pursuant to Ordinance No. 7 makes some reference to the judgment of the International Military Tribunal, but the amount of reference varies substantially. Only a few of the judgments discuss specifically the application of Article X of Ordinance No. 7. This section concludes with extracts from the judgments in each of the 12 later trials which make reference to, cite, or quote from the IMT judgment (subsec. F). These extracts, of course, are illustrative and far from all-inclusive.

B. Extracts from the Report to the President by Mr. Justice Jackson, 6 June 1945*

June 6, 1945

The President,
The White House,
Washington, D. C.

My dear Mr. President:

I have the honor to report accomplishments during the month since you named me as Chief of Counsel for the United States in prosecuting the principal Axis War Criminals.

* * * * *

III

* * * * *

3. Whom will we accuse and put to their defense? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals. We also propose to establish the criminal character of several voluntary organizations which have played a cruel and controlling part in subjugating first the German people

*Report of Robert H. Jackson, United States Representative to the *International Conference on Military Trials*, London, 1945, *op. cit.*, pages 42, 47, and 48.

and then their neighbors. It is not, of course, suggested that a person should be judged a criminal merely because he voted for certain candidates or maintained political affiliations in the sense that we in America support political parties. The organizations which we will accuse have no resemblance to our political parties. Organizations such as the Gestapo and the SS were direct action units, and were recruited from volunteers accepted only because of aptitude for, and fanatical devotion to, their violent purposes.

In examining the accused organizations in the trial, it is our proposal to demonstrate their declared and covert objectives, methods of recruitment, structure, lines of responsibility, and methods of effectuating their programs. In this trial, important representative members will be allowed to defend their organizations as well as themselves. The best practicable notice will be given, that named organizations stand accused and that any member is privileged to appear and join in their defense. If in the main trial an organization is found to be criminal, the second stage will be to identify and try before regular military tribunals individual members not already personally convicted in the principal case. Findings in the main trial that an organization is criminal in nature will be conclusive in any subsequent proceedings against individual members. The individual member will thereafter be allowed to plead only personal defense or extenuating circumstances, such as that he joined under duress, and as to these defenses he should have the burden of proof. There is nothing novel in the idea that one may lose a part of or all his defense if he fails to assert it in an appointed forum at an earlier time. In United States wartime legislation, this principle has been utilized and sustained as consistent with our concept of due process of law.

* * * * *

Respectfully yours,

ROBERT H. JACKSON

C. The IMT Case and Membership in Criminal Organizations

I. ARTICLES 9, 10, AND 11 OF THE CHARTER OF THE IMT

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military, or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

2. EXTRACTS FROM THE INDICTMENT IN THE IMT CASE CONCERNING THE ACCUSED ORGANIZATIONS*

II. The following are named as groups or organizations (since dissolved) which should be declared criminal by reason of their aims and the means used for the accomplishment thereof and in connection with the conviction of such of the named defendants as were members thereof: DIE RIECHSREGIERUNG (REICH CABINET); DAS KORPS DER POLITISCHEN LEITER DER NATIONALSOZIALISTISCHEN DEUTSCHEN ARBEITERPARTEI (LEADERSHIP CORPS OF THE NAZI PARTY); DIE SCHUTZSTAFFELN DER NATIONALSOZIALISTISCHEN DEUTSCHEN ARBEITERPARTEI (commonly known as the "SS") and including DER SICHERHEITSDIENST (commonly known as the "SD"); DIE GEHEIME STAATSPOLIZEI (SECRET STATE POLICE, commonly known as the "GESTAPO"); DIE STURMABTEILUNGEN DER NSDAP (commonly known as the "SA"); and the GENERAL STAFF and HIGH COMMAND of the GERMAN ARMED FORCES. The

*Trial of the Major War Criminals, *op. cit.*, volume I, pages 28, 29, 41, 42, and 80.

identity and membership of the groups or organizations referred to in the foregoing titles are hereinafter in Appendix B more particularly defined.

COUNT ONE—THE COMMON PLAN OR CONSPIRACY

* * * * *

H. INDIVIDUAL, GROUP AND ORGANIZATION RESPONSIBILITY FOR THE OFFENSES STATED IN COUNT ONE

* * * Reference is hereby made to Appendix B of this indictment for a statement of the responsibility of the groups and organizations named herein as criminal groups and organizations for the offense set forth in this count one of the indictment.

[A similar sentence on "group and organization responsibility" concluded the charges under each of the remaining counts: count two—crimes against peace; count three—war crimes; count four—crimes against humanity. See Trial of the Major War Criminals, *op. cit.*, volume I, respectively pages 42, 65, and 67.]

* * * * *

APPENDIX B

Statement of Criminality of Groups and Organizations

The statement hereinafter set forth, following the name of each group or organization named in the indictment as one which should be declared criminal, constitute matters upon which the prosecution will rely *inter alia* as establishing the criminality of the group or organization:

[The specifications, covering more than four printed pages, appear in Trial of the Major War Criminals, *op. cit.*, volume I, pages 80-84.]

3. EXTRACTS FROM THE JUDGMENT OF THE IMT CONCERNING THE ACCUSED ORGANIZATIONS*

The Charter also provided that at the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the Tribunal may be convinced) that the group or organization of which the individual was a member was a criminal organization.

* * * * *

The Tribunal was further asked by the prosecution to declare all the named groups or organizations to be criminal within the meaning of the Charter.

* * * * *

*Ibid., pages 171, 172, 178, and 285-287.

The Tribunal appointed commissioners to hear evidence relating to the organizations, and 101 witnesses were heard for the defense before the commissioners, and 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits.

Thirty-eight thousand affidavits, signed by 155,000 people, were submitted on behalf of the Political Leaders, 136,213 on behalf of the SS, 10,000 on behalf of the SA, 7,000 on behalf of the SD, 3,000 on behalf of the General Staff and OKW, and 2,000 on behalf of the Gestapo.

The Tribunal itself heard 22 witnesses for the organizations. The documents tendered in evidence for the prosecution of the individual defendants and the organizations numbered several thousands.

* * * * *

The Tribunal, after examination, granted all those applications [for witnesses and documents] which in its opinion were relevant to the defense of any defendant or named group or organization, and were not cumulative.

* * * * *

THE ACCUSED ORGANIZATIONS

Article 9 of the Charter provides:

“At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

“After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration, and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.”

Article 10 of the Charter makes clear that the declaration of criminality against an accused organization is final, and cannot be challenged in any subsequent criminal proceeding against a member of the organization. Article 10 is as follows:

“In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for mem-

bership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

The effect of the declaration of criminality by the Tribunal is well illustrated by Law Number 10 of the Control Council of Germany passed on 20 December 1945, which provides:

"1. Each of the following acts is recognized as a crime:

* * * * *

"(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

* * * * *

"3. Any person found guilty of any of the crimes above-mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labor.

(c) Fine, and imprisonment with or without hard labor, in lieu thereof."

In effect, therefore, a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

Article 9 [of the Charter], it should be noted, uses the words "The Tribunal may declare," so that the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.

Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organizations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions, and penalties be standardized. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.

2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

The Denazification Law of 5 March 1946, however, passed for Bavaria, Greater Hesse, and Wuerttemberg-Baden, provides definite sentences for punishment in each type of offense. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organization or group declared by the Tribunal to be criminal exceed the punishment fixed by the Denazification Law. No person should be punished under both laws.

3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organization so that such punishment shall not exceed the punishment prescribed by the Denazification Law.

The indictment asks that the Tribunal declare to be criminal the following organizations: the Leadership Corps of the Nazi Party; the Gestapo; the SD; the SS; the SA; the Reich Cabinet, and the General Staff and High Command of the German Armed Forces.

[The judgment hereafter devotes more than 20 printed pages to its detailed findings concerning the accused organizations. See "Trial of the Major War Criminals," *op. cit.*, volume I, pages 257-279. Declarations of criminality were made concerning the following organizations or specified components thereof: the Leadership Corps of the Nazi Party, the Gestapo, the SD, and the SS. The IMT declined to declare the following accused organizations criminal: the SA, the Reich Cabinet, and the General Staff and High Command of the German Armed Forces.]

D. Medical Case—Extracts from the Judgment Concerning Membership of Defendants in the SS*

JUDGE CRAWFORD: *Count four—Membership in criminal organization*: The fourth count of the indictment alleges that the defendants Karl Brandt, Genzken, Gebhardt, Rudolf Brandt, Mrugowsky, Poppendick, Sievers, Brack, Hoven, and Fischer are guilty of membership in an organization declared to be criminal by the International Military Tribunal, in that each of these named defendants was a member of the SCHUTZSTAFFELN DER NATIONAL SOZIALISTISCHEN DEUTSCHEN ARBEITER-PARTEI (commonly known as the SS) after 1 September 1939, in violation of paragraph 1 (*d*), Article II of Control Council Law No. 10.

Before turning our attention to the evidence in the case we shall state the law announced by the International Military Tribunal with reference to membership in an organization declared criminal by the Tribunal:

"In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende, and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called riding units * * * .

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes, excluding, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter, and who had committed

*U.S. *vs.* Karl Brandt, volume II, this series, pages 180, 181, 198, 252, and 253.

no such crimes. The basis of this finding is the participation of the organization in war crimes and crimes against humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to belong to the organizations enumerated in the preceding paragraph prior to 1 September 1939."

* * * * *
PRESIDING JUDGE BEALS: *Karl Brandt*

* * * * *
MEMBERSHIP IN CRIMINAL ORGANIZATION

Under count four of the indictment Karl Brandt is charged with being a member of an organization declared criminal by the judgment of the International Military Tribunal, namely, the SS. The evidence shows that Karl Brandt became a member of the SS in July 1934 and remained in this organization at least until April 1945. As a member of the SS he was criminally implicated in the commission of war crimes and crimes against humanity, as charged under counts two and three of the indictment.*

* * * * *
POPPENDICK

* * * * *
MEMBERSHIP IN CRIMINAL ORGANIZATION

The defendant Poppendick is charged with membership in an organization declared criminal by the judgment of the International Military Tribunal, namely, the SS. Poppendick joined the SS in July 1932. He remained in the SS voluntarily throughout the war, with actual knowledge of the fact that that organization was being used for the commission of acts now declared criminal by Control Council Law No. 10. He must, therefore, be found guilty under count four of the indictment.

With reference to the nature of punishment which should be imposed under such circumstances, the International Military Tribunal has made the following recommendation:

"1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions, and penalties be standardized. Uniformity of treatment so far as practical should be a basic principle.

*The judgment devotes a similar paragraph to each of the defendants charged with membership in the SS (Ibid., pages 222, 228, 240-241, 248, 252-253, 263, 281, 290, and 297).

In the extracts here reproduced, only the discussions concerning Karl Brandt and Poppendick have been reproduced. Karl Brandt was the first defendant discussed and the discussion concerning Poppendick is distinguished by the fact that he was convicted only under the membership count and that the Tribunal discusses in some detail "the nature of punishment which should be imposed under such circumstances."

This does not, of course, mean that discretion in sentencing should not be vested in the Court; but the discretion should be within fixed limits appropriate to the nature of the crime.

"2. Law No. 10 * * * leaves punishment entirely to the discretion of the trial court even to the extent of inflicting the death penalty.

"The Denazification Law of 5 March 1946, however, passed for Bavaria, Greater Hesse, and Wuerttemberg-Baden, provides definite sentences for punishment in each type of offense. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organization or group declared by the Tribunal to be criminal exceed the punishment fixed by the Denazification Law. No person should be punished under both laws."

(See *Trial of the Major War Criminals, op. cit., vol. 1, p. 257.*)

In weighing the punishment, if any, which should be meted out to the defendant for his guilt by reason of the charge contained in count four of the indictment, this Tribunal will give such consideration to the recommendations of the International Military Tribunal as may under the premises seem meet and proper.

Conclusion

Military Tribunal I finds the defendant Helmut Poppendick not guilty under counts two and three of the indictment, and finds and adjudges the defendant Helmut Poppendick guilty as charged in the fourth count of the indictment.¹

E. Justice Case—Extracts from the Judgment Concerning Membership of Defendants in the Leadership Corps of the Nazi Party, the SD, and the SS²

PRESIDING JUDGE BRAND: The indictment contains four counts, as follows:

* * * * *

(4) Membership of certain defendants in organizations which have been declared to be criminal by the judgment of the International Military Tribunal in the case against Goering, *et al.*

* * * * *

JUDGE HARDING:

MEMBERSHIP IN CRIMINAL ORGANIZATIONS

¹ Defendant Poppendick was thus found guilty only under the charge of membership in a criminal organization. He was sentenced to imprisonment for 10 years.

² *U.S. vs. Josef Altsoetter, et al.*, volume III, this series, pages 955, 1029-1031, 1142, 1144, 1157, 1158, and 1168-1178.

C. C. Law 10, Article II, paragraph 1 (d), provides:

"1. Each of the following acts is recognized as a crime:

* * * * *

"(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." Article 9 of the IMT Charter provides:

"At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."

Article 10 of the IMT Charter is as follows:

"In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

Concerning the effect of the last quoted section, we quote from the opinion of the IMT in the case of United States, *et al.*, vs. Goering, *et al.*, as follows:

"Article 10 of the Charter makes clear that the declaration of criminality against an accused organization is final and cannot be challenged in any subsequent criminal proceeding against a member of the organization."*

We quote further from the opinion in that case:

"In effect, therefore, a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."

* * * * *

"A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and

*Trial of the Major War Criminals, *op cit.*, volume I, pages 255 and 256.

groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.”¹

The Tribunal in that case recommended uniformity of treatment so far as practicable in the administration of this law, recognizing, however, that discretion in sentencing is vested in the courts. Certain groups of the Leadership Corps, the SS, the Gestapo, the SD, were declared to be criminal organizations by the judgment of the first International Military Tribunal. The test to be applied in determining the guilt of individual members of a criminal organization is repeatedly stated in the opinion of the First International Military Tribunal. The test is as follows: Those members of an organization which has been declared criminal “who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes” are declared punishable.

Certain categories of the Leadership Corps are defined in the First International Military Tribunal judgment as criminal organizations. We quote:

“The Gauleiter, the Kreisleiter, and the Ortsgruppenleiter participated, to one degree or another, in these criminal programs. The Reichsleitung as the staff organization of the Party is also responsible for these criminal programs as well as the heads of the various staff organizations of the Gauleiter and Kreisleiter. The decision of the Tribunal on these staff organizations includes only the Amtsleiter who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organizations attached to the Leadership Corps other than the Amtsleiter referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration.”²

In like manner certain categories of the SD were defined as criminal organizations. Again, we quote:

“In dealing with the SD the Tribunal includes Aemter III, VI, and VII of the RSHA, and all other members of the SD,

¹ Ibid., page 256.

² Ibid., page 261.

including all local representatives and agents, honorary or otherwise, whether they were technically members of the SS or not, but not including honorary informers who were not members of the SS and members of the Abwehr who were transferred to the SD."

In like manner certain categories of the SS were declared to constitute criminal organizations:

"In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf-Verbaende, and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called SS riding units."

C. C. Law 10 provides that we are bound by the findings as to the criminal nature of these groups or organizations. However, it should be added that the criminality of these groups and organizations is also established by the evidence which has been received in the pending case. Certain of the defendants are charged in the indictment with membership in the following groups or organizations which have been declared and are now found to be criminal, to wit: The Leadership Corps, the SD, and the SS. In passing upon these charges against the respective defendants, the Tribunal will apply the tests of criminality set forth above.*

* * * * *

JUDGE BLAIR:

THE DEFENDANT JOEL

* * * * *

Concerning Joel's membership in the SS and SD, a consideration of all of the evidence convinces us beyond a reasonable doubt that he retained such membership with full knowledge of the criminal character of those organizations. No man who had his intimate contacts with the Reich Security Main Office, the SS, the SD, and the Gestapo could possibly have been in ignorance of the general character of those organizations.

We find defendant Joel guilty under counts two, three, and four.

JUDGE HARDING:

THE DEFENDANT ROTH AUG

* * * * *

The defendant is charged under counts two, three, and four of the indictment. Under count four he is charged with being a mem-

*The further extracts from the judgment which follow contain the discussion of the Tribunal concerning count four (Membership in criminal organization) with respect to six of the seven defendants charged. A mistrial was declared with respect to Karl Engert, the seventh defendant charged under count four (see sec. XX C 1).

ber of the Party Leadership Corps. He is not charged with membership in the SD. The proof as to count four establishes that he was Gauwalter of the Lawyers' League. The Lawyers' League was a formation of the Party and not a part of the Leadership Corps as determined by the International Military Tribunal in the case against Goering, et al.

As to counts two and four of the indictment, from the evidence submitted, the Tribunal finds the defendant not guilty.

* * * * *

THE DEFENDANT NEBELUNG

Upon the evidence submitted, it is the judgment of this Tribunal that the defendant Nebelung is not guilty under any of the counts charged against him in the indictment.

THE DEFENDANT CUHORST

The defendant Cuhorst is charged under counts two, three, and four of the indictment.

There is no evidence in this case to substantiate the charge under count two of the indictment.

As to count four, the proof establishes that Cuhorst was a Gaustellenleiter and so a member of the Gau staff and a "sponsoring" member of the SS. His function as Gaustellenleiter was that of a public propaganda speaker.

In its judgment the International Military Tribunal, in defining the members of the Party Leadership Corps who came under its decision as being members of a criminal organization, states the following:

"The decision of the Tribunal on these staff organizations includes only the Amtsleiter who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organizations attached to the Leadership Corps other than the Amtsleiter referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration." *

There is no evidence in this case which shows that the office of Gaustellenleiter was the head of any office on the staff of the Gauleitung.

With regard to the SS the judgment of the International Military Tribunal is as follows:

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members

*Trial of the Major War Criminals, *op cit.*, volume I, page 261.

of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter * * *.”*

Referring back to the membership enumerated, the judgment declares:

“In dealing with the SS, the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf-Verbaende, and the members of any of the different police forces who were members of the SS.” *

It is not believed by this Tribunal that a sponsoring membership is included in this definition.

The Tribunal therefore finds the defendant Cuhorst not guilty under counts two and four of the indictment.

* * * * *

PRESIDING JUDGE BRAND:

THE DEFENDANT OESCHEY

* * * * *

The defendant Oeschey is charged under count four of the indictment with being a member of the Party Leadership at Gau level within the definition of the membership declared criminal according to the judgment of the first International Military Tribunal in the case against Goering, *et al.*

We have previously quoted the findings of the first International Military Tribunal which define the organizations and groups within the Leadership Corps which are declared to be criminal. Oeschey was provisionally commissioned with the direction of the legal office of the NSDAP in the Franconia Gau and served in that official capacity for a long time. In his testimony he states that from 1940 to 1942 he was solely in charge of the Gau legal office as section chief. The evidence clearly establishes the defendant's voluntary membership as the chief of a Gau staff office subsequent to 1 September 1939. The judgment of the first International Military Tribunal lists among the criminal activities of the Party Leadership Corps the following:

“The Leadership Corps played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews which was put into effect shortly after the Nazis came into power. The Gestapo and SD were instructed to coordinate with the Gauleiter and Kreisleiter the measures taken in the pogroms of 9 and 10 November 1938. The Leader-

*Ibid., page 273.

ship Corps was also used to prevent German public opinion from reacting against the measures taken against the Jews in the East. On 9 October 1942, a confidential information bulletin was sent to all Gauleiter and Kreisleiter entitled 'Preparatory measures for the final solution of the Jewish question in Europe—rumors concerning the conditions of the Jews in the East.' This bulletin stated that rumors were being started by returning soldiers concerning the conditions of Jews in the East which some Germans might not understand, and outlined in detail the official explanation to be given. This bulletin contained no explicit statement that the Jews were being exterminated, but it did indicate they were going to labor camps, and spoke of their complete segregation and elimination and the necessity of ruthless severity. * * *

"The Leadership Corps played an important part in the administration of the slave labor program. A Sauckel decree dated 6 April 1942 appointed the Gauleiter as plenipotentiary for labor mobilization for their Gaue with authority to coordinate all agencies dealing with labor questions in their Gaue, with specific authority over the employment of foreign workers, including their conditions of work, feeding, and housing. Under this authority the Gauleiter assumed control over the allocation of labor in their Gaue, including the forced laborers from foreign countries. In carrying out this task the Gauleiter used many Party offices within their Gaue, including subordinate political leaders. For example, Sauckel's decree of 8 September 1942, relating to the allocation for household labor of 400,000 women laborers brought in from the East, established a procedure under which applications filed for such workers should be passed on by the Kreisleiter, whose judgment was final.

"Under Sauckel's directive the Leadership Corps was directly concerned with the treatment given foreign workers, and the Gauleiter were specifically instructed to prevent 'politically inept factory heads' from giving 'too much consideration to the care of eastern workers.' * * *

"The Leadership Corps was directly concerned with the treatment of prisoners of war. On 5 November 1941 Bormann transmitted a directive down to the level of Kreisleiter instructing them to insure compliance by the army with the recent directives of the department of the interior ordering that dead Russian prisoners of war should be buried wrapped in tar paper in a remote place without any ceremony or any decorations of their graves. On 25 November 1943 Bormann sent a circular instructing the Gauleiter to report any lenient treatment of prisoners of war. On 13 September 1944 Bormann

sent a directive down to the level of Kreisleiter ordering that liaison be established between the Kreisleiter and the guards of the prisoners of war in order 'better to assimilate the commitment of the prisoners of war to the political and economic demands.' * * *

"The machinery of the Leadership Corps was also utilized in attempts made to deprive Allied airmen of the protection to which they were entitled under the Geneva Convention. On 13 March 1940 a directive of Hess, transmitted instructions through the Leadership Corps down to the Blockleiter for the guidance of the civilian population in case of the landing of enemy planes or parachutists, which stated that enemy parachutists were to be immediately arrested or 'made harmless.' " *

As to his knowledge, the defendant Oeschey joined the NSDAP on 1 December 1931. He was head of the Lawyers' League for the Gau Franconia and a judicial officer of considerable importance within the Gau. These offices would provide additional sources of information as to the crimes outlined. Furthermore, these crimes were of such wide scope and so intimately connected with the activities of the Gauleitung that it would be impossible for a man of the defendant's intelligence not to have known of the commission of these crimes, at least in part if not entirely.

We find the defendant Oeschey guilty under counts three and four of the indictment. In view of the sadistic attitude and conduct of the defendant, we know of no just reason for any mitigation of punishment.

JUDGE HARDING:

THE DEFENDANT ALTSTOETTER

* * * * *

The question which remains to be determined as to the defendant Altstoetter is whether, knowing of its criminal activities as defined by the London Charter, he joined or retained membership in the SS, an organization defined as criminal by the International Military Tribunal in the case of Goering, *et al.*

The evidence in this case as to his connection with the SS is found primarily in his personnel record which covers a great many pages, in his correspondence with SS leaders, and his own testimony. From this evidence it appears that the defendant, upon the request of Himmler, joined the SS in May 1937. He stated that Himmler told him he would receive a rank commensurate with his civil status. The record does not indicate what rank in the SS was commensurate with his civil status as a member of the Reich

*Ibid., pages 259-261.

Supreme Court, but on 20 April 1938 he was promoted to Untersturmfuehrer, which corresponds to a second lieutenant in the army. He was subsequently promoted on 20 April 1939 to Obersturmfuehrer; on 20 April 1940 to Hauptsturmfuehrer. On 12 March 1943, according to a letter to the SS Main Personnel Office, signed by Himmler, he was promoted to Sturmbannfuehrer, effective 25 January 1943 and, by the same letter, to Obersturmbannfuehrer as of 20 April 1943, and it was directed that he be issued a skull and crossbones ring. In June 1943 he wrote to the Chief of the SS Main Office, SS Gruppenfuehrer Berger, thanking him for this ring bestowed by the Reich Leader SS. In this letter he wrote.

“Both this promotion and the honoring of this decoration with the skull and crossbone ring I will take not only as a token of the Reich Leader’s most distinct proof of trust in me, but also as an incentive for further active proof of my loyalty and for strictest adherence to my duties in my career as an SS man.”

On 11 February 1944 he wrote SS Gruppenfuehrer and Lieutenant General of the Waffen SS, Professor Dr. Karl Gebhardt, a letter containing the following paragraph:

“One more personal remark—You kindly promoted me SS Oberfuehrer. It is not that far yet. At least, I did not get to know it until now. I merely tell you this because I do not want to claim anything for me which does not correspond to facts.”

By letter dated 16 June 1944 he was notified that the Reich Leader SS had promoted him to the rank of Oberfuehrer, effective 21 June 1944.

The defendant stated that he was assigned to the legal staff of the 48th Standarte and later to the legal staff of the SS Main Office. He stated that he had no actual duties. However, part of his service credentials, dated 14 March 1939, under the heading of qualifications, signed by Dalski, SS Obersturmbannfuehrer, the following is stated:

“SS Untersturmfuehrer Altstoetter is frank, honest and helpful. His ideology is firmly established on a National Socialist basis. A. was a leader of the staff of the 48th Standarte and there at all times performed his duties in a satisfactory manner.”

In a report from Leipzig, dated 10 June 1939, it is stated that he was awarded the “badge of honor for legal service, in silver,” effective 19 April 1938, signed Sachse, SS Untersturmfuehrer and Adjutant.

The defendant was evidently higher regarded by Himmler who, on 18 September 1942, at a meeting with Thierack and Rothenberger, referred to him as a reliable SS Obersturmfuehrer.

It also appears that his appointment to the Ministry of Justice was at the suggestion of Himmler and that the defendant's relationship with Himmler was one which Thierack fostered for purposes of his own.

At the instance of Thierack, he visited Himmler at his headquarters and was present at a speech given by Himmler at Kochem, where he attended a dinner for twelve people, including SS Standartenfuehrer Rudolf Brandt and SS Obergruppenfuehrer Pohl.

He visited Berger, a high SS official, at Berger's request. He carried on considerable correspondence with high officials in the SS, including Himmler, SS Gruppenfuehrer Professor Dr. Gebhardt, SS Gruppenfuehrer Berger, and Kaltenbrunner, Chief of the Security Police and SD.

On 25 May 1940 Altstoetter wrote to the Reich Leader SS as follows:

"If I can contribute my small part towards helping our Fuehrer to accomplish his great task for the benefit of our nation, this causes me particular joy and satisfaction, especially in my capacity as SS officer."

According to a letter to Gebhardt, Himmler had instructed the SS leaders to request Altstoetter's advice in certain matters.

On 6 June 1944 he wrote Gebhardt, congratulating him upon a recent award. In this letter he states:

"I am especially glad about your distinction, especially because I do not see only in it a recognition of your great war service as a physician and surgeon but also as a research scientist and organizer and which is attributed to our old and trusty friend."

The evidence in this case clearly establishes that the defendant joined and retained his membership in the SS on a voluntary basis. In fact it appears that he took considerable interest in his SS rank and honors. The remaining fact to be determined is whether he had knowledge of the criminal activities of the SS as defined in the London Charter. In this connection we quote certain extracts from the judgment of the International Military Tribunal in the case of Goering, *et al.*, as to the SS—

"Criminal activities: SS units were active participants in the steps leading up to aggressive war. The *Verfuegungstruppe* was used in the occupation of the Sudetenland, of Bohemia and Moravia, and in Memel. The Henlein Free Corps was under

the jurisdiction of the Reich Leader SS for operations in the Sudetenland in 1938, and the Volksdeutsche Mittelstelle financed fifth column activities there.

"The SS was even a more general participant in the commission of war crimes and crimes against humanity. Through its control over the organization of the police, particularly the Security Police and SD, the SS was involved in all the crimes which have been outlined in the section of this judgment dealing with the Gestapo and SD. * * * The Race and Settlement Office of the SS, together with the Volksdeutsche Mittelstelle were active in carrying out schemes for Germanization of occupied territories according to the racial principles of the Nazi Party and were involved in the deportation of Jews and other foreign nationals. Units of the Waffen SS and Einsatzgruppen operating directly under the SS Main Office were used to carry out these plans. These units were also involved in the widespread murder and ill-treatment of the civilian population of occupied territories. * * *

"From 1934 onward the SS was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates of concentration camps was carried out as a result of the general policy of the SS, which was that the inmates were racial inferiors to be treated only with contempt. There is evidence that where manpower considerations permitted, Himmler wanted to rotate guard battalions so that all members of the SS would be instructed as to the proper attitude to take to inferior races. After 1942 when the concentration camps were placed under the control of the WVHA they were used as a source of slave labor. An agreement made with the Ministry of Justice on 18 September 1942 provided that antisocial elements who had finished prison sentences were to be delivered to the SS to be worked to death. * * *

"The SS played a particularly significant role in the persecution of the Jews. The SS was directly involved in the demonstrations of 10 November 1938. The evacuation of the Jews from occupied territories was carried out under the directions of the SS with the assistance of SS police units. The extermination of the Jews was carried out under the direction of the SS central organizations. It was actually put into effect by SS formations. * * *

"It is impossible to single out any one portion of the SS which was not involved in these criminal activities. The Allgemeine SS was an active participant in the persecution of the Jews and was used as a source of concentration camp guards. * * *

"The Tribunal finds that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programs were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognized, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organized. Every effort had been made to make the SS a highly disciplined organization composed of the elite of national socialism. Himmler had stated that there were people in Germany 'who become sick when they see these black coats,' and that he did not expect that 'they should be loved by too many.' * * * Himmler in a series of speeches made in 1943, indicated his pride in the ability of the SS to carry out these criminal acts. He encouraged his men to be 'tough and ruthless'; he spoke of shooting 'thousands of leading Poles,' and thanked them for their cooperation and lack of squeamishness at the sight of hundreds and thousands of corpses of their victims. He extolled ruthlessness in exterminating the Jewish race and later described this process as 'delousing.' These speeches show that the general attitude prevailing in the SS was consistent with these criminal acts. * * *

"In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende, and the members of any of the different police forces who were members of the SS. * * *

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter * * *."

In this regard the Tribunal is of the opinion that the activities of the SS and the crimes which it committed as pointed out by the judgment of the International Military Tribunal above quoted are of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberfuehrer in the SS, could have been unaware of its illegal activities, particularly a

*Ibid., 270 and 273.

member of the organization from 1937 until the surrender. According to his own statement, he joined the SS with misgivings, not only on religious grounds but also because of practices of the police as to protective custody in concentration camps.

Altstoetter not only had contacts with the high ranking official of the SS, as above stated, but was himself a high official in the Ministry of Justice stationed in Berlin from June 1943 until the surrender. He attended conferences of the department chiefs in the Ministry of Justice and was necessarily associated with the officials of the Ministry, including those in charge of penal matters.

The record in this case shows as part of the defense of many of those on trial here that they claim to have constantly resisted the encroachment of the police under Himmler and the illegal acts of the police.

Documentary evidence shows that the defendant knew of the evacuation of Jews in Austria and had correspondence with the Chief of the Security Police and Security Service regarding witnesses for the hereditary biological courts. This correspondence states:

“If the Residents’ Registration Office or another police office gives the information that a Jew has been deported, all other inquiries as to his place of abode as well as applications for his admission of hearing or examination are superfluous. On the contrary, it has to be assumed that the Jew is not attainable for the taking of evidence.”

It also quotes this significant paragraph:

“If in an individual case it is to the interest of the public to make an exception and to render possible the taking of evidence by special provision of persons to accompany and means of transportation for the Jew, a report has to be submitted to me in which the importance of the case is explained. In all cases offices must refrain from direct application to the offices of the police, especially also to the Central Office for the Regulation of the Jewish Problem in Bohemia and Moravia at Prague, for information on the place of abode of deported Jews and their admission, hearing, or examination.”

He was a member of the SS at the time of the pogroms in November 1938, “Crystal Week,” in which the IMT found the SS to have had an important part. Surely whether or not he took a part in such activities or approved of them, he must have known of that part which was played by an organization of which he was an officer. As a lawyer he knew that in October of 1940 the SS was placed beyond reach of the law. As a lawyer he certainly knew that by the thirteenth amendment to the citizenship law

the Jews were turned over to the police and so finally deprived of the scanty legal protection they had theretofore had. He also knew, for it was part of the same law, of the sinister provisions for the confiscation of property upon death of the Jewish owners, by the police.

Notwithstanding these facts, he maintained his friendly relations with the leaders of the SS, including Himmler, Kaltenbrunner, Gebhardt, and Berger. He refers to Himmler, one of the most sinister figures in the Third Reich, as his "old and trusty friend." He accepted and retained his membership in the SS, perhaps the major instrument of Himmler's power. Conceding that the defendant did not know of the ultimate mass murders in the concentration camps and by the Einsatzgruppen, he knew the policies of the SS and, in part, its crimes. Nevertheless he accepted its insignia, its rank, its honors, and its contacts with the high figures of the Nazi regime. These were of no small significance in Nazi Germany. For that price he gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Altstoetter is guilty under count four of the indictment.

F. Statements from the Twelve Judgments of the Military Tribunals Established Pursuant to Ordinance No. 7 Which Make Reference to Findings in the Judgment of the IMT

I. MEDICAL CASE—EXTRACTS FROM THE JUDGMENT CONCERNING THE AHNENERBE SOCIETY¹

PRESIDING JUDGE BEALS: — *The Ahnenerbe Society* — The Ahnenerbe Society, of which [defendant] Sievers was Reich Business Manager, was in existence as an independent entity as early as 1933.

* * * * *

In its judgment, the International Military Tribunal made the following findings of fact² with reference to the Ahnenerbe:

"Also attached to the SS main offices was a research foundation known as the Experiments Ahnenerbe. The scientists attached to this organization are stated to have been mainly

¹ U.S. vs. Karl Brandt, volume II, this series, pages 188 and 189.

² Trial of the Major War Criminals, *op. cit.*, volume I, page 269.

honorary members of the SS. During the war an institute for military scientific research became attached to the Ahnenerbe which conducted extensive experiments involving the use of living human beings. An employee of this institute was a certain Dr. Rascher, who conducted these experiments with the full knowledge of the Ahnenerbe, which were subsidized and under the patronage of the Reichsfuehrer SS who was a trustee of the foundation."¹

We shall now discuss the evidence as it pertains to the cases of the individual defendants.

2. MILCH CASE—EXTRACTS FROM THE JUDGMENT CONCERNING THE CHARGES OF SLAVE LABOR (COUNT ONE)²

JUDGE MUSMANNO: Fritz Sauckel³ was in supreme command of the procurement of labor for the entire war effort, and his conduct in carrying out his task has been vividly portrayed in the judgment of the International Military Tribunal:

[At this point the judgment contains more than five printed pages setting forth a number of quotations from the IMT judgment.]⁴

Under the provisions of Article X of Ordinance No. 7, these determinations of fact by the International Military Tribunal are binding upon this Tribunal "in the absence of substantial new evidence to the contrary." Any new evidence which was presented was in no way contradictory of the findings of the International Military Tribunal, but, on the contrary, ratified and affirmed them.

3. JUSTICE CASE—EXTRACT FROM THE JUDGMENT CONCERNING THE "NIGHT AND FOG DECREE"⁵

JUDGE BLAIR: The Night and Fog Decree arose as the plan or scheme of Hitler to combat so-called resistance movements in occupied territories. Its enforcement brought about a systematic rule of violence, brutality, outrage, and terror against the civilian populations of territories overrun and occupied by the Nazi armed forces. The IMT treated the crimes committed under the Night and Fog decree as war crimes and found as follows:

¹ The Tribunal made no express reference to Article X of Ordinance No. 7.

² U.S. vs. Erhard Milch, Case 2, volume II, this series, pages 780-785.

³ Plenipotentiary General for Labor Allocation and a defendant in the IMT case.

⁴ Trial of the Major War Criminals, *op cit.*, volume I, pages 243-247.

⁵ U.S. vs. Josef Altstoetter, *et. al.*, volume III, this series, pages 1032-1034.

"The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7 December 1941 Hitler issued the directive since known as the 'Nacht und Nebel Erlass' (Night and Fog decree), under which persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial and punishment in Germany. This decree was signed by the defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the families of the arrested person. Hitler's purpose in issuing this decree was stated by the defendant Keitel in a covering letter, dated 12 December 1941, to be as follows:

"'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.'

* * * * *

"The brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of resistance movements themselves, but was also extended to their families."¹

The Tribunal also found that:

"One of the most notorious means of terrorizing the people in occupied territories was the use of the concentration camps."²

Reference is here made to the detailed description by the IMT judgment of the manner of operation of concentration camps and to the appalling cruelties and horrors found to have been committed therein. Such concentration camps were used extensively for the NN prisoners in the execution of the Night and Fog Decree as will be later shown.

The IMT further found that the manner of arrest and imprisonment of Night and Fog prisoners before they were transferred to Germany was illegal, as follows:

"The local units of the Security Police and SD continued their work in the occupied territories after they had ceased to be an area of operations. The Security Police and SD engaged

¹ Trial of the Major War Criminals, *op cit.*, volume I, pages 232 and 233.

² *Ibid.*, page 234.

in widespread arrests of the civilian population of these occupied countries, imprisoned many of them under inhumane conditions, and subjected them to brutal third degree methods, and sent many of them to concentration camps. Local units of the Security Police and SD were also involved in the shooting of hostages, the imprisonment of relatives, the execution of persons charged as terrorists and saboteurs without a trial, and the enforcement of the Nacht und Nebel decree under which persons charged with a type of offenses believed to endanger the security of the occupying forces were either executed within a week or secretly removed to Germany without being permitted to communicate with their family and friends.”¹

The foregoing quotations from the IMT judgment will suffice to show the illegality and cruelty of the entire NN plan or scheme. The transfer of NN prisoners to Germany and the enforcement of the plan or scheme did not cleanse it of its iniquity or render it legal in any respect.

The evidence herein adduced sustains the foregoing findings and conclusions of the IMT. In fact the same documents, or copies thereof, referred to and quoted from in the IMT judgment were introduced in evidence in this case. In addition, a large number of captured documents and oral testimony were introduced showing the origin and purpose of the Night and Fog plan or scheme, and showing without dispute that certain of the defendants with full knowledge of the illegality of the plan or scheme under international law of war and with full knowledge of the intended terrorism, cruelty, and other inhumane principles of the plan or scheme became either a principal, or aided and abetted, or took a consenting part in, or were connected with the execution of the illegal, cruel, and inhumane plan or scheme.

4. POHL CASE—EXTRACTS FROM THE JUDGMENT CONCERNING THE WVHA OF THE SS, TREATMENT OF EASTERN CIVILIAN WORKERS, TREATMENT OF THE JEWS, AND LOOTING OF PUBLIC AND PRIVATE PROPERTY²

PRESIDING JUDGE TOMS: The defendants are charged in the indictment as officials of the Wirtschafts-und Verwaltungshauptamt (commonly called the WVHA) of the Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the SS). The whole sordid history of the SS and its criminal activities has been told in detail in the judgment of the

¹ *Ibid.*, page 266.

² *U.S. vs. Oswald Pohl, et al.*, volume V, this series, pages 965, 966, 970, 974, and 976.

International Military Tribunal,¹ and need not be repeated here. In this case, the Tribunal is concerned only with the members of the WVHA, or Economic Administrative Main Office, and its predecessors, the Hauptamt Verwaltung und Wirtschaft, or Main Office Administration and Economy, and the Hauptamt Haushalt und Bauten, or Main Office Budget and Buildings.

Early in 1942, the WVHA was organized under Himmler's order to coordinate and consolidate the administrative work of the SS. The organization of the former Administrative Department and Department of Budget and Buildings of the SS was taken over intact and, in addition, another main office of the SS was incorporated into WVHA, namely, the Inspekteur der Konzentrationslager, or Inspector of Concentration Camps. Of this revamped organization, the defendant Pohl was continued as chief and was in supreme command. The WVHA was divided into five Amtsgruppen, or departments [office groups or divisions], namely:

Amtsgruppe A—budget, law and administration.

Amtsgruppe B—supply, billeting, and equipment.

Amtsgruppe C—works and buildings.

Amtsgruppe D—concentration camps.

Amtsgruppe W—economic enterprises.

Each Amtsgruppe was headed by a chief and was, in turn, divided into Aemter or offices. For example, Amtsgruppe A was subdivided into Amt A I to Amt A V, Amtsgruppe B was likewise subdivided, while Amtsgruppe W was subdivided into Amts W I to Amt W VIII. Each Amt or office was charged with some specialized phase of the general field covered by its Amtsgruppe.

The WVHA, as one of the 12 main offices of the SS central organization, was charged with the administrative needs of the entire SS, including supplies of every kind, billeting, transportation, and also the administration of the entire system of concentration camps. This did not involve the commitment to, or release of inmates from concentration camps, but it did involve the maintenance and administration of the camps and the use of the inmates as a source of forced labor.

* * * * *

The extent of the deportation of eastern civilian laborers and the ruthless manner in which they were seized and abducted has been related in detail in the judgment of the International Military Tribunal.² To repeat the shocking story in the judgment in this case would serve no useful purpose. It is sufficient simply to

¹ Trial of the Major War Criminals, *op cit.*, volume I, pages 268-273.

² *Ibid.*, pages 243-247.

state that it has been repeatedly and conclusively proved before this and other Tribunals that about 5,000,000 men, women, and children were violently seized and forcibly deported as slaves. As to the systematic extermination of the Jews, the International Military Tribunal has found¹ that, in pursuance of a fanatical public policy, it was deliberately decided to exterminate an entire race of human beings. There is no way to determine the total number of Jews who were killed, but in testimony before the International Military Tribunal it was stated that one military group operating in the East killed 90,000 people in one year, and another group killed 135,000 Jews and Communists in the first four months of the program. With these findings of fact by the International Military Tribunal this Court is in full accord and adopts them as found facts in the present case.

* * * * *

TREATMENT OF THE JEWS

This disgraceful chapter in the history of Germany has been vividly portrayed in the judgment of the International Military Tribunal.² Nothing can be added to that comprehensive finding of facts, in which this Tribunal completely concurs. From it we see the unholy spectacle of six million human beings deliberately exterminated by a civilized state whose only indictment was that its victims had been born in the wrong part of the world of forbears whom the murderers detested. Never before in history has man's inhumanity to man reached such depths. Had Germany rested content with the exclusion of Jews from her own territory, with denying them German citizenship, with excluding them from public office, or any like domestic regulation, no other nation could have been heard to complain. But such prejudice and hatred, once fanned into flame, are difficult to control. And so, when the Nuernberg decrees against the Jews were pronounced, the fuse was lighted, and soon the program of world-wide extermination of Jews was launched. Had Germany not been checked, one wonders what race, or creed, or nation would next have been branded as subhuman and marked for extermination.

* * * * *

LOOTING OF PUBLIC AND PRIVATE PROPERTY

The story of systematic pillage of occupied countries is related in the judgment of the International Military Tribunal,³ which this Tribunal adopts as findings of fact in this case. It is a tale of

¹ Ibid., pages 247-252.

² Ibid., pages 247-253 and 303.

³ Ibid., pages 238-243.

ruthless depravity unequalled in history. It was not confined to looting by individuals or isolated detachments. It was the carrying out of a general military policy, announced by the top command at the outset of the war.

5. FLICK CASE—EXTRACTS FROM THE JUDGMENT CONCERNING THE APPLICATION OF ARTICLE X OF ORDINANCE NO. 7 AND THE RESPONSIBILITY OF PRIVATE PERSONS UNDER INTERNATIONAL LAW¹

PRESIDING JUDGE SEARS: To the extent required by Article X of Military Government Ordinance No. 7 the Tribunal is bound by the judgment of the International Military Tribunal (hereinafter referred to as IMT) in Case 1 against Goering, *et al.*, but we shall indulge no implications therefrom to the prejudice of the defendants against whom the judgment would not be *res judicata* except for this article. There is no similar mandate either as to findings of fact or conclusions of law contained in judgment of coordinate Tribunals. The Tribunal will take judicial notice of the judgments but will treat them as advisory only.

* * * * *

The question of the responsibility of individuals for such breaches of international law as constitute crimes has been widely discussed and is settled in part by the judgment of IMT. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals.

“That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. In the recent case of *Ex Parte Quirin* (1942, 317 U.S. 1, 63 S. Ct. 1, 87 L. Ed. 3), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court said:

“‘From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribed for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.’”²

But IMT was dealing with officials and agencies of the State, and it is urged that individuals holding no public offices and not

¹ U.S. vs. Friedrich Flick, *et al.*, Case 5, volume VI, this series, pages 1189-1192.

² Trial of the Major War Criminals, *op. cit.*, volume I, page 223.

representing the state, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender *in propria persona*. The application of international law to individuals is no novelty. (See "The Nuremberg Trial and Aggressive War," by Sheldon Glueck (Alfred A. Knopf, New York, 1946), ch. V, p. 60-67 inclusive, and cases there cited.) There is no justification for a limitation of responsibility to public officials.

6. FARBEN CASE—EXTRACT FROM THE JUDGMENT CONCERNING THE SLAVE-LABOR CHARGES*

PRESIDING JUDGE SHAKE:—*Farben and the slave-labor program—*

The prosecution does not contend that Farben instituted a slave-labor program of its own. On the contrary, it is the theory of the prosecution that the defendants, through the instrumentality of Farben and otherwise, embraced, adopted, and executed the forced-labor policies of the Third Reich, thereby becoming accessories to and taking a consenting part in the commission of war crimes and crimes against humanity in violation of Article II of Control Council Law No. 10. This, therefore, calls for a brief résumé of the slave-labor program of the Reich government during the war years. For this purpose we may rely upon the judgment of the IMT, since Article X of Military Government Ordinance No. 7 provides that, before these Tribunals, the "statements by the International Military Tribunal in the judgment in Case 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary." The findings of the IMT with respect to the criminal character of the slave-labor program of the Third Reich were not challenged in this trial.

[The judgment then proceeds to discuss the slave-labor program, making a number of references to and quotations from the judgment of the IMT.]

*Extracts from mimeographed transcript, Case 6, U.S. *vs.* Carl Krauch, *et al.*, 29 July 1948, page 16,778.

7. HOSTAGE CASE—EXTRACT FROM THE JUDGMENT CONCERNING THE APPLICABLE LAW¹

JUDGE CARTER: It is urged that Control Council Law No. 10 is an *ex post facto* act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20 December 1945, a date subsequent to the dates of the acts charged to be crimes. It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23h of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a tribunal trying a case charging a crime under the provisions of Control Council Law No. 10 to determine if the acts charged were crimes at the time of their commission and that Control Council Law No. 10 is in fact declaratory of then existing international law.

This very question was passed upon by the International Military Tribunal in the case of the United States *vs.* Hermann Wilhelm Goering in its judgment entered on 1 October 1946.² Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language:

“The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.”

We adopt this conclusion. Any doubts in our mind concerning the rule thus announced go to its application rather than to the correctness of its statement. The crimes defined in Control Council Law No. 10 which we have quoted herein were crimes under pre-existing rules of international law, some by conventional law such as that exemplified by the Hague Regulations of 1907 clearly make the war crimes herein quoted crimes under the proceedings of that convention.

¹ U.S. *vs.* Wilhelm List, *et al.*, Case 7, volume XI, this series, pages 1238 and 1239.

² Trial of the Major War Criminals, *op. cit.*, judgment of the IMT, volume I, page 171 ff.

8. RuSHA CASE—EXTRACTS FROM THE JUDGMENT CONCERNING THE APPLICABLE LAW¹

PRESIDING JUDGE WYATT: The constitution, powers, jurisdiction, and functions of this Tribunal are fully stated in the judgment of the International Military Tribunal and the following subsequent cases: The United States of America *vs.* Brandt, *et al.*, Case No. 1; the United States of America *vs.* Altstoetter, *et al.*, Case No. 3; and the United States of America *vs.* Pohl, *et al.*, Case No. 4. We deem it sufficient to say that this case was submitted to this Tribunal, and the trial conducted, in accordance with the law and rules of procedure applicable to the Tribunal.

* * * * *

RICHARD HILDEBRANDT

* * * * *

Hildebrandt, as the sole defendant, is charged with special responsibility for and participation in the extermination of thousands of German nationals pursuant to the so-called "Euthanasia program." It is not contended that this program, insofar as Hildebrandt might have been connected with it, was extended to foreign nationals. It is urged by the prosecution, however, that notwithstanding this fact, the extermination of German nationals under such a program constitutes a crime against humanity; and in support of this argument the prosecution cites the judgment of the International Military Tribunal as well as the judgment in the case of the United States of America *vs.* Brandt, Case 1. Neither decision substantiated the contention of the prosecution.

9. EINSATZGRUPPEN CASE — EXTRACTS FROM THE JUDGMENT CONCERNING THE EINSATZGRUPPEN AND GERMANY'S LAUNCHING OF AGGRESSIVE WARS²

PRESIDING JUDGE MUSMANN: The International Military Tribunal in its decision of 1 October 1946 declared that the Einsatzgruppen and the Security Police, to which the defendants belonged, were responsible for the murder of two million defenseless human beings, and the evidence presented in this case has in no way shaken this finding.

* * * * *

¹ U.S. *vs.* Ulrich Greifelt, *et al.*, volume V, this series, pages 88 and 161.

² U.S. *vs.* Otto Ollendorf, *et al.*, volume IV, this series, pages 412, 454, 456, and 457.

JUDGE SPEIGHT: On 30 September 1946, the International Military Tribunal, created by the London Agreement, after a trial which lasted 10 months, rendered a decision which proclaimed that Germany had precipitated World War II and, by violating international commitments and obligations, had waged aggressive war. The International Military Tribunal, in addition to rendering judgment against specific individuals, declared certain organizations, which were outstanding instruments of Nazism, to be criminal.

* * * * *

JUDGE DIXON: The matter of responsibility for breach of the international peace was fully considered and decided by the International Military Tribunal in its decision of 30 September 1946.*

“The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on the 1 September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.”

It was this monstrously selfish and evil aggression which precipitated, as the International Military Tribunal pointed out, a global war whose effects are visible today throughout the world. The legal consequences drawn from the International Military Tribunal adjudication, which is now *res judicata*, may not be altered by the assertion that someone else may also have been at fault.

* * * * *

Although advancing the proposition that Russia signed a secret treaty with Germany prior to the Polish war, the defense said or presented nothing in the way of evidence to overcome the well-considered conclusion of the International Military Tribunal that Germany started an aggressive war against Russia. On the basis of this finding alone, Russia's participation in the Allied Council which formulated Law No. 10 was legal and correct and in entire accordance with international law.

*Trial of the Major War Criminals, *op. cit.*, volume I, page 204.

10. KRUPP CASE—EXTRACTS FROM THE JUDGMENT CONCERNING SPOILIATION OF PROPERTY AND TREATMENT OF RUSSIAN PRISONERS OF WAR AND WESTERN WORKERS¹

JUDGE WILKINS: In its judgment, the International Military Tribunal made the following comment:²

“These articles [Articles 49 and 52 of the Hague Convention] * * * make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.”

We quote further from the IMT judgment:³

“The evidence in this case has established, however, that the territories occupied by Germany were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy. There was in truth a systematic ‘plunder of public or private property,’ which was criminal under Article 6 (b) of the Charter.

* * * * *

“The methods employed to exploit the resources of the occupied territories to the full varied from country to country. In some of the occupied countries in the East and West, this exploitation was carried out within the framework of the existing economic structure. The local industries were put under German supervision, and the distribution of war materials was rigidly controlled. The industries thought to be of value to the German war effort were compelled to continue, and most of the rest were closed altogether. Raw materials and the finished products alike were confiscated for the needs of the German industry.”

In the general summary, the IMT found:⁴

“ * * * war crimes were committed on a vast scale never before seen in the history of war. They were perpetrated in all the countries occupied by Germany * * *.”

* * * * *

¹ U.S. vs. Alfred Krupp, *et al.*, volume IX, this series pages 1339, 1340, 1376, 1377, 1396, and 1397.

² Trial of the Major War Criminals, *op. cit.*, volume I, page 239.

³ *Ibid.*, page 239.

⁴ *Ibid.*, pages 226 and 227.

PRESIDING JUDGE ANDERSON: Russian prisoners of war were discriminated against in every material respect. It was shown before the International Military Tribunal, hereinafter referred to as the IMT, and shown here that prior to the attack on Russia, the high Nazi policy makers had determined not to observe international law in the treatment of Russian prisoners of war. The regulations on the subject were signed by General Reinecke on 8 September 1941. They brought a protest from Admiral Canaris.¹ He pointed out in substance that although Russia was not a party to the Geneva Convention, the principles of general international law as to the treatment of prisoners of war were applicable. Continuing, he said:

“Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people * * *. The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.”

The IMT held that this protest correctly stated the legal position. However, it was ignored entirely. The reason is indicated by a note by Keitel, Chief of the High Command of the Armed Forces, made on the back of Admiral Canaris' protest. This is as follows:¹

“The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.”

* * * * *

JUDGE DALY: Until the spring of 1942, only certain groups of so-called western workers were actually compelled to go into Germany. At that time, Sauckel's Labor Mobilization Program became effective, and compulsory labor laws were enacted in the occupied countries. As stated in the International Military Tribunal judgment, the following appears.²

“Sauckel's instructions, too, were that foreign labor should be recruited on a voluntary basis, but also provided that ‘where, however, in the occupied territories, the appeal for volunteers does not suffice, obligatory service and drafting must under all circumstances be resorted to.’ Rules requiring labor service in Germany were published in all the occupied territories.”

¹ Ibid., page 232.

² Ibid., page 245.

II. MINISTRIES CASE—EXTRACTS FROM THE JUDGMENT CONCERNING ARTICLE X OF ORDINANCE NO. 7, THE TRIBUNAL'S RE-EXAMINATION OF WHETHER GERMANY ENGAGED IN AGGRESSIVE WARS AND INVASIONS, AND PRINCIPLES USED IN ASCERTAINING GUILT¹

PRESIDING JUDGE CHRISTIANSON: Notwithstanding the provisions in Article X of Ordinance No. 7, that the determination of the International Military Tribunal that invasions, aggressive acts, aggressive wars, crimes, atrocities and inhumane acts were planned or occurred, shall be binding on the Tribunals established thereunder and cannot be questioned except insofar as the participation therein and knowledge thereof of any particular person may be concerned, we have permitted the defense to offer evidence upon all these matters. In so doing we have not considered this article to be a limitation on the right of the Tribunal to consider any evidence which may lead to a just determination of the facts. If in this we have erred, it is an error which we do not regret, as we are firmly convinced that courts of justice must always remain open to the ascertainment of the truth and that every defendant must be accorded an opportunity to present the facts.

* * * * *

COUNT ONE—CRIMES AGAINST PEACE

* * * * *

Notwithstanding the fact that the International Military Tribunal and several of these tribunals have decided that the Third Reich was guilty of aggressive wars and invasions, we have re-examined this question because of the claim made by the defense that newly discovered evidence reveals that Germany was not the aggressor. It should be made clear, however, that this defense is not submitted by all of the defendants. For example, the defendant von Weizsaecker freely admits that these acts were aggressions.

* * * * *

JUDGE POWERS: In discussing whether or not the Reich Cabinet was a criminal organization within the meaning of the London Charter, the International Military Tribunal said:²

¹ U.S. *vs.* Ernst von Weizsaecker, *et al.*, volume XIV, this series, pages 317, 323, 338, and 339.

² Trial of the Major War Criminals, *op. cit.*, volume I, pages 275 and 276.

“The Tribunal is of the opinion that no declaration of criminality should be made with respect to the Reich Cabinet for two reasons:

“(1) Because it is not shown that after 1937 it ever really acted as a group or organization;

“(2) Because the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal. * * *

“It will be remembered that when Hitler disclosed his aims of criminal aggression at the Hossbach Conference, the disclosure was not made before the Cabinet, and that the Cabinet was not consulted with regard to it, but, on the contrary, it was made secretly to a small group upon whom Hitler would necessarily rely in carrying on the war. * * *

“It does appear, however, that various laws authorizing acts which were criminal under the Charter were circulated among the members of the Reich Cabinet and issued under its authority, signed by the members whose departments were concerned.”

The principles there stated are equally applicable to the defendants here who were members of the Cabinet and to those defendants who occupied positions of responsibility and power in the various ministries.

We concur in and shall apply the following principles laid down by the International Military Tribunal: *

“A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.”

**ibid.*, page 226.

12. HIGH COMMAND CASE—EXTRACTS FROM THE JUDGMENT CONCERNING THE APPLICABLE LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY, AND CRIMES AGAINST CIVILIANS¹

PRESIDING JUDGE YOUNG: In the judgment rendered by the International Military Tribunal it is said:

“The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.”

[The judgment in the High Command case then quotes the balance of the entire section of the IMT judgment entitled “The Law of the Charter.” See Trial of the Major War Criminals, *op. cit.*, volume I, pages 218–224.]

Here ends the quotation from the “Trial of the Major War Criminals.”

This reasoning applies also to Control Council Law No. 10. The same authority creating the London Agreement created this Control Council law. As was said by Tribunal III in the Justice Case:²

“It can scarcely be argued that a court which owes its existence and jurisdiction solely to the provisions of a given statute could assume to exercise that jurisdiction and then, in the exercise thereof, declare invalid the act to which it owes its existence. Except as an aid to construction we cannot and need not go behind the statute.”

That is the end of the quotation.

The Charter, supplemented by Control Council Law No. 10, is not an arbitrary exercise of power, but “it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.” (*Judgment, IMT, supra.*) As a matter of interest to students we might point out that this general principle is sustained by the following extract from Grotius, written in 1625:³

“It is proper also to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects.”

¹ U.S. *vs.* Wilhelm von Leeb, *et al.*, volume XI, this series, pages 470, 476, 477, 481, 482, 491, 495, 496, and 501.

² U.S. *vs.* Josef Altstoetter, *et al.*, volume III, this series, page 965.

³ Grotius, *The Rights of War and Peace*, translated from the Latin by A. C. Campbell, A. M. (1901), M. Walter Dume, publisher, Washington and London, chapter XX, page 247.

We also refer to an article from the Manchester Guardian of 28 September 1946, containing a description of the trial of Sir Peter of Hagenbach held at Breisach in 1474. The charges against him were analogous to "Crimes against Humanity" in modern concept. He was convicted.

However, these citations are of academic interest only, merely given to show the soundness of the judgment of the IMT. We think it may be said the basic law before mentioned simply declared, developed, and implemented international common law.

By so construing it, there is eliminated the assault made upon it as being an *ex post facto* enactment.

Our view is fortified by the judgment rendered in Case 7, United States *vs.* Wilhelm List, *et al.*, where it is said (vol. XI, this series, p. 1240) :

"We conclude that *pre-existing international law* has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey. Anything in excess of existing international law therein contained is a utilization of power and not of law. It is true, of course, that courts authorized to hear such cases were not established nor the penalties to be imposed for the violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes." [Emphasis supplied]

Then there is quoted the language of the IMT heretofore* set out in this opinion.

Many of the questions in the IMT case are presented in this case. The same unlawful orders, acts, and practices are involved; only the defendants are different. Hitler was the very center of vast expanding concentric rings of influence that touched every person in Germany. The defendants in this case are only one or two steps removed from Goering, Keitel, Jodl, Doenitz, and Raeder, defendants in the IMT case. Much of the evidence introduced in this case was introduced in the IMT hearing. Consequently, the great importance of the judgment of that trial as applying to the issues of law involved in this case, is readily apparent.

The IMT judgment contains an elaborate account of Hitler's rise to power, the plans and acts of aggression, and the barbarities and crimes perpetrated upon the armed forces and civilians of the

*U.S. *vs.* Wilhelm von Leeb, *et al.*, volume XI, this series, pages 472 and 473.

countries with which Germany was at war. In view of the fact that these general findings are supported by the record in the instant case, we shall make further liberal quotations from and references to it in this judgment.

* * * * *

JUDGE HARDING: The IMT said:¹

“The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

* * * * *

“The Tribunal is of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity.”

What was held by the IMT with respect to the London Agreement and Charter, the basic laws under which it functioned, is authority for a similar holding by this Tribunal with respect to the basic law under which it was set up and under which it functions.

We deem it unnecessary to discuss the objection that Control Council Law No. 10 is in violation of the maxim *nullum crimen sine lege; nulla poena sine lege*. We find it without merit. It has been passed upon so many times by the Nuernberg Tribunals and held without merit, that further comment here is unnecessary.

* * * * *

WAR CRIMES AND CRIMES AGAINST HUMANITY

In the judgment of the International Military Tribunal on pages 226–232, *et seq.*,² is a statement of the war crimes committed by the Wehrmacht. Extracts from this are as follows:

[Here follows a series of lengthy quotations from the IMT judgment.]

All of these unlawful acts, as well as employment under inhuman conditions and at prohibited labor, is shown by the record in this case. They were deliberate, gross, and continued violations of the customs and usages of war as well as the Hague Regulations (1907) and the Geneva Convention (1929) and of international common law.

CRIMES AGAINST CIVILIANS

The record in the instant case is replete with horror. Never in

¹ Trial of the Major War Criminals, *op. cit.*, volume I, pages 218 and 253.

² Trial of the Major War Criminals, *op. cit.*, volume I.

the history of man's inhumanity to man have so many innocent people suffered so much.

* * * * *

In the IMT judgment it is said:

[The judgment in the High Command case quotes approximately five printed pages of quotations from the IMT judgment. See Trial of the Major War Criminals, *op. cit.*, volume I, pages 232-238.]

These findings of the IMT are sustained by the record in this case, and other offenses are shown as well.

The connection of the defendants with these offenses is disposed of in our discussion of the individual cases.

XVI. JUDICIAL NOTICE

A. Introduction

Article IX of Ordinance No. 7 required that the tribunals take judicial notice of three different types of materials: facts of common knowledge; official government documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of crimes; and the "records and findings" of military or other tribunals of any of the United Nations (subsec. B). Article 21 of the Charter of the IMT contained the same provisions.

The provisions concerning judicial notice of facts of common knowledge afforded few grounds for divergent views during the trials. Concerning the general acceptance of this principle, one of the defense counsel stated:

"It is one of the first rules of evidence all over the world that a fact which seems indisputable to all need not be proven."

(See Dr. Haensel's argument on behalf of the defense before the joint session of the Tribunals on the question of conspiracy to commit war crimes and crimes against humanity, sec. XXIV C 2.) In the IMT trial the Tribunal was asked to take judicial notice of a number of official reports on investigations of war crimes and of the findings and sentences imposed in war crimes trials before military courts. The IMT judgment makes express reference to only one official report of which it had been asked to take judicial notice, and that was to a report of the War Crimes Branch of the Judge Advocate's Section of the Third United States Army on the Flossenburg concentration camp which the judgment quotes. (See Trial of the Major War Criminals, *op. cit.*, vol. I, pp. 234-235.) The IMT judgment states at an earlier point: "The case, therefore, against the defendants rests in a large measure on documents of their own making." (*Ibid.*, p. 173.)

In the later Nuernberg trials the tribunals were frequently asked to take judicial notice of government reports on war crimes and of the records and findings of other tribunals of the Allied Nations. However, no reference to statements in government reports on war crimes has been found in the later Nuernberg judgments, and the references made to the findings of other tribunals are principally to those of the IMT (sec. XV) and to a lesser degree to those of the other Nuernberg tribunals of concurrent jurisdiction.

Numerous discussions arose during the trials concerning judicial notice, and many rulings on the subject were made in various connections. In this section six different instances of argument and tribunal rulings have been reproduced to illustrate

in a general way these various questions. The first three instances are taken from the Medical case; the next two from the Justice case; and the last from the Farben case.

The question of admitting proof of a matter of which the Tribunal took judicial notice arose in the Medical case. Counsel for the defendant Brack, in connection with the charges related to the euthanasia program, offered in evidence pictures of incurably insane persons reproduced in "Life" magazine in an article entitled "Most U. S. Mental Hospitals Are a Shame and a Disgrace," and other pictures reproduced in a German scientific publication. The Tribunal rejected the defense offer, stating that it took judicial notice of the fact that there were incurably insane people of various degrees all over the world. The transcript of the pertinent discussion preceding the ruling and of the ruling itself are reproduced in subsection C 1.

The taking of judicial notice of testimony in the record of another case is illustrated by the extracts from the Medical case reproduced in subsection C 2. After a defense counsel in the Medical case proposed to read extracts from the testimony of two witnesses who had already been heard in the Milch trial, prosecution counsel suggested instead that a copy of the transcript of the testimony in question be certified to the Tribunal by the Secretary General. After the Tribunal indicated that it thought that this procedure would meet the desired purpose, defense counsel stated his agreement. When the prosecution in the Medical case offered in evidence judgments of Austrian and German courts in which certain persons had been convicted for participation in the euthanasia program, defense counsel objected. The Tribunal sustained the defense objection, stating that the judgments in question "might well be cited as declaring the law in case of an argument" but that "they should not be received as evidence." The pertinent parts of the discussion before the Tribunal and the Tribunal's ruling are reproduced in subsection C 3.

Requests that the Tribunal take judicial notice of government documents and reports of the United Nations, particularly those concerning the investigations of war crimes, raised problems concerning the furnishing of translations to the opposing party. This is illustrated by the transcript of the Justice case, reproduced in subsection D 1, where the parties eventually arrived at an agreed solution after considerable discussion.

The question of judicial notice of the "records and findings" of other tribunals under Article IX at times became involved with the provisions of Article X that certain determinations in the judgment of the IMT were binding upon the later tribunals, and that statements in the IMT judgment constituted proof of the

facts stated in the absence of substantial new evidence to the contrary. This is illustrated herein by extracts from the transcript of a lengthy discussion between counsel and the Tribunal in the Justice case, reproduced in subsection D 2. These extracts likewise indicate an effort, which the prosecution frequently made, to avoid the delays and practical difficulties of reproducing in English and German document books, copies of documents and translations thereof which had already been received in evidence in the IMT case, and which were available in both languages to all concerned in the Nuernberg archives and the library of the Nuernberg courthouse.

In the Farben trial, a number of defense counsel marked a substantial number of documents for identification only, without indicating their precise purpose in doing so. This led to a statement by Judge Morris concerning the general nature of judicial notice, which is reproduced in subsection E. In the judgment in the Krupp case, the Tribunal stated: "No document marked for identification has been considered unless it was one, the contents of which justified us in taking judicial notice thereof." (See sec. VI L 4.)

B. Provisions of Article IX, Ordinance No. 7

Article IX

The Tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Comparable provisions of the Charter of the IMT are the following:

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

* * * * *

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

C. Medical Case—Extracts from the Transcript on Three Occasions Where Questions Arose Concerning Judicial Notice

I. EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE, 9 MAY 1947¹

DR. FROESCHMANN (counsel for defendant Brack): Mr. President, in this connection I want to submit from my document book appendix No. 3.² I beg your pardon, it is appendix 2. I am referring to Brack Document 45 on pages 36 to 44, which is from an issue of the periodical "Life."

PRESIDING JUDGE BEALS: We don't have that appendix to your document book.

DR. FROESCHMANN: I have submitted it, Mr. President. It follows Brack Document Book 2, and I submitted it at least a fortnight ago.

MR. HARDY (associate counsel for the prosecution): The prosecution does not have a copy of that, Your Honor. However, it is apparently from a magazine which gives conditions in mental hospitals in the United States, and this comes under the category of evidence which the Tribunal has ruled should not come up or be offered in evidence until a later date.

DR. FROESCHMANN: Mr. President, I was going to ask the witness, Dr. Pfannmueller, just one question: whether such types as are depicted in this periodical by means of photographs, whether these are the types which he has just testified about.²

PRESIDING JUDGE BEALS: It is a matter of common knowledge that such types exist all over the world, such types of mentally defective persons exist everywhere, and the Tribunal will take judicial notice that such types are found everywhere.

DR. FROESCHMANN: In any case, Mr. President, I wasn't trying to make the impression, if I have, of only describing the condition of insane patients in America.

PRESIDING JUDGE BEALS: We understand that, Counsel.

DR. FROESCHMANN: There was a German book I was going to submit to the Tribunal which contains the same type of pictures. May I then, Mr. President, submit Brack Document 45, as Brack

¹ Extract from mimeographed transcript, Case 1, U.S. vs. Karl Brandt, et al., pages 7300-7303.

² This offer was made during the testimony of Dr. Hermann Pfannmueller, a defense witness called in connection with the charges relating to the euthanasia program and the killing of Jewish persons. Dr. Pfannmueller had just described the characteristics of incurably insane persons at Egelfing, Bavaria. Dr. Pfannmueller's testimony is reproduced in the mimeographed transcript, 9 and 12 May 1947, pages 7291-7412.

Defense Exhibit 3, may I submit that to the High Tribunal as my next exhibit?

PRESIDING JUDGE BEALS: We do not have the document book.

MR. HARDY: I want to object to the submission of this document until such time as I have time to peruse the document. I haven't seen the document and the prosecution hasn't been presented with the document defense counsel refers to.

DR. FROESCHMANN: In that case I will hold that back until the document book is ready.

PRESIDING JUDGE BEALS: We will recess for 30 minutes, and possibly during that time counsel can examine the document.

(Recess)

THE MARSHAL: The Tribunal is again in session.

MR. HARDY: May it please Your Honor, this Brack Exhibit which is Document No. 45 is contained in Life Magazine of 6 May 1946 edition; it narrates the bedlam of 1946; the title is "Most U. S. Mental Hospitals Are a Shame and a Disgrace." I want to pass the exhibit up to the Tribunal for their perusal, much as the prosecution deems it immaterial. The conditions in the insane hospitals of the United States are not at issue here. The question is whether or not the inmates shown therein are fit subjects for euthanasia. It does not seem—the prosecution fails to see the relevancy of the document.

DR. FROESCHMANN: Mr. President, I state expressly that the text to these pictures was in no way intended by me as evidence in the case of Viktor Brack. I limit myself exclusively to the question to the witness whether such types as pictured there are the types of incurably insane persons, and I also limit myself to the question of whether the photographs in this German pocketbook edition on psychology by Pleussner, on page 405, following, are also such types. The book itself has been given to me by a third party and I cannot offer it in evidence, but I believe that an inspection of these photographs would be of interest to the Tribunal and would be useful for the examination of the witness as to whether these are types of incurably insane persons.

MR. HARDY: With reference to this book containing the series of pictures, Your Honor has stated the Tribunal will take judicial notice of the conditions of such people as existing all over the world, hence I don't see the necessity of showing these pictures to the witness.

PRESIDING JUDGE BEALS: The Tribunal takes judicial notice of the fact that all over the world, in every country, civilized or uncivilized, there are insane people, incurably insane people of

various degrees, many who have no mentality at all, as described by the witness, and the Tribunal is of the opinion that admitting exhibits containing pictures showing such people is submitting a matter of no probative value before the Tribunal, and adds nothing to the judicial notice which the Tribunal will take of such situations. Counsel may further interrogate the witness as to what class of persons he deems subjects for euthanasia. If the witness does deem any person a proper subject for euthanasia that is a different matter. But insofar as counsel showing pictures and descriptions of incurably and hopelessly insane people, the Tribunal takes judicial notice that there are such people everywhere.

The objection to the admission of these exhibits is sustained.

DR. FROESCHMANN: In view of this ruling, may I at least show this book for their notice?

JUDGE BEALS: Yes, counsel may exhibit the book to the Tribunal.

2. EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE, 28 APRIL 1947*

DR. SAUTER (counsel for defendants Blome and Ruff): Mr. President, I had intended to quote testimony from two witnesses, SS Obergruppenfuehrer Wolff, who has been mentioned here repeatedly, and also the testimony of Professor Doctor Hippke, who also was mentioned on numerous occasions. Originally I intended, considering the importance of their testimony, to have them heard personally on the witness stand. In the meantime, however, these two witnesses were heard orally before the Milch Tribunal downstairs and were cross-examined subsequently. For that reason, I decided not to examine these witnesses here. If we would examine these two witnesses here it would cost us approximately 4 days, for that is exactly the length of time they took downstairs. Therefore, I should merely like to quote excerpts from their testimony. I am not going to do that today because the supplemental document book in which these two testimonies are contained is not yet available to you. By tomorrow morning this supplemental book will be available to you and then I shall be in a position to read excerpts from these two testimonies.

MR. HARDY: Your Honors, I don't know whether defense counsel knows the procedure necessary for the introduction of testimony taken before Tribunal II. It will only necessitate that

*Extract from mimeographed transcript, Case 1, U.S. vs. Karl Brandt, et al., pages 6552-6554.

he receive a copy of the record and have the record certified by the Secretary General of that Tribunal, and then request the Tribunal here to take judicial notice thereof. And by doing so, I don't see the reason or necessity for reading into the record here the testimony taken before Tribunal II. It may be done that simply. I don't know whether he is aware of that or not.

DR. SAUTER: Mr. President, I have already stated that I am not going to read this long record verbatim, but shall only quote a few excerpts which appear to be of particular importance. I am doing that in the interest of brevity of the proceedings and for the same reason I forewent the opportunity to examine these witnesses personally, because that would have cost us approximately 4 days. The prosecution probably would not be able to get any more from these two witnesses in their cross-examination than was the case downstairs in the Milch Tribunal. What I suggested now is intended to accelerate the proceedings.

MR. HARDY: Your Honor, I agree with Dr. Sauter 100 percent. I am merely trying to inform him to have it certified by the Secretary of that Tribunal so it will not delay us here when he introduces it tomorrow.

PRESIDING JUDGE BEALS: Counsel, the prosecuting attorney is correct. If the Secretary General will certify the entire testimony of these two witnesses, this Tribunal will take judicial notice of that testimony. It is then available before this Tribunal for both parties and can be referred to in argument. It will then be noted by the Tribunal in its entirety and counsel may call attention in argument and in his brief to those portions which he deems important to his defense. Of course, the evidence is already in transcript form. The Secretary General will just certify that so many pages of the mimeographed transcript as to the testimony of those witnesses before Tribunal II, and that testimony is before this Tribunal for judicial notice, and the Tribunal will take judicial notice of that testimony. It seems to me that would accomplish every purpose that counsel for the defendant Ruff, and the other defendants whose defense will be put in next, that would answer every purpose that the defendants could desire.

DR. SAUTER: Thank you, Mr. President. I am in full agreement with you.

3. EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE, 14 JANUARY 1947¹

MR. MCHANEY (chief prosecutor) : I would like at this time to introduce into evidence two judgments, one being an Austrian court and the other being a German court judgment, against certain defendants who were accused of murder because of their participation in the euthanasia program.

PRESIDING JUDGE BEALS: Are these documents contained in the document book, or are they separate?

MR. MCHANEY: Yes, Your Honor, the first one — the basis on which the objection is about to be offered — is NO-317, on page 64. This is not the judgment but the indictment of an Austrian court.

DR. FROESCHMANN (counsel for defendant Brack) : Mr. President, I object to the presentation of document 317. It cannot be clearly seen from this document what the prosecution actually wants to prove with this document. The evidence contained in these documents, namely the indictment and the verdict² of an Austrian court, does not refer to any of the defendants themselves. Therefore, it cannot be presented as direct evidence against any or any one, of the defendants. Furthermore, this indictment and verdict come from the time immediately after the capitulation and, therefore, is not a captured document which would be covered by the signature of the two gentlemen who have signed this document prior to its presentation. It can only be assumed that the prosecution wants to clarify to the Tribunal with these documents how an Austrian court maintained its attitude toward this question of euthanasia. However, this does not mean anything but to try to teach the Tribunal as to what legal conception was maintained by an Austrian court and an Austrian prosecution. However, to find the law to formulate it is the business of the Tribunal. There can be no evidence presented for this purpose by the prosecution or by the defense. Therefore, I request that this document be not admitted.

MR. MCHANEY: If the Tribunal please, the prosecution offers these judgments for two reasons; firstly and primarily to put before the Court the holdings of other tribunals on the precise question here at issue; namely, the legality of the so-called "euthanasia" program. One is a judgment of an Austrian court. However, I think reference is made in the judgment to the German statutes which were in existence at the time the alleged crimes

¹ Ibid., pages 1686-1689.

² The judgment was contained in a separate document which was also included in the prosecution's document book.

took place, and there is a discussion in here about the applicability of the facts proved as against the existing German law at that time. Of course, the second judgment is that of a German court, and the ruling upon the legality of the so-called "euthanasia" program under German law. But secondly we also offer them for the purpose of proving the facts found in the judgment. I am not terribly concerned about the second point, but without any question the Tribunal is at liberty to attach evidentiary weight to the facts found in these judgments which are in a large part, incidentally, based upon the confessions of the defendants involved, and the judgments on their face show that the acts of the defendants being tried were part of the broad "euthanasia" program. For example, the first Vienna court judgment concerns the killing of children under the organization which is shown on the left hand side of the chart. We're offering the documents for both of those purposes.

PRESIDING JUDGE BEALS: These documents, being judgments of Austrian courts, might well be cited as declaring the law in case of an argument. The Tribunal is of the opinion that they should not be received as evidence. Their authority is to be cited as the holdings of courts, but the Tribunal is of the opinion that they do not properly constitute evidence. Consequently, the objection will be sustained.

MR. MCHANEY: If the Tribunal please, do I understand that the ruling precludes the reading of these documents? In other words, we are presented with the problem of bringing these documents to the attention of the Tribunal and we certainly prefer to do it either under the process of judicial notice or by introducing them into the record as evidence.

PRESIDING JUDGE BEALS: These documents as trial records might well be included in any brief that might be filed on a question of law. The Tribunal does not think that the record should be so encumbered with procedure as that. They are authorities and decisions on points of law by other courts, and should be cited as such and might be regarded by the prosecution as such.

MR. MCHANEY: I do not want to labor the point, but I would like to call to the Tribunal's attention that Article IX of Ordinance No. 7 does provide that judgments and records of other military tribunals, namely those of Allied Nations, which —

PRESIDING JUDGE BEALS: Do you contend that these are judgments of a court of any Allied Nation?

MR. MCHANEY: Not at all, Your Honor, but we take the position that the Court is at liberty to receive such documents in evidence and to attach weight as evidence to the findings of such tribunals, in spite of the fact that these are not findings of Allied

tribunals. If it were an Allied tribunal I feel that under Ordinance No. 7—they would necessarily be admissible under Ordinance No. 7. I am simply urging that the Court may receive them.

PRESIDING JUDGE BEALS: Properly certified copies of these judgments might be filed with the Tribunal in support of arguments on questions of law. The Tribunal is of the opinion that they should not be received in evidence. The objection is sustained.

D. Justice Case—Extracts from the Transcript on Two Occasions Where Questions Arose Concerning Judicial Notice

1. EXTRACTS FROM THE TRANSCRIPT OF THE JUSTICE CASE, 16 AND 17 APRIL 1947¹

MR. WOOLEYHAN (associate counsel for the prosecution): May it please the Court, the prosecution, pursuant to Article IX of Ordinance No. 7, offers at this time several official government documents and reports of the United States for judicial notice by this Tribunal. Pursuant to Rule 20 of the rules promulgated by this Tribunal,² after reading portions of these reports we will deposit an official copy thereof in writing with the Tribunal. Since there does not exist any German version of these rather voluminous reports, and since the rules do not require us to furnish any, we are only reading those portions of the reports in which we are interested, so that over the interpreting system simultaneously the German version will come forth.

PRESIDING JUDGE MARSHALL: Let's have a better description of the documents than you have already given. They come from the Department of State, I take it.

MR. WOOLEYHAN: I will describe them very briefly, one by one.

The first one is a report by the Office of Strategic Services. It is a draft for the War Crimes Staff of the United States War Department, published in Washington, 13 August 1945. The Office of Strategic Services was and is an integral part of the War Department, which we submit comes within the definition set out in Article IX of Ordinance No. 7.

The second one is a United States Army Service Forces manual, but it was prepared by the same agency that I have just described, namely, the Office of Strategic Services. Both of these documents

¹ Extracts from the mimeographed transcript, Case 3, *U.S. vs. Josef Altstoetter, et al.*, tr. pages 2231-2233, 2240.

² The provisions of Rule 20 are read by the presiding judge in the discussion which follows.

are classified, but the classification permits this Tribunal to look at them.

The third is a Department of State publication entitled "The Digest of International Law," written by Hackworth and published in 1943. That digest is in some fifteen volumes, but we offer only an excerpt of two pages from volume 5. That is, as I stated, an official State Department publication.

The last report was prepared by the Special Legal Unit for Germany and Austria in the Supreme Headquarters of the Allied Expeditionary Forces, G-5. During the war G-5 was the General Staff designation for all occupational and alien civil affairs duties. This was written and published on 23 February 1945.

PRESIDING JUDGE MARSHALL: It is sufficient for our purposes. Have defense been properly notified?

MR. WOOLEYHAN: I carefully conned the rules, Your Honor, and could find no requirement for notice on this point.

DR. SCHILF (counsel for defendants Klemm and Mettgenberg): As far as I was able to understand, we are concerned with official publications which, according to the ruling quoted, are to be submitted as evidence by the prosecution, which can be submitted according to the provision.

MR. WOOLEYHAN: If the Court please, these documents are offered as a matter of judicial notice.

PRESIDING JUDGE MARSHALL: One moment, please. Under the rule and doctrine of judicial notice, it would perhaps not be necessary to introduce them in evidence. We may take judicial notice of certain things. Article IX really declares the rule and seems to make no requirement of copies or of previous notice of submission. It seems to make no requirement that they be offered at all. Now, we will hear you on that, of course. Maybe, in order that this entire matter may be considered by all the members of defense counsel, I perhaps should have read Article IX, which is brief. Article IX of Ordinance No. 7 — it reads:

"The tribunals shall not require proof of facts of common knowledge, but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military and other tribunals of any of the United Nations."

That is merely stating a rule that applies to all courts in American and English jurisprudence, at least. Now, that is binding upon this Tribunal because that is our charter. But in

addition to that, the uniform rules of these Tribunals elaborate upon that a little bit.

So that we will all be thinking of the same thing, I will read briefly from this: "When either the prosecution —" It is Rule 20 of the rules.

"When either the prosecution or a defendant desires the Tribunal to take judicial notice of any official government document or report to the United Nations, including any act, ruling, or regulation of any committee, board, or council heretofore established by or in the Allied nations for the investigation of war crimes or any record made by, or finding of, any military or other tribunal of any of the United Nations, this Tribunal may refuse to take judicial notice of such document, rule, or regulation unless the party proposing to ask this Tribunal to judicially notice such a document, rule, or regulation, places a copy thereof in writing before the Tribunal."*

Now then, the question arises as to whether this is one of the exceptions of Article IX.

DR. SCHILF: That settles the matter completely, but I only have one request, that we defense counsel may have a German copy made available, in case this has not already been promised by the prosecution.

I doubt whether translations of the documents which are only being submitted for judicial notice are available to us, and I was not able to understand clearly beforehand whether these translations are to be made available to us or not. Therefore I would like the prosecutor to make a further statement on the matter.

MR. WOOLEYHAN: Your Honors, the translation of these bulky reports is not only not incumbent upon the prosecution, according to the rules, but further, we feel, unnecessary for the reason that the only portions of these reports with which the prosecution is at all interested will, we propose, be read slowly and distinctly through the microphone and will, in due course, appear in the German transcript.

[There follows a detailed discussion on the length of the portions of the documents to be read, the problem of translation, and the question of procuring extra copies of the original documents for the defense. The next ensuing extract from the transcript records the related discussion on the following day.]

DR. SCHILF: May it please the Court, the gentlemen of the prosecution and the defendants whom I represent, yesterday, after the end of the session, again discussed the matter of the trans-

*Rule 20 became one of the "Uniform Rules of Procedure" and was not amended at any time. See sections IV and V.

lation of the documents which are to be read today; documents which are to be submitted to the Court only for judicial notice. Since it has been established that only those passages will be read for judicial notice which will be entered in the transcript, I have no further objections if that procedure is adopted as the prosecution suggested. That is to say, without making the translation available to us in advance, the document will be read in the English text and we will have an opportunity to examine the German translation from the transcript. That means that all difficulties have been removed which apparently developed yesterday.

PRESIDING JUDGE MARSHALL: I am very glad to have the matter so easily adjusted, and I may say to you, Dr. Schilf, if you need time to digest this you will have an opportunity, even after the reading and after the transcript is available to you, to bring this matter up again.

2. EXTRACTS FROM THE TRANSCRIPT OF THE JUSTICE CASE, 29 APRIL 1947*

MR. LAFOLLETTE (deputy chief counsel for the prosecution): this time may it please Your Honors, likewise for purposes of judicial notice and to make the record a complete document to which to refer, the prosecution wishes to invite the judicial notice of the Tribunal to certain evidence presented to and accepted by the International Military Tribunal and a few brief excerpts from the findings and verdict of the International Military Tribunal relevant to the afore-mentioned evidence. The evidence and findings to which we refer have as a common denominator of subject matter the concentration camps.

PRESIDING JUDGE MARSHALL: Mr. Wooleyhan, you say "the evidence and findings." We understand that only the findings of the International Military Tribunal become binding upon us in the absence of any evidence to the contrary.

MR. WOOLEYHAN: That is quite true, Your Honor. However, the evidence presented before the International Military Tribunal does come within the ambit of judicial notice for your consideration. Whether or not it may be binding is only relevant to the findings. However, we had hit upon this method as a short method of introducing evidence which otherwise would have to be done separately by document.

*Extracts from mimeographed transcript, U.S. vs. Josef Altstoetter, et al., Case 3, volume III, tr. pages 2762-2767, 2770-2772, 2777 and 2782.

May I recapitulate: We offer for your judicial notice, and notice only, certain evidence offered and accepted by the International Military Tribunal. In addition to that we offer certain brief excerpts from the findings of the International Military Tribunal which we propose are binding upon this Tribunal insofar as evidence is concerned. In other words, our position is not that the evidence is binding.

JUDGE BRAND: Are you suggesting that in order to show that the findings were to be treated as findings, it is necessary to show that they were based on evidence, and were therefore not irrelevant to the case, and that therefore the evidence is admissible in order to show that the findings were made upon evidence?

MR. WOOLEYHAN: Your Honor, that is the ultimate conclusion which we assumed the Court would draw. May I explain briefly that whatever evidence I may read from the record of the International Military Tribunal is, as you will see, quoted from certain documents which were offered and admitted before that Court.

JUDGE BRAND: I am wondering why those documents are not available at this time. It could be introduced instead of reading from the evidence of those documents as they appear in the record of the IMT.

MR. WOOLEYHAN: Your Honor, the documents to which I will refer, if I am permitted, are available; however, we had thought that since the record of the IMT is a genuine source of judicial notice, that it would be much shorter and more efficient to refer to them in this manner rather than introduce them as separate exhibits,* inasmuch as it's purely a collateral matter anyway.

PRESIDING JUDGE MARSHALL: This is a novel question, to say the least, and it is now the usual recess time. We shall give thought to that. I think we understand your theory. We have your request in mind sufficiently to be able to consider it without further discussion at this time.

We will recess now for 15 minutes.

(A recess was taken.)

*At this time (29 Apr. 1947) four trials were being conducted concurrently in Nuernberg (the Medical, Justice, Pohl, and Flick cases) and the task of publishing the numerous mimeographed English and German document books had assumed such proportions that the personnel and mechanical facilities available were at times unable to keep up with demands upon them, a fact which caused occasional adjournments until the reproduction staff could catch up. A similar difficulty had arisen in the IMT trial (as noted in sec. VII A). The IMT permitted the practice of allowing German documents to be marked in evidence without a prior translation, provided the offering party then read pertinent parts in open court. Under this procedure the German transcript contained verbatim extracts of the exhibit introduced, while, by virtue of the system of simultaneous interpretation, the English, French and Russian transcripts contained parallel translations. The defense was free to fill out the record by reading into it any other parts they considered pertinent. Here, in the Justice case, the prosecution attempted to reach a similar result by asking the Tribunal to take judicial notice of parts of the IMT record, and then reading those parts into the Justice record so that the German transcript would contain the verbatim of and the English transcript a translation of the extracts of evidence from the IMT

THE MARSHAL: The Tribunal is again in session.

MR. WOOLEYHAN: Your Honor, before the Tribunal voices its decision on the proposed plan of procedure here, does Your Honor still think it is necessary to quote from Article X, Ordinance No. 7?

PRESIDING JUDGE MARSHALL: I think we are quite familiar with it, but now it might be to an advantage if you would outline just what you expect to introduce here by way of judicial knowledge.

MR. WOOLEYMAN: During the prosecution's case in chief thus far, certain concentration camps have been brought out in the evidence. They have been brought out in various contexts, including certain defendants in the trial, but the physical nature of those concentration camps, what went on there, and the fate of the people who were sent there, have not been brought out in the documents or testimony, except insofar as isolated instances were concerned. Now, particularly with reference to [concentration camps] Mauthausen, Flossenbergl, and Auschwitz, the prosecution does feel it necessary to call the Court's attention to the nature of and activities in those three concentration camps at least.

PRESIDING JUDGE MARSHALL: May I inquire whether those things sufficiently appear in the judgment itself, or do you want to go to the record?

MR. WOOLEYHAN: They do not appear sufficiently in the judgment itself. We are primarily concerned with the record.

JUDGE BRAND: What portion of Article X do you suggest authorizes judicial notice of mere evidence offered in another tribunal?

MR. WOOLEYHAN: There is, if the Court please, with regard to the record alone, the last clause of Article IX, which is the applicable article, and it reads: "and the records and findings of military or other tribunals of any of the United Nations."

MR. LAFOLLETTE (deputy chief counsel for the prosecution): We are pointing out again, I am only repeating what Mr. Wooleyhan says, there are two things. We ask the Court to take judicial notice of the records of other tribunals, and we contemplate referring to the page of the transcript, or of the document where these records were made in the IMT record. Now this judicial notice of the findings in Article X are of the findings on the evidence, but the records we offer also refer to judicial notice,

record. The principal difference from the IMT practice would have been that, since judicial notice was asked, no copy of the original exhibit would have been introduced in evidence. The defense, on its part, could thereafter secure a copy of the original from the IMT archives and if it chose, read further parts into the record. Since the Tribunal in the Justice case disapproved of this practice, the prosecution either had to forego the introduction of the evidence or else further burden the limited reproduction and translation staff with making certified copies of the IMT exhibits, obtaining certified translations of these documents (or extracts thereof), and then making mimeographed copies in English and German for the respective document books.

and that is what we are seeking to do, and we are relying on the provisions of Article IX of Ordinance No. 7.

JUDGE BRAND: In your construction, that is based solely on the meaning of the word "records."

MR. LAFOLLETTE: I think "records and findings." Yes, Sir.

JUDGE BRAND: We are not raising any issue as to "findings."

MR. LAFOLLETTE: Yes, but on the word "records" it has judicial notice as distinguished from "findings" which are binding under Article X. As to the judicial notice, the record of any military tribunal, we believe, is provided for in Ordinance 7.

JUDGE BRAND: As you define the record of, say, a trial, either the prosecution or the defense could introduce by the method you now suggest for judicial notice any evidence either for the prosecution, or the defense, which can be found in the testimony of any other case which has been tried by an international tribunal.

MR. LAFOLLETTE: Exactly, provided adequate identification is made so that this Tribunal may ascertain what that record is and where it is, yes.

JUDGE BRAND: I have grave doubts whether the word "records" was in fact meant to include any and all testimony introduced by any and all parties in any or all of these trials.

[There follows considerable further discussion of the meaning of the word "records."]

DR. KUBUSCHOK (counsel for defendants von Ammon and Schlegelberger): May I make a brief remark. Concerning Articles IX and X, I would ask you to compare them. If one shares the view of the prosecution, the last sentence of Article X would be incomprehensible or at least superfluous.* If one follows the interpretation by the prosecution, it would be possible to make all the evidence of the other trials irrefutable. In that case the last paragraph in Article X would be un-understandable, the meaning of which is, that determination of fact, that is the findings of the court, may be refuted by new evidence. Therefore, I believe, that the word "record" in Article IX can under no circumstances be interpreted in such an extensive way as the prosecution is doing.

MR. LAFOLLETTE: If Your Honor please, I don't believe that that argument is legally sound. We are not claiming that this evidence is binding, and consequently, of course, the last sentence of Article X remains in full effect. All we are saying is that the record is evidence, not that it constitutes a finding of ultimate fact or guilt. Of course we are not contending that, so that what we

*"Statements of the International Military Tribunal in the judgment in Case 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

are contending is not inconsistent with the last sentence of Article X.

JUDGE BRAND: But your contention, carried to its logical conclusion, might result in this situation: You might find an exhibit offered in evidence and received in evidence by the IMT and upon your theory it would be admissible as judicial notice of the facts therein stated, although the findings of the IMT might have been that they found the document which had been received in evidence to be incorrect or untrue.

MR. LAFOLLETTE: That is quite true.

JUDGE BRAND: And then you would have us taking judicial knowledge of something that the IMT had found incorrect in fact.

MR. LAFOLLETTE: No, I ask you to take — well, that is no different — to me it is no different, Your Honor, than if during the evidence that is introduced in this trial, after it is introduced, some of it this Court will reject as untrue, some it will accept; and when it reaches its conclusion of ultimate fact and law, if we follow back logically, we would say that this Court could not have reached the conclusion that it reached unless it rejected something that was in the record. I do not see that what we are requesting this Court to do in any way involves an inconsistency such as Your Honors have just mentioned. We are not asking you to be bound by what —

PRESIDING JUDGE MARSHALL: May I ask you a question? How are you proposing to bring those matters of evidence before this Court at this time?

MR. WOOLEYHAN: We were proposing to read quotations from certain documents received in evidence before the IMT, as stated in the official transcript of the IMT.

PRESIDING JUDGE MARSHALL: You are going to read from those documents, do I understand you to say?

MR. WOOLEYHAN: The documents were read by the prosecution into the record of the IMT.

JUDGE MARSHALL: And you are proposing to read from those same documents before this Tribunal at this time?

MR. WOOLEYHAN: We are, Your Honor, and then —

JUDGE MARSHALL: Maybe I did not make myself clear, I mean introduce the documents in this Court and then read from them.

MR. WOOLEYHAN: That would not be judicial notice, Your Honor.

JUDGE BRAND: It would be evidence, and judicial notice isn't evidence in the true sense of the word.

MR. WOOLEYHAN: That is precisely right.

MR. LAFOLLETTE: Except to the extent that this language makes it. If it doesn't, then, of course, we are wrong. That is all there is to it.

* * * * *

JUDGE MARSHALL: The reason why you are limited at this time is because you don't have the translations of them to submit to opposing counsel; is that true?

MR. WOOLEYHAN: If we had at our disposal all the documents that had been admitted in the IMT, from which I hope to quote, we would have submitted them as exhibits, as new evidence, subject to linking them up; but we felt that this would be a much more expeditious procedure, and with no prejudice of defense counsel, for the reason that the German transcript has every word that we would read. It also appears in the German transcript of the IMT, one copy of which is now in the interpreter's booth, and several other copies are available in the library, in the same place we got this.

* * * * *

Afternoon Session

(The hearing reconvened at 1330 hours, 29 April 1947.)

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE MARSHALL: Without further argument, I think we may as well settle the matter that we discussed this forenoon once for all. We will take judicial notice of anything that appears in the judgment of the IMT, subject, of course, to rebuttal on new evidence. We interpret the word "record" as found in Article IX of Ordinance No. 7 more narrowly than the prosecution counsel do, and the record does not include evidence unless that evidence is discussed in the International Military Tribunal's judgment.*

MR. WOOLEYHAN: May it please the Court, in line with the ruling of the Tribunal, the prosecution offers for the judicial notice of the Tribunal a few pertinent excerpts from the judgment of the International Military Tribunal referring to concentration camps. I regret that we have not a German transcript, we only have the English, but proceeding on the same ground as heretofore, we feel that defense counsel will not be prejudiced in any way in view of the fact that German transcripts translating the English do exist in the library, and it is a matter of cross reference to the portions which we read here in English.

*For a different result with respect to testimony from the record of a trial before another tribunal of concurrent jurisdiction, see the extracts from the transcript of the Medical case reproduced in section XVI C 2.

E. Farben Case—Statement of Judge Morris Concerning Judicial Notice

EXTRACT FROM THE TRANSCRIPT IN THE FARBEN CASE,
29 APRIL 1948*

JUDGE MORRIS: I have had something on my mind to say for some little time with regard to documents that have been given numbers for identification only and not introduced or received in evidence. I am afraid that there may be some misapprehension developed that will cause some confusion in connection with briefing and arguing. Now when a document is marked for identification only and remains that way in the record, it's identified, filed with the Secretary General, but it does not become evidence. It is not before the Tribunal for consideration. Therefore it is not proper to base any argument on that document, either in oral argument or in the briefs. There is one exception to that rule — at least it should be stated as an exception to avoid confusion. That is where some document has been identified but the contents of that document are the proper subject of judicial notice on the part of the Tribunal. In that case, of course, the attention of the Tribunal may be called to it either in oral argument or in a brief, and counsel may argue that, not because it has been identified by a number in this record, but because it is a document of such importance and import that the Tribunal takes judicial notice of it. But unless you are dealing with that kind of document, the giving of identification numbers does not bring the document before the Tribunal for consideration, and your reference to such a document in argument, either by brief or orally, is improper and, of course, will be entirely wasted, because the Tribunal will not consider any argument based on documents presented for identification, with the one exception that if the contents of the document are something that the court will take judicial notice of, then it could be presented and argued in court in any event and the identification number will not destroy the status of the document as being one of which we would take judicial notice. I have wanted to make these remarks for some time because I am afraid, at least on the part of some counsel, there has been the misapprehension that when a document is identified only and in the record that it may be the basis of discussion.

PRESIDING JUDGE SHAKE: I may say that what Judge Morris has said expresses the views of the Tribunal as a whole and I am hopeful that it will be of help in avoiding any misunderstanding with reference to the state of our record.

*U.S. vs. Carl Krauch, et al., Case 6, tr. pages 12859 and 12860.

XVII. TAKING OF EVIDENCE ON COMMISSION

A. Introduction

The IMT was authorized under Article 17 (e) of the IMT Charter "to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission." The IMT limited the taking of evidence on commission to the so-called "Accused Organizations." Concerning this practice the IMT stated in its judgment (Trial of the Major War Criminals, *op. cit.*, vol. I, p. 172) :

"The Tribunal appointed Commissioners to hear evidence relating to the organizations, and 101 witnesses were heard for the Defense before the Commissioners, and 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits.

"Thirty-eight thousand affidavits, signed by 155,000 people, were submitted on behalf of the Political Leaders, 136,213 on behalf of the SS, 10,000 on behalf of the SA, 7,000 on behalf of the SD, 3,000 on behalf of the General Staff and OKW, and 2,000 on behalf of the Gestapo."

Article V (e) of Ordinance No. 7 authorized the taking of evidence on commission in language identical with Article 17 (e) of the IMT Charter. In 5 of the 12 Nuernberg trials which followed the IMT case, evidence was taken on commission (the Justice, Flick, Farben, Krupp and Ministries cases). No evidence was taken on commission in the Medical, Milch, Pohl, Hostage, RuSHA, Einsatzgruppen, and High Command cases.

The first tribunal established under Ordinance No. 7 which appointed commissioners to take evidence was Tribunal III in the Justice case, and this was done upon agreement of both the prosecution and defense. Near the end of the prosecution's case in chief, Presiding Judge Marshall became incapacitated from attending sessions because of serious illness. The two other members of the Tribunal and the alternate judge met with prosecution and defense counsel to discuss the situation, and it was noted that a number of prosecution affiants whom the defense wished to cross-examine were available for cross-examination. The defense was agreeable that this testimony be taken before two members and the alternate members sitting as commissioners of the Tribunal. By written order of 2 June 1947, the Tribunal appointed the commissioners, and the commissioners, sitting together, thereafter took the testimony of 13 witnesses and filed their report with the Tribunal. The Tribunal on 9 June 1947 ordered that the trans-

cript of the proceedings before the commissioners "be considered by the Tribunal in all respects as if the proceedings had been had, the interrogations made, and the testimony given before the full Tribunal." The transcript of the initial discussion concerning the establishment of a commission and the ensuing orders concerning the commissioners are reproduced in subsection B. Because of Judge Marshall's continuing illness, the Tribunal was reconstituted before it next convened, the alternate member, Judge Harding, replacing the incapacitated member and Judge Brand being appointed presiding judge. (See sec. XXII, concerning alternate members.) The Justice case proceeded to its conclusion before the Tribunal as reconstituted without any further taking of evidence on commission.

The next tribunal to appoint a commissioner to take evidence was Tribunal IV in the Flick case. The sole evidence taken on commission was the testimony of Albert Speer, former Reich Minister of Armament and War Production, whose testimony is reproduced in full in section VII D, volume VI, this series. Speer, former Reich Minister of Armament and War Production, had been sentenced to 20 years' imprisonment by the IMT and committed to Spandau Prison in Berlin. The Spandau prisoners were under the control of the Allied Control Council for Germany, and it was not possible to secure Control Council agreement for Speer to come to Nuernberg to testify. The orders concerning the taking of Speer's evidence on commission are reproduced in subsection C.

The practice of taking evidence on commission was much more extensively employed in the three other cases where commissioners were appointed, the Farben, Krupp, and Ministries trials. At this later stage a number of special problems arose and the defense made a number of objections to the practice. The minutes of the conferences of presiding judges indicate that the matter of commissioners was discussed at these conferences on three occasions: on 4 February 1948 the presiding judges appointed Judge Crawford as a master commissioner and directed him to draft pertinent rules of procedure; on 16 March 1948, the presiding judges decided that orders concerning commissioners were the responsibility of the individual tribunals concerned; and on 25 May 1948, the presiding judges considered the effects of limited commission facilities and the equitable adjustment of claims of the respective tribunals for the use of commission facilities. (The pertinent extracts of the minutes of the conferences are reproduced in subsec. D.)

In the Farben trial commissioners were used principally to hear the testimony of affiants of both the prosecution and the defense who had been called for cross-examination by the opposing party.

The first order appointing a commissioner in the Farben case, which stated the commissioner's powers and duties, is reproduced in subsection E 1. The commissioners in the Farben case were not authorized to rule upon objections made before them, although the defense on two occasions urgently appealed to the Tribunal to grant this power to the commissioner. The transcript of the discussions of the Tribunal and of counsel on this matter and the related order of the Tribunal are reproduced in subsections E 2, E 3, and E 4 respectively. For a time the Tribunal ruled upon objections made by written memorandums, but on 7 May 1948, a few days before the close of the defense case, the Tribunal announced that it would pass upon future objections "in considering the case on its merits, rather than to leave you in a state of uncertainty until such time as you are preparing briefs and arguments." This announcement is reproduced in subsection E 5. Three weeks later, on 1 June 1948, the Tribunal held a special session for the purpose of closing the evidence in the case, at which time the Tribunal received the reports of its two commissioners on the taking of evidence, declared that the proceedings before the commissioners were officially made a part of the record, and discharged the commissioners. The statement of the Tribunal concerning these matters is reproduced in subsection E 6.

In the Krupp case, near the end of the prosecution's case in chief, the Tribunal appointed a commissioner to hear the cross-examination of a number of prosecution affiants whose affidavits had been introduced in evidence as exhibits. The defense objected to simultaneous proceedings before the commissioner and the Tribunal, arguing in open court that the defendants had a right to be present at proceedings both before the commissioner and the Tribunal, and further, that the defendant's principal counsel should not be compelled to elect whether he should attend the commission proceedings or the proceedings before the Tribunal. The Tribunal rejected this objection, stating that there were ample defense counsel so that arrangements could be made to accommodate the approved practice of taking evidence on commission. (There were for each of the 12 defendants a principal and an associate defense counsel.) The transcript of the argument and the Tribunal's decision is reproduced in subsection F 1. After the Tribunal had ruled and stated that it desired no further argument on the matter, the persistence of the defense counsel in attempting to argue further and to protest the ruling eventually culminated in a walk-out *en masse* of defense counsel from the courtroom, and in contempt proceedings. The transcript of the further proceedings directly preceding the walk-out are reproduced in section XXI E, along with further materials dealing with the contempt of court.

At the first hearing before the commissioner, the defense noted a continuing objection to simultaneous proceedings before the commissioner and the Tribunal, as shown by the extract from the transcript reproduced in subsection F 2.

In the Ministries case, the largest of the 12 trials before tribunals established pursuant to Ordinance No. 7, the Tribunal made the most extensive use of commissioners in the taking of evidence. During the prosecution's case in chief the Tribunal ordered that the testimony of a large number of prosecution witnesses be taken before commissioners. Just after the conclusion of the prosecution's case in chief, the Tribunal ordered that "Unless otherwise ordered, all documentary evidence will be taken before a commissioner or commissioners, who will be appointed by the Court. The commissioners will in addition take the testimony of such witnesses as the Tribunal shall from time to time order." (The full text of this order, which also dealt with the order of trial, is reproduced in sec. XII E.) Just before the beginning of the defense case the Tribunal appointed two of its members as commissioners to hear evidence on behalf of two defendants who were prepared to proceed, and for 5 days these commissioners, sitting together, heard evidence on behalf of the defendant Meissner, as well as the testimony of Friedrich Gaus, who had given a number of affidavits previously introduced in evidence by the prosecution and whom the defense had requested for cross-examination. The Tribunal order constituting the commission is reproduced in subsection G 1. More than 2 months after the defense case had been in progress, the prosecution and defense stipulated that "in all cases where oral evidence is taken before a commissioner appointed by this Tribunal and objection to any question or answer is made by any party, the commissioner shall rule thereon, which ruling will be deemed acceded to by the parties and objections thereto waived unless within 5 days of the date when the ruling is made the party or parties aggrieved thereby shall file with the Tribunal a petition for the review of the commissioner's action." The Tribunal approved this stipulation by written order (reproduced in subsec. G 2). This was the only case in which the commissioners were given authority to rule upon motions in the first instance. After the defense case had been under way for several months, the Tribunal extended the amount of evidence to be taken on commission "because of the undue amount of time which has been used and is being consumed in the presentation of evidence on behalf of the defense, and the necessity for greater expedition of trial." This was done by an order of 23 July 1948 which directed that "until all defendants who so desire shall have testified before the Tribunal, the Tribunal will not itself hear

testimony of other witnesses"; that "the testimony of all witnesses other than the defendants themselves in the first instance will be presented by the Tribunal's commission"; that "all rebuttal and surrebuttal testimony will be taken in the first instance before the commission"; and that the Tribunal would entertain defense motions to hear other evidence before the Tribunal only after all defendants so desiring had testified. When this order was made, the case on behalf of the defendant Veessenmayer, the 11th of the 21 defendants to present evidence, was in progress, and the transcript of the proceedings (before the Tribunal and the commissioners) since the beginning of the defense case had already more than doubled in size the transcript of the prosecution's case in chief. The order was issued on the 52d separate calendar day on which the Tribunal convened during the defense case. After the issuance of this order the Tribunal itself heard defense evidence on 55 more separate trial days. The order of the Tribunal is reproduced in subsection G 3. The defense moved in open court and argued at some length that the Tribunal vacate this order. The transcript of this argument is reproduced in subsection G 4. The Tribunal took the motion under advisement and denied it some time later, stating its reasons in a memorandum attached to the order. This order and memorandum are reproduced in subsection G 5.

B. Justice Case—Agreement of the Defense to Proceedings before Two Members and the Alternate Member of the Tribunal, Sitting as Commissioners; and Three Related Orders of the Tribunal Concerning Hearings before the Commissioners

I. DISCUSSION BEFORE TWO MEMBERS AND THE ALTERNATE MEMBER OF THE TRIBUNAL ON THE QUESTION OF THE CROSS-EXAMINATION OF PROSECUTION AFFIANTS BEFORE COMMISSIONERS OF THE TRIBUNAL

**EXTRACT FROM THE TRANSCRIPT OF THE JUSTICE CASE,
2 JUNE 1947***

JUDGE BRAND, PRESIDING: The judges who are present this morning have thought it advisable to come into the courtroom for a conference with counsel for the prosecution and for the defense.

The record will show that we are not sitting as a court this morning. We have come in for the purpose of conferring with

*Extract from mimeographed transcript, Case 3, U.S. vs. Josef Altstoetter, et al., pages 3812-3814.

the gentlemen for the prosecution and defense as individual judges, and with you as individual lawyers.

The reason for this procedure is that his honor the presiding judge, Judge Marshall, is in the hospital for, we trust, only a few days, and we consider it important that we should not sit as a court in his absence. Our reason for that being that we desire to make it perfectly clear that he remains as the presiding judge, and that we are not sitting as a court in his absence.

We will, however, expect the interpreters and the reporters to make a record of this conference, in the same manner as they would do if we were in open session.

The individuals who are here, I am sure all of us, desire to waste as little time as possible.

We are advised this morning that there are a number of witnesses who have been brought from considerable distances, who are here at the request of defense counsel for the purpose of being cross-examined by defense counsel. It might be difficult, and would surely be most inconvenient, to send them all home in the hope of securing them again at a later time. Therefore, in behalf of my associates and myself, I should like to ask the prosecution, if the prosecution has any suggestions, which I understand he has, as to a procedure by which we might expedite the trial when it reconvenes, and with fairness to all parties.

MR. WOOLEYHAN (associate counsel for the prosecution): Your Honors, in the absence of the Presiding Justice the prosecution respectfully suggests that under the provisions of Article V (e) of Ordinance No. 7, and, further, under Rule 24 of the Rules of Procedure for Military Tribunal III, that the Tribunal duly appoint from its members one or more commissioners to hear and to take evidence upon the cross-examination of the witnesses now available, and to become available, until the Presiding Justice can return to the bench. That is, in our opinion, completely non-prejudicial to the defense and is in the interest of an expeditious clearing up of the cross-examination of these affiants.

JUDGE BRAND, PRESIDING: The judges who are conferring with you have considered that suggestion. We think that if such a procedure should be carried out it should be under substantially the following conditions:

1. That an order should be made to be signed by the Presiding Judge. I understand he is able to do so, and by the other members of the Court, so that it will unquestionably be the act of the entire Court.

2. That the order should appoint as commissioners, the three judges who are conferring with you this morning: the Honorable Judge Blair, the Honorable Judge Harding, and myself.

That, we would then proceed to hear the cross-examination of these witnesses as conducted by the defense counsel and the redirect examination, if any. And, that the testimony should then be reported by the three of us to the full Court consisting of: the Presiding Judge, Judge Blair, and myself.

That, upon the examination of that cross-examination by the Presiding Judge, and by the other members of the Court, sitting as a Court, there would be no possible prejudice to any party, that we can see.

On the other hand, to release these witnesses whom the defense counsel has called might prove prejudicial to you.

Speaking for my associates I should like to know whether the members of the defense counsel, at this time, find any objections to the procedure which I have suggested? And, I suggest that you do not address the Court because the Court is not here.

DR. SCHILF (counsel for defendant Klemm): May it please the Court—

JUDGE BRAND, PRESIDING: We did not hear you Dr. Schilf.

DR. SCHILF: Your Honor, on our part, we apparently have no objections that this procedure be approved; that, in other words, a commission of the Court should carry on the cross-examination, and that the record should then be submitted to the entire Court.

JUDGE BRAND, PRESIDING: We thank you for that as your answer. I should like to ask if there are any of the attorneys of the defense who, at this time, think there will be any objections whatsoever to this procedure. Do you feel that you can speak for all of them, Dr. Schilf?

DR. SCHILF: Yes, I believe I have convinced myself that none of my colleagues have any objections of any kind, so that I feel that I am empowered to speak for all of the defense counsel, to make that declaration on behalf of all defense counsel.

JUDGE BRAND, PRESIDING: Then, I am sure that when the Court convenes we may be able to count upon the defense counsel then making a similar pronouncement in open court so that the record will be clear upon that matter.

It appears to be necessary that we should recess—I beg your pardon—it appears to be necessary that the judges should not meet with you again until tomorrow morning at 9:30 in order that, in the meantime, we may secure, if possible, a written order which will be the official order of the Court, signed by Judge Marshall and the other members of the Court, which would then authorize us to proceed in the manner we have outlined.

I think that disposes of this matter for the time being in this conference.

I have two other matters about which we have also discussed.

[The transcript of the next ensuing remarks of Judge Brand are reproduced in section XII C. These remarks concerned the order of trial during the defense case in chief.]

2. TRIBUNAL ORDER OF 2 JUNE 1947*

MILITARY TRIBUNAL III

CASE 3

United States of America

Plaintiff

vs.

Josef Altstoetter, et al.

Defendants

ORDER

IT APPEARING to the Tribunal that the prosecution has introduced into evidence certain affidavits and that at the request of defense counsel the affiants have been brought to Nuernberg for cross-examination and are now available for that purpose: in order to expedite the trial of this cause it is deemed expedient to appoint commissioners to hear the testimony of said affiants upon their cross-examination and redirect examination, if any, and to certify the verbatim transcript of such testimony and examination to the Tribunal; NOW, THEREFORE,

IT IS ORDERED that the Honorable James T. Brand, the Honorable Mallory B. Blair, judges of this Tribunal, and the Honorable Justin W. Harding, alternate judge, be and they each are appointed as commissioners to take the testimony of such affiants as may be available for cross-examination and redirect examination, and to certify the same to this Tribunal for its consideration. To this end each of the said commissioners are authorized to administer oaths, to direct the proceedings, and to propound such questions as they may deem advisable.

The Marshal is directed to produce the witnesses for cross-examination and redirect examination from time to time as may be directed by the commissioners and until further order of this Tribunal. The hearings will be held in the regular courtroom of Tribunal III, and the record shall be taken and recorded as is done when the Court is in open session. The first session will be held at 9:30 o'clock in the forenoon on Tuesday, the 3d day of June 1947.

*U.S. vs. Josef Altstoetter, et al., Case 3, Official Record, volume 33, pages 1088 and 1089.

This order is made pursuant to provisions of Ordinance No. 7, Article V, section (e).

2 June 1947

[Signed] CARRINGTON T. MARSHALL
Presiding Judge
[Signed] JAMES T. BRAND
[Signed] MALLORY B. BLAIR

3. TRIBUNAL ORDER OF 9 JUNE 1947¹

ORDER

The report of the commissioners, dated 9 June 1947, is received. The transcript of the proceedings before the commissioners, the interrogation of the witnesses, and their testimony will be considered by the Tribunal in all respects as if the proceedings had been had, the interrogations made, and the testimony given before the full Tribunal.

Dated this 9th day of June 1947

[Signed] CARRINGTON T. MARSHALL
Presiding Judge
[Signed] JAMES T. BRAND
[Signed] MALLORY B. BLAIR

4. TRIBUNAL ORDER OF 12 JUNE 1947²

ORDER

The commissioners, heretofore appointed by order of the Tribunal to hear the cross-examination of certain affiants, having completed the cross-examination and redirect examination of all available affiants pursuant to the order of the Tribunal, Now, **THEREFORE**, the appointment is terminated as of this date. The commissioners will therefore not convene on Monday, 16 June 1947. The order heretofore made that the Tribunal reconvene on 16 June 1947, is hereby vacated.

IT IS ORDERED that the Tribunal reconvene on 23 June 1947 at the hour of 9:30 o'clock in the forenoon, at which time the Tribunal will hear the opening statements of counsel for the defendants.

¹ Ibid., page 1367.

² Ibid., page 1391.

Dated this 12th day of June 1947.

[Signed] CARRINGTON T. MARSHALL
Presiding Judge

[Signed] J. T. BRAND

[Signed] M. B. BLAIR
Judges

C. Flick Case—Two Orders of the Tribunal Concerning the Taking of Testimony of Defense Witness Albert Speer Before a Commissioner

I. TRIBUNAL ORDER OF 10 SEPTEMBER 1947*

MILITARY TRIBUNAL IV

CASE 5

United States of America }
vs. }
Friedrich Flick, *et al.* }

ORDER

The Tribunal having previously approved an application on behalf of Counsel for the defendant Steinbrinck for the calling as a witness of Albert Speer, and it now appearing to the Tribunal that said Albert Speer has been removed from confinement in the Nuernberg jail and is presently confined in the Spandau prison in Berlin under the authority of the Allied Control Council; and it further appearing that it is not feasible for the said Albert Speer to be produced in open court for the defendant Steinbrinck, joined in by counsel for the prosecution, it is hereby ordered as follows:

1. Dr. John H. E. Fried is appointed as a commissioner of this Tribunal for the purpose of taking the testimony of Albert Speer, having it properly recorded, and submitting the record of such testimony to the Tribunal.

2. Dr. Hans Flaechsner, having been designated by counsel for the defendant Steinbrinck as his representative at the hearing of the testimony of Albert Speer, is authorized to be present at said hearing and to examine said witness.

3. Mr. Nobert Barr, having been designated by counsel for the prosecution as its representative at the hearing of the testimony of Albert Speer, is authorized to be present at said hearing and to examine said witness.

*U.S. *vs.* Friedrich Flick, *et al.*, Case 5, Official Record, volume 34, pages 477 and 478.

4. The proceedings at said hearing shall be conducted in the German language only and a qualified court reporter will record the entire proceedings in the German language;¹ the reporter will be designated by the commissioner.

5. The commissioner and representatives of counsel will proceed to Berlin for the purpose of hearing the testimony of Albert Speer at such time and pursuant to such conditions as may be agreeable to the Allied Control Council or its authorized representatives.

6. The Secretary General of the Military Tribunals is directed to forward a copy of this order to the legal adviser to the United States Military Governor for Germany, together with a request to said legal adviser to take such action as he may deem necessary in order to obtain the permission of the appropriate authorities for proceeding in the manner hereinabove described.

Date: 10 September 1947.

[Signed] CHARLES B. SEARS
Presiding Justice
Military Tribunal IV

2. TRIBUNAL ORDER OF 24 OCTOBER 1947²

ORDER

Mr. John H. E. Fried, having been duly appointed by order of this Tribunal, dated 10 September 1947, as commissioner for the purpose of taking the testimony of the witness Albert Speer at Spandau prison in Berlin; said commissioner having proceeded to Berlin with representatives of counsel for both the prosecution and the defense and having heard the testimony of the witness Albert Speer beginning on 8 October 1947; the testimony so taken having been duly recorded and sworn to by the witness Albert Speer in the German language and a translation into the English language, certified to be accurate, having been furnished to this Tribunal and to counsel for both prosecution and defense; therefore, upon motion by counsel for the defendant Steinbrinck, joined in by counsel for the prosecution, it is hereby ordered as follows:

1. The transcript of the testimony of the witness Albert Speer shall be incorporated into the official transcript of the proceedings before this Tribunal and will appear in both the German and English transcripts.³

¹ Concerning the translation of this testimony and its incorporation into the record, see the next ensuing order of the Tribunal.

² U.S. *vs.* Friedrich Flick, *et al.*, Case 5, Official Record, volume 34, page 553.

³ The complete testimony of the witness Speer is reproduced in section VII D, volume VI, this series. Earlier, in February 1947, before Speer had been transferred from Nuernberg Prison to Spandau Prison in Berlin, his testimony was taken on deposition for use in the Milch case. See section XVIII J 2.

2. The testimony of the witness Albert Speer is hereby made an integral part of the evidence before this Tribunal and shall be considered in the same manner as if the witness had testified directly before this Tribunal.

Date: 24 October 1947.

[Signed] CHARLES B. SEARS
Presiding Justice
Military Tribunal IV

D. Minutes of the Conference of the Committee of Presiding Judges, Concerning the Taking of Evidence on Commission

I. EXTRACTS FROM THE MINUTES OF THE CONFERENCE OF 4 FEBRUARY 1948

OFFICE OF MILITARY GOVERNMENT (U.S.)
SECRETARIAT FOR MILITARY TRIBUNALS

Office of the Secretary General

No. 6

Palace of Justice
Nuernberg

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES*
4 February 1948 1635

Judge Curtis G. Shake, Executive Presiding

MEMBERS OF THE COMMITTEE PRESENT:

Judge Lee B. Wyatt, Tribunal I
Judge Michael A. Musmanno, Tribunal II
Judge Hu C. Anderson, Tribunal III
Judge William C. Christianson, Tribunal IV
Judge George J. Burke, Tribunal V (sitting for Judge Wennerstrum)
Colonel John E. Ray, Secretary General

MEMBERS ABSENT:

Judge John C. Young, Tribunal V-A

GUEST:

Judge Johnson T. Crawford

* * * * *

2. *Master Commissioner:*

* Official Record, Tribunal Records, volume 5, pages 142 and 143.

Judge Shake stated that it was planned to return Judge Crawford, now sitting on Tribunal I, as master commissioner for the Tribunals and requested approval of the committee, which was granted. He further stated that Judge Crawford would draw up rules of procedure for adoption in the near future. Colonel Ray suggested that all legal consultants be appointed commissioners and be available as assistants to Judge Crawford in emergencies.

* * * * *

[Signed] JOHN E. RAY
Colonel FA
Secretary General

2. EXTRACTS FROM THE MINUTES OF THE CONFERENCE OF 16 MARCH 1948

OFFICE OF MILITARY GOVERNMENT (US)
SECRETARIAT FOR MILITARY TRIBUNALS

Office of the Secretary General

No. 9

Palace of Justice
Nuernberg

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES*
16 March 1948 1635

Judge Curtis G. Shake, Executive Presiding

MEMBERS OF THE COMMITTEE PRESENT:

Judge William C. Christianson, Tribunal IV

Judge John C. Young, Tribunal V

Judge Michael A. Musmanno, Tribunal II

Colonel John E. Ray, Secretary General

MEMBERS ABSENT:

Judge Hu C. Anderson, Tribunal III

GUEST:

Judge Johnson T. Crawford

* * * * *

3. *Commission Orders:*

Judge Crawford, master commissioner, presented a draft of an order regarding commissioners. It was decided that orders of this nature were the responsibility of the Tribunal concerned. Judge Shake offered to draft a suggested order for presentation to the individual Tribunals. The offer was accepted.

* * * * *

*Ibid., pages 147 and 148.

[Signed] JOHN M. RAYMOND
Colonel GSC
Associate Director
[Signed] JOHN E. RAY
Colonel, FA
Secretary General

3. EXTRACTS FROM THE MINUTES OF THE
CONFERENCE OF 25 MAY 1948

OFFICE OF MILITARY GOVERNMENT (US)
SECRETARIAT FOR MILITARY TRIBUNALS
Office of the Secretary General

No. 13 Palace of Justice
Nuernberg
CONFERENCE OF COMMITTEE OF PRESIDING JUDGES*
25 May 1948 1650

Judge Curtis G. Shake, Executive Presiding

MEMBERS OF THE COMMITTEE PRESENT:

Curtis G. Shake, Presiding Judge, Tribunal VI
William C. Christianson, Presiding Judge, Tribunal IV
John C. Young, Presiding Judge, Tribunal V
Edward J. Daly,
Judge, acting for Hu C. Anderson, Presiding
Judge, Tribunal III

MEMBERS ABSENT:

None

GUESTS:

General Telford Taylor, Chief Counsel for War Crimes
Dr. Howard H. Russell, Secretary General

* * * * *

4. *Commission:*

A general discussion was held on the limited commission facilities which are not meeting present demands. It was suggested that Dr. Russell investigate the possibility of holding a third commission in one of the interrogation rooms, thereby cutting down on the personnel required, with Dr. Fried acting as commissioner. Failing that, it was agreed that Judge Crawford, as master commissioner, should make such equitable adjustment of the situation as possible.

* * * * *

[Signed] HOWARD H. RUSSELL
Secretary General

* Ibid., pages 152 and 153.

E. Farben Case—Various Items from the Record Concerning the Taking of Evidence on Commission

I. TRIBUNAL ORDER APPOINTING A COMMISSIONER,
18 NOVEMBER 1947*

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
18 NOVEMBER 1947

United States of America

vs.

Carl Krauch, *et al.*,

Defendants

} CASE 6

In order to discharge the obligation resting upon it to achieve an expeditious hearing of the issues and to avoid unreasonable delay (Military Government Ordinance No. 7, Art. VI), the Tribunal finds it necessary to issue the following:

ORDER

1. Mr. James G. Mulroy is hereby appointed a commissioner of this Tribunal to preside at and supervise the taking of the testimony of such witnesses as may hereafter, from time to time, be designated by the Tribunal on the official record of its proceedings.

2. Before assuming his official duties hereunder the said Mr. James G. Mulroy shall take, subscribe to, and file with the Secretary General an oath or affirmation to the effect that he will honestly, faithfully, and impartially perform and discharge his duties as such commissioner.

3. Said commissioner shall have power to administer oaths; take evidence; enforce the attendance of witnesses, parties, and counsel; preserve good order; fix and determine the time of his hearings; and do all other things reasonably necessary to the proper administration of his office; all subject to the directions of the Tribunal and review by the Tribunal for good cause shown.

4. The said commissioner shall cause a verbatim report of his proceedings, including the testimony and evidence taken before him, to be properly recorded, reported, certified to, and filed in the office of the Secretary General. All evidence so reported by the commissioner shall be considered by the Tribunal as of the same force and effect as evidence heard by the Tribunal in open court. The commissioner shall also cause an appropriate number

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 55, pages 122 and 123.

of copies of all such testimony and evidence, in the German and English languages, to be made available for the use of the Tribunal and counsel in this cause.

5. It shall be the duty of the Secretary General and the Marshal of the Tribunals to make available to said commissioner such facilities, services, and accommodations as may be reasonably necessary for the proper discharge of his official duties.

6. This order is without prejudice to the power and authority of the Tribunal to modify or rescind the same at its pleasure.

MILITARY TRIBUNAL VI:

[Signed] CURTIS G. SHAKE
Presiding Judge

[Signed] JAMES MORRIS
Judge

[Signed] PAUL M. HEBERT
Judge

[Signed] CLARENCE F. MERRELL
Alternate Judge

Dated this 18th day of November 1947.

2. DEFENSE REQUEST THAT THE COMMISSIONER BE EMPOWERED TO RULE UPON OBJECTIONS AND DISCUSSION THEREON

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
22 MARCH 1948²

DR. DIX (counsel for defendant Schmitz): I ask Your Honors' permission to make a short announcement. I hope that you will have some joy from this announcement, Your Honors. It serves to expedite the proceedings.

The Tribunal will remember that the defense, when the commission was instituted, asked for the privilege of having the Tribunal reserve its right to make decisions on objections. Since quite a few objections have not been decided on and, on the other hand, the defense counsel have made the acquaintance of the commissioner, all of defense counsel are agreed to have the commissioner empowered to make decisions on objections and we merely ask for the privilege of being permitted to petition these decisions to the Tribunal, if necessary.²

PRESIDING JUDGE SHAKE: Is the prosecution ready to express its view on the suggestion of counsel for the defense?

¹ Extract from mimeographed transcript, Case 6, U.S. vs. Carl Krauch, *et al.*, pages 9783 and 9784.

² The first hearing before a commissioner in the Farben case was held on 12 December 1947.

MR. AMCHAN (associate counsel for the prosecution): We are taken a bit by surprise, but it occurs to us that if the hearings before the commissioner are going along satisfactorily and the defense is satisfied with the way it is being handled, the prosecution is. I think we ought to continue with it. There have been no difficulties encountered by either side, as I understand it. I am doubtful what useful purpose will be served at this state if the commissioner is given authority to rule and in connection with those rulings the aggrieved party will probably apply to this Court seeking a review. It occurs to me that those additional lateral proceedings might lengthen the time. We are used to—we have experience in the proceedings as in effect. We are entirely satisfied to have them continue as they are now, especially in view of the statement of counsel that he is entirely satisfied with the manner in which the commissioner has conducted these hearings and he has had no occasion to petition this Tribunal to review any action of the commissioner. Under those circumstances, we would like to leave the matter as it is now which seems to work pretty well for all concerned.

PRESIDING JUDGE SHAKE: Dr. Dix, your offer is on the record. The Tribunal will take note of it and consider it and call the matter up at a subsequent time and express our disposition in that regard. Thank you very much.

3. FURTHER REQUEST BY THE DEFENSE THAT THE COMMISSIONER BE EMPOWERED TO RULE UPON OBJECTIONS AND DISCUSSION THEREON

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
16 APRIL 1948¹

DR. DIX: Your Honors, my attention is called to the fact that there is something about the commission which calls for help. The Tribunal will remember that the defense made a motion to give the commissioner the right to decide upon the objections raised in the commission.² The prosecution objected at the time, but they didn't give any reasons for their objection. They merely said that they preferred that things should remain the way they were—that is, that the commissioner should not have the right to decide on the objections.

Now the objections are piling up and, practically speaking, the matter goes on over the objections and the documents are admitted

¹ Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, pages 11681-11684.

² Reproduced in the section immediately preceding.

over the objections.* The questions are put and the answers are made over the objections for the sole reason that the commissioner doesn't have the right to decide on the objections.

This is a great factual disadvantage, an objectional disadvantage for the defense, not only from the point of view that an enormous amount of work is connected with reading the transcript and then asking the Tribunal to decide on the objections, but it is also an enormous amount of work for the Tribunal.

In addition, the practice has arisen that in the cross-examination of affiants of the defense, questions are asked beyond the limit of the affidavit and that, even without questions, documents are being introduced; that is to say, rebuttal documents are being submitted ahead of time which are connected with defendants who are not present, who are not informed about it, because the agenda only says that there is only one affidavit about one defendant. That puts the defense counsel concerned at a disadvantage, because they cannot deal with the documents in the redirect examination because they are not present.

In other words, it is an intolerable situation that two independent proceedings run simultaneously without the Tribunal remaining in control of both of them.

Therefore, I ask—and Your Honors designated it as a satisfactory offer of the defense—when we said that the commissioner should decide upon the objections of the defense—that this offer be accepted, and that the commissioner be given this authority; and I further ask that you should help us in some way and see to it that either all those affidavits or all those defense counsel not affected by the affidavits on the agenda be informed that documents will be introduced or requested which go beyond the limit of the affidavit so that they can represent the rights of their clients.

PRESIDING JUDGE SHAKE: Dr. Dix, I would like to discuss this matter with you just for a moment. Probably the Tribunal will have to consider it. I certainly would not want to take the responsibility of passing on it on behalf of my associates. In the first place, I think we stated to you at the time you made the motion that the reason for the practice that has prevailed was the feeling on the part of the Tribunal that we did not wish to have ourselves subjected to the possible criticism of having delegated judicial authority to some ministerial officer that we felt it was our responsibility in the first instance, at least, to assume

* This statement was made after the defense case had been under way for more than 3 months. The prosecution was using a considerable number of documents during the cross-examination of defense affiants, particularly for the purpose of impeachment. When the defense objected to the prosecution's offer of a document before the commission, only the Tribunal could pass upon the matter.

the responsibility of saying what was or was not competent evidence.

I may say also that the order transferring these affidavits to the commissioner for the purpose of supervising the cross-examination was specific in that the authority of the commissioner was just to conduct cross-examination.* I feel quite sure that I can speak for the Tribunal when I say that if the prosecution wishes to avail itself of the practice that we have indulged of also offering rebuttal material, that rebuttal material had better be offered in this Tribunal if it is to be considered by the Tribunal as such.

If you gentlemen will read the order—and applying this to the prosecution as well as the defense—you will find that the commissioner was authorized to conduct a cross-examination only and my own view is that it is not proper to use the commissioner for the purpose of offering rebuttal testimony. That had better be done before the Tribunal.

Now, I should like to ask you one thing further with reference to your view of the subject. When you suggest that the commissioner be allowed to pass upon the admissibility of evidence in these cross-examinations, do you have in mind that the ruling of the commissioner with respect to the admissibility of the evidence will be binding on both parties, or is it to be subject to review by the Tribunal? What is your view on that subject?

DR. DIX: Your Honor, when I made the motion at the time I said, of course, with a right of appeal to the Tribunal. I think we have to ask for this, that this Tribunal will have the final authority.

PRESIDING JUDGE SHAKE: Very well, then; now I think we do understand your situation and this is Friday afternoon. We shall be in recess very shortly now until Monday and I will undertake to say to you that the first thing Monday morning the Tribunal will dispose of this matter so that you will know just what the procedure is to be.

DR. DIX: May I say one more thing so that the prosecution will not be led to misunderstand me? I did not only speak of rebuttal documents, Your Honors—one could argue about what really constitutes a rebuttal document—but I also said that it is bad that cross-examination questions go beyond the limit of the affidavit, and in this respect the interests of other defendants are affected. These are two problems, then. I just wanted to say that in order

*In a written order of 26 February 1948, the Tribunal stated: "Testimony of all witnesses whose affidavits or interrogatories have been or which may hereafter be admitted in evidence in this case, and on which affidavits or interrogatories there has been no previous cross-examination, shall be taken before the said commissioner and verbatim report of such testimony shall be promptly made to the Tribunal as provided in the above-mentioned order, dated 18 November 1947." The order of 18 November 1947, the initial order appointing the commissioner, is reproduced in section E 1.

not to be misunderstood by the prosecution and so that the prosecution doesn't say we didn't introduce any rebuttal documents. We can discuss that.

PRESIDING JUDGE SHAKE: Now, I can put your mind at rest on one thing so that you may know how to plan your work, and that is that it is the view of the Tribunal that the purpose of the hearing before the commissioner is to conduct a cross-examination and the scope of the cross-examination is the affidavit which is the subject of the cross-examination, and we do take the view that to go beyond that is to go beyond the authority of the commissioner; and whether it is a matter that applies to some other defendant must be determined from the standpoint of the competency as to whether or not it is proper cross-examination as to the document that is the subject of the cross-examination.

I hope that is clear, and certainly the purposes of the cross-examination ought not be abused to the point of using that as a means of offering rebuttal testimony. That must be done here before the Tribunal unless we make some further order assigning some different duties to a commission; but, as matters stand, the functions of the commissioner are to conduct the cross-examination of the author of the affidavit, and the subject of the cross-examination is the affidavit which has been offered in evidence before the Tribunal. That much we can be clear about.

Now, the subject of the commissioner passing upon the admissibility of evidence: we will give you our decision on Monday morning.¹

4. TRIBUNAL RULING REFUSING TO EMPOWER THE COMMISSIONERS TO RULE UPON MOTIONS

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
20 APRIL 1948²

PRESIDING JUDGE SHAKE: I should like to make one ruling on behalf of the Tribunal, and that is with respect to the oral motion made on the record a few days ago by Dr. Dix on behalf of defense counsel. The substance of the motion was that the Tribunal should revise the orders appointing commissioners so as to vest the commissioners with the power in the first instance, to rule upon the admissibility of evidence subject, however, to ultimate review by the Tribunal.

The Tribunal has considered that matter, and, in the light of the circumstance that we are approaching the end of the evidence in

¹ The Tribunal's ruling is reproduced in subsection E 4 immediately following.

² Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, pages 11879 and 11880

this case, has come to the conclusion that it would not be wise to disturb the existing practice. May I point out to you the problem that would arise if the Tribunal should conclude, in a particular instance, that the commissioner had erred in excluding some testimony that had been offered by one of the parties. Under such circumstances, the witness might be no longer available, or the situation might arise so near the end of the trial as to make it impractical to bring the witness back to answer the question that had been excluded by the commissioner and that the Tribunal had concluded was proper. In addition to that, counsel will recall that when the matter of appointing a commissioner was first approached, there was some question raised as to the propriety of the Tribunal delegating judicial authority to an administrative officer. In the light of that objection, which we think has some fundamental merit, we believe that it would be better to continue the practice of permitting counsel to make their objections on the record, in the commissioner's hearing, and let the evidence be put on the record, and then the Tribunal will review the question upon request. In that way, if the question is deemed to have been improper, the answer will go out and be stricken. If the question is deemed to have been proper, the answer will be in the record and it will not be necessary to face the situation of finding and bringing back the witness at some considerable inconvenience and expense for everybody concerned, and for a very small matter, perhaps.

So, the motion made by Dr. Dix is now overruled. May I say, in the same connection, that if counsel for the prosecution and the defense will simply hand one of us a memorandum from time to time, citing the English page of the transcript where evidence has been offered, to which there were objections, we will undertake to rule on those before we approach the end of the evidence. That need not be and should not be in the form of a formal motion. We do not care to burden the Defense Center with that trouble. Just give us an informal, unsigned note or memorandum, calling our attention to the page on the English transcript where there was an objection that the interested parties would like to have the Tribunal pass upon. We shall take those, and from time to time, indicate our rulings and dispose of those matters.

5. DECISION OF THE TRIBUNAL TO PASS UPON FURTHER OBJECTIONS MADE IN COMMISSION WHEN CONSIDERING THE CASE ON THE MERITS

EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE,
7 MAY 1948*

PRESIDING JUDGE SHAKE: We shall also rule on the objections contained in the transcript of the proceedings of the commission, in part. The objection found on page 4653 of the English transcript is overruled. The objection on page 5013 of the transcript is sustained.

[The Tribunal continued to announce rulings on various objections.]

That is as far as the Tribunal has gone in the examination of the objections on the transcripts of the commissioner. May I say in that connection, gentlemen, that our experience in dealing with the character of the objections that have been called to our attention has led us to conclude that perhaps we ought to say that we believe that it would accomplish the ends of justice if we postponed the rulings on the transcript that have not yet been called to our attention until we come to the consideration of the case on the merits. It imposes a very heavy burden on the Tribunal to go through all of these objections. The character of the objections are such that since they deal with the problem with which the Tribunal must ultimately concern itself, it would perhaps be better for counsel to leave the matter stand as it is, rather than for us to take the time necessary to examine all of these objections and leave you gentlemen in a state of uncertainty as to what the rulings may be while you are preparing your briefs and your arguments. We shall complete the rulings on the objections that have already been specifically called to our attention by counsel for the defense, at the next session of the Tribunal, we hope—we think we can do that. But as to the objections contained in the record currently and subsequent to these, we believe, gentlemen, that if you bear in mind the fact that the Court will pass on those objections in considering the case on its merits rather than to leave you in a state of uncertainty until such time as you are preparing briefs and arguments, perhaps it would serve your ends as well and certainly relieve us of a very heavy burden of spending the time in going over those matters in the late stages of this trial. That will be our disposition in regard to that matter. However, as to those objections which have been called to our attention by

* Ibid., pages 13798-13800.

Dr. Dix in the memorandum he filed, we will complete that task and rule specifically on each of them. Perhaps at the next session we shall do that.

6. STATEMENT OF THE TRIBUNAL AT THE CLOSING OF THE EVIDENCE IN THE FARBEN CASE CONCERNING THE FINAL REPORTS OF THE COMMISSIONERS AND RELATED MATTERS

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
1 JUNE 1948¹

PRESIDING JUDGE SHAKE: Gentlemen, the Tribunal has previously announced that we are holding today's session for the sole purpose of closing the evidence in this case, on a number of outstanding matters which we have tried to keep in mind to bring to a conclusion today. I hope that we have not overlooked anything of any substantial interest or value.

The first matter that we have before us is that of the proceedings before the commissioners, Mr. Mulroy and Judge Crawford.² The Tribunal has, dated as of today, a fifth and final report from Mr. Mulroy, in which he recites the names of 12 witnesses who were examined before him, giving the dates of the examinations, the names of the witnesses, and the pages of the official transcript in which the testimony of those witnesses is recorded. His report further lists six exhibits that were introduced in evidence in the course of those examinations.

The Tribunal now deposits with the Secretary General, for the archives, this report made today by Mr. Mulroy, and the proceedings as entered and recorded in the official transcript of the Tribunal are now formally and officially made a part of the record in this case, and Mr. Mulroy is relieved and discharged from further responsibilities as a commissioner of the Tribunal.

We also have, as of today, a report from Judge Crawford, likewise giving the names of 34 defense witnesses and one prosecution witness that was examined before him, the dates of those examinations, and the pages of the official transcript in which the testimony of those witnesses has been entered on the proceedings of the Tribunal.

His report further discloses that 37 exhibits were introduced in evidence in the course of those examinations. The Tribunal now

¹ Ibid., pages 14508-14509.

² The order appointing Mr. Mulroy a commissioner is reproduced in subsection E 1. Judge Crawford was appointed a commissioner on 17 March 1948; the order of appointment being in substantially the same language as that concerning Mr. Mulroy.

recognizes, as a part of the official proceedings of this Tribunal, the evidence and the exhibits that were offered before Judge Crawford in the course of those examinations.

We now hand to the Secretary General for deposit in the archives the certificate of Judge Crawford, and his responsibility as a commissioner of this Tribunal is now recognized as having been fully discharged by the Tribunal.

F. Krupp Case—Various Items from the Record Concerning the Taking of Evidence on Commission

1. EXTRACTS FROM THE TRANSCRIPT OF THE PROCEEDINGS ON 16 JANUARY 1948¹

THE MARSHAL: Persons in the courtroom will please find their seats.

The Honorable, the Judges of Military Tribunal III.

Military Tribunal III is now in session. God save the United States of America and this Honorable Tribunal.

There will be order in the Court.

PRESIDING JUDGE ANDERSON: Mr. Marshal, will you ascertain if all the defendants are present in the courtroom?

THE MARSHAL: May it please Your Honor, all the defendants are present in the courtroom.

PRESIDING JUDGE ANDERSON: Let the record so show.

Judge Daly will preside for today's session.

MR. HUEBSCH (assistant counsel for the prosecution): Yesterday afternoon we had finished with Exhibits 704 which—

JUDGE WILKINS: Excuse me; Mr. Thayer, could you arrange for someone to appear before the commissioner today?²

MR. THAYER (Chief, Krupp Trial Team, for the prosecution): We can, Your Honor, if defense counsel are agreeable to it. I wasn't clear last night after the conference whether we could do that or not. We didn't want to insist upon it ourselves.

JUDGE WILKINS: Yes, you arrange for it. One of the witnesses is to appear before him at 1:30. I am sure you could make those

¹ Extracts from the mimeographed transcript, *U.S. vs. Alfried Krupp von Bohlen und Halbach, et al.*, Case 10, pages 1788-1791, and 1816-1818.

² On the preceding evening Judge Wilkins had held a discussion in chambers with representatives of counsel for both the prosecution and the defense concerning the matter of proceedings before the commissioner. Some days earlier, by written order of 16 January 1948, the Tribunal had appointed Carl I. Dietz as "a commissioner of this Tribunal to preside at and supervise the taking of testimony of such witnesses as may hereafter, from time to time, be designated by the Tribunal on the official record of its proceedings." The language of this order with respect to the powers of the commissioners, "all subject to the directions of the Tribunal and review by the Tribunal for good cause shown," was substantially the same as the earlier order of the Farben Tribunal appointing Mr. Mulroy as commissioner. See section XVII E 1.

arrangements. You work it out between you and the defense counsel.

DR. WECKER (associate counsel for defendant Krupp): May it please Your Honors, I don't know whether during the meeting after the session I made myself perfectly clear, if I pointed out the right of the defendant to be confronted with the witness. With that remark I wanted to indicate that all the defendants and their defense counsel will want to make use of their right which is laid down in Ordinance No. 7 to conduct cross-examination. This right for cross-examination is devised as we can see, from the American law on being confronted with the witness. For that reason, we were going to make the proposition, and I think it has been made quite clear that the commissioner should sit only on such days as the defendants who are concerned by the testimony of the witness and want to be present can really be present at the commissioner's hearing.

JUDGE WILKINS: You are not going to take the position, are you, that all of these witnesses have to appear here in court or on some day when the defendants may be present?

DR. WECKER: May it please Your Honors, that was really the point of view I was taking, and not because of my own personal sense of justice, but because of the explicit request of the defendants, that is to say all defendants, who refer to Ordinance No. 7 which guarantees them this right, and also because partly—

JUDGE WILKINS: Let me say this to you a minute. The particular point that we raised last night at our conference was this: The prosecution has certain witnesses who are now waiting here who have made affidavits which have been admitted in evidence, and under the rules, as you know, of Ordinance No. 7, we may accept statements or affidavits, and so on. Now as a courtesy to the defense, we stated at the outset that you would be given the opportunity to cross-examine these witnesses. It now develops that because of time we find that it will be impossible for us to have those witnesses appear because the best illustration of that is the witness Amman* who took almost 2 days and we just cannot take the time. So, we are now giving you the opportunity inasmuch as you requested the opportunity to cross-examine these witnesses—referring now to the witnesses who have executed the affidavits and where you requested the opportunity to cross-examine them, we are now giving you the opportunity to cross-examine them before the commissioner, and the prosecutor stated yesterday that there are several of them here now waiting for cross-examination. So, this afternoon, at 1:30, you will arrange with Mr. Thayer

*Ernst Amman testified as a prosecution witness. His testimony is recorded in the mimeographed transcript, 9 and 12 January 1948, pages 1378-1469.

then, for one of those witnesses to appear before the commissioner.

We have noted, and I am saying this just for the record, that while there are probably roughly 12 or 13 of the defense lawyers here this morning, often times in the conduct of this trial there have been as few as four and five, and as we see it there will be no great hardship at all for you to arrange for your more capable defense counsel to be present at those hearings before the commissioners. So Mr. Thayer, you will arrange for one of those witnesses to be before the commissioner at 1:30.

Judge Daly suggested that you have two present, so that if you have time to cover both that is what we desire.

MR. THAYER: I think, your Honor, we have given 24 hours' notice on two of the witnesses, Wagner and Krueger. May I inquire where such a commissioner hearing will be held?

JUDGE WILKINS: We will try to be in communication with the Secretary General. In the meantime we will arrange, if there is a courtroom available we will arrange for it in a courtroom. We will be able to give you more information on that before we adjourn at 1315, I'm sure.

DR. WECKER: May I ask just one more question, that is, whether the Tribunal has the rule that the commissioner, apart from the two cases which may be open to discussion, that on principle, the commissioner will also be allowed to sit on days when the defendants themselves cannot be present during the commission?

JUDGE WILKINS: Yes, it will be entirely up to the defense counsel, if you want the defendants here or whether you want certain ones of them to appear at the hearing before the commissioners.

May I suggest to you again that you already have an affidavit of these witnesses and you have copies of it so you know the testimony that this particular witness can give, and therefore, you can determine whether you want several of your defense lawyers there or just one or two.* That is a problem that you can easily determine because you have all the information before you from the affidavit.

DR. WECKER: Your Honor, we discussed the question yesterday whether it would be possible to use Saturday mornings for such sittings?

JUDGE WILKINS: Yes, Saturday mornings as well. We will

*A list of principal and associate defense counsel in the Krupp case is reproduced at page 6, volume IX, this series.

arrange for it tomorrow morning, as a matter of fact. Mr. Thayer, you can work on that theory and let us know at 1315 hours.

[At this point the prosecution continued with the offer of documentary evidence until the mid-morning recess.]

THE MARSHAL: Persons in the courtroom will please find their seats.

The Tribunal is again in session.

MR. RAGLAND (deputy chief counsel for the prosecution): Your Honors, prosecution is in a bit of difficulty with the document books. We planned after the completion of Document Book 23 to put on Document Book 25. We have Document Book 25 ready and the exhibits are ready. However, a copy was not served until 1 o'clock yesterday, therefore under the rules, it cannot go on until this afternoon.

JUDGE DALY, PRESIDING: Let's ask if defense counsel are willing to waive that rule.

DR. POHLE (counsel for defendant von Buelow): Does the Court expect my opinion concerning this document book?

JUDGE DALY, PRESIDING: We expect the opinion of any lawyer who has any thoughts on it.

DR. SCHILF (counsel for defendant Janssen): Your Honor, I am sorry that the defense has to say that we have to insist on the 24-hour time.

JUDGE DALY, PRESIDING: All right, if you insist on it, that is all the Court wants to know.

MR. RAGLAND: May I complete this? I understand the defense now insists on the 24-hour rule.

JUDGE DALY, PRESIDING: That is what I understood from what was just said.

MR. RAGLAND: We also have Document Book 26 which could be put on. Apparently there was some mix-up in the furnishing of exhibits. The books are ready and the exhibits are ready, except for the collection of exhibits. I understand from the document room that it will take 20 or 25 minutes in order for these exhibits to be collected.

JUDGE DALY, PRESIDING: How about these witnesses that you have? How many witnesses have you waiting to testify?

MR. RAGLAND: We have at least two with respect to whom 24 hours' notice has been given. I am not sure whether they are in the building at the moment, but I can check. We did ask them to be here at 1 o'clock this afternoon, in order that they may go on before a commissioner at 1:30.

JUDGE DALY, PRESIDING: My only reason for inquiring was so that we could use the Court's time between now and 1:30.

MR. RAGLAND: It would be possible to check in two or three minutes to see whether these witnesses are available, Your Honor.

JUDGE DALY, PRESIDING: All right.

DR. POHLE: Your Honor, may I use the time available until the witness is brought, to go back once again to the question of the commissioner which was discussed once this morning already. The question has to do with cross-examination. For the moment I should just like to say that according to Article IV (e) of Ordinance No. 7 each of the defendants has the right to cross-examine prosecution witnesses by means of his defense counsel in order to substantiate his defense. It is our conception that this regulation means that every defendant has the right to cross-examine each witness by means of his defense attorney. That is, to be represented at such examination and moreover a—

JUDGE DALY, PRESIDING: Just a minute. Is it the plan of counsel for defense that each time a witness is made available for cross-examination, that witness is to be examined by counsel representing these defendants? If that is the attitude of the defendants, we are entitled to know it at this time.

DR. POHLE: Yes, Your Honor.

JUDGE DALY, PRESIDING: All right, it will be done by commission as already stated. There are enough defense lawyers. I think that the record indicated there are 36 names on there. There may have been some duplications, one lawyer may appear for more than one person, but there are 20-odd lawyers in this case. Now there are sufficient lawyers to take care of you. We will proceed as announced.

DR. POHLE: Your Honor, we cannot jeopardize the rights of the defendants in this way. I understand the regulation to mean that the defendant first of all has a right to be present and I—

JUDGE DALY, PRESIDING: This Tribunal determines how it construes and reads the ordinances and it has the responsibility for it. If at any time your reading of an ordinance is different from ours, we constitute the Tribunal, and you will have to submit to our ruling on it.

DR. POHLE: Judge Daly, I shall do that, of course, and I only should like to express now that several of the defendants told me during the recess that they wanted to be present during cross-examination before the commissioner, according to their established right. As a matter of fact all 12 said so.

JUDGE DALY, PRESIDING: All right, you have your statement on the record.

[The transcript of the proceeding which follows is reproduced in section XXI E, which contains materials concerning the contempt of defense counsel in the Krupp case. This contempt arose from incidents developing when

defense counsel continued to speak after Judge Daly stated that there would be no further oral discussion concerning the taking of evidence on commission at this time.]

2. STATEMENT BY DEFENSE COUNSEL AT THE FIRST HEARING BEFORE A COMMISSIONER IN THE KRUPP CASE

EXTRACT FROM THE TRANSCRIPT OF THE PROCEEDINGS BEFORE COMMISSIONER DIETZ, 23 JANUARY 1948¹

COMMISSIONER DIETZ: Dr. Kranzbuehler, did you have something to say to the commissioner?

DR. KRANZBUEHLER (counsel for defendants Krupp and Ihn): Before beginning with the interrogation of witnesses before the commissioner, I should like to point out that the record ought to show in this case that every simultaneous proceeding before the Tribunal and before the commissioner are made against the objection of the defense. Since the objection has been overruled by the Tribunal, the defense, of course, is prepared to cooperate with the interrogations before the commissioner, and within the scope of this proceedings to safeguard the interest of their client as best they can.

COMMISSIONER DIETZ: The objection will be noted for the record, and we will proceed to call the first witness, he being Paul Krueger.²

3. DEFENSE MOTION TO VACATE TRIBUNAL ORDER DIRECTING THE TAKING OF EVIDENCE ON COMMISSION AND TO STRIKE ALL TESTIMONY TAKEN PURSUANT THERETO³

MOTION TO VACATE ORDER DATED 16 JANUARY 1948 AND TO STRIKE ALL TESTIMONY TAKEN PURSUANT THERETO⁴

COMES NOW the defendant Friedrich von Buelow and moves this Tribunal to vacate an order of this Tribunal dated 16 January 1948 and to strike all testimony taken before the "Commissioner" named therein on the ground:

¹ Extract from mimeographed transcript, *U.S. vs. Alfried Krupp von Bohlen und Halbach, et al.*, Case 10, page 2229.

² Krueger's testimony is recorded in the mimeographed transcript, 23, 24 January 1948, pages 2229-2276.

³ *U.S. vs. Alfried Krupp von Bohlen und Halbach, et al.*, Case 10, Official Record, volume 38, page 1089.

⁴ This motion was one of 15 filed on behalf of defendant von Buelow on the same day, all of which were dismissed in one order by the Tribunal. The Tribunal's order on these motions is reproduced at pages 253-254, following the defense to dismiss the indictment "for defects appearing on its face" and the prosecution's answer to that motion.

(1) that said order denies to the accused the right to be confronted by witnesses against him; denies to the accused "due process of law"; as guaranteed by the laws and the Constitution of the United States of America; as guaranteed by Control Council Proclamation No. 3, a copy of which is hereto attached, marked as Exhibit 1; as guaranteed in Military Government Letter No. 1 dated 10 January 1948, a copy of which is hereto attached, marked as Exhibit 2;¹ and as guaranteed by the rules and practice applicable to the trial of criminal cases in all civilized jurisdictions.

And the accused moves to strike from the record any and all testimony taken before the said "Commissioner" on the ground:

(1) that the said commissioner is not vested by law with the right or power to function as a judicial officer, or to administer oaths, or to otherwise take testimony as a substitute judge for this Tribunal.

This motion is based upon the record of trial, the exhibits hereto attached, and upon argument and the testimony to be adduced at the hearing thereon.

[Signed] JOSEPH S. ROBINSON

[Signed] DR. WOLFGANG POHLE by [Initial] W. C.
Attorneys for Friedrich von Buelow

4. ANSWER OF THE PROSECUTION TO THE DEFENSE MOTION TO VACATE THE TRIBUNAL ORDER ON TAKING OF EVIDENCE ON COMMISSION AND RELATED MATTERS

ANSWER AND MEMORANDUM TO MOTION TO VACATE ORDER DATED 16 JANUARY 1948 AND TO STRIKE ALL TESTIMONY TAKEN PURSUANT THERETO²

For the reasons hereinafter set forth, the United States respectfully opposes the Applications, designated as Motion No. 10 filed by each of the defendants, to vacate the order of this Tribunal appointing a commissioner and to strike all testimony taken pursuant thereto.

This motion, like other motions filed by the defendants, is in derogation of Ordinance No. 7 and cannot be entertained. Article VII of that ordinance makes affidavits admissible if the Tribunal deems them to have probative value. For the reasons set forth in the memorandum and answer filed in the Flick case and appended to the answer to Motion No. 1, this provision does not contravene due process. "A fair trial does not necessarily exclude

¹ Exhibits 1 and 2 are not reproduced herein.

² U.S. *vs.* Alfred Krupp von Bohlen und Halbach, *et al.*, Case 10, Official Record, volume 38, pages 1014 and 1015.

hearsay testimony and *ex parte* affidavits" (U. S. v. *et al.*, Flick, p. 10976). And while without in any way conceding that the basic principles of either the Constitution of the United States or Control Council Proclamation No. 3 have been departed from, we also point out that neither apply to the defendants in this proceeding.

While this Tribunal could have admitted affidavits without according the defendants any right to cross-examine the affiants thereon, it in fact appointed a commissioner, pursuant to the powers vested in it under Article V (e) "to appoint officers for the * * * taking of evidence on commission", to permit the defendants to cross-examine the affiants whose affidavits had been admitted in evidence. Appointment of such commissioner did not, however, enlarge the rights of the defendants nor give them a right to confrontation not available to them before. In fact, however, the defendants were not denied the right of confrontation. As pointed out in the answer to Motion No. 7, hearings before the commissioner were scheduled so as to insure that at no time would witnesses be heard before both the commissioner and the Tribunal and so that any defendant who desired to confront the witnesses against him was always able to do so.

The commissioner was duly appointed and authorized and no rights were denied the defendants by the order appointing him.

Wherefore the prosecution respectfully requests that the motion be denied.*

[Signed] RAWLINGS RAGLAND
Deputy Chief of Counsel

[Signed] CECELIA H. GOETZ
For: TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

12 April 1948

*The Tribunal, in dismissing this and 14 other motions filed at the same time by the defendant von Buelow, stated that "the respective replies of the prosecution are an adequate answer to said motions * * * and each of them should be overruled." The order is reproduced above at page 253.

G. Ministries Case—Various Items from the Record
Concerning the Taking of Evidence on Commission

I. TRIBUNAL ORDER, 3 MAY 1948, APPOINTING TWO
OF THE MEMBERS OF THE TRIBUNAL AS COMMISS-
SIONERS TO HEAR AND RECEIVE CERTAIN EVIDENCE*

MILITARY TRIBUNALS
TRIBUNAL IV, CASE 11

United States of America }
 against }
Ernst von Weizsaecker, *et al.* }

ORDER

It appearing to the Tribunal that the defendants Meissner and Schellenberg are prepared to further present both oral and documentary evidence in such case, which this Tribunal is not presently in position to hear and receive, and it appearing to the Tribunal that it is necessary in order to expedite the trial of this cause that a commission be appointed to hear the presentation and offer of such evidence and to certify the verbatim transcript of such testimony and examination to the Tribunal; NOW THEREFORE,

IT IS ORDERED that the Honorable Leon W. Powers, and Robert F. Maguire, judges of this Tribunal, be and they are hereby appointed as commissioners to constitute a commission and to hear the presentation and offer of such evidence as may be presented by the prosecution and of cross-examinations in connection therewith and to certify the same to this Tribunal for its consideration. To this end, each of the said commissioners is authorized to administer oaths, to direct the proceedings and to propound such questions as may seem advisable.

The Marshal is directed to procure such witnesses for direct and cross-examination from time to time as may be directed by the commission and until further order of this Tribunal. The hearings will be held in the regular courtroom of Tribunal IV, and the record shall be taken and recorded as done when the Tribunal is in open session. The first session of the commission hereby appointed will be held at 9:30 o'clock in the forenoon on Tuesday, the 4th day of May 1948.

*U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 73, page 1946.

This order is made pursuant to provisions of Ordinance No. 7, Article V, section (e).¹

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
For and in behalf of Tribunal IV

Nuernberg, Germany
3 May 1948

2. TRIBUNAL ORDER, 21 JULY 1948, APPROVING A STIPULATION OF THE PROSECUTION AND THE DEFENSE CONCERNING THE AUTHORITY OF COMMISSIONERS TO RULE UPON OBJECTIONS MADE DURING THE HEARING OF ORAL EVIDENCE²

ORDER

It appearing to the Court that a written stipulation has been entered into between the United States of America and the defendants Weizsaecker, Steengracht, Woermann, Ritter, Keppler, Erdmannsdorff, Veessenmayer, Bohle, Dietrich, Rasche, Lammers, Koerner, Pleiger, Kehrl, Darré, von Krosigk, Stuckart, and Puhl that in all cases where oral evidence is taken before a commissioner appointed by this Court and objection is made by any party to any question or answer, the commissioner shall rule thereon and that the commission ruling will be deemed acceded to by the parties and objections thereto waived unless within 5 days of the date when ruling is made the party or parties aggrieved shall file with the Tribunal a petition for the review of the commissioner's action and it appearing to the Tribunal that said stipulation is both appropriate and necessary the same is hereby approved.

And IT IS HEREBY ORDERED that in all cases where oral evidence is taken before a commissioner appointed by this Tribunal and objection to any question or answer is made by any party, the commissioner shall rule thereon, which ruling will be deemed acceded to by the parties and objections thereto waived unless within 5 days of the date when the ruling is made the party or parties aggrieved thereby shall file with the Tribunal a petition for the review of the commissioner's action.

The Tribunal upon consideration of any petition for review will determine the propriety of the commissioner's ruling and make appropriate ruling with respect thereto.

¹ Pursuant to this order the case in chief on behalf of the defendant Meissner was almost entirely presented before the commissioners. However, the presentation of evidence on behalf of Schellenberg was heard before the Tribunal.

² U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 39, page 387.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

Nuernberg, Germany
21 July 1948

3. TRIBUNAL ORDER, 23 JULY 1948, EXTENDING THE
EVIDENCE TO BE HEARD ON COMMISSION*

ORDER

Because of the undue amount of time which has been and is being consumed in the presentation of evidence on behalf of the defense and the necessity for greater expedition in the progress of the trial, the Tribunal, after due consideration of all factors involved, has determined upon the following course of proceeding, which is hereby ordered:

1. Until all defendants who so desire shall have testified before the Tribunal, the Tribunal will not itself hear testimony of other witnesses.

2. The testimony of all witnesses other than the defendants themselves in the first instance will be presented before the Tribunal's commission.

3. After the defendants shall have testified before the Tribunal, if due and expeditious progress has been made, the Tribunal will entertain and consider application from the defendants to itself hear the testimony of witnesses who have been or otherwise would be heard before the commission. Pending testifying in his own behalf each defendant shall proceed diligently to present his other testimony before the commission.

4. All rebuttal and surrebuttal testimony will be taken in the first instance before the commission unless, for special reason shown by written application, the Tribunal determines otherwise.

5. Each defendant after giving testimony before the Tribunal shall complete the testimony of any remaining witnesses before the commission.

6. The case of each defendant shall be completed by the earliest practicable date and upon such completion counsel for prosecution and defense will prepare and submit to the Court their trial briefs relating thereto.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

Nuernberg, Germany
23 July 1948

*Ibid., pages 396 and 397.

4. DEFENSE MOTION AND ARGUMENT IN OPEN COURT, 29 JULY 1948, REQUESTING THE TRIBUNAL TO AMEND ITS ORDER OF 23 JULY 1948, AND STATEMENT OF JUDGE POWERS WITH RESPECT THERETO

EXTRACT FROM TRANSCRIPT OF THE MINISTRIES CASE, 29 JULY 1948¹

DR. KUBUSCHOK (counsel for defendant Rasche and general spokesman for defense counsel): May it please Your Honors, in my capacity as spokesman for all defense counsel, I would like to make a statement concerning the order of this Tribunal of 23 July 1948.² The Tribunal has ruled that as a matter of principle all defense witnesses are to be examined before a commissioner and it merely left open one thing, that at a later stage, that is, after the defendants themselves had been heard, the Tribunal will consider applications from defense counsel to have specific witnesses heard directly before the Tribunal. The examination and consideration to be given to such motions will depend on the amount of time spent on the previous examination of the defendants themselves before the Tribunal. Defense counsel on numerous occasions have expressed their misgivings against witness testimony being rendered before a commission. It must be pointed out that the provisions of Article V (e) of Ordinance No. 7,³ must undoubtedly be considered as an exceptional provision on the basis of which non-essential parts of the proceedings *in toto* may be withdrawn from direct oral discussion before the Tribunal itself. The ruling of the Court introduces a fundamental deviation from and challenge to the principle of direct presentation of evidence before the ruling Tribunal itself, and must increase the existing misgivings to such an extent that the objective of any legal proceedings no longer appears to be safeguarded — that is, to establish the given facts of a case through the judges who were appointed to render a just judgment. Thus, the basis for a due process seems to be endangered. Defense counsel recognize a fact which can be discerned now; that this trial will last for a considerable length of time. However, they take the point of view that the defense counsel cannot be blamed for such duration of trial. The introduction of an immense quantity of evidence by the prosecution, a large part of which concerned general charges made it necessary for defense counsel of each individual defendant often

¹ Extract from mimeographed transcript, Case 11, U.S. *vs.* Ernst von Weizsaecker, *et al.*, pages 14018-14023.

² Reproduced immediately above.

³ "The Tribunals shall have the power (e) to appoint officers for the carrying out of any task designated by the Tribunals, including the taking of evidence on commission."

to enter into charges which, as a matter of fact, were not expressly connected with his respective client, where, however, the possibility was not excluded that they might eventually be applied, in due course, to the particular defendant. The general misgivings existing against abandoning the principle of direct proceedings are much too clear for it to be necessary at this point to list them again. Beyond that, however, I should like to point out that those of the defendants whose case in chief is now to be presented, in due course, to Your Honors are going to be prejudiced compared with the cases in chief already presented and also compared with the case in chief of the prosecution which has already taken place. The almost complete shifting of witness testimony to commission, and the number of witnesses to be heard by the commission daily, renders it impossible for each defendant who is interested in the respective witnesses' testimony to attend the examination of those witnesses; and also, it renders it impossible for the respective defendant to exercise his right of presence at the proceedings as granted by Article IV (*d*) of Ordinance No. 7. By means of this right, there is no doubt that the defendant is to be granted the prerogative of having a direct part in all phases of the proceedings which may affect his interests, irrespective of the fact as to whether the proceeding takes place before the Tribunal itself or before a commission. Hence, if in the future witness testimony is submitted in speedy sequence before a commission it will be impossible, for example, for a defendant of the economic group to attend the witness' testimony before the commission in which they are specifically interested, while simultaneously the cases in chief of the individual economic defendants are being presented before the Tribunal. Aside from these legal misgivings there are also considerable misgivings as to the usefulness and feasibility of the new regulation. If, as a result of the provisions of the new ruling of the Tribunal, the principle is abandoned that it be left to either party to arrange for the proper sequence and the selection of their evidence, this fact also requires a total change in the plan of defense counsel still to be heard.

If the case in chief begins with the testimony of the defendant on his own behalf, and if the question as to whether witnesses will be heard by the Tribunal itself is not yet clarified at the time the defendant takes the witness stand, then it will become necessary, for reasons of safety and security, for the defendant himself to discuss certain facts and matters which previously had only been scheduled as subject matter to be discussed on behalf of the defendant by a witness appearing on his behalf before the Tribunal itself; for there will always be some items and subject matter of such importance as to urge defense counsel to insist

on having them treated before the Tribunal itself. If defense counsel has the opportunity first of all to clear up such queries and points by calling a witness to the witness stand, then in his examination of the defendant it may only be necessary to refer to the matter again very briefly, in the event that some doubt remained to be clarified. Now under the new procedure, for reasons of security and in his client's interest, he will be compelled to discuss such items fully, and thus the speeding up of the trial will be frustrated from the very start. It also seems to be a regrettable fact that now it will no longer be possible to initiate the treatment of the defendant's case in chief by calling in an expert witness, first of all, who is experienced in the particular field and capable of rendering testimony in it. This was certainly intended in many instances in connection with cases still to be presented in this trial, since these cases, to a much greater extent than the previous ones, will concern totally new fields and spheres, and therefore, so to say, will represent smaller individual trials within the entire over-all scope of the main trial. In view of the above, the defense counsel respectfully beg Your Honors to give consideration to the legal and practical misgivings stated above, and respectfully request that Your Honors' order of 23 July 1948 be suitably amended.

JUDGE POWERS, PRESIDING: I suppose the legal procedure would be to file a written motion to come on in the ordinary course and, of course, you have the privilege of doing that. In the meantime, however, let me assure you that no prejudice is going to result to any defendant. Your statement assumes that the Tribunal possesses far greater mental capacity than it actually possesses. We don't remember all this testimony. We are going to have to read it, and it reads just as well whether taken before the commissioner or taken before the Court. The experience thus far in the case confirms the view of the Tribunal that no prejudice is going to result to anybody. However, if you want to file a motion the Court, will, in the regular order of procedure, make whatever order it thinks is appropriate. If you want to consider this as a motion, and I suppose it is in that form, the Tribunal, I guess, is willing to waive the requirement that it be in writing.

DR. KUBUSCHOK: Yes, Your Honor, I'll repeat it in writing.

JUDGE POWERS, PRESIDING: We will consider it as a motion and give the matter some consideration and announce a ruling a little later.*

*The order containing the Tribunal's ruling is reproduced immediately below.

5. TRIBUNAL ORDER AND MEMORANDUM, 17 AUGUST 1948, DENYING DEFENSE MOTION OF 29 JULY 1948*

ORDER

On 29 July 1948, Dr. Egon Kubuschok, in behalf of the defendants generally in these proceedings, made a motion before the Tribunal, praying that the Tribunal rescind that certain order made by it on 23 July 1948, relating to the examination of certain witnesses before commissions appointed by the Tribunal.

The Tribunal having considered said motion, and being fully advised in the premises, IT IS ORDERED that said motion be, and the same is hereby, denied.

Memorandum hereto attached is made a part of this order.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

Nuernberg, Germany
17 August 1948

MEMORANDUM

On 29 July 1948, shortly after the motion herein considered was made, the Tribunal announced that said motion was being denied, and that a formal order to that effect would later be made. The formal order hereto attached was accordingly made pursuant to such announcement.

In making this order, the Tribunal desires to reiterate that it is under a duty to conduct these proceedings as expeditiously as is possible and consistent with fairness to all parties concerned. It wishes to emphasize, however, that, although the order here in question was made to facilitate the trial, such order would not have been made if the Tribunal had not been satisfied, beyond a shadow of a doubt, that no prejudice would result to the defendants therefrom.

Article V, paragraph (e), of Ordinance No. 7, in defining the powers of the military Tribunals, states that they shall have the power "to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission." The Charter also contains a similar provision, and it appears that the taking of evidence before commissions was extensively employed during the IMT proceedings.

The contention of some of the defendants that they are being discriminated against by the order in question, because commissions were scarcely used during the presentation of the prosecu-

*U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 77, pages 8619-8621.

tion's case, is clearly without merit. This becomes clear to anyone who considers the conditions prevailing in this case. The case has been in progress for over 7 months. At the close of the prosecution's case, the transcript record of evidence taken before the Tribunal was exceedingly voluminous and, in addition thereto, thousands of exhibits had been received in evidence. For over three and a half months since the close of the prosecution's case, the defendants have been engaged in presenting their respective cases. The record which, as above indicated, was exceedingly voluminous at the commencement of the defendants' cases, has been greatly lengthened during the three and a half months of their presentation, and hundreds of additional exhibits have been introduced in their behalf. Several more weeks will be required to complete the taking of evidence. When all the evidence to be introduced has been received, and the case is finally submitted to the Tribunal, the Tribunal will have before it for consideration a transcript record of stupendous proportions and several thousand exhibits, altogether comprising such a voluminous record as is rarely submitted to a tribunal.

The members of the Tribunal feel that they are endowed with fairly good memories; they realize, however, that it would be sheer foolhardiness for them to make a decision upon the evidence introduced before the Tribunal by the prosecution, in the light of the impressions retained in their memories from the times several months ago, when hundreds of items of evidence were introduced. The Tribunal must, under such circumstances, rely upon the record transcript of the evidence and the exhibits introduced, in giving final consideration to such evidence. Inasmuch as the Tribunal must and will do this with respect to the prosecution's evidence, similar treatment of the defendants' evidence surely will result in no discrimination against the defendants. The fact that the transcript record in one instance is made up of evidence which was partly received before commissions and partly before the Tribunal itself makes no real difference between the record of the prosecution and the defense, for the record coming partly through the commissions is as correct with respect to competency and relevancy as is the record made from evidence which was introduced almost entirely before the Tribunal, for the Tribunal has final decision on questions of admissibility of evidence offered before the commissions.

Therefore, when the record is finally submitted to the Tribunal, so much thereof as comprises the record of the defendants' cases will, for all practical purposes, represent as clearly and completely all evidence taken in their behalf as will the record of the prosecution represent the evidence in its case. From the records

thus made, it will be possible for both sides to thoroughly argue and brief the evidence for the Tribunal.

In the light of these considerations, the Tribunal is of the opinion that the objections urged against the order of 23 July 1948 are without merit, and therefore the motion of defendants to rescind such order is denied.

[Initials] W.C.C. [WILLIAM C. CHRISTIANSON]

17 August 1948

XVIII. RULES AND PRACTICE CONCERNING VARIOUS TYPES OF EVIDENCE

A. Introduction

The Nuernberg trials were international in character. The Tribunals were not bound by technical rules of evidence as recognized in any jurisdiction of the United States of America or of any other country. The Tribunals tried the cases and there were no juries. The main test of the admissibility of evidence was established by the requirement that the Tribunals admit any evidence which they deem "to have probative value." Articles VII and VIII of Ordinance No. 7, which dealt principally with the rules of evidence and related procedures, are reproduced in subsection B, along with the comparable provision of the IMT Charter. Article VII stated that "the following shall be deemed admissible if they appear to the Tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations and other statements, diaries, letters, the records, findings, statements and judgments of the Military Tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any documents or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay." The Tribunal was required under the Ordinance to "afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the Tribunal the ends of justice require."

For the most part the materials in this section have been grouped into sections according to general types or broad categories of evidence. In many instances the line between these categories is not distinct and in some cases there is the usual overlapping that comes about because of the very dynamics of trial practice. To begin with, the half dozen rules of the Uniform Rules of Procedure which deal with a variety of matters incidental to the offering of various types of evidence have been set forth (subsec. C). This is followed by materials on contemporaneous or captured documents (subsec. D). Although some books and publications dated before Germany's collapse dealt with the facts under issue, and in some cases clearly fell into the rules concerning contemporaneous documents, different rules developed in some of the cases concerning books and publications which were not contemporaneous or which were offered as authoritative opinion evidence, or for some other special purpose. Therefore, rulings on the admissibility of various kinds of books and publications

from the Medical and Ministries trials have been reproduced separately (subsec. E.) The next eight subsections (F–M) deal with testimony or admissions of different kinds, including testimony given by affidavit and deposition and including admissions by defendants given in affidavits or in interrogations before trial. Testimony by witnesses who appeared in person to testify before the Tribunals (and in some cases before commissioners of the Tribunals) has been broken into two parts, testimony by persons other than defendants (subsec. F), and testimony by defendants (subsec. G). The next three subsections H–J deal with the employment of affidavits, interrogatories, and depositions — sometimes referred to popularly as “affidavit evidence” when discussing matters of practice. Since the IMT practice in this field had great influence as a persuasive precedent upon later developments, illustrative materials from the IMT case have been grouped together (subsec. H), and since the Medical case, as the first trial before a Tribunal established under Ordinance No. 7, likewise stands in a special position, selections from the Medical case have also been reproduced separately (subsec. I). Illustrative materials from the records of each of the other eleven cases have been reproduced together, according to the order in which the indictments in the cases were issued (subsec. J). These last three subsections exclude, except for passing references, affidavits of defendant made before trial. Pre-trial interrogations of defendant and pre-trial affidavits by defendants raise quite distinct problems, and they are treated separately (subsec. K). The introduction of “affidavit-evidence” led to various rules concerning the cross-examination of affiants or the submission of cross-interrogatories to affiants. Accordingly, the affidavit of a deceased affiant presented special difficulties, since the only means of meeting such an affidavit was by counterevidence and argument. Materials on the affidavits of deceased affiants are reproduced separately (subsec. L), partly because this matter raised distinct questions and partly because the materials included are quite extensive.

In a number of instances parts of the testimony given by a witness in one trial were offered in evidence as an exhibit in another trial. Several illustrative extracts from the Medical and Farben cases on this practice are reproduced in subsection M.

In the Medical case the Tribunal refused a defense request to conduct high-altitude experiments employing low pressure chambers under the supervision of the Tribunal (subsec. N). A number of the defendants were charged with participation in high-altitude experiments upon concentration camp inmates, and

under the defense proposal several of the defendants were to be subjected to these experiments.

Only one case has been found where the members of the Tribunal and representatives of the prosecution and defense visited the scene of alleged criminal conduct as a part of the official proceedings. This occurred in the Hostage case where a visit to Norway was made upon the invitation of the Norwegian Government (subsec. O).

The nature and context of the various arguments and rules in subsections D-O are briefly outlined in separate introductions to the respective subsections. The materials reproduced herein by no means exhaust, even by way of illustration, the rules and practices of evidence which may be considered important or interesting. However, in addition to the usual limitations of personnel and of space, certain limitations are inherent in the very nature of the subject matter. For example, rulings rejecting evidence as having no probative value or as being too remote were ordinarily made without any narrative explanation of the reasons. An understanding of these bare rulings would require a knowledge of the evidence proffered as well as a picture of the issues as they appeared at the time the rulings were made. Similarly, a ruling rejecting evidence offered on rebuttal ordinarily would serve little purpose unless lengthy materials could be set forth herein to show the status of the proof and counter proof on various issues at the close of the case in chief of the defendants.

A number of general observations by the Tribunals concerning the rules and practice of evidence are contained in the extracts from the judgments of the Tribunals reproduced in section VI. A number of other sections of this volume deal with matters closely related to rules of evidence. Certain findings in the judgment of the IMT were binding upon the later Tribunals, and statements in the judgment of the IMT constituted proof of the facts stated in the absence of substantial new evidence to the contrary. These matters are dealt with in section XV. Judicial Notice is the subject of section XVI, and the taking of evidence on commission the subject of section XVII.

B. Provisions of Articles VII and VIII, Ordinance No. 7

Article VII

The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the

foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

Article VIII

The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof.

Comparable provisions of the Charter of the IMT are the following:

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

* * * * *

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

C. Uniform Rules of Procedure—Rules 9, 17, 18, 19, 21, and 22*

Rule 9. Oath; Witnesses

(a) Before testifying before the Tribunal each witness shall take such oath or affirmation or make such declaration as is customary and lawful in his own country.

(b) When not testifying, the witnesses shall be excluded from the courtroom. During the course of any trial, witnesses shall not confer among themselves before or after testifying.

* * * * *

*The Uniform Rules of Procedure, as last revised, are reproduced in full in section V. The six rules here involved were not changed throughout the course of the trials.

Rule 17. Prosecution to File Copies of Exhibits—Time for Filing

The prosecution, not less than 24 hours before it desires to offer any record, document, or other writing in evidence as part of its case in chief, shall file with the Defendants' Information Center not less than one copy of each record, document, or writing for each of the counsel for defendants, such copy to be in the German language. The prosecution shall also deliver to Defendants' Information Center at least four copies thereof in the English language.

Rule 18. Copies of All Exhibits to be Filed with Secretary General

When the prosecution or any defendant offers a record, document, or other writing or a copy thereof in evidence, there shall be delivered to the Secretary General, in addition to the original of the document or other instrument in writing so offered for admission in evidence, six copies of the document. If the document is written or printed in a language other than the English language, there shall also be filed with the copies of the document above referred to, six copies of an English translation of the document. If such document is offered by any defendant, suitable facilities for procuring English translations of that document shall be made available to the defendant.

Rule 19. Notice to Secretary General Concerning Witnesses

At least 24 hours before a witness is called to the stand either by the prosecution or by any defendant, the party who desires the testimony of the witness shall deliver to the Secretary General an original and six copies of a memorandum which shall disclose: (a) the name of the witness; (b) his nationality; (c) his residence or station; (d) his official rank or position; (e) whether he is called as an expert witness or as a witness to testify to the facts, and if the latter, a brief statement of the subject matter concerning which the witness will be interrogated. When the prosecution prepares such a statement in connection with a witness whom it desires to call, at the time of the filing of the foregoing statement two additional copies thereof shall be delivered to the Defendants' Information Center. When a defendant prepares the foregoing statement concerning a witness whom he desires to call, the defendant shall, at the same time the copies are filed with the Secretary General, deliver one additional copy to the prosecution.

* * * * *

Rule 21. Procedure for Obtaining Written Statements

Statements of witnesses made "in lieu of an oath" may be admitted in evidence if otherwise competent and admissible and containing statements having probative value, if the following conditions are met:

- (1) The witness shall have signed the statement before defense

counsel, or one of them, and defense counsel shall have certified thereof; or

(2) The witness shall have signed the statement before a notary, and the notary shall have certified thereto; or

(3) The witness shall have signed the statement before a Buergermeister and the Buergermeister shall have certified thereto, in case neither defense counsel nor a notary is readily available without great inconvenience; or

(4) The witness shall have signed the statement before a competent prison camp authority, and such authority shall have certified thereto in case the witness is incarcerated in a prison camp.

(5) The statement "in lieu of an oath" shall contain a preamble which shall state, "I, (name and address of the witness) after having first been warned that I will be liable for punishment for making a false statement in lieu of an oath, state and declare that my statement is true in lieu of an oath, and that my statement is made for submission as evidence before Military Tribunal _____, Palace of Justice, Nuernberg, Germany, the following:"

(6) The signature of the witness shall be followed by a certificate stating; "The above signature of (stating the name and address of the witness) identified by (state the name of the identifying person or officer) is hereby certified and witnessed by me." (To be followed by the date and place of the execution of the statement and the signature and witness of the person or officer certifying the same.)

Rule 22. Special Circumstances

If special circumstances make compliance with any one of the above conditions impossible or unduly burdensome, then defense counsel may make application to the Tribunal for a special order providing for the taking of the statement of desired witness concerning conditions to be complied with in that specific instance.

D. Contemporaneous and Captured Documents

I. INTRODUCTION

A number of fundamental matters relating to the practice in the presentation of documentary evidence has already been taken up earlier in section VII, "Handling of Language Problems Arising Because of the Bilingual or Multilingual Nature of the Nuernberg Trials." Whether documents were contemporaneous with the acts charged by the indictment or whether they were affidavits, depositions, interrogatories, or other written material, they were

introduced as exhibits, each exhibit consisting of the original or a certified copy of the original document. Any discussion of the practice with respect to documentary evidence necessarily touches upon the employment of document books, and accordingly the utilization of document books must be explored further at this point.

In the trials following the IMT case, mimeographed copies of most of the exhibits were bound together in document books according to an arrangement determined by the offering party. Ordinarily a document book contained documents dealing with only one count, one topic, or one defendant. For reference purposes the prosecution document books were numbered consecutively, as were the document books on behalf of a defendant or the so-called "general defense" document books. Each document book contained an index or table of contents giving the document number, a space where the exhibit number could be entered at the time of offer, a description of each document, and the page of the document book at which each document could be found. Under the description of the document the offering party identified the document and often made self-serving statements or summaries indicating the purpose of the document and the importance ascribed to it by the offering party. Sometimes quotations of parts of the document thought to be particularly important were given in this description. As an illustration of one of the more elaborate types of indices, the title page and index to the first 16 documents from a defense document book in the Farben case are reproduced in section 2. This document book was one of a series entitled "Documents on German Foreign Policy, Introduced for the Purpose of Proving the German People's Ignorance of Hitler's Plans to Wage Aggressive Wars." It was one of many used by the defense in the Farben trial in successfully countering the prosecution's evidence in support of the charges of criminal participation in crimes against peace. The descriptions in the indices to the document books were, of course, treated as argument and the opposing party was free to make counter-observations in its oral arguments or written briefs.

The larger part of the contemporaneous documents, those authored before the surrender of Germany in May 1945, were captured German documents. Captured German documents were the principal evidence relied upon by the prosecution in each of the Nuernberg trials, and the practice which evolved with respect to their admission is a most significant chapter in the history of adjective law at Nuernberg. Captured documents received in Nuernberg by the American prosecution before and during the IMT case were registered by and processed under the supervision

of the Documentation Division, Office, United States Chief of Counsel. Major Coogan, Chief of the Documentation Division, executed an affidavit which described at some length how the documents were captured, analyzed, registered, translated, and safeguarded. This affidavit, which in time came to be commonly called the "Coogan affidavit," was submitted in evidence at the beginning of the IMT case. Documents received in Nuernberg after the close of the evidence in the IMT case were registered by and processed under the supervision of the Document Control Branch, Evidence Division, Office, United States Chief of Counsel for War Crimes. The chief of this branch, Mr. Fred Niebergall, executed an affidavit similar to the Coogan affidavit, which dealt with the discovery and processing of the captured documents not dealt with by the Coogan affidavit. Both the Coogan and the Niebergall affidavits were introduced in evidence in each of the later trials as a part of the general authentication of the captured documents to be offered. The Coogan and Niebergall affidavits have both been reproduced earlier in this volume in section VII D, "Captured German Documents—Discovery, Registration, Reproduction of Copies, Safekeeping."

After making its opening statement, it was the uniform practice of the prosecution to make an initial statement to the Tribunal concerning its plan of presenting evidence, an important part of which was devoted to laying the foundation for the offer and authentication of captured German documents. The introductory statement in the IMT case by Col. Robert G. Storey, Executive Trial Counsel for the United States Prosecution, is reproduced in "Trial of the Major War Criminals," *op. cit.*, volume II, pages 156–161. A similar introductory statement of the prosecution in the Medical case, the first trial before a tribunal established pursuant to Ordinance No. 7, is reproduced in section VII E. During the preliminary statements in the later 12 trials the Coogan and Niebergall affidavits were offered in evidence as prosecution exhibits, and sometimes the Niebergall affidavit was read in full or in part to the Tribunal in open court.

In addition to the general foundation for authenticating captured documents furnished by the Coogan and Niebergall affidavits, the prosecution submitted a certificate with each captured document offered as an exhibit. An example of these individual certificates is reproduced in 3 below. The exhibit in question was a photostatic copy of an unsigned carbon copy of a memorandum listing the membership and positions of the defendant Alfried Krupp von Bohlen und Halbach in more than 30 enterprises and organizations. This memorandum had been found in folder KG/7 of the files of the defendant at the headquarters of the Krupp

concern in Essen, Germany. This document (*NIK-10660, Pros. Ex. 5*) was offered on the first day of the prosecution's presentation of evidence. The defense objected to its admission on the ground that it bore no signature and that no evidence had been submitted as to its author or as to where it came from. After considerable discussion the Tribunal admitted the exhibit in evidence, stating that the objection went rather to the weight than to the admissibility of the document. The transcript of the discussion which arose in court, the Tribunal's ruling, and a later discussion of the general practice of submitting certificates along with exhibits is reproduced in 4 below.

The Uniform Rules of Procedure contained no specific provisions on the filing of certificates concerning the discovery and location of documents, and none concerning the precise methods for their authentication. Frequently the defense offered documents without a certificate. Where the prosecution objected to this practice, admission of the document was held in abatement pending the submission of such a certificate. This practice is illustrated by an extract from the transcript of the Medical case, reproduced in 5 below. When the prosecution did not object, uncertified defense exhibits were usually admitted without further ado. The admission of defense exhibits without certificates was discussed by the Tribunal archivist in her final report, which is reproduced on pages 196-207. Under a chapter called "Problems of Defense Exhibits," the archivist stated:

"Hundreds of defense exhibits have been accepted in evidence in the various cases, in the form of mimeographed or photostat copies without certificates; many of those which did have certificates were superficially certified to by the counsel for the defendant involved."

Occasionally the defense requested further particulars beyond those contained in the certificate accompanying the individual prosecution exhibits. For example, in the High Command case the defense moved that the prosecution be directed to furnish information on when and where four documents were found; the files and collection of files from which the documents were taken; the German agency in which the document originated; what had been discovered concerning the author of the document, and "What other circumstances have been found which may be of importance for the judgment of the document?" In answering this motion the prosecution supplies information in answer to each of the defense questions, except to the general question last quoted above. The answer stated further that without formal request the defense could obtain such information from the Document Room of the Archives of the IMT (all four of the documents

in question had been received in evidence in the IMT case), or from the library of the Nuernberg court house. The Tribunal denied the defense motion as not well taken. The defense motion, the prosecution answer (less the last part of the appendix thereto), and the Tribunal order are reproduced in 6 below.

Ordinarily the defense raised no questions concerning the authenticity of captured documents. The preliminary parts of the judgments in most of the cases make some reference to the role of captured documents in the trial (sec. VI). For example, it was stated in the early part of the judgment in the Justice case: "In rendering this judgment it should be said that the case against the defendants is chiefly based upon captured German documents, the authenticity of which is unchallenged."

A captured file of German documents often contained carbon copies of outgoing correspondence as well as original copies of incoming correspondence. Sometimes the carbon copy of the outgoing letter did not contain copies of the enclosures mentioned in the text of the letter. The latter type of situation arose in the Flick case with respect to a carbon copy of a letter of the defendant Weiss. The defense objected to the admission of the document unless the enclosure (a circular) was likewise submitted. The prosecution stated that the enclosure had been sent out with the original letter, that no copy of the enclosure had been found, and that the prosecution had no objection to the defense submitting a copy of the enclosure if one were found. The Tribunal admitted the document, stating that the objection would be considered in determining what weight should be given the exhibit. The transcript of the prosecution's offer, the objection, the related discussion, and the Tribunal's ruling is reproduced in 7 below. Extracts from the proceedings in the Hostage case concerning two different types of unsigned documents are reproduced in 8 below, the first dealing with an unsigned copy of a military order, the second involving an unsigned carbon copy of a letter first introduced as an exhibit in the IMT case.

Many of the captured documents, such as minutes of meetings and war diaries, were very bulky, containing parts which were clearly relevant, parts with respect to which the parties had different ideas as to relevancy, and parts clearly not pertinent at all. The practice of the offering party under these circumstances was not uniform and was partly conditioned by the difficulties of reproducing and translating documents. Sometimes the offering party offered the entire document as an exhibit, but in the English document book included a translation of only those parts which the offering party considered relevant. The opposing party could later offer a translation of the further parts it considered relevant

in its own document books. In the Einsatzgruppen case the prosecution stated at the beginning that it would be its policy to offer the entire document as an exhibit, but that the document books would contain "only those portions which we have thought were in any way relevant in this case. Should our judgment have been faulty we shall gladly join defense counsel in the correction of it." When the defense in that case later raised a question as to one of the prosecution's documents, and subsequent informal discussion between the parties revealed that some pages of the document were missing in the exhibit, the prosecution procured the missing pages from Washington, D. C., and then offered the missing parts. The transcript of the prosecution's statement of its general policy and the later discussion in court when the error was pointed out and rectified is reproduced in 9 below.

Sometimes the offering party offered only a certified extract of a document as an exhibit, the translation in the document book corresponding with the extracts contained in the exhibit. If the offering party had in its files the parts of the document omitted, the opposing party, if it chose, could then demand the balance of the document and offer other parts of the document as an exhibit of the opposing party. However, the prosecution sometimes had in its files only those extracts which investigators in far away places had certified as the relevant extracts of lengthy reports or documents. This was particularly true with respect to lengthy field reports from various commands of the German Army which had been captured and taken to Washington or other places outside of Germany for military study. A complicated instance of this kind arose early in the Hostage case when the prosecution offered extracts from various teletyped reports made to the Wehrmacht Commander Southeast. The defense objected to the admission of the exhibit on the ground that the exhibit as offered contained only scattered pages from a document which clearly was of many pages in length. After considerable discussion, the Tribunal admitted the document, observing however that if the prosecution did not procure the missing pages upon a demand by the defense that the Tribunal would consider that fact in evaluating the matters shown by the exhibit as offered. The pertinent extract from the proceedings on this matter is reproduced in 10 below. Later on the Tribunal issued a general order concerning documents "from which documentary evidence has been taken and offered in evidence by the prosecution." The Tribunal order that these documents "be made available to the defendants (a) by permitting an examination of such documents by designated representatives of the defendants in Washington, D. C., or (b) by transporting such documents to Nuernberg for examination by

the defense, or (c) for failure of the United States to do so, it will be presumed that the evidence withheld which could have been produced or made available to the defendants, would be unfavorable to the prosecution." This order is reproduced in full on pages 410-412, in the section dealing with "Production of Documents for the Defense." Similar questions arose where the prosecution offered only one document or several related documents from files containing still other documents, or where individual documents were found and related documents had been destroyed or were not found. The handling of questions of this nature have been illustrated earlier in the various materials reproduced in section XIII L, "Production of Documents for the Defense."

The defense frequently offered parts of prosecution exhibits as defense exhibits, apparently desiring to emphasize the parts in question by the inclusion of mimeographed copies in their document books along with other related defense materials. The Tribunal rejected such an offer in the Medical case, observing that the prosecution exhibit was available to defense counsel for use in argument, but that offering it in evidence a second time was improper. The pertinent extract of the transcript containing the offer and rejection is reproduced in 11 below. This practice was not uniformly adhered to in all of the later trials.

Under Rule 17 of the Uniform Rules of Procedure, the prosecution was required to file copies of documents to be offered 24 hours in advance of their offer. Copies had to be filed in both German and English, and ordinarily service upon the Defendants' Information Center (later known as the Defense Center) was considered notice to the defense. The defense had to file copies of its documents with the Secretary General (through the Defense Center), but since the defense had no facilities of its own for translating and reproducing documents, the Uniform Rules contained no requirements as to notice. The Tribunals made constant efforts to have the defense counsel file their documents in time so that delays would not occur in the presentation of the defense case because of a sudden overburdening of the Translation Division. On many occasions a defendant was allowed to rest his case subject to submitting documents which had not yet been translated. This was a frequent practice in the Medical case, as illustrated by the transcript of the proceedings at the close of the case for the defendant Mrugowsky, reproduced in 12 below. Notice of documents to be offered was ordinarily accomplished by presenting the opposing party with the document books, both in German and English, containing mimeographed copies of the documents shortly to be offered. These document books were usually quite lengthy, averaging about 100 mimeographed pages, and when several trials

were being conducted concurrently, there were occasions when one party or the other "ran out" of document books. Ordinarily such occasions were anticipated and available witnesses were called. But this again required 24 hours' notice under Rule 19 of the Uniform Rules of Procedure, and occasionally adjournments had to be taken because the required notice had not been given with respect to either documents or witnesses, and because the opposing party would not waive notice. The Tribunals were authorized by Rule 24 of the Uniform Rules of Procedure to amend the rules on notice (amendments to any of the rules could be made "in the interest of fair and expeditious procedure"). No instance has been found, however, where the 24-hour rule was not enforced when the defense refused to waive notice, but on a number of occasions the defense was allowed to proceed over prosecution objection when the defense had not given the notice required by the rules. In the RuSHA case, on the second day of trial, the Tribunal adjourned the case for a day because the 24-hour rule had not run with respect to either documents or witnesses. The transcript of the discussion leading up to the adjournment is reproduced in 13 below. Short adjournments occasionally occurred in a number of the trials because the Reproduction Division had been unable to reproduce enough document books to meet the demands of several trials at a particular time.

The rule requiring 24 hours' notice of documents to be offered in evidence by the prosecution was not held to apply to documents used on cross-examination, for the obvious reason that this would have prevented surprise by giving fore knowledge of a means of impeachment to defendants or defense witnesses. A discussion of this question arose during the cross-examination of the first defendant in the Hostage case, and the pertinent extracts from the transcript of the proceedings concerning the discussion of counsel and the Tribunal's ruling are reproduced in 14 below. In the IMT case many of the most incriminating documents were not discovered until the trial was well under way, and some of the most dramatic moments of that trial came when defendants or defense witnesses were presented with such documents upon cross-examination. In the later trials the prosecution often held certain documents in reserve for purposes of cross-examination, a fact which the prosecution asserted in opposing defense applications for access to all documents in the prosecution's files (see sec. XIII L 8, "Pohl, Ministries and Farben cases—Defense Applications for Production of All Documents in the Possession of the Prosecution Which Originated from or Involved Particular Offices and Agencies"). This practice was accepted and approved in most of the cases. The Tribunal in the Farben case, for example, in grant-

ing the defendants access to copies of documents in the prosecution's files, made an exception with respect to those "documents which the prosecution, in good faith, expects to use in cross-examination or in rebuttal" (see p. 431). However, the Tribunal in the RuSHA case was critical of this practice. A statement of the presiding judge in the RuSHA trial on this matter is reproduced in 15 below. Copies of exhibits first used upon cross-examination were ordinarily circulated at the time or later as "loose documents," although such copies were sometimes made a part of a supplemental or rebuttal document book. Similarly copies of a comparatively small number of documents were occasionally submitted as "loose documents," either because they were not discovered in time for submission with related documents in a document book, or because their importance did not become apparent until a later stage of trial.

In most of the trials the party offering documentary evidence read parts of the documents which it considered of particular weight. This practice had developed to an unusual degree in the IMT case because of the language problem in a four-language trial. The translation staff was not large enough to translate in advance much of the large amount of documentation upon which the offering party wished to rely. Accordingly the offering party read the extracts in court so that, by means of the system of simultaneous interpretation, the judges heard in their own language the parts of the documents read, and subsequently the transcript in the various languages contained a record of the translations. The opposing party could thereafter read other parts of the documents. An example of the IMT's practice is illustrated by an extract from the transcript of the proceedings during the direct examination of the defendant Raeder, reproduced in 16 below. (For a fuller discussion of the practice of reading extensively from documents in the IMT case and the reasons therefor, see sec. VII A.) In the later trials, where only two languages were normally involved, translations were in the hands of all concerned before the offer of the documents, either in the document books or in the "loose documents" distributed separately from the document books. Therefore, in the later trials there was no language problem which made the reading of the documents imperative and, in fact, the reading of documents in the later trials led to the duplicate reproduction of translations in the document books, on the one hand, and later in the transcript of the daily proceedings. However, parts of the documents were still read in many of the later trials for one or more of several reasons: giving emphasis to the more important parts of the documents; supporting commentary or argument as to the purpose in offering documents; or making

it easier for the Tribunal to follow the progress of the proceedings from day to day without constantly reading from the voluminous document books outside of court. Quite often the defense encouraged the Tribunals to direct the prosecution to make comments on the alleged probative value of documents, in particular the relation of documents to the alleged criminal responsibility of particular defendants. The defense urged that such commentary afforded a substitute for a detailed bill of particulars. Generally speaking the Tribunals in the earlier trials permitted greater leeway in the reading from documents at the time of their offer than was the case in the later trials. The tendency in the later cases was to limit the reading from documents in open court and to encourage commentary, together with quotations from the documents, in the indices to the document books or in the later argumentation (closing statements and final briefs). The divergent practice between the Milch case (Case 2) and the RuSHA case (Case 8) is shown by extracts from the proceedings in those cases which are reproduced in 17 below.

Objections to documentary evidence normally were made at the time the document was offered as an exhibit. In the Hostage case, for example, the presiding judge made the following statement early in the trial:

“The Court wishes to make this statement, to the effect that where there is an exhibit offered, and there is no statement in the record of any objection, it is presumed that it will be received in evidence without objection, so you will keep that in mind in further proceedings before this Tribunal.” (*Tr. p. 162.*)

However, under the liberal rules followed by the Tribunal, later objections were allowed when the opposing party discovered a ground for objection not discovered at the time of the offer. In the Ministries case, where the documentary evidence of the defense was taken before commissioners appointed by the Tribunal (see order of 29 March 1948, reproduced on pp. 282–284), only the Tribunal could pass upon objections made orally before the commission or filed in writing.

During the first days of the IMT trial the defense objected to a captured document, a letter from Gauleiter Rainer to the defendant Seyss-Inquart, on the ground that the letter was a highly biased account of the history of Austria's incorporation into Germany, and that Gauleiter Rainer was available as a witness to give a more accurate account. The objection was overruled with the observation that the defendant could challenge the accuracy of the contents of the letter and that the defense could call Rainer as a wit-

ness if it desired. The transcript of the offer of the Rainer letter, the ensuing argument, and the Tribunal's ruling is reproduced in 18 below. Later there were few objections of this kind, although the defense constantly urged that documents contemporaneous with the Hitler regime were often biased accounts of the events reported. (See, for example, the allegations contained in the defense motion for a recess of 6 months, filed in the Ministries case on 22 March 1948, and reproduced on pp. 508-515.)

**2. FARBEN CASE—TITLE PAGE OF A GENERAL DEFENSE
DOCUMENT BOOK AND INDEX TO THE FIRST SIXTEEN
DOCUMENTS IN THIS DOCUMENT BOOK**

**Military Tribunals
Case 6**

DOCUMENTS ON GERMAN FOREIGN POLICY

**Introduced for the Purpose of Proving the German People's
Ignorance of Hitler's Plans to Wage Aggressive Wars**

Part I

**Submitted by defense counsel
Dr. Conrad Boettcher
[counsel for the defendant Krauch]**

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3	The Reich Government's appeal to the German people of 1 February 1933	5
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5	Hitler's speech on the policy of the Government on the occasion of the Reichstag meeting at the Krolloper on 23 March 1933	7-9
6a	Adolf Hitler's speech in the German Reichstag on 17 May 1933, dealing with the National-Socialist peace policy	10-12
6b	Concordate between the Holy See and the German Reich of 20 July 1933, published in the Reich Law Gazette, Part II, on 18 September 1933	13-14
7	Adolf Hitler's radio address of 14 October 1933, dealing with Germany's withdrawal from the League of Nations, and in which is stressed the willingness of the German Government to join a new convention for general disarmament	15-17
8	Adolf Hitler's address at the beginning of the election campaign at the Berlin Sportpalast on 24 October 1933	18
9	Adolf Hitler's address "for equal rights and peace," given to the German workers in the hall of the Dynamowerk in Siemensstadt on 10 November 1933	19
<i>III. 1934: Excerpts form Hitler's speeches and other public announcements which all emphasize the peaceable intentions of the new government</i>		
10	German-Polish statement of non-aggression of 26 January 1934	20-21
11	The Fuehrer's speech before the German Reichstag at the Krolloper in Berlin on 30 October 1934	22
12	Reich government memorandum to the question of disarmament on 13 May 1934	23-29

*"C.K." stood for the defendant Carl Krauch. The defense counsel selected their own document symbols and numbering for identifying defense documents. The exhibit number, of course, was not assigned until the document was offered in evidence.

<i>Doc. No.</i>	<i>Contents</i>	<i>Page</i>
<i>C.K.*</i>		
13	“Germany’s Proposition for the Armament Convention,” aid memoire of the German Reich government of 16 April 1934 to the British disarmament memorandum, taken from: “Weltgeschichte der Gegenwart in Dokumenten,” Essener Verlagsanstalt, Essen 1936, Part I, page 26	30-31
14	“Germany’s and France’s No,” the Reich Foreign Minister Freiherr von Neurath’s speech of 27 April 1934 given before the German press. Taken from: “Weltgeschichte der Gegenwart in Dokumenten,” Essener Verlagsanstalt, Essen 1936, Part I, page 31	32-39
15	The Fuehrer’s speech at the Gau Party Rally of the NSDAP at Gera on 17 June 1934	40
16	Speech of the Fuehrer’s deputy, Rudolf Hess, at Bochum on 8 December 1934, dealing with the German peace policy and German—French mutual understanding	41
	<i>IV. 1935: Excerpts from Hitler’s speeches and other public announcements which all emphasize the peaceable intentions of the new Government</i>	

[Altogether 40 documents were listed in the table of contents for this document book, the English version of which was 131 pages long.]

*“C.K.” stood for the defendant Carl Krauch. The defense counsel selected their own document symbols and numbering for identifying defense documents. The exhibit number, of course, was not assigned until the document was offered in evidence.

3. KRUPP CASE— CERTIFICATE FILED WITH DOCUMENT
NIK-10660, PROSECUTION EXHIBIT 5, AN UNSIGNED
MEMORANDUM FROM THE FILES OF THE KRUPP
CONCERN

(Place) Nuernberg, Germany

(Date) 25 November 1947

CERTIFICATE

I, Rolf C. Schnyder of the Evidence Division of the
Office of Chief of Counsel for War Crimes, hereby certify
that the attached document, consisting of

3 ~~typewritten~~
photostated pages and entitled
~~mimeographed~~
~~handwritten~~

NIK-10660, List of positions held by
Alfried von Bohlen und Halbach since 1937.

(~~the original~~)

dated 1937 to 1943, is (a true copy) of a document which
was delivered to me in my above capacity, in the usual course of
(~~the original~~)

official business, as (a true copy) of a document found in German
archives, records and files captured by military forces under the
command of the Supreme Commander, Allied Expeditionary
Forces.*

To the best of my knowledge, information, and belief, the
original document is held at:

Krupp files, Essen.

[Signed] ROLF C. SCHNYDER

*The captured document was a carbon copy of an unsigned typewritten memorandum, and various additions or corrections have been made in pencil and in ink on its face. The document listed the offices (chairman, deputy chairman, or member) which the defendant Krupp held in more than 30 organizations, mostly incorporated business enterprises.

4. KRUPP CASE—DISCUSSION OF AND RULING UPON A DEFENSE OBJECTION TO THE ADMISSIBILITY OF AN UNSIGNED MEMORANDUM FROM THE FILES OF THE KRUPP CONCERN, AND RELATED DISCUSSION ON THE GENERAL PRACTICE OF SUBMITTING INDIVIDUAL CERTIFICATES WITH EACH CAPTURED DOCUMENT

EXTRACTS FROM THE TRANSCRIPT OF THE KRUPP CASE,
9 DECEMBER 1947¹

MR. THAYER (chief, Krupp trial team for the prosecution): I offer as Prosecution Exhibit 5, Document NIK-10660, to be found on page 32 of the English Document Book I, and page 35 of the German document book.² This document sets forth the dates on which the defendant Alfried Krupp took certain positions and joined certain organizations. This document is a captured document from the Krupp files in Essen.

JUDGE DALY, PRESIDING: It may be marked as No. 5.

DR. KRANZBUEHLER (counsel for defendant Krupp): I object to the admission of this document because it bears no signature and no evidence has been presented as to who is its author and where it comes from.

MR. THAYER: May it please the Tribunal. No signature is required on a captured document and this is certified to have been a captured document. It was brought from the Krupp files in Essen. We did not make up the document; the only addition is the addition of an NIK number.³ This was found in the files. It was probably prepared in 1943 which I believe is the last date on it, and it was in the files of the defendant Alfried Krupp. I can give Dr. Kranzbuehler the folder of the Essen file in which this document was found—it was found in Folder KG/7.

DR. KRANZBUEHLER: Your Honor, I think this document opens a question of principle, namely, whether documents may be presented here which bear no signature and of which no one can ascertain where they have been set up and whether their contents are correct. The files might contain many documents, many copies, many drafts, for which no one will be responsible. I do not

¹Extracts from the mimeographed transcript, Case 10, U.S. vs. Alfried Krupp von Bohlen und Halbach, *et al.*, pages 127-130, 133 and 134.

²Concerning the use of English and German document books in connection with the offer of documentary evidence, see the statement of the prosecution at the beginning of the presentation of its case in the Medical trial, reproduced in section VII E. The document books contained copies of the exhibit or of translations of the exhibit.

³The Document Control Branch registered documents according to lettered series, i.e., "NIK" stood for "Nuernberg Industrialist-Krupp." Hundreds of documents were registered in this series.

consider it proper evidence when a document is introduced of which no one can tell me who made it and who guarantees that the contents are correct. I consider this document as improper evidence.

MR. THAYER: The prosecution feels that the document is certainly proper evidence. The probative value that can be given to it, I think, is for the Tribunal. It is a document which was found in the files of the defendant Alfried Krupp and may be presumed to be a correct listing of his memberships and activities as of a certain date, since it was prepared in his own office—or at least was kept in his office.

JUDGE DALY, PRESIDING: What is there to show that it was captured in his office?

MR. THAYER: There is the certificate which we prepare with the documents—it always shows the origin of the document. This document I know, because I have checked it, comes from Essen. That is certified to on the certificate with the photostatic copy which is introduced in evidence, it gives the origin of the document as the Krupp files, Essen.

JUDGE DALY, PRESIDING: That is on the document itself?

MR. THAYER: No, Sir. That is on the certificate of the processing office here.

JUDGE DALY, PRESIDING: Where is that to be found? In this document book?

MR. THAYER: No, Sir. That is in the folder which accompanies the photostat which is put in evidence. It is not in the document book which you have.

JUDGE DALY, PRESIDING: You have it in your possession?

MR. THAYER: Yes, Sir.

JUDGE DALY, PRESIDING: May we see that?

MR. THAYER: This is the document we offer in evidence. It is accompanied by a certificate which contains this fact. I might add to it, Your Honor, the folder number from which it came, to make it more exact, if it be desired that that be done.

JUDGE DALY, PRESIDING: The Tribunal would like to inquire of Dr. Kranzbuehler whether he questions whether the document which the photostatic copy in question is claimed to be a photostatic copy of, is a captured document, captured in the files of the Krupp Industry?

DR. KRANZBUEHLER: No. If Mr. Thayer has given an assurance on the original, that this is a photostatic copy of a captured document, I accept this as a fact and do not dispute it. I only dispute that a document whose originator cannot be ascertained is a document with evidential value. In my opinion the prosecution must produce the author of the document and he must be a

witness to testify to the correctness of the data made by him in this document.

JUDGE DALY, PRESIDING: The Tribunal's feeling is that this gets to a matter of weight rather than to admissibility, as long as it is conceded that this is a captured document, and that gets also to the question of probative value. The document may be admitted. The objection is overruled.

* * * * *

JUDGE DALY, PRESIDING: Mr. Thayer, may I interrupt to clarify one question in my mind? I have before me the certificate which we were discussing a moment ago. Is that the character of certificate that accompanies all of these documents?

MR. THAYER: Yes, Sir, if I understand you correctly.

JUDGE DALY, PRESIDING: This is the certificate to the effect that—certifying that the particular document to which it refers was delivered to the man who signed it (I cannot read his name) in the usual course of official business, as a document found in the German archives, etc. Now is that the character of certificate that accompanies all of these documents?

MR. THAYER: Yes, Sir, that is the character of all of them. The information will vary slightly, sometimes, as to its source; and then it is covered by the Niebergall affidavit, which I think is [Prosecution] Exhibit 3, and by the Coogan affidavit, which was put in as Exhibit 2, which explains the procedure and the method of processing these documents and the method in which they are found and located and how they became captured documents.*

JUDGE DALY, PRESIDING: Well, does this certificate appear in the record with respect to each of the documents?

MR. THAYER: Yes, Sir.

JUDGE DALY, PRESIDING: I mean as accompanying each of the documents; and is this the only certificate that is offered in that connection?

MR. THAYER: Yes, Sir.

JUDGE DALY, PRESIDING: All right, proceed.

JUDGE WILKINS: As I understand, there is one of these certificates in each file?

MR. THAYER: Yes, Sir; each photostatic copy of a document is accompanied by a copy of the certificate.

DR. KRANZBUEHLER: I think defense counsel must reserve the right to call as witness the person who made the certificate, in order to find out, under oath, where he found this document. I do not know whether such cases will occur. I only want to point out that they may occur and that the defense reserves the

*The Coogan and Niebergall affidavits are reproduced in section VII D.

right to determine the origin of the documents with witness' testimony.

JUDGE DALY, PRESIDING: Well, the record will indicate that the counsel have not waived that right.

5. MEDICAL CASE—TEMPORARY EXCLUSION OF DEFENSE EXHIBIT NOT ACCOMPANIED BY A CERTIFICATE OF AUTHENTICATION

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE, 28 FEBRUARY 1947*

DR. MARX (counsel for defendants Schroeder and Becker-Freysing): The next exhibit is a report of Professor Kalk, of 13 March 1945, about hepatitis research.

MR. HARDY (associate counsel for the prosecution): Obviously, this next exhibit purports to be a German document, a report dated 13 March 1945. Throughout the presentation of this case on the part of the prosecution, we have in every instance submitted with the German document a certificate stating that this is an original German document, and setting forth where the document was obtained; and it has been the procedure thus far that any submission of any documentary evidence, captured documents or otherwise, to contain or should have attached thereto such certificates in order to be admitted before this Tribunal. Now this obviously is a report by Professor Kalk and has no substantiation whatsoever. Therefore I object to the admission of this document at this time.

DR. MARX: Mr. President, I should like permission to submit the original report later if there are objections to the admissibility now; then I shall dispense with offering it at the present time if I may have the opportunity of doing so later.

PRESIDING JUDGE BEALS: The objection on the part of the prosecution is well taken but counsel for the defendant Schroeder may offer the document later with the proper description, where it came from, where it was found, etc., authenticating the document, which should be offered to the prosecution so that it may be studied in advance. Then when it is offered to the Tribunal, the Tribunal will consider any arguments that are made by either side and rule on the admission or non-admissibility of the document.

* * * * *

*Extract from mimeographed transcript, U.S. vs. Karl Brandt, *et al.*, Case 1, pages 3772 and 3773.

DR. MARX: Thank you, Mr. President. I have concluded the submission of documents, and thus I have finished the case for the defense of the defendant Schroeder.

PRESIDING JUDGE BEALS: The Tribunal notes that the counsel for defendant Schroeder has closed his case, with the reservation that the documents to which he referred may be offered at some later time.

6. HIGH COMMAND CASE—DEFENSE MOTION THAT THE PROSECUTION BE DIRECTED TO FURNISH INFORMATION ON THE DISCOVERY AND NATURE OF FOUR CAPTURED DOCUMENTS, PROSECUTION ANSWER SETTING FORTH INFORMATION, AND TRIBUNAL RULING

a. Defense Motion, 15 March 1948*

Hans Meckel
Counsel for defendant Otto Schniewind
Case 12

Nuernberg 15 March 1948
[Stamp] Filed: 15 March 1948

To: Military Tribunal V

I request the prosecution be directed to find out the origin and the author of the below-listed documents and to inform the Tribunal and defense on the result of the inquiries:

1. Document L-79, Exhibit 1083, offered on 27 February 1948, Document Book 13.
2. Document 798-PS, Exhibit 1101, offered on 27 February 1948, Document Book 13.
3. Document 1014-PS, Exhibit 1102, offered on 27 February 1948, Document Book 13.
4. Document 789-PS, Exhibit 1153, offered on 1 March 1948, Document Book 15, Part I.

In particular, the answers to the following questions are of interest:

- a. When were the documents found?
- b. Where were the documents found?
- c. Under what circumstances were the documents found?
- d. In which files or file collections were these documents contained? Identification of the files.
- e. Which German agency do these documents originate from?

*U.S. vs. Wilhelm von Leeb, *et al.*, Case 12, Official Record, volume 27, page 681.

- f. What has been found out about the author of the document?
- g. What other circumstances have been found which may be of importance for the judgment of the document.

According to the affidavit of Major Coogan¹ which was introduced by the prosecution as Exhibit 2, these data must have been recorded when finding the document (par. 3 of affidavit) and must have been entered in the register when further examining the document (pars. 4 and 7 of affidavit).

[Signed] HANS MECKEL

b. Answer of the Prosecution, 26 March 1948²

[Stamp] Filed: 30 March 1948.

Answer to the Motion of the Defendant Schniewind for Information Concerning Exhibits

1. Under date of 15 March 1948, Dr. Hans Meckel, defense counsel for Schniewind, filed a motion requesting that the prosecution be directed to inform him of the origin and author of Document L-79, Prosecution Exhibit 1083; Document 798-PS, Prosecution Exhibit 1101; Document 1014-PS, Prosecution Exhibit 1102; Document 789-PS, Prosecution Exhibit 1153.

2. The prosecution herewith submits, in appendix A, the information requested by defense counsel. It is pointed out, however, that such information is accessible to defense counsel by making appropriate inquiry to the document room, the archives of the International Military Tribunal and/or the library. Accordingly, it is quite unnecessary for defense counsel to make further requests for such information either to the Tribunal or to the prosecution.

Respectfully submitted,
[Signed] JAMES M. MCHANEY
Deputy Chief of Counsel

Nuernberg, Germany: 26 March 1948

APPENDIX A

Document L-79, Exhibit 1083, Document Book 13

a. When were the documents found?

Answer: 23 May 1945.

b. Where were the documents found?

Answer: Flensburg, Germany.

¹ Reproduced in section VII D,

² U.S. *vs.* Wilhelm von Leeb, *et al.*, Case 12, Official Record, volume 27, pages 684-687.

c. Under what circumstances were the documents found?

Answer: They were surrendered to the Allied Forces at the time of the capitulation of the Doenitz government.

d. In which files or file collections were these documents contained? Identification of files.

Answer: Files of OKW (North).

e. Which German agency do these documents originate from?

Answer: Reich Chancellery.

f. What has been found out about the author of the document?

Answer: The document is written and signed by Lt. Col.

Schmundt, Adjutant of the Fuehrer. The signature and handwriting as well as the contents of the document were admitted to be authentic by "Testimony of Wilhelm Keitel," taken at Nuernberg, Germany, on 5 October 1945, 1430-1700 hrs., by Mr. Thomas J. Dodd. OUSCC [Office United States Chief of Counsel].

The document was offered at the IMT trial as Exhibit USA-29.¹

[Similar information was furnished in the balance of this appendix concerning the other three documents on which the defense motion sought information.]

c. Order of the Tribunal, 23 March 1948²

UNITED STATES MILITARY TRIBUNAL V
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
23 MARCH 1948

[Stamp] Filed: 26 March 1948

The United States of America

vs.

Wilhelm von Leeb, *et al.*,

Defendants

} *CASE 12*

ORDER

The motion of defendant Schniewind requesting information concerning the circumstances, time, and place of the finding of documents L-79, 798-PS, 1014-PS, and 789-PS has been con-

¹ The prosecution furnished no answer to question *g* of the defense motion: "What other circumstances have been found which may be of importance for the judgment of the document?"

² U.S. *vs. Wilhelm von Leeb, et al.*, Case 12, Official Record, volume 27, page 680.

sidered by the Tribunal. The Tribunal finds the motion not well taken and the same is therefore denied.

BY THE TRIBUNAL:

[Signed] JOHN C. YOUNG
Presiding Judge

Done this 23d day of March 1948.

7. FLICK CASE—DISCUSSION OF AND RULING UPON A DEFENSE OBJECTION TO THE ADMISSIBILITY OF A CARBON COPY OF A LETTER BY DEFENDANT WEISS WHICH DID NOT CONTAIN THE ENCLOSURE MENTIONED IN THE LETTER

EXTRACT FROM THE TRANSCRIPT OF THE FLICK CASE,
25 APRIL 1947¹

MR. ERVIN (deputy chief of counsel for the prosecution): I now offer as Prosecution Exhibit 130, Document NI-4477,² which appears at page 10 of the English document book.

[This exhibit contained two parts, an original letter of 21 April 1943 from Buskuehl, general director of one of the firms of the Flick concern, transmitting a circular to the defendant Weiss, and a carbon copy of Weiss' reply which returned the circular to Buskuehl. The translation of the text of the letters appears in footnote.²]

PRESIDING JUDGE SEARS: The document now offered is received by the Tribunal in evidence as Prosecution Exhibit 130, and the Secretary General will note its receipt in the record.

DR. SIEMERS (counsel for defendant Weiss): I would like to object to the submission of this document in view of the fact that it has not been submitted complete. A part of this document is a circular of the District Group Ruhr and it can only be fully understood together with the annex. If the prosecution will be good enough to submit also the annex which belongs to the letter, we will agree to the submission of the document.

MR. ERVIN: If Your Honor please, it will appear from this document that the defendant Weiss sent back the enclosure of the letter to the man who had sent it to him. The only letters which

¹ Extract from mimeographed transcript, U.S. vs. Friedrich Flick, *et al.*, Case 5, pages 464-466.

² The Buskuehl letter stated:
"Knowing that you are interested in the problem of employment of Soviet prisoners of war and its influence on labor cost, I am sending you enclosed a circular letter of the District Group Ruhr which deals with the costs of Soviet Russian prisoners of war."

The reply of defendant Weiss stated:
"I have been looking with great interest through the documents sent with your letter of 21 April dealing with the employment of Soviet PW's. Enclosed I am returning same and thank you for letting me have them."

the prosecution has in its possession are the two which appear here, since we have the file copies from Berlin. So the prosecution introduces these two documents merely to show a knowledge and interest upon the part of the defendant Weiss in problems of Soviet prisoners of war in general. No argument, of course, can be made on the basis of a report which is not attached to the particular letter, but I do think as a whole they show the general interest at this point, which is all the prosecution desires to derive from the two letters.

PRESIDING JUDGE SEARS: With this explanation, did you want to say something further, Dr. Siemers?

DR. SIEMERS: It is not a case, as Mr. Ervin thinks, of a matter of general interest of the defendant Weiss in the matter of use of Russian prisoners of war, but in connection with the enclosure it will be shown that it was only a very special interest, a special interest concerning the question of expense, what the position of the Russian prisoners of war was to be in relation to other workers, German workers, etc.

The conclusion cannot, therefore, be drawn that the defendant had any interest in the use of prisoners of war. It is only merely an administrative question. The administration had to know what the expenditure would be. Therefore, I believe this letter should be submitted complete, that is, with the enclosure.

MR. ERVIN: Your Honor please, it seems to me that Dr. Siemers and I are arguing the weight which should be given to this letter in evidence rather than its admissibility. I should think that it should be received in evidence by the Court, which will then determine the proper amount of weight to be given to it. As I have explained before, we do not have in our possession the enclosure which went with the letter. It is a complete exchange on its face showing the enclosure to have gone back to the man who sent it to him originally; and it is a genuine authentic copy of it, and I think it is clearly admissible under the rules, but only point of issue is what Dr. Siemers thinks it means and what I think it means.

PRESIDING JUDGE SEARS: If Dr. Siemers would furnish a copy, if his client has one, I suppose you would consider it?

MR. ERVIN: I would have no objection whatever to the introduction of it.

PRESIDING JUDGE SEARS: Yes. I don't know, of course, whether anybody has said anything to him, or whether he has said anything as to whether the defendant Weiss* kept any copy of this

*The testimony of the defendant Weiss is recorded in the mimeographed transcript, 16, 17, 20, and 21 October 1947, pages 8885-9125. Extracts from his testimony are reproduced in sections V I and VII F, volume VI, this series.

document. In any event, it seems that the Tribunal will receive the document, but the weight that is to be given to it and the argument of Dr. Siemers will be considered when it comes to weighing of this communication by the Tribunal.

8. HOSTAGE CASE—ADMISSION OVER DEFENSE OBJECTION OF TWO UNSIGNED CAPTURED DOCUMENTS WITH OBSERVATIONS BY THE TRIBUNAL CONCERNING THEIR PROBATIVE VALUE

a. Unsigned Copy of an Order by General Boehme

EXTRACT FROM THE TRANSCRIPT OF THE HOSTAGE CASE,
18 JULY 1947*

MR. DENNEY (chief prosecutor): If Your Honors please, we turn now to the early days of October in the Southeast, particularly Serbia. As Mr. Fenstermacher indicated this morning, we have seen the deceased Boehme placed as Plenipotentiary Commanding General in Serbia in addition to his duties with XVIII Corps at the request of the defendant List in September of 1941. The first document in book 3, which is at page one of that book, and also page one of the German is NOKW-192 which we offer as Prosecution Exhibit 78.

This is a copy of an order by General Boehme which was issued on 4 October 1941 to the Chief of the Military Administration, the Commander of Serbia of 342d Infantry Division and a Corps Signal Battalion.

DR. LATERNER (counsel for defendants List and von Weichs): Your Honors, I object to the submission of this document because it is not signed. Actually it is only a typewritten sheet of paper which has been photostated.

MR. DENNEY: Your Honors will see as we proceed with the presentation of this matter that this order was issued again. It is necessary to state that we only can photostat what we find. This is the only copy of this order which we were able to get. The further proof will show that the order was passed down.

PRESIDING JUDGE WENNERSTRUM: The Court is conscious of the fact that this apparently is a copy, but as has been indicated in previous rulings, it will be taken for such probative value as the Court may deem it is entitled to and if it is connected with other matters then the Court can give such additional consideration to it as the Court may deem proper. Objection will be overruled.

*Extract from mimeographed transcript, U.S. vs. Wilhelm List, *et al.*, Case 7, pages 351 and 352.

b. Unsigned Copy of a Letter from Rosenberg to Bormann

EXTRACT FROM THE TRANSCRIPT OF THE HOSTAGE CASE,
16 JULY 1947*

MR. DENNEY (chief prosecutor): The next document which the prosecution offers in evidence as Exhibit 4 is Document 071-PS. This document was received in evidence as Exhibit USA-371 before the International Military Tribunal.

[The document was the carbon copy of a letter which Rosenberg sent to Martin Bormann in response to a letter from Bormann to Rosenberg. The Bormann letter, which was the signed original, was likewise introduced in the IMT case as Document 072-PS, USA Exhibit 357. Both documents are reproduced in German in "Trial of the Major War Criminals" op. cit., volume XXV, pages 135-140. These two documents were from the famous "Rosenberg files," which had been secreted by burial shortly before Germany's collapse and later discovered by American investigators. Many of these documents were introduced as exhibits in the IMT case and their authenticity was not challenged by Rosenberg. If the certificate attached to the document as offered in the Hostage case had indicated that this was a captured document from the Rosenberg files, and if it had indicated immediately that the document stated, on its face, that it was a reply to a signed original document, much of the basis of the ensuing discussion would have been removed.]

DR. LATERNSEER (counsel for defendants List and von Weichs): Your Honor, before the submission of this document, may I see this document? (Defense counsel looks at document.)

Your Honor, I object to the submission of this document. At first glance I can see that it is a photostat copy. From this photostat copy it cannot be seen, first of all, whether it is a carbon copy of the letter or whether it is a copy of the letter. Also, it doesn't show a letterhead nor from whom the letter comes. As to the signature this document isn't even signed.

Third, what the prosecution intends to prove by this I could take from yesterday's opening speech. I would like to suggest the following: the letter proves that it has been written, but it doesn't prove that its contents are true. As a rule it shows the opinion of the writer of the letter and need not be in line with the actual conditions since, for all these reasons, it cannot be regarded as a proper document, I would ask the Tribunal to look at the document, it must be rejected as evidence of any kind of value.

MR. DENNEY: If Your Honor please, the rules provide that documents received in evidence before the International Military Tribunal shall be received in evidence in these cases. Of course with this document as with any document that is offered by the

*Ibid., pages 147-151.

prosecution or the defense, it is for the Court to determine what weight they shall give it, if any, and we have nothing to do with probative value. There is a certificate with this document certifying that it was received as an exhibit. It was United States Exhibit 371 in the IMT. It was put in as part of the case in chief—I believe against the defendant Rosenberg—and while I do not contend that one who writes a letter necessarily speaks the truth, we have a later document which refers to a Task Force Rosenberg which is operating in the Southeast area, which indicates that what is said in this document is true.

PRESIDING JUDGE WENNERSTRUM: What do you claim for this exhibit?

MR. DENNEY: We claim that this exhibit, Your Honor, involves the defendant List. It shows that he was cooperating with the program in the Party whereby they were seizing cultural works of art and enabling them to send people to the Southeast. I believe the particular reference here is to the cremation in the Archives in Jewish libraries.

PRESIDING JUDGE WENNERSTRUM: Who do you claim wrote this letter?

MR. DENNEY: It was written, if Your Honor please, by Rosenberg, who was later to become the Reich Protector for the Eastern Occupied Territories.

PRESIDING JUDGE WENNERSTRUM: Does the letter so show?

MR. DENNEY: The letter does not so show.

DR. LATERNSEER: Your Honor, the letter doesn't show at all who wrote it. In addition the prosecution doesn't even say that this letter was sent. If a copy is made, then I don't understand why this copy doesn't contain the signature. I maintain that this letter was never signed. I could even go further with my allegation. I could, for instance say—I don't know this—that it wasn't signed because the contents weren't correct. Also, Your Honor, the fact that the letter was accepted in the first trial as evidence doesn't make this letter a document. For at the time it was submitted, it was submitted for another reason than it is submitted today. At that time, it was submitted against Rosenberg, I don't know why the colleague at that time didn't object to this letter. I would like to say once again that I cannot see from the document itself, and that is necessary, who wrote the letter. The letter isn't signed and I don't know whether it was ever sent off.

MR. DENNEY: If Your Honor pleases, the rules provide that documents which have been received in evidence before the International Military Tribunal shall be received here. However, for the benefit of the Court, I will be glad to check the record there.

It is my impression that it was further identified during the proceedings—and see whether or not we can establish that. In any event, it was received in evidence before the IMT.

DR. LATERNSEER: Your Honor, may I just say something else? I have already emphasized that the fact that the letter was presented and accepted in the first trial should not matter at all. I am of the opinion that the Tribunal now should rule on my objections to this document and should not be bound by the ruling of the first Tribunal whether it is admissible or not, because I am bringing in a new reason why this document should be admitted as a document.

PRESIDING JUDGE WENNERSTRUM: The Tribunal will reserve ruling on the admissibility of this particular exhibit.

MR. DENNEY: Would Your Honor wish that we point out the parts at this time which we offer, subject of course to a motion to strike in the event that the Tribunal rules against it?

PRESIDING JUDGE WENNERSTRUM: The Court will give consideration to the document in itself and if and when it is admitted; if it is admitted then you can comment upon it.

MR. DENNEY: Very well, Your Honor. Then if I may suggest that we mark it Exhibit 4a for identification at this time so that it will have a number. That is not in evidence, Dr. Laternser, that is merely for identification.

PRESIDING JUDGE WENNERSTRUM: Purely for the purpose of marking of the exhibit and not for a consideration that it is being admitted, it may be so numbered "4a."

EXTRACT FROM THE TRANSCRIPT OF THE HOSTAGE CASE,
24 JULY 1947*

JUDGE BURKE, PRESIDING: We have under consideration the matter of the offer of introduction of exhibit known as Exhibit 4a offered on behalf of the prosecution.

The Tribunal has prepared a report upon its findings in that matter. The provisions of Control Council Law No. 10 and Ordinance No. 7, Military Government, Germany, enacted pursuant thereto, provide that certain specified kinds of documentary evidence shall be deemed admissible.

Document 071-PS, found on page 8 of document book 4, appears to come within the scope of these provisions and for that reason it will be received in evidence.

*Tr. pages 704 and 705.

It is the considered opinion of this Tribunal, however, that matters of competency, relevancy, and of materiality have not been removed from the scrutiny of the triers of fact and continue to be pertinent factors in evaluating the weight and credibility of the evidence in determining the guilt or innocence of the accused.

Thus, it becomes important that the party offering an exhibit, even though it is admissible by charter pronouncement, supports it with evidence of foundation, authenticity, and correctness.

The credence to be given the document will be determined from a consideration of all these factors. Such must be the rule to be followed here in order that no inference may arise that a technical expediency has been substituted for long established rules of evidence.

For that reason the exhibit marked "Exhibit 4a" will be received in evidence.

9. EINSATZGRUPPEN CASE—PROSECUTION STATEMENT CONCERNING PROPOSED PRACTICE IN OFFERING LENGTHY DOCUMENTS CONTAINING BOTH RELEVANT AND IRRELEVANT PARTS, AND DISCUSSION FOLLOWING AN ERROR DISCOVERED AFTER A DEFENSE OBJECTION

EXTRACT FROM THE TRANSCRIPT OF THE EINSATZGRUPPEN CASE, 29 SEPTEMBER 1947*

MR. FERENCZ (chief prosecutor) : Some of the documents to be used are lengthy and cover many subjects completely unrelated to the issues at bar. We have extracted for the document books only those portions which we have thought were in any way relevant in this case. Should our judgment have been faulty we shall gladly join defense counsel in the correction of it. The proof in this case is quite free from subtlety, and I think we should quarrel little respecting the admitting of documents.

The defense counsel have had and will continue to have access to the complete document, and it is the complete document which will be offered as an exhibit. In accordance with the procedure established in other Military Tribunals and with the permission of the Court, the prosecution will assume that a document is in fact admitted into the record if no objection is raised by the

*Extract from mimeographed transcript, U.S. vs. Otto Ohlendorf, *et al.*, Case 9, pages 67 and 68.

defense counsel at the time that the document is offered in evidence.¹

EXTRACT FROM THE TRANSCRIPT OF THE EINSATZGRUPPEN
CASE, 14 OCTOBER 1947 ²

MR. WALTON (associate counsel for the prosecution): May it please the Tribunal, during the afternoon session of Tribunal II-A on 30 September 1947, Dr. Aschenauer [counsel for defendant Ohlendorf] interposed an objection to book 3-D, page 39 of the English, page 69 of the German, Document NOKW-628, offered as Prosecution Exhibit 160.³ In subsequent conferences with Dr. Aschenauer it was determined that pages 2, 3, 5, and 8 of this document were, in fact, missing. Under Your Honor's ruling, which was made upon the basis of our statement that the entire document may be presumed to be in evidence where we have extracted parts of it for translation in the document book, we immediately telegraphed Washington to forward the missing pages of this document. These pages, which I have already referred to, came by air courier after the Tribunal had recessed on 9 October and are now available, together with the proper certification attached.

At this time, therefore, the prosecution moves the Tribunal that it be allowed to place a photostatic copy of each of these missing pages in the archives of the Tribunal and respectfully requests the Tribunal to instruct the Secretary General to add them to Document NOKW-628.

The prosecution has further made three typewritten copies of these pages and is prepared at this time to deliver them to Dr. Aschenauer. Counsel can therefore make the necessary comparison between his copy and the photostat, which, if Your Honors admit it, will then be in the official record of the case.

PRESIDING JUDGE MUSMANN: The request of the prosecution is approved. The full statement made by Mr. Walton is self-explanatory and the Tribunal need not take up each item detail by detail. The Secretary General is instructed to receive the photostatic copies and make them part of the official record of Case 9, now before Tribunal II-A.

¹ This statement was made just after the prosecution's opening statement as a part of the prosecution's statement of its plan of presenting evidence. The prosecution's case in chief required only two days, and during these two days 252 exhibits were offered in evidence. No witnesses were called by the prosecution.

² Extract from mimeographed transcript, U.S. vs. Otto Ohlendorf, *et al.*, Case 9, pages 588 and 584.

³ At the time of making his objection, Dr. Aschenauer merely stated the following: "Your Honor, I should like you to admit this document only according to its probative value." To which the presiding judge stated: "That will be so recorded."

10. HOSTAGE CASE—ADMISSION OF A PROSECUTION EXHIBIT CONTAINING EXTRACTS FROM TELE-TYPED REPORTS WITH THE UNDERSTANDING THAT FAILURE TO REPRODUCE THE OMITTED PARTS OF THE DOCUMENT UPON DEMAND BY THE DEFENSE WOULD AFFECT THE PROBATIVE VALUE OF THE PARTS OFFERED

EXTRACTS FROM THE TRANSCRIPT OF THE HOSTAGE CASE,
16 JULY 1947*

MR. DENNEY (chief prosecutor) : The next document, NOKW-968, is offered as Prosecution Exhibit 29. This contains reports from various administrative and sub-area headquarters in teletype to Wehrmacht Commander Southeast; reports from the SD in Belgrade and on the daily reports to the Wehrmacht Commander Southeast.

[The prosecution thereupon read various extracts from these teletype reports. The exhibit as offered contained photostatic copies of nine pages of a report which was at least 73 pages long, the last page of the exhibit being numbered 73. The report as a whole was not dated, but many of the individually numbered items of the report contained references to events happening on stated dates and in stated places. The certificate attached to the exhibit stated that the original document was held at the Pentagon, Washington, D. C.]

DR. LATERNER (counsel for defendants List and von Weichs) : Mr. President, I have just looked at the photostat copy which has been given to me in order to judge what kind of document is in question here. I have established the following facts: first, the document has no heading, it cannot be found who wrote it; second, the document bears no date; third, it bears no signature. It is just sheets written on the typewriter. It is also interesting, page 1 is not numbered. Page 2 is not called page 2 but page 12. The next page is page 48 and the next is page 49a, the next 57a, the next is called 61, and the next page, for a change, carries no number at all. The last two pages are marked 68 and 73 respectively. Mr. President, in my opinion, the foundation of such evidence is not permanent. As defense counsel we must be able to determine from whom this material comes, the heading, and it must bear some kind of signature or name, and we would also have to see a date. Because all these essential prerequisites of a written document in order to have any probative value at all, since they are lacking, I must object to the introduction of this document and apply to the Court, before it passes ruling on the admissibility of this document, to look at the photostat copy.

*Extracts from mimeographed transcript, U.S. vs. Wilhelm List, et al., Case 7, pages 219, and 220-224.

MR. DENNEY: Your Honor, these are captured documents taken from the files. It is apparent from the numbering that we have on the left of the pages that the excerpts taken here are not seriatim. We skip from 112 to 120, 127 to 138, and it is true that these are pages extracted from a complete report. As to their being signed, unfortunately we don't have anything to do with the way the documents are when they are captured. Certainly, if Dr. Laternser wants the pages in between, if the Court deems he should have them, we can send over for them. I don't know what material is in there. They have been screened in Washington and of the seven or eight pages that we have here we have used perhaps half of the material. I believe it is apparent that these are just a compilation of reports based on the various units whose names appear.

DR. LATERNSEER: Mr. President, in my opinion, there must be a limit. The indiscriminate picking out of documents and the mix-up of documents, I want to point especially to the last page which is marked as No. 73 bears another note under it, 73a is to follow. At least the prosecution should have provided me with the last pages in order to see who signed this document, from whom it originates, also the heading is lacking. It is definitely possible, and I maintain it is a private compilation. I don't know from whom it comes, and the prosecution also will find no point in the document from whom this document originates.

MR. DENNEY: Obviously, Your Honor, it is just a compilation of reports which was captured from their files and as can be seen from what is here, the entries one above or below the other don't have anything to do with what went on before. It is certainly true that there is nothing on it to show. I believe it is apparent from the contents of the document that it is a report which has to do with a military office in Serbia because there is a copy later of the daily report to the Wehrmacht Commander Southeast. There is a report from the SD Belgrade and from various sub-area headquarters. As I say we are not responsible for the condition of the documents when we get them.

PRESIDING JUDGE WENNERSTRUM: The Tribunal is conscious of the fact that the documents which have been presented or the translations of these documents which have been presented are fragmentary. If counsel for the defendants wish to make demand of the prosecution for the presentation of these parts which are not shown here, that is their privilege, and failure to produce them or to give counsel the opportunity to know what they show will be considered by the Court in connection with its consideration of these particular matters which are shown in this exhibit.

DR. LATERNSEER: I agree with you on this proposal, but I

request that it should not be allowed until the missing parts have arrived. The prosecution should not be allowed to proceed with the reading of this document because we don't know where this document comes from, who issued it, who signed it. The prosecution does not know that, I do not know that, and for that reason, I ask that until the parts which are missing have arrived, that until then, the prosecution postpone the reading of this document.

PRESIDING JUDGE WENNERSTRUM: The Tribunal is of the opinion that the consideration of this document and its admissibility, and the reading of it, should not be deferred at this time. I am wondering if counsel for the defendants understood my suggestion as to a demand for it—on their part, not from us the Tribunal, but on the part of the defendants—of the prosecution. Do I understand the counsel to make such a demand? Dr. Laternser, if you will make such a record through the loud speaker so that it can go into the record rather than by some nod of the head, it would make a better record for the Court and the entire proceedings.

DR. LATERNSER: I make the request that the prosecution submit the rest of this document and only then continue reading from this document.

PRESIDING JUDGE WENNERSTRUM: The Court will make notice of the comments of Dr. Laternser as a request unto the prosecution for the submission of the remainder of these documents; however, the Court will not restrict the reading of these documents that is now before them, and the prosecution may continue with the reading. As the Tribunal previously stated, the failure to present such documents for the benefit of the defense counsel will be taken into consideration by the Tribunal in its consideration of this particular document.

MR. DENNEY: I take it that Dr. Laternser's request has been directed to Document NOKW-968, and the missing pages as shown by the pagination which appears in the document?

PRESIDING JUDGE WENNERSTRUM: That is the understanding of the Tribunal.

II. MEDICAL CASE—RULING THAT A DOCUMENT PUT IN EVIDENCE BY THE PROSECUTION SHOULD NOT AGAIN BE PUT IN EVIDENCE AS A DEFENSE EXHIBIT

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
28 FEBRUARY 1947*

PRESIDING JUDGE BEALS: Let me understand, Counsel, just

*Extract from mimeographed transcript, U. S. vs. Karl Brandt, et al., Case 1, page 3770.

what you are offering as Schroeder Defense Exhibit 19. A portion of the Ding Diary which is already in evidence?

DR. MARX (counsel for defendant Schroeder): Yes. That is an excerpt from the prosecution document book, Document NO-265 [Prosecution Exhibit 287]; in the German document book 12, on page 36.

PRESIDING JUDGE BEALS: The Ding Diary, being already in evidence, including the portion to which counsel is now referring, it is not necessary—indeed, it is improper to offer that in evidence again. It will be available to counsel to use in argument, whether by way of brief or oral argument or any reference which counsel desires to make to it, but it is not properly offered in evidence a second time.

12. MEDICAL CASE—AUTHORIZATION FOR A DEFENSE COUNSEL TO REST HIS CLIENT'S CASE SUBJECT TO SUBMITTING DOCUMENTS NOT YET TRANSLATED AT A LATER POINT IN THE DEFENSE CASE

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
3 APRIL 1947*

DR. FLEMMING (counsel for defendant Mrugowsky): Then I should merely like to ask to reserve the right, Mr. President, for submitting a number of affidavits and other documents later, which have not yet been translated.

PRESIDING JUDGE BEALS: You mean, of course, documents of similar nature to those contained in your document book 2?

DR. FLEMMING: No, documents of a different nature—affidavits and similar evidence, such as in document book 1.

PRESIDING JUDGE BEALS: And you say that those documents are not now ready to be presented to the Tribunal, is that correct?

DR. FLEMMING: Yes, that is right.

PRESIDING JUDGE BEALS: It has not been the policy of the Tribunal to close the door to evidence, competent evidence, which may be offered as the cases for other defendants are heard and before the last defendant has rested his case. The Tribunal understands that the defendants are under some handicap in preparing their evidence, so the matter will be acted upon and any defendant will be heard before the defendants have closed their case, and other evidence may be offered and will not be rejected upon the ground

*Ibid., page 5475.

that it is offered too late—I mean upon the ground alone that the evidence is offered too late.¹

DR. FLEMMING: Then, at the moment, I have nothing more to submit in the Mrugowsky case.

13. RuSHA CASE—ADJOURNMENT TAKEN TO COMPLY WITH THE RULES ON 24 HOURS' NOTICE WITH RESPECT TO DOCUMENTS AND WITNESSES

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
21 OCTOBER 1947²

MR. SHILLER (trial counsel for the prosecution): If the Tribunal please, document books 5-D and 5-E have not yet been bound and delivered in English. The prosecution has ready document book 5-F in English but the German of this was not distributed to defense counsel until this morning and, therefore, does not come within the technical 24-hour rule.³ However, we are ready to proceed if defense counsel will waive any objection.

PRESIDING JUDGE WYATT: Well, unless there is objection we will go ahead.

DR. HAENSEL (counsel for defendant Greifelt): On behalf of my colleagues and on my own behalf, I have to object to the presentation of documents which we did not have in our possession 24 hours ahead. I would ask the Tribunal to bear in mind that in any case, on account of the many documents that we have, we find ourselves in a very difficult situation. Therefore, we cannot waive our opportunity of studying these documents at least for a period of 24 hours.

PRESIDING JUDGE WYATT: The rules are perfectly clear that the documents must be served 24 hours before they are offered.

MR. SHILLER: Yes, Your Honor.

PRESIDING JUDGE WYATT: If there are objections they cannot be received at this time.

MR. SHILLER: Notice of the prosecution's first witness was not served on the defense counsel until this morning. The case has proceeded rather more expeditiously today than the prosecution anticipated and we would suggest that the Court adjourn at this time so that we can abide by all the rules and present our first witness tomorrow morning.

¹ Tribunal I granted a number of defendants permission to introduce at a later time affidavits not yet executed at the time of the principal submission of evidence on behalf of the respective defendants. See section XVIII I 7.

² Extract from mimeographed transcript, Case 8, U.S. vs. Ulrich Greifelt, *et al.*, pages 189-191.

³ Rule 17 of the Uniform Rules of Procedure.

PRESIDING JUDGE WYATT: There is no reason for that situation to have arisen. The Court was perfectly explicit in its announcement on the date of the arraignment as to exactly how the trial would be handled.*

MR. SHILLER: Your Honor, we just have not been able to prepare these documents in sufficient quantity to take care of presenting them at such a rapid pace; the pace today has been approximately three times that of any Military Tribunal up to this point. If the defense counsel would not object, we could call the first witness. The cross-examination could not take place until tomorrow.

DR. HAENSEL: May it please the Tribunal to bear in mind, when it comes to cross-examination of a witness one must at least have a 24-hour limit; otherwise one cannot work out the questions; therefore, we cannot waive the 24-hour rule.

PRESIDING JUDGE WYATT: He is entitled to 24 hours if he insists upon it, according to the rules laid down for their protection, and I think they are entitled to have it. I will not hear any evidence that has not been submitted to the attorneys for the defense as the rules require.

MR. SHILLER: The cross-examination will not take place until tomorrow. However, the prosecution at this moment has no more evidence prepared to introduce today.

PRESIDING JUDGE WYATT: Under those circumstances the Court will be compelled to recess until tomorrow morning, but I warn you that this will not be repeated. You must get your evidence in shape and proceed with the trial, or quit with what you have.

MR. SHILLER: We shall do our best, Your Honor.

PRESIDING JUDGE WYATT: The Court will recess until 9:30 tomorrow morning.

THE MARSHAL: The Tribunal will recess until 0930 hours tomorrow morning.

*The difficulty arose late in the afternoon of the first trial day devoted to the offer of evidence by the prosecution. At this point the prosecution had offered in evidence, on this one trial day, 260 documentary exhibits. The copies of these exhibits had been bound in twelve different document books (1, 2-A, 2-B, 2-C, 3, 4-A, 4-B, 4-C, 4-D, 5-A, 5-B, and 5-C). Eleven days earlier, at the arraignment on 10 October 1947, the Tribunal had directed that exhibits be offered without the reading of extracts therefrom into the record. This practice expedited the prosecution's offer of documents very greatly, and the reproduction division had been unable to reproduce enough document books for both the RuSHA trial and the other trials then in the process. The Tribunal's announcement of the rule concerning the offer of documents without the reading of extracts thereof into the record is reproduced in section XVIII D 17 b, followed by a further statement concerning the rule and some later discussion thereof by defense counsel and the Tribunal.

14. HOSTAGE CASE—RULING THAT DOCUMENTS USED UPON CROSS-EXAMINATION MAY BE ADMITTED IN EVIDENCE WITHOUT REFERENCE TO THE RULE ON 24 HOURS' NOTICE, AND RELATED DISCUSSION

EXTRACTS FROM THE TRANSCRIPT OF THE HOSTAGE CASE DURING THE CROSS-EXAMINATION OF DEFENDANT LIST, 22 SEPTEMBER 1947 *

MR. FENSTERMACHER (chief prosecutor): Field Marshal, will you look at the Document NOKW-1902?

PRESIDING JUDGE WENNERSTRUM: What exhibit number?

MR. FENSTERMACHER: This has no exhibit number, Your Honor, it is a cross-examination document. This is a report from Town Headquarters I, to the Commanding Officer of Rear Army Area 553. Is that correct, Field Marshal?

DEFENDANT LIST: The Commander of the Rear Army Area 553.

DR. LATERNSEER (counsel for defendant List and von Weichs): May I please have a look at the document before any questions concerning the document are asked?

MR. FENSTERMACHER: Certainly.

* * * * *

PRESIDING JUDGE WENNERSTRUM: Mr. Fenstermacher, is this document to be offered in evidence, or is it to be marked as an exhibit?

MR. FENSTERMACHER: I think we should mark it for identification now, Your Honor, and then offer the number after the 24 hours is passed and I suggest—we have no copies to distribute to Your Honors at this time, but it should be marked as Exhibit 585-A for identification.

PRESIDING JUDGE WENNERSTRUM: 585-A.

MR. FENSTERMACHER: For identification, and we hope to have enough copies to go around tomorrow.

* * * * *

JUDGE CARTER, PRESIDING: Mr. Fenstermacher, is it your idea that the 24-hour rule applies to cross-examination exhibits?

MR. FENSTERMACHER: I think it does not apply to our showing a witness a document which he has not seen for 24 hours earlier, but I believe it does apply, Your Honor, to the actual offer into evidence; that is to say, we can cross-examine on a document which we have not previously shown to the defense, but I believe we must give them 24 hours before we actually offer it into evidence.

*Extracts from mimeographed transcript, U.S. vs. Wilhelm List, et al., Case 7, pages 3400, 3402, 3403-3405.

JUDGE CARTER, PRESIDING: I wouldn't think that was the rule—I don't have it before me—because that would defeat the very purposes of cross-examination quite often. It seems to me it ought to be submitted in evidence right during the cross-examination; otherwise, if it isn't, what right do you have to examine on it at all?

MR. FENSTERMACHER: I would rather have that statement of the rule, Your Honor. The prosecution have been working on that construction. Whether Dr. Laternser has had any objection or not, I do not know.

JUDGE CARTER, PRESIDING: Unless the rules specifically provide otherwise, it seems to me it should be permitted in evidence without the 24-hour rule.

MR. FENSTERMACHER: Very well, Your Honors.

DR. LATERNSEER: Your Honors, I am referring to the 24 hours' notice because I do not know that any rule exists which makes an exception in view of any documents, so that I also have to insist that the 24-hour rule apply concerning cross-examination documents.

JUDGE CARTER, PRESIDING: Unless the rule provides definitely to the contrary, I am inclined to the view that Dr. Laternser's position is in error because it wouldn't do much good to hold back cross-examination exhibits if you had to give them to the defense 24 hours in advance to study over, when the very purposes are to the contrary.

MR. DENNEY (chief prosecutor): If Your Honor please, throughout the International Military Tribunal case and all other cases here, to my knowledge cross-examination documents have never been submitted to defense counsel prior to the time that they were produced in court and handed to the witness. There has been some variation with reference to the time when these documents were admitted. Some of the present military tribunals hold a view that the documents can only be marked for identification on cross-examination, and that at the close of the entire defendants' case the formal offer in evidence is to be made.

However, that has no reference at all to the 24-hour rule. Other Tribunals have taken the position that the documents may be offered and received in evidence immediately, and I think so far as the question is concerned it has no bearing on the 24-hour rule, but I am not aware of any such provision that Dr. Laternser has just stated.

JUDGE CARTER, PRESIDING: Well, the Tribunal is of that opinion, but we do feel that copies ought to be available so that we can follow along on this cross-examination.

MR. FENSTERMACHER: We will certainly try to do that in the future, Your Honor. This is a document which just arrived and we were not able to get copies in time.

15. RuSHA CASE—STATEMENT BY THE PRESIDING JUDGE CONCERNING THE PROSECUTION'S PRACTICE IN HOLDING DOCUMENTS IN RESERVE FOR CROSS-EXAMINATION

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
4 DECEMBER 1947¹

PRESIDING JUDGE WYATT: One other thing that the Tribunal desires to call to the attention of the prosecution. In the examination of the defendant Greifelt the practice was resorted to of holding documents in reserve until after the witness had been examined about them, and then presenting them to him. The Tribunal frowns on that practice. That has no application on anybody now in the courtroom because they did not participate in it; but we simply want to state to counsel for the prosecution, it is the view of the Tribunal that all documents should have been introduced in the case in chief. That's the fair way to try a case. We will permit the introduction of no other documents unless they are strictly and wholly contradictory to some evidence that has been adduced from the witness.

16. IMT CASE—RULING THAT A DEFENSE COUNSEL DURING EXAMINATION OF HIS CLIENT MAY READ PARTS OF A PROSECUTION EXHIBIT NOT PREVIOUSLY READ BY THE PROSECUTION

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
16 MAY 1946²

(Lord Justice Sir Geoffrey Lawrence)

THE PRESIDENT: Dr. Siemers [counsel for defendant Raeder] if there are any passages in this document [Document L-79, Exhibit USA-27] which have not been read and to which you attach importance, you may read them now; and for the rest, all that the Tribunal thinks you ought to do is to ask the defendant [Raeder] what his recollection was or what happened at that meeting, and if he can supplement the document as to what happened at the meeting, he is entitled to do so. The Tribunal does

¹Extract from mimeographed transcript, U. S. *vs.* Ulrich Greifelt, *et al.*, Case 8, page 1968.

²Trial of the Major War Criminals, *op. cit.*, volume XIV, page 41.

not intend to prevent your reading anything from the document which has not yet been read, nor from getting from the witness anything which he says happened at the meeting.

DR. SIEMERS: Mr. President, I understood the witness to mean that he recalled the research staff which the prosecution had not mentioned. Thus it came about that the witness, since he too knows the document, at the same time pointed out that the research staff was also mentioned in the document. I believe that can explain the misunderstanding. The situation is clear to me, and perhaps I may read this sentence in that connection.

THE PRESIDENT: Yes, certainly.

17. MILCH AND RuSHA CASES—EXTRACTS FROM THE PROCEEDINGS SHOWING A DIFFERENCE OF PRACTICE CONCERNING READING FROM OR COMMENTING UPON DOCUMENTS AT THE TIME OF OFFER

a. Milch Case—Discussion between Judge Musmanno and Prosecution Counsel Concerning the Advantage of Reading Substantial Parts of Important Documents

EXTRACT FROM THE TRANSCRIPT OF THE MILCH CASE, 3 JANUARY 1947¹

JUDGE MUSMANNO: Mr. Denney, it would appear to me that where you have a document of sufficient importance as to be studied by the Tribunal in analyzing all the testimony, that you read a substantial part of it into the record.

MR. DENNEY [chief trial counsel for the prosecution]: Yes, but if Your Honor please, that is exactly our intention.

JUDGE MUSMANNO: So that the record [of the proceedings in open court] itself will be complete without having to leaf through a number of other documents.²

MR. DENNEY: Yes, Your Honor, that is exactly what I have in mind. The only reason that I mentioned that we won't read the complete document in every instance is because that process was followed on occasion before the first trial [the IMT case] and I thought perhaps Your Honors might have the idea that every document should be read *in toto*. Now, of course, if Your Honors, want it, we will definitely do it, but we do definitely have in mind to read into the record documents at some length where they are

¹Extract from mimeographed transcript, U. S. vs. Erhard Milch, Case 2, pages 28 and 29. This discussion took place on the first day the prosecution offered evidence and while the prosecution was outlining its plans for presenting evidence and authenticating documents.

²The Official Record, of course, included the documentary exhibits as well as the transcript of the daily proceedings.

important and where we feel that they cast light either on the slave-labor program or medical experiments, or that we feel is definitely on the subject, but of course that is for Your Honors' ruling.

JUDGE MUSMANNO: In other words, the record [of the proceedings in open court] should be self-sustaining.

MR. DENNEY: Yes, we have that in mind, Your Honor.

b. RuSHA Case—Two Announcements that the Tribunal Did Not Desire Counsel to Read from or Comment upon Documents in Offering Them, and Discussion of the Defense Request that the Prosecution Discuss the Importance of Documents in Offering Them

(1) Statement of Presiding Judge Wyatt at the Arraignment, 10 October 1947

**EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
10 OCTOBER 1947¹**

PRESIDING JUDGE WYATT: The Tribunal is of the opinion that reading excerpts from documents introduced in evidence will not be helpful to the Court. You will simply identify your documents, both the prosecution and the defense, introduce them in evidence, and then in your briefs call the attention of the Court to those portions of the documents you consider to be material.

(2) Statement of Presiding Judge Wyatt just preceding the Offer of Evidence by the Prosecution, 21 October 1947

**EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
21 OCTOBER 1947²**

PRESIDING JUDGE WYATT: We are now ready to proceed with the taking of testimony. We would like to again call counsel's attention to the fact that, as far as documentary evidence is concerned, all that the Tribunal desires is that the documents be identified and offered in evidence without reading from them or commenting about them. It will be the duty of the Court to study these documents. They will be in evidence and we are of the opinion that comment or reading from them at this time will not be helpful.

¹Extract from mimeographed transcript, U. S. vs. Ulrich Greifelt, et al., Case 8, page 28.

²Ibid., pages 126 and 127.

When a document is offered it will be considered in evidence without any ruling from the Court unless objections are interposed.

The Tribunal desires to call counsel's attention to the fact that the rules under which the Tribunal operates expressly provide that technical rules regarding evidence shall not prevail. That is true for the reason that the case is being tried before a court of judges and not a jury of laymen. We are supposed to know the probative value of evidence.

We can assure you that when evidence is offered, whether objected to or not, if it has no probative value this Court will give it no consideration. You may be assured of that. You may proceed.

- (3) *Discussion of Defense Request that the Prosecution Discuss the Importance of Documents in Offering Them, 21 October 1947**

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
21 OCTOBER 1947*

DR. HAENSEL (counsel for defendant Greifelt): I would like to ask the Tribunal to make a decision as to what is meant by the words "introduction of the document before the Tribunal." When one says "to introduce a document," then I understand it to mean that this document is being introduced against a specific defendant and for a specific purpose. I would like to point out to the Tribunal that in other Tribunals in this Palace of Justice a similar procedure is used by the prosecution; namely, that they do not only introduce a document and give it an exhibit number, but they also state, either in writing or orally, what this document deals with, and which defendant in particular it implicates.

Of course, you can do that in all sorts of ways, but we have to do it somehow because otherwise we won't be able to follow the introduction of evidence and every defendant would have to have a document against himself in particular and thus we would lose the time which we are gaining now by this brief introduction of evidence. I am quite sure we would save time if the defendants, once they are on the stand, would talk about the documents which are introduced against them rather than about all the documents. What I mean is that if we don't limit every document for every defendant, every defendant will have to take up his stand and give us his point of view on every one of the documents. It is up to the Tribunal, of course.

*Ibid., pages 134-136.

MR. SHILLER (trial counsel for the prosecution) : May it please Your Honors, in a case of this nature, it is very difficult, on introducing evidence dealing with organizations and dealing with crimes committed, we contend, by a number of the defendants acting together, upon introducing each document, to list the defendants concerned in that document. This is not a procedure followed before any of the other military tribunals and we contend that it is quite clear from the documents as to which organization they pertain and which defendants are thereby affected.

PRESIDING JUDGE WYATT: The attorneys for the defendants will have to do just what the Court has to do, read the document and determine for himself whether it applies to his client or not. Go ahead.

DR. SCHWARZ (counsel for defendant Hofmann) : May it please Your Honors, I would like to mention a point here in connection with this subject; namely, that in accordance with Military Government Ordinance No. 7, the defendant or the counterparty have the opportunity, according to Article VII, to object to this document. What I wish to point out, in particular now, is that they can object to the probative value of a document. However, the defendant can only object to the probative value of that document if he knows whether the document is held against him or not. Therefore, I consider it necessary that the prosecution always mention briefly the probative value of the document without commenting on the document, of course. I can only object to the probative value of the document if I know whom the document is being held against.

PRESIDING JUDGE WYATT: The only way I know for you to find that out is to read the document.

18. IMT CASE—ADMISSION OVER DEFENSE OBJECTION OF A CAPTURED LETTER AS PROOF OF MATTERS STATED IN THE LETTER WHEN THE AUTHOR IS AVAILABLE AS A WITNESS

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
28 NOVEMBER 1945*

MR. ALDERMAN (associate trial counsel for the United States) : I offer in evidence our Document 812-PS, as Exhibit USA-61. It contains three parts. First, there is a letter dated 22 August 1939 from Mr. Rainer, then Gauleiter at Salzburg, to the defendant Seyss-Inquart, then Austrian Reich Minister. That letter

*Trial of the Major War Criminals, *op. cit.*, volume II, pages 367-369.

encloses a letter dated 6 July 1939 written by Rainer to Reich Commissioner and Gauleiter Josef Buerckel.

DR. HANS LATERNSE (cocounsel for defendant Seyss-Inquart) : I object to the presentation of the letters contained in Document 812. Of course, I cannot object to the presentation of this evidence to the extent that this evidence is to prove that these letters were actually written. However, if these letters are to serve as proof for the correctness of their contents, then I must object to the use of these letters, for the following reason, particularly, the third document: It is a letter which, as is manifest from its contents, has a certain bias, for this reason, that in this letter it is explained to what extent the Austrian Nazi Party participated in the Anschluss.*

It purports, further, to expose the leading role played by the party group Rainer-Klausner.

From the bias that is manifest in the contents of this letter, this letter cannot serve as proof for the facts brought forth in it, particularly since the witness Rainer, who wrote this letter, is available as a witness. I have discovered he is at present in Nuernberg.

I object to the use of this letter to the extent that it is to be used to prove the correctness of its contents, because the witness who can testify to that is at our disposal in Nuernberg.

THE PRESIDENT: The Tribunal will hear Mr. Alderman in answer to what has been said. The Tribunal has not yet read the letter.

MR. ALDERMAN: I think perhaps it would be better to read the letter before we argue about the significance of its contents.

THE PRESIDENT: Are you relying upon the letter as evidence of the facts stated in it?

MR. ALDERMAN: Yes.

THE PRESIDENT: From whom is the letter, and to whom is it addressed?

MR. ALDERMAN: The first letter is from Mr. Rainer who was at that time Gauleiter at Salzburg, to the defendant Seyss-Inquart, then Reich Minister of Austria.

That letter encloses a letter dated 6 July 1939, written by Rainer to Reich Commissioner and Gauleiter Josef Buerckel. In that letter, in turn, Rainer enclosed a report on the events in the NSDAP of Austria from 1933 to 11 March 1938, the day before the invasion of Austria.

*The three parts of the document referred to are reproduced in volume XII, this series, pages 656-668.

I had some other matters in connection with this that I did want to bring to the attention of the Tribunal before it passes upon the admissibility.

THE PRESIDENT: I don't think that the defendant's counsel is really challenging the admissibility of the document; he challenges the contents of the document.

MR. ALDERMAN: Yes. On that, in the first place, we are advised by defendant's counsel that this man Rainer is in Nuernberg. I would assume he is there.

We have also an affidavit by Rainer stating that what is stated in these communications is the truth. However, it seems to us that the communications themselves, as contemporaneous reports by a Party officer at the time, are much more probative evidence than anything that he might testify to before you today.

DR. LATERNER: I have already said that this letter has these characteristics, that it is biased, that it tends to emphasize and exaggerate the participation of the Austrian Nazi Party on the Anschluss. Therefore, I must object to the use of this letter as objective evidence. It was not written with the thought in mind that the letter would be used as evidence before a court. If the writer had known that, the letter undoubtedly would have been formulated differently, considering his political activity.

I believe, although I am not sure, that the witness is in Nuernberg. In that case, according to a principle which is basic for all trial procedure, the witness should be presented to the Court personally, particularly since, in this case, the difficulties inherent in the question of Messersmith do not here pertain.

THE PRESIDENT: The Tribunal is of the opinion that the letters are admissible. They were written to and received by the defendant Seyss-Inquart. The defendant can challenge the contents of the letters by his evidence.

If it is true that Rainer is in Nuernberg, it is open to the defendant to apply to the Tribunal for leave to call Rainer in due course. He can then challenge the contents of these letters, both by the defendant Seyss-Inquart's evidence and by Rainer's evidence. The letters themselves are admitted.

MR. ALDERMAN: May it please the Tribunal, I agree quite fully with the statement that if it had been known that these letters were to be offered in evidence in a court of justice, they very probably would have been differently written. That applies to a great part of the evidence that we shall offer in this case.

E. Books and Publications

I. INTRODUCTION

German publications issued before Germany's unconditional surrender were ordinarily admitted in evidence as probative of the materials discussed therein, just as captured documents from the files of various German agencies and individuals. Similarly, contemporaneous Allied publications dealing with facts in issue were ordinarily declared admissible without presenting any affidavit by the author verifying the facts stated in the publication. However, articles from magazines, journals, and newspapers written after Germany's surrender were ordinarily rejected, unless the proponent obtained an affidavit from the author verifying the statements made in the article. There were some exceptions, particularly where the article was written by an expert and where the testimony of the expert as a witness would have been admissible. In the Medical case, for example, the Tribunal admitted publications from approved medical journals concerning the nature and scope of medical experiments, stating that it would pass upon the question of the admissibility of each publication as it was offered. Pertinent extracts from the transcript of the Medical case dealing with this question are reproduced in 2 below. In the Ministries case, after the prosecution had objected to a number of documents offered on behalf of the defendant von Weizsaecker, the Tribunal issued an order concerning the general rules it would follow "in the absence of special circumstances affecting the probative value of a particular document which may *** justify deviation." The pertinent parts of this order covering books, publications, and contemporaneous diaries are reproduced in 3 below.

2. MEDICAL CASE—STATEMENT OF THE TRIBUNAL ON THE ADMISSION OF EXTRACTS FROM MEDICAL JOURNALS OR OTHER PUBLICATIONS RECOGNIZED AS RESPONSIBLE BY PHYSICIANS, AND RELATED PROCEEDINGS

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE, 26 JUNE 1947*

PRESIDING JUDGE BEALS: With reference to these documents which are under consideration, being extracts from publications which are deemed relevant by counsel, the Tribunal will be inclined

*Extracts from mimeographed transcript, U. S. vs. Karl Brandt, *et al.*, Case 1, pages 10169, 10170, 10172, and 10173.

to admit in evidence extracts from publications which are approved medical journals, or publications which are recognized generally in the countries in which they are published, by physicians and other persons, as being responsible publications. That, of course, will require each document to be presented and considered by the Tribunal and the ruling made on each document as it may be offered.

When I spoke of responsible publications, I intended to say publications which are regarded as responsible insofar as medical matters and surgical matters are concerned.

Counsel may proceed.

DR. SERVATIUS [counsel for defendant Karl Brandt]: Mr. President, I should like to say something of a fundamental nature about the admissibility of other documents over and beyond the ruling which the Tribunal just made. I should like the whole question to be examined from this point of view. The evidence in this trial refers to the entire legal aspect of the matter, because the prosecution asserts that the defendants have offended the principal penal laws of all civilized countries. There are no laws to this effect, not even in America today. The witness, Professor Ivy, only said that a commission met which was going to make some regulations of an administrative sort. What the law actually is in the world we can only judge from what has happened. The situation is the same as it is in international law where the effort is made to ascertain international law. The IMT maintained this law always existed and was simply drawing on it. In that case we must proceed as a legislature proceeds. We must have a view of this whole medical field as a whole and take into account the opinions of all, not only the authorities, but also the entire population. For that reason the statements made in the press in articles by less prominent authors are of great importance. They are all a reflection of real life. We should try to ascertain the situation as a whole. This is a sort of mosaic, which must be assembled. You cannot take only authorities; you must take other voices, too, which are a part. The structure must include all of them. Only from the total facts can real life be seen and can it be ascertained what the real opinion of humanity is.

PRESIDING JUDGE BEALS: As I stated, each document will be considered as it is presented. Suppose you reserve this argument until some document is presented and objected to. We can consider it as concrete when it is presented to the Tribunal as a document.

DR. SERVATIUS: Mr. President, I offer Document Karl Brandt 110 as Exhibit 44; that is the paper by Professor McCance in connection with experiments.

PRESIDING JUDGE BEALS: Did you say that was published in "The Lancet"?

DR. SERVATIUS: Yes, and 1936 is the date, a paper by Professor McCance.

PRESIDING JUDGE BEALS: Has counsel for the prosecution any objection to the admission of this document?

MR. HARDY (associate counsel for the prosecution): The prosecution would like the defense counsel to state what is the reputation of "The Lancet," as I am not familiar with it.

PRESIDING JUDGE BEALS: The Tribunal is. The reputation of the magazine is very good; it is an English medical journal.

MR. HARDY: No objection.

PRESIDING JUDGE BEALS: Karl Brandt Document 110 will be admitted as Brandt Defense Exhibit 44.

[Thereafter a number of further extracts from British, American, and German medical publications were admitted in evidence.]

DR. SERVATIUS: Next comes Karl Brandt 104; I am not sure whether the Tribunal has that in English.

PRESIDING JUDGE BEALS: Yes, it is contained in this book.

DR. SERVATIUS: This is an article from the Readers Digest of January 1947 entitled "I Starved for Science." This is an article from a fiction magazine which contains semi-scientific information also, and there are some scientific works. This is a report by a volunteer who, as a conscientious objector, went through a hunger experiment with 35 of his comrades. I put it in first of all in order to refute what Professor Ivy said, namely, that such experiments do not involve pain, simply minor unpleasantness.

MR. HARDY: I shall not object to the introduction of this document but, however, counsel should reserve any argument as to the probative value of this document for the arguments, and then the probative value of the document can be determined by the Tribunal. The document is not refuting the testimony of Dr. Ivy. It can be seen it simply states how volunteers subjected themselves to dietetic experiments. At the end everyone was happy and they had a whopping party. There is nothing in it to refute Professor Ivy's testimony; that is the reason I am not objecting to it. I think if he has any comment to make on the document it should be reserved for argument.

PRESIDING JUDGE BEALS: The Tribunal is not disposed to admit this offered article in evidence. It will not be received.

MR. HARDY: I understand it will not be received?

PRESIDING JUDGE BEALS: This offered exhibit will not be received in evidence.

DR. SERVATIUS: Mr. President, since I have similar documents here, may I please say the following: if I may use these documents only in my argument then I shall have to bring them to the attention of the Tribunal later in my concluding plea or not even then? Am I understanding you correctly?

PRESIDING JUDGE BEALS: The argument of counsel must be based upon evidence which is received and admitted before the Tribunal and not upon extraneous matters.

DR. SERVATIUS: Then Mr. President I am not in a position to base my argument on anything because I will have no practical case to refer to, but must refer only to hypothetical cases. I think I must be given an opportunity to substantiate what I am going to present. I cannot rely purely on theory.

PRESIDING JUDGE BEALS: That is what I am trying to say, that the arguments of counsel are supposed to be based on the evidence which is before the Tribunal, from the facts and evidence which have been received. That is not limiting counsel's argument to theory, but on the contrary gives counsel evidence which is before the Tribunal upon which to base his argument. Counsel, of course, in his argument may draw deductions from matters which are in evidence. He does not have to argue only the evidence. That matter can be taken up later if counsel is in doubt about the argument.

3. MINISTRIES CASE—EXTRACTS FROM A TRIBUNAL ORDER CONCERNING THE ADMISSIBILITY OF BOOKS, PUBLICATIONS, AND CONTEMPORANEOUS DIARIES*

MILITARY TRIBUNAL

TRIBUNAL IV, CASE 11

The United States of America }
 against } [Stamp] Filed: 27 July 1948
Ernst von Weizsaecker, *et al.* }

ORDER

The prosecution has interposed objections to the receipt of a very considerable number of documents offered by the defendant Weizsaecker. The documents in question fall into several categories, books, publications, diaries, affidavits, statements, and so forth. Inasmuch as the same questions are likely to arise with respect to other documentary exhibits, the Tribunal has considered the question involved and, in the absence of special circumstances

*U. S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 76, pages 3301 and 3302.

affecting the probative value of a particular document which may in its judgment justify deviation, announces the following rules:

1. Books written before the end of the war by participants in or qualified observers of the events leading up to and during the war are admissible.

2. Books or other publications written after the end of the war by participants in the events or by qualified observers thereto are not admissible unless verified by affidavit and then subject to the usual conditions covering affidavits.

3. Actual contemporaneous diaries are admissible provided that the whole diary from which excerpts are offered is submitted to the adverse party for inspection.

4. Books and publications not otherwise admissible which counsel deem authoritative literature and are related to the events involved in these proceedings may, however, be used by counsel in final briefs and arguments.

[The remaining paragraphs of this order, paragraphs 5 and 6, concern affidavits and written statements. These paragraphs are reproduced in section XVIII J 12.]

Nuernberg, Germany
27 July 1948

[Signed]

WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

F. Oral Testimony by Persons Other Than Defendants

I. INTRODUCTION

Both the Charter of the IMT and Ordinance No. 7 made it clear that the calling and examination of witnesses, quite as much as the production of other evidence, was to follow the basic pattern of the adversary system or partisan method, under which the presentation of evidence is primarily the duty of the opposing parties. Article 15 (a) of the IMT Charter charged the chief prosecutors with the duty of the "investigation, collection, and production before or at the Trial of all necessary evidence," whereas Article 16 provided:

"(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

“(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.”

Article 24 (e) of the Charter stated that:

“The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.”

Article XI of Ordinance No. 7 likewise provided that first the prosecution and then the defense “shall produce its evidence subject to the cross-examination of its witnesses.”

No instance has been found where any Tribunal declared that either of the opposing parties was obliged to call a witness, regardless of how material his testimony might be. On the contrary, the Tribunal in the Medical case stated that neither the prosecution nor the defense were under such an obligation (see 2 below). The question arose where the defense asked the prosecution to explain why it had not called two material witnesses. The prosecution answered that the two persons in question were themselves incriminated and obviously hostile to the prosecution. One of the persons in question, Professor Haagen, later testified at length for the defense. (See “List of Witnesses in Case 1,” vol. II, this series, pp. 332–335.)

The fact that the opposing parties had the burden of going forward with the evidence at various stages of the Nuernberg trials was in contrast to Continental practice. Under Continental procedure the judge, or the presiding judge where several judges sit together, assumes a much more active role than under the adversary system. For example, under German criminal procedure the judge conducts most of the questioning and determines the details of the order in which evidence is to be presented. (See the statement of Dr. Kubuschok, reproduced in sec. XIII G 2.) As a general rule the judges in the Nuernberg trials only asked occasional questions of witnesses. However, there were times when questioning by the Tribunal was extensive, and in the Pohl Case the Tribunal recalled the defendants Pohl and Tschentscher to the stand after the conclusion of the defense case in chief for further examination by members of the Tribunal (sec. XVIII G 8). “Tribunal witnesses” and collateral inquiries present unusual rather than normal types of situations, and deserve separate discussion.

In four of the 12 trials before Tribunals established pursuant to Ordinance No. 7, a total of nine witnesses were called as Tribunal witnesses. In the Medical case one witness, Dr. Walter

Neff, was called as a Tribunal witness. The prosecution informed the Tribunal that Neff was highly informed of certain facts in issues, but that he was himself greatly incriminated and that the prosecution did not wish to vouch for all the answers Neff might make. The Tribunal approved the prosecution's proposal that Neff be called as a Tribunal witness, but the Tribunal left the principal interrogation of Neff up to opposing counsel, question first being asked by the prosecution and then by the defense (see 3 below).

In the Milch case the Tribunal called Mr. Walter Lichtenstein as a Tribunal witness concerning the employment and pay of prisoners of war by the American Armed Forces during the war. The presiding judge asked the first questions, followed by an interrogation by defense counsel. There were no questions by the prosecution. In the Pohl case two persons were called as Tribunal witnesses in connection with the circumstances under which Heinrich Schwartz, a member of the staff of Wewelsburg Concentration Camp, made conflicting statements in two affidavits which had been introduced in evidence, the first by the prosecution and the second by the defense. The Tribunal first called Mr. Larry Wolff, an interrogator on the prosecution staff, who had obtained the first affidavit from Schwartz after interrogation, and then later called Schwartz himself. The prosecution began the examination of Wolff and the Presiding Judge began the examination of Schwartz. Both witnesses were interrogated by members of the Tribunal and by prosecution and defense counsel. The Tribunal in the Einsatzgruppen case called five persons as Tribunal witnesses: Rolf Wartenberg, an interrogator of the prosecution, concerning the interrogation of a defendant before trial after the defense alleged that the defendant had given pre-trial affidavits under duress; Friedel Reich, a German woman whose affidavits conflicted with the testimony of her superior; and two American medical officers and a German doctor (Capt. George T. Carpenter, Lt. William L. Bedwill, and Dr. Herbert Grahmann) concerning the ability of defendants to stand trial. The Presiding Judge began the questioning of four of these witnesses and thereafter there were questions either by the prosecution or the defense or by both. Wartenberg was questioned first by the prosecution and later by members of the Tribunal and the defense counsel.

In the two lengthy contempt proceedings involving certain defense counsel in the Justice and Krupp cases (sec. XXI, "Contempt of Court and Reprimands"), the procedure adopted by the respective Tribunals was quite different. In the Justice case, where the contempt occurred outside the presence of the Tribunal, the Tribunal requested the prosecution to take the initiative in investi-

gating and bringing out the evidence in the first instance. Counsel for the two respondents conducted cross-examination of the witnesses called by the prosecution and called and examined witnesses for the respondents. In the contempt proceedings in the Krupp case, on the other hand, the prosecution took no part whatsoever in developing the facts. The contempt there had begun in the presence of the Tribunal, and the members of the Tribunal assumed the initiative in developing the facts in the first instance. The defense counsel involved in the contempt chose one of their cocounsel, who was not involved, to represent them in questioning witnesses and in presenting argument.

Ordinance No. 7 contained no provisions with respect to the scope of direct, cross, redirect, or re-cross-examinations, nor did the Uniform Rules of Procedure adopted by the Tribunals. The examination of witnesses, therefore, was controlled entirely by the discretion of the Tribunals, subject only to such provisions of the Ordinance as those providing that the Tribunals were to "confine the trial strictly to an expeditious hearing of the issues," that "the Tribunals shall not be bound by technical rules of evidence," and that they "shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure." The employment of the adversary method in the examination of witnesses was not without practical difficulties, particularly because most of the trials involved multiple defendants and a great variety of factual issues. Moreover, a great majority of German witnesses who were most informed about certain factual issues were themselves closely associated with the defendant, or else themselves implicated to some degree in the conduct which was the subject of the charges. When the prosecution in the Medical case did not wish to assume the responsibility for calling a material witness as a prosecution witness because of his personal involvement, personal bias, and probable hostility, the Tribunal approved a prosecution proposal that the witness be called as a Tribunal witness (sec. 3 below). However, in other cases the prosecution did not take this precaution, and in several instances found itself in difficulty with respect to impeachment of a witness called in the first instance as a prosecution witness. In the Flick case, for example, the Tribunal permitted defense counsel to go beyond matters covered in the direct examination of the prosecution and the Tribunal stated that on redirect examination the prosecution would not be allowed to cross-examine the witness as to the new matters, in the sense of impeaching his credibility (4 below). The Tribunal in the Farben case followed a practice on impeachment which was similar to the Flick ruling just mentioned (5 below). The prosecution first introduced a number of affidavits

by Frank-Fahle, a director and important official of the Farben concern. During a lengthy cross-examination by the defense, during the prosecution's case, Frank-Fahle gave much favorable testimony to the defense. Upon redirect examination the Tribunal several times admonished the prosecution that it could not cross-examine its own witness. Later Frank-Fahle was called during the defense case as a defense witness, and when the prosecution sought to impeach him at that time, the Tribunal struck some of his testimony after stating: "This is one man. He has testified as a witness for both sides. If you cast doubt on his credibility you have cast doubt on his credibility as a witness for the prosecution as well as for the defense." In this type of situation the prosecution argued that the application of conventional rules of impeachment did not necessarily operate to encourage the process of discovering the truth, that the rule had been developed with an eye to the jury system, and that various exceptions to the conventional rule were possible at the discretion of the trial court, even where technical rules of evidence were followed.

One of the questions frequently presented was the scope of cross-examination of prosecution witnesses, and various related matters. In the RuSHA case the Tribunal stated that upon cross-examination a prosecution witness could be examined concerning any matter under the charges (6 below).

Witnesses, and particularly defense witnesses, were often called to testify concerning several different counts of the indictment. Defense witnesses were frequently desired as witnesses on behalf of several defendants. It was customary, although there were some exceptions, to require a witness who once took the stand to be examined on all counts and on behalf of all defendants. For example, when the same person had been requested as a witness by a number of defendants, the IMT declared: "It is only necessary that such witness be called to the stand once. He may then be interrogated by counsel for any defendant as to any material matter." (Trial of the Major War Criminals, *op cit.*, vol. IV, p. 3.) A similar announcement by the Tribunal in the Justice case is reproduced in 7 below. However, when the prosecution and defense elicited testimony by affidavit from the same witness on several subjects, it was frequently the practice to introduce several affidavits dealing with the different matters. (See the materials on affidavits in subsec. H-J.) Where the affiant was called for cross-examination under these circumstances an attempt was usually made to have him appear after all his affidavits were introduced.

Cross-examination sometimes became quite lengthy and often argumentative. On many individual occasions the Tribunals inter-

vened in the interests of an orderly proceeding. In none of the cases was an express time limit placed in advance upon cross-examination by the defense. However, during the last part of the Farben trial the Tribunal restricted the prosecution's cross-examination of defendants and defense witnesses before the Tribunal to 20 percent of the time which had been taken upon direct examination. After protests on two occasions by the prosecution concerning this limitation, the Tribunal announced that where the prosecution anticipated that cross-examination would take more than the allotted time it could request that cross-examination be transferred to a commissioner of the Tribunal, where no specific time limit would be imposed. The transcript of proceedings on three different occasions which relate to this matter are reproduced in 8 below.

A precise time limitation upon cross-examination was adopted by the Tribunal in the RuSHA case as a part of an agreement between the parties and the Tribunal concerning the completion of the defense case. A part of this agreement was that the prosecution's cross-examination would be limited to 30 minutes for defendants and 10 minutes for defense witnesses.

On several occasions the Tribunals ruled that witnesses were not obliged to answer questions which might be self-incriminating. In the Hostage case, for example, the presiding judge warned the prosecution witness General Felber in this connection (9 below). In the High Command case, Field Marshals von Manstein and von Rundstedt did not appear as defense witnesses after the Tribunal informed them that they were not obliged to give self-incriminating testimony. The transcript pertinent to this matter has been reproduced in the earlier section on "Procurement of Witnesses for the Defense" at page 381.

In the Farben case, where a number of the defense counsel were former attorneys for the Farben concern, the defense apparently was in some doubt as to whether a defense counsel could appear as a witness without being disqualified as counsel. The Tribunal announced that the counsel could testify without disqualifying himself (10 below).

In the Medical and Farben cases, defendants on several occasions were allowed to question expert witnesses of the prosecution in persons as well as through counsel (sec. XIII I).

With respect to the oath or affirmation required of witnesses, Rule 9 (a) of the Uniform Rules of Procedure provided:

"Before testifying before the Tribunal each witness shall take such oath or affirmation or make such declaration as is customary and lawful in his own country."

A variety of different oaths were administered in the Nuernberg trials, five of which are shown by the extracts from the transcript of four of the trials which are reproduced in 11 below. The Tribunals quite frequently departed from the requirement of Rule 9 (a) that the oath taken by a witness be the oath or affirmation which was customary or legal in his country, apparently because of oversight in most cases, and occasionally because the customary oath was not known to the witness, the Tribunal, or counsel. For religious reasons a number of witnesses merely made affirmations to state the truth, and at least in one case no oath or affirmation was given to a defense witness after the prosecution waived any objection. The transcript involving the making of an affirmation by a member of Jehovah's Witnesses in the RuSHA case is reproduced in 12 below. An arrangement whereby no oath or affirmation was given is shown by the transcript of the proceedings surrounding the calling of a Mennonite as a witness in the RuSHA case (13 below).

2. MEDICAL CASE—DEFENSE REQUEST THAT PROSECUTION EXPLAIN WHY IT HAS NOT CALLED TWO WITNESSES, PROSECUTION REPLY AND TRIBUNAL STATEMENT THAT NEITHER PARTY IS UNDER OBLIGATION TO CALL WITNESSES UNLESS IT SO DESIRES

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE DURING THE CROSS-EXAMINATION OF THE DEFENDANT SCHROEDER, 27 FEBRUARY 1947*

MR. MCHANEY (chief prosecutor): Now General, let us try to reach some agreement about this Document NO-127, Prosecution Exhibit 306. Is it not true that the paragraph of this letter from Professor Haagen very clearly proves that Haagen was planning to make artificial infection experiments to test the effectiveness of this dried vaccine for typhus?

DEFENDANT SCHROEDER: He had the plan from Rose for typhus vaccine experiments and typhus injections, but he did not intend for them to be fatal, and it says nothing about that here; he says that sickness was to be expected.

DR. HANS FRITZ (counsel for the defendant Rose): Mr. President, a great deal of time has been spent in this trial concerning the correspondence of Professor Haagen, to establish what he was doing at the University of Strasbourg or in the concentration camp at Natzweiler. For this purpose these letters have been

*Extract from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, pages 3646 and 3647.

shown, in part, to prove that those experiments on hepatitis or typhus were made. No doubt the prosecution knows as well as I that Professor Haagen is in Baden-Baden in French custody and his assistant, Miss Crodel, is in Berlin. I do not understand why the prosecution did not call these two persons as witnesses, for in that way these letters could be explained much more easily. I would be glad if the prosecution would explain why they do not call these two people as witnesses.

MR. MCHANEY: I think the answer to that is perfectly obvious. Both Haagen and Miss Crodel are in custody and in the judgment of the prosecution, at least, are clearly implicated in the experiments on human beings, which resulted in the death of certain of these subjects, which has been testified to during this trial by the witness Schmidt¹ who worked in Strasbourg. We are in a position to know and see reports concerning this matter. Obviously the prosecution is under no obligation to call witnesses who would be hostile. It is not to be expected that Professor Haagen, under the circumstances, would take the stand and admit that he carried out a single infection experiment on human beings without their consent. A reasonable conclusion would be exactly the contrary, and the same is true with respect to his assistant, Miss Crodel. If these witnesses are to be called, it is apparently open to any defense counsel to put in a request. I think some of them have already done so with respect to Miss Crodel. It is perfectly obvious that they are not possible prosecution witnesses.

PRESIDING JUDGE BEALS: Neither the prosecution nor the defense are obligated to call witnesses save those that they desire to put on the stand. The witness Crodel has been asked for by several defendants.² Whether any of the other defense counsel have requested Dr. Haagen, I do not remember, but anyone can do so if they desire his attendance. Whether he can be procured is another matter, but the Tribunal would approve the order.³

3. MEDICAL CASE—DISCUSSION CONCERNING THE CALLING OF DR. NEFF AS A TRIBUNAL WITNESS UPON THE PROSECUTION'S SUGGESTION

EXTRACTS FROM THE MEDICAL CASE, 16 DECEMBER 1946⁴

¹ The testimony of the witness Walter Schmidt is recorded in the mimeographed transcript, 16 January 1947, pages 1816-1863.

² Miss Brigitte Crodel did not appear as a witness.

³ Professor Eugen Haagen later appeared and testified at length as a defense witness. His testimony is recorded in the mimeographed transcript, 17, 18, 19, 20 June 1947, tr. pages 9408-9712.

⁴ Extracts from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, this series, pages 493-495 and 506.

MR. MCHANEY (chief prosecutor) : It is now just a few minutes before the noon adjournment, and I would like to raise only one other point that the Tribunal may wish to rule upon.

We now have in the Nuernberg jail a man by the name of Walter Neff, and the Tribunal probably has heard mention of his name in connection with some of the documents, particularly in connection with the high-altitude and freezing experiments. Walter Neff was first a prison assistant to Dr. Rascher and was in September 1942 pardoned by Heinrich Himmler and eventually put in a police reserve unit. We think that it would be desirable for the Tribunal to hear the testimony of Walter Neff in connection with the experiments of which he has knowledge in Dachau.

The prosecution has duly served notice of the calling of Walter Neff on the defense counsel on last Saturday, about 12 o'clock. The prosecution, however, is reluctant to call Walter Neff as its own witness. The reason we feel that way is because Neff may very well be indicted and tried in this courthouse for his participation in the experiments at Dachau, and we would not wish to be bound by what he might testify to in this Court, particularly with respect to what he might have to say about his own participation in those experiments.

On the other hand, he has more knowledge about what went on in Dachau, I think, than any other living man, and I think it might be very desirable for the Tribunal to hear what he has to say. I request, therefore, that Neff be called as a Court witness; that is, the witness of the Tribunal, and in that way the prosecution would be free to examine him to any extent that might be necessary, and also, if necessary, to impeach him; but, even more important, if he is later tried, we would not be in the position of having relied on his testimony before this Tribunal and then proceed to try him and perhaps submit proof at variance with what he had to say here, especially with respect to himself. I would ask the Tribunal to make a ruling on that.

I do not know when it would be convenient for us to call Neff—possibly late today or some time this week. In any event, we have four Polish witnesses in Nuernberg now. We have two witnesses from Strasbourg. I would like for them to be able to testify this week so they would not have to stay in Nuernberg over the recess. It might be that we would delay Neff's testimony, possibly until even after Christmas.

JUDGE SEBRING: Would it be your purpose, Mr. McHaney, in the event this witness was called to the stand and was required to testify, to use such testimony as might be elicited from the witness stand against the witness Neff in a subsequent prosecution?

MR. MCHANEY: Well, that does not concern me quite so much as the possibility that he will take a defensive attitude as to his own participation in these experiments. I think that at that point his testimony may come into doubt. I think it would be fair if he were warned before he testified that anything he might say here could be used against him. It is just difficult to foresee what we might want to do with respect to his testimony at a later date.

PRESIDING JUDGE BEALS: The Tribunal will now recess until 1:30.

(A recess was taken until 1330 hours.)

* * * * *

MR. HARDY (associate counsel for the prosecution): At this time, we have completed the presentation of sea-water experiments. On another occasion, at a later date, we will ask permission to call witness Fritz Pillwein. At present he is not available; we have been informed that he is in Munich, and that he will be here in a few days.

MR. MCHANEY: Is the Tribunal prepared at this time to make a ruling with respect to the testimony of the witness Walter Neff? It might be expedient to call him at this time.

PRESIDING JUDGE BEALS: The Tribunal is not prepared to rule upon the question of the testimony of the witness Walter Neff at this time.

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EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE,
17 DECEMBER 1946*

PRESIDING JUDGE BEALS: The Tribunal will now announce its ruling in the matter of the proposed witness Neff. The ruling of the Court will be pronounced by Judge Sebring.

JUDGE SEBRING: Gentlemen of the prosecution and the defense, during the course of the trial session held yesterday afternoon the prosecution made an oral motion before the Tribunal that one Walter Neff be called to the witness stand as a court witness. As the Tribunal understands the assertions of the prosecution, they are that the said Walter Neff is believed to have been an eyewitness to many of the allegedly criminal medical experiments for which the defendants are now on trial, that he is one of the few eyewitnesses now available to the prosecution; that he is being personally held in physical custody by the occupational authorities

*Ibid., pages 546-548, 594 and 595.

upon suspicion of having been an active participant in such experiments; that he may in some subsequent proceeding be indicted for such participation in such experiments and be tried as a war criminal, which fact is known to him; that for this reason the prosecution is of the belief that the witness may prove to be a hostile witness and consequently, the prosecution does not care to call him as its own witness and thus vouch for his veracity or credibility. Nor, on the other hand, does it want to take an unfair advantage of the witness by requiring him to make statements under the compulsion of an oath when such statements may be used against him in a subsequent criminal proceeding.

The Tribunal is concerned, of course, with learning the whole truth about the charges now pending against the defendants in the dock. At the same time, it is equally concerned with protecting the rights of persons who may be subsequently brought to trial on charges of criminality.

With these considerations in mind, the Tribunal has come to the following conclusions:

1. The witness Walter Neff will be called to the witness stand and placed under oath as a court witness, under which status both the prosecution and the defendants will be permitted to examine him as though he were being interrogated on cross-examination.

2. In order adequately to protect the rights of the witness, however, the Tribunal now advises the prosecution that when the said Walter Neff is brought to the witness stand and placed under oath, but before he has given any material testimony, the Tribunal intends to warn him that because of possible active participation by him in certain medical experiments conducted at Dachau Concentration Camp on human subjects, the American authorities may decide to file criminal charges against him and try him as a war criminal, in which event any statements made by him under oath can and may be used against him in such prosecution; that consequently he may refuse to answer any questions put to him which in his opinion tend to incriminate him.

If the prosecution wishes the defendant called under the conditions prescribed by the Tribunal, the Tribunal will have him called as a court witness.

PRESIDING JUDGE BEALS: The prosecution may proceed.

MR. MCHANEY: If the Tribunal please, the ruling made by the Court with respect to the witness Walter Neff is satisfactory to the prosecution, and we would like to have him called today following the testimony of the witness Heinrich Stoehr.

* * * * *

MR. MCHANEY: If the Tribunal please, we would like at this time to call the Court's witness, Walter Neff, for examination.

PRESIDING JUDGE BEALS: The Marshal will summon Walter Neff.

(Walter Neff, a witness, took the stand and testified.)

JUDGE SEBRING: Witness, the Tribunal is now about to put certain questions to you before you are sworn as a witness in this case.

Do you answer to the name of Walter Neff?

WITNESS NEFF: Yes.

Q. Where do you now live?

A. In Dachau, Kufsteinstrasse, No. 2.

Q. Are you a German national?

A. Yes.

Q. Very well, hold up your right hand and repeat after me the oath:

I swear by God, the Almighty and Omniscient, that I will speak the pure truth and will withhold and add nothing.

(The witness repeated the oath.)

JUDGE SEBRING: You may sit down. Witness, before you were brought to the witness stand, the prosecuting authorities advised this Tribunal that you are now being held in custody by the American authorities upon suspicion of having actively participated in certain allegedly criminal medical experiments held in Dachau Concentration Camp prior to liberation, for which you may possibly be prosecuted as a war criminal. In view of this statement made by the prosecution to the Tribunal, the Tribunal now wishes to caution you that although you are now being called as a witness and will be compelled to answer questions under oath, that any statements made by you as a witness can and may be used as evidence against you in the event of such a prosecution; and that, consequently, you may refuse to answer such questions put to you as may, in your honest opinion, tend to incriminate you. Do you understand?

A. Yes.

JUDGE SEBRING: The prosecution may proceed with the examination.

4. FLICK CASE—DISCUSSION CONCERNING THE PERMISSIBLE NATURE OF FURTHER EXAMINATION BY THE PROSECUTION WHEN A PROSECUTION WITNESS IS CROSS-EXAMINED BY THE DEFENSE ON NEW MATTERS

EXTRACT FROM THE TRANSCRIPT OF THE FLICK CASE FOLLOWING THE CROSS-EXAMINATION OF PROSECUTION WITNESS ERICH GRITZBACH BY COUNSEL ON BEHALF OF THREE DEFENDANTS, 4 JUNE 1947¹

CROSS-EXAMINATION

* * * * *

DR. NATH (counsel for defendant Kaletsch) : I have no further questions.

(Dr. Kranzbuehler, counsel to the defendant Burkart, approached the lectern.)

PRESIDING JUDGE SEARS: Dr. Kranzbuehler, is your client in any way affected by this count of the indictment?²

DR. KRANZBUEHLER: He is not indicted in the Petschek case, Mr. President, nor did I want to interrogate the witness on the Petschek matter; but the witness was in a central position as head of Goering's Staff Office and has been questioned about the Four Year Plan and the Central Planning Office here. That is a matter on which the prosecution took evidence.

PRESIDING JUDGE SEARS: Go ahead.

DR. KRANZBUEHLER: That is a subject on which the prosecution took evidence, and that is a subject on which I wanted to ask some questions, too.

PRESIDING JUDGE SEARS: Just a moment.

(The Presiding Judge and Judge Richman briefly conferred.)

Did you wish to address the Court, Mr. Lyon?

MR. LYON (chief, Flick trial team, for the prosecution): I thought I would await the ruling of the Tribunal first, Your Honor.

PRESIDING JUDGE SEARS: The Tribunal hasn't been asked to rule, but the Tribunal intervenes for the purpose of advising the attorney if possible.

¹Extract from mimeographed transcript, U.S. vs. Friedrich Flick, et al., Case 5, pages 2561-2563.

Extracts from the testimony of Gritzbach are reproduced at pages 575-598 volume VI, this series. His complete testimony is recorded in the mimeographed transcript, 3 and 4 June 1947, pages 2470-2579.

²The witness had been examined principally concerning the charges of the Aryanization of the Petschek firms, a part of the allegations of count three of the indictment.

MR. LYON: Well, perhaps it would be in order for me to say just a word as to the position of the prosecution. We certainly have no objection to any questions pertaining to the Rombach matter. If any other questions are considered appropriate by the Tribunal I should just like to state that the prosecution would assume in that case that the examination is in the nature of a direct examination by the defense counsel, and the prosecution would like to reserve the right to cross-examine the witness with respect to any of these other matters.

PRESIDING JUDGE SEARS: What do you mean by cross-examining, to amplify and correct? Of course, you can't attack the credibility of your own witness.

MR. LYON: Well, it would be a matter of amplifying and perhaps correcting any matters brought out that would amount to a direct examination by the defense counsel.

PRESIDING JUDGE SEARS: Dr. Kranzbuehler, your intention is to interrogate simply in respect to the negotiations or attempted negotiations or conversations with officers of the Four Year Plan in relation to the Petschek matters, is that right?

DR. KRANZBUEHLER: Not with reference to the Petschek affair, Mr. President.

PRESIDING JUDGE SEARS: Weren't all —

DR. KRANZBUEHLER: I only wanted to ask him general questions about the Central Planning Office, in order to clear up some documents about the Central Planning Office which had been submitted. If the prosecution has any objections about my doing this in cross-examination I would like to have the witness called as the Tribunal's witness.

PRESIDING JUDGE SEARS: What do you say to that, Mr. Lyon?

MR. LYON: If it please the Tribunal, it seems to the prosecution that the proposal of defense counsel is to, in effect, put on a defense witness at this point. That is perfectly all right with us, as long as he is treated as such and the prosecution has the right to cross-examine as fully as though he had been an original witness of the defense for that purpose.

PRESIDING JUDGE SEARS: Yes, the original witness called after you had called the same witness. Of course, you can't cross-examine as to the credibility of your own witness, even though he is called subsequently as a witness for the defense. But of course, you can show corrections or amplifications.

MR. LYON: Yes, Your Honor, that is what I had in mind.

PRESIDING JUDGE SEARS: Very well; I think we will hear you, Dr. Kranzbuehler, but I think you should be very brief.

5. FARBEN CASE—DISCUSSIONS CONCERNING THE PERMISSIBLE NATURE OF EXAMINATION BY THE PROSECUTION WHEN A FORMER FARBEN OFFICIAL WAS CALLED AS A WITNESS FIRST BY THE PROSECUTION AND LATER BY THE DEFENSE

EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE DURING THE TESTIMONY OF DR. FRANK-FAHLE AS A PROSECUTION WITNESS, 14 OCTOBER 1947¹

*REDIRECT EXAMINATION*²

MR. SPRECHER (chief, I. G. Farben trial team, for the prosecution): You are a lawyer yourself, Witness?

WITNESS FRANK-FAHLE: I have studied for a doctor's degree, but I have no admission to the bar.

Q. Would you prefer to have this examination conducted in English or German?

A. English, if the Court agrees.

PRESIDING JUDGE SHAKE: It will be agreeable to the Court.

Q. Apart from the commercial members of the Vorstand [the Managing Board of I. G. Farben] whom you met in the meetings of the Commercial Committee, did you get to know most of the technical members of the Vorstand?

A. I met the technical members of the Vorstand before or outside of the meetings.

Q. Did you have any lawyers working under you in "Zefi," that is, Farben's Central Finance Administration?³

A. Yes.

Q. And were some of the assistant defense counsel here among those lawyers? I mean absolutely no reproach. I merely wish to indicate the facts to the record.

A. Yes.

Q. And some of the lawyers who questioned you yesterday had

¹Extracts from mimeographed transcripts, U.S. vs. Carl Krauch, et al., Case 6, pages 2017 and 2018, 2024 and 2025.

Dr. Guenther Frank-Fahle's entire testimony as a prosecution witness is recorded in the mimeographed transcript, 13, 14 October 1947, pages 1942-2053. His entire testimony as a defense witness is recorded in the mimeographed transcript (22 March 1947, pages 9788-9826). Further extracts from Frank-Fahle's testimony are reproduced in volume VII this series.

²The witness had been called for cross-examination by the defense concerning six affidavits which he had executed after interrogation by representatives of the prosecution and which the prosecution had previously introduced in evidence. The direct examination was short, since he was merely asked whether he had any additions or corrections to make in his affidavits. The cross-examination had been conducted by seven of the defense lawyers.

³The witness had been a Prokurist and director (Direktor) of the Farben concern; one of the deputies of the defendant Ilgner (Chief of Farben's Berlin Office N W 7); a leading official of Farben's Central Finance Administration; Chief of the Office of the Commercial Committee of the Managing Board of Farben, and Secretary of the Commercial Committee. He occasionally had acted as Chief of the Berlin Office in the absence of the defendant Ilgner.

worked with you concerning various questions which came up in the Central Finance Administration, is that right?

A. Of course.

Q. Did you discuss before you took the stand yesterday with some of these lawyers the testimony you would give today on cross-examination?

A. I discussed general questions about the I G trial with some of them, but not with everybody who asked me questions on cross-examination.

Q. That is perfectly understandable. Now, during absences of [defendant] Dr. Ilgner from Farben's Berlin N W 7 Office because of his numerous journeys, one place and another, you had some experience with respect to getting orders from him before he left concerning your duties, as well as reporting to him concerning what had gone on when he returned. Is that not true?

A. It is true, Mr. Sprecher. But the duties we had to attend to in Berlin office were of a more current nature. Therefore, any directions given by Dr. Ilgner could have concerned only pending matters. During his very extended absences so many important matters came up which were decided immediately by Dr. Krueger or by myself.

* * * * *

Q. Now, yesterday [upon cross-examination] you said a number of things in which you went into your own conclusions about matters which I had not gone into in my direct examination, but they did relate to some of the matters which were in your affidavits. Now, let me ask you a few questions along some of those lines.

PRESIDING JUDGE SHAKE: Just before you do that I deem it proper to remind you, Mr. Sprecher, that this is your witness, that you are not cross-examining a witness, but he is your witness in chief.

MR. SPRECHER: Your Honor, it was my purpose in my earlier questions, which I asked this morning, to indicate the basis of the relationship between this defendant, the defendants in the dock, and even some of the defense counsel here. Since many of the questions yesterday during cross-examination were exceedingly leading calling for "yes" and "no" answers in respect to conclusions, it would seem to me proper to follow a course to arrive at my ends rather shortly, rather than by laying a large amount of foundation. Now, that is my first point.

PRESIDING JUDGE SHAKE: Well, in that case, of course, we need not remind you that the field of leading questions is much broader in cross-examination than in chief. Leading questions are entirely

permissible in cross-examination. The Chair's only purpose in reminding you is that this Tribunal has concerned itself very much in trying to get the trial of this case into orderly channels and, insofar as you will observe the rules of examination yourself, you'll help the Tribunal in maintaining its consistent policy, and we suggest, not to limit your field of inquiry, but insofar as you can, refrain from cross-examining the witness. That was our only purpose.

MR. SPRECHER: Yes, Sir.

I have just one more thing. I think you have touched upon a subject which is an old subject. You mentioned the question of "my witness," and for many purposes that is a proper term, but I do not think we could conduct inquiries in Germany with adverse conditions as they are if we did not have certain privileges of so-called impeachment, where the witness, in cross-examination by defense counsel, is taken off the beaten path of direct examination.

JUDGE SHAKE: Well, of course, neither party owns a witness. What I mean by that, when I say your witness, is your witness in the sense that you examined him directly and you are not cross-examining a witness produced by the other side.

MR. SPRECHER: Thank you very much.

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE DURING
THE TESTIMONY OF DR. FRANK-FAHLE AS A DEFENSE WITNESS,
22 MARCH 1948*

CROSS-EXAMINATION

MRS. KAUFMAN (associate counsel for the prosecution): Witness, did you know Major Bloch of the Intelligence Department of the OKW well?

A. I knew Major Bloch, yes.

Q. Did you also know his superior, Colonel Piekenbrock, pretty well?

A. Yes.

DR. BACHEM (associate counsel for the defendants Ilgner and von der Heyde): Your Honor, I believe that these questions were not touched upon during my examination; that they go beyond the scope of my examination, and I therefore object.

MRS. KAUFMAN: I believe these questions go to the credibility of the witness, Your Honor.

PRESIDING JUDGE SHAKE: The Tribunal will overrule the objection on the sole ground that these are the first two questions that have been asked and they may be preliminary. However,

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, pages 9820-9823.

unless there is some connection subsequently with the testimony of the witness, standing alone, the questions would not be proper.

MRS. KAUFMAN: Is it not a fact that you had Major Bloch request you for his department after you were drafted into the Army in 1939?

A. On 1 August 1939, I was drafted into the Wehrmacht as a captain. I went through the war, up to February 1940, holding that rank, and in January 1940 I was assigned to Major Bloch's department of the OKW. That was after my friend, Colonel Piekenbrock, found out that Farben, already since the end of December 1939, had made an application according to which I was to be released from military service.

Q. Did you return to Farben shortly after your assignment to Major Bloch's department?

A. Pardon me?

Q. Did you return to Farben shortly after your assignment to Major Bloch's department?

A. Yes, I returned to Farben because the request of I G that I should be released from military service was granted in February 1940. I returned to my regiment, which was on the Luxembourg border, reported, was told that I had been released, and then returned to Farben. I have told this in long statements that are here since the past 3 or 4 years.

JUDGE MORRIS: May I inquire of counsel?

PRESIDING JUDGE SHAKE: Just a moment counsel.

JUDGE MORRIS: Are you still attacking the credibility of this witness? Is that the purpose of these questions?

MRS. KAUFMAN: If Your Honor please, I do not intend to pursue this line of questioning further. I have completed my questions and my intention was to show part of the picture of the witness' relation to NW 7 [Farben's Berlin Office].

JUDGE MORRIS: On the theory that that affected the truthfulness or the weight to be given to his testimony?

MRS. KAUFMAN: That is correct.

JUDGE MORRIS: Of course you realize that an attack on his credibility goes to the credibility of all his testimony, and this witness has testified extensively for the prosecution through affidavits.

MRS. KAUFMAN: I believe the prosecution has taken the position with respect to witnesses called by the prosecution, particularly those witnesses who have established themselves as hostile witnesses to the prosecution, and I do not believe that the prosecution intended to be bound by—

MR. AMCHAN [associate counsel for the prosecution]: If Your Honors please, we do not understand the rule to be, in a case

of this sort, where a witness is offered for one purpose by the prosecution, and we have indicated that the witness is an official of Farben whom we necessarily have to call, and in cases where later the witness is offered by a defendant and we undertake to cross-examine him as to the scope of his testimony and in the event we undertake to interrogate a defense witness as to his credibility, we thereby also attack his credibility for the purposes for which we have offered him as our witness.

PRESIDING JUDGE SHAKE: Well, Counsel, this is one man. He has testified as a witness for both sides. If you cast doubt on his credibility you have cast doubt on his credibility as a witness for the prosecution as well as for the defense.

MR. AMCHAN: Without arguing the point then, let us say that the last questions just put to the witness are not for the purpose of attacking his credibility.

JUDGE SHAKE: Then on the motion made by the defense the testimony referred to by the prosecution is now stricken from the record and will not be considered by the Tribunal.

6. RuSHA CASE—RULING THAT A PROSECUTION WITNESS MAY BE CROSS-EXAMINED CONCERNING ANY CHARGE IN THE INDICTMENT

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE DURING THE TESTIMONY OF PROSECUTION WITNESS ERICH SCHULZ, 5 NOVEMBER 1947*

CROSS-EXAMINATION

DR. SCHMIDT (counsel for defendant Tesch): Before being accepted in a home of the Lebensborn, did the women have to pass an examination by a classification officer from the Settlement Office? Witness, please wait a second before answering so that the interpreter will be able to catch up with us.

WITNESS SCHULZ: Yes.

MR. NEELY (associate counsel for the prosecution): Your Honor, we object to this line of questioning. We feel that it has nothing to do with the testimony, in the direct examination of the witness. It concerns Lebensborn, but it has nothing to do with the phase of the examination which we have just undergone. It concerns only the maternity homes, which in no way was the subject of the direct examination.

PRESIDING JUDGE WYATT: The trouble about that is that the

*Extract from mimeographed transcript, U.S. vs. Ulrich Greifelt, et al., Case 8, pages 1069 and 1070. The complete testimony of the witness Schulz is recorded in the mimeographed transcript, 5 November 1947, pages 1060-1098.

defense, when you put a witness up for any purposes, has a right to cross-examine him about anything that is charged in the indictment. I overrule the objection.

7. JUSTICE CASE—ANNOUNCEMENT THAT A WITNESS APPEARING FOR ONE DEFENDANT SHALL BE EXAMINED AT THAT TIME BY COUNSEL FOR OTHER DEFENDANTS DESIRING THE TESTIMONY OF THE SAME WITNESS

**EXTRACTS FROM THE TRANSCRIPT OF THE JUSTICE CASE,
8 JULY 1947***

PRESIDING JUDGE BRAND: We have concluded that when a witness is physically present in court, and present in the course of the presentation of the defendants' cases, of the defense, we will expect all defendants who desire to examine that witness, by their attorneys, to do so in order that it will not be necessary to call the witness back to the witness stand in connection with the case of each separate defendant.

[The Tribunal further discussed affidavits, and the Tribunal's discussion on that topic is reproduced in section XVIII J 3.]

PRESIDING JUDGE BRAND: Now, we fully recognize, gentlemen, the fact that the defense counsel, each of you, would prefer to present the case of your particular defendant as a separate unit; and, we also understand that the prosecution would prefer, if possible, to prepare the cross-examination as to each separate defendant. But, we have concluded that it will not be practicable to do that.

Both sides are having the fullest opportunity which the law can give, when you have the chance to examine the witness in behalf of your client in open court.

The necessity for an expeditious trial requires us to enforce this procedure, and you may rest assured that the Tribunal will allocate the testimony to the proper defendants' case, even though it may be presented in this manner.

*Extracts from mimeographed transcript, U.S. *vs.* Josef Altstoetter, Case 3, *et al.*, pages 4877 and 4879.

8. FARBEN CASE—DISCUSSIONS IN COURT ON THREE DIFFERENT OCCASIONS CONCERNING THE PRACTICE OF LIMITING THE PROSECUTION'S CROSS-EXAMINATION OF DEFENDANTS AND DEFENSE WITNESSES BEFORE THE TRIBUNAL TO 20 PERCENT OF THE TIME OF DIRECT EXAMINATION

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE AT THE END OF THE CROSS-EXAMINATION OF THE DEFENDANT WURSTER, 12 APRIL 1948¹

PRESIDING JUDGE SHAKE: Mr. Prosecutor, I indicated a little while ago that under the schedule that the Tribunal had set up we deemed about 1 hour and 40 minutes is ample time for the cross-examination of this defendant, in view of the time that he testified in chief.² The prosecution has now used 2½ hours. The Tribunal cannot permit this cross-examination to continue and expect other counsel to observe in good faith as they have done up to now, and keep within their limitations of time.³ It is necessary for me to say, Counsel, that you must now conclude this cross-examination.

MR. SPRECHER (chief, I.G. Farben trial team, for the prosecution): Mr. President, may I, if it is your pleasure, make a remark or two in connection with the problem which we are now faced with.

JUDGE SHAKE: You may state what you have to say for the record. We are here to allow you that privilege.

MR. SPRECHER: Mr. President, we don't have the opportunity in advance to plan the presentation of questions for the examination of a defendant or a defendant's witnesses, and particularly since Your Honors have announced in court this question of a time limit, I think that we sometimes get rather evasive answers which take up a lot of time and we don't get to the point soon enough so that we can proceed more rapidly.

Besides that, when a defendant takes the stand it is our one time to go fully into the case with him. Now, for our purposes, particularly in view of the fact that the direct examination can be mechanical or exact schedule may not at all enable us to do

¹ Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, pages 11118 and 11119.

² The defendant Wurster's direct examination was conducted on 8, 9, and 12 April 1948, and covers 145 pages (tr. pages 10861-10874, 10909-11011, and 11044-11071). The cross-examination was conducted on 2 April 1948, and covers 47 pages (tr. pages 11072-11120).

³ On 27 February 1948, the 33d trial day of the defense case, the Tribunal had announced a schedule for the completion of the defense case (this announcement is reproduced on pages 470-499). Several days prior to this announcement the Tribunal had held a conference in chambers on this matter with representatives of the prosecution and defense and at that time had stated that the defense, in submitting a proposed schedule for the completion of the case, should allow approximately 20 percent of the time of direct examination of witnesses for cross-examination by the prosecution.

justice for our case within the arbitrary time limit. I think Your Honors will recall that in one or two instances we have been below this so-called 20 percent time schedule for the prosecution, and I just point that out to Your Honors in connection with this problem. Now, if the prosecution from time to time, at least upon first appearances, has not been too efficient in some of its questioning, we still don't feel that that fact should really prejudice us with respect to finishing the examination with respect to subjects we have not asked about and which are new and are relevant.

JUDGE SHAKE: Well, Mr. Prosecutor, representatives of the prosecution staff sat in on the informal discussion with the Tribunal and representatives of the defense [when the completion of the defense case was scheduled]. I may say to you that counsel for the defense, many of them, urged that we were applying a too tight schedule for them. But the schedule was our best judgment as to what was reasonable and fair, and counsel generally—and I may say that has been true up to this time including counsel for the prosecution—have kept within the reasonable bounds of that schedule. As I said before, it is hardly fair to counsel for the defense, nor to the Tribunal, now, at this stage, to have a cross-examination to the extent to which this has been carried. We wouldn't be inclined to place an arbitrary, strictly-to-the-minute limitation on you. I hardly feel that your statement that sometimes longer leeway is justified because of evasive answers is true here. We have heard this defendant testify. His answers have been fairly responsive to your questions, and under the circumstances I may say to you that it is the unanimous decision of this Tribunal that you have carried this cross-examination far enough.

MR. SPRECHER: Thank you.

JUDGE SHAKE: Are there any further questions, gentlemen?

[Redirect examination followed thereafter.]

EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE DURING
THE CROSS-EXAMINATION OF DEFENSE WITNESS HELMUT
SCHNEIDER, 14 APRIL 1948 *

PRESIDING JUDGE SHAKE: Mr. Minskoff, will you please indicate to the Tribunal about how long your cross-examination will continue?

MR. MINSKOFF [associate counsel for the prosecution]: I think it will take about 25 minutes to one-half hour.

JUDGE SHAKE: Just a moment. The Tribunal thinks that that is too long in view of the period of time that the witness testified

*Extracts from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 8, pages 11419-11421; 11427, 11428, and 11440-11442.

in chief.¹ We don't want to be arbitrary about this matter. We want to give you a reasonable time for cross-examination, but we think you ought to finish up in about half that time.

MR. MINSKOFF: Mr. President, may I just say this: That of the various witnesses that the defense has indicated will be called before the Tribunal [in connection with the charges relating to the employment of concentration camp inmates at Farben's Auschwitz plant], the present witness has the highest position² and would therefore be the one who would be likely to know most of the relevant facts with which we are concerned here. Therefore, the cross-examinations of other witnesses will, in all likelihood, be so much shorter, because they wouldn't know the answers to all the pertinent questions, so in the end the Court's time will not be used unduly.

MR. SPRECHER: Mr. President, I am rather surprised that this rule or statement is now being applied with respect to defense witnesses as well as to defendants. In the case of defendants, we were advised in advance, by virtue of their books and one thing or another, as to something of what they would testify about. If we didn't have the full amount of time we really needed for cross-examination, we had some other alternatives in order to do justice to our case. If you recall during the prosecution's case we introduced affidavits such as the one that has been introduced by Dr. Seidl by this witness, and without saying ten words about them we turned the man over for cross-examination and there were no limits imposed at any time by the Tribunal. Now in this case, not only has this witness been on the stand, but a 20-page affidavit (*Doc. Duerrfeld 651, Duerrfeld Def. Ex. 2*) has been introduced by him, and now in less than a total of something like a half hour for a very important witness like this one, Your Honor is imposing more or less a time limit on us. We think that is a very different type of treatment than that which was accorded to the defense during the prosecution's case with respect to the examination of important witnesses.

¹ Prior to the direct examination of Schneider, Dr. Seidl (counsel for defendant Duerrfeld) introduced a 20-page affidavit by Schneider in evidence (Document Duerrfeld 651, Duerrfeld Defense Exhibit 2). The direct examination covered 25 pages (tr. pages 11386-11410) and made no direct reference to the affidavit. The cross-examination to this point covers 10 pages (tr. pages 11410-11419). On the second day after Schneider was excused from the witness stand, Dr. Seidl offered in evidence three further affidavits by Schneider (Duerrfeld Documents 1164, 905, and 106, respectively Duerrfeld Exhibits 141, 144, and 151). These three affidavits were among hundreds with respect to which the prosecution neither waived cross-examination nor called the affiants for cross-examination. See section XVIII J 7.

² Concerning his position at Farben's Auschwitz plant, Schneider stated the following in one of his four affidavits (Duerrfeld Document 1164, Duerrfeld Defense Exhibit 141): "In the Farben Auschwitz works I was in charge of all labor problems in the personnel department from the fall of 1941 on until the evacuation of the works. I was under the immediate supervision of Dr. Martin Rossbach, Manager of the personnel department, whom I represented during his absence in the last two years."

JUDGE SHAKE: Perhaps the solution for that is to let you have cross-examination like this before the commissioner.* In other words, we have had uniform practice here now since early in the defense of limiting counsel for the defense in the presentation of their cases. They have complied with that. Now along with that, we have had a similar limitation of the same character on the prosecution. There has been no question raised about this until the last few days, and we have been somewhat embarrassed by the situation because of the insistent demands of the prosecution for expanding the rule that we thought was generally accepted by counsel on both sides so as to permit the prosecution to have more time for cross-examination; and manifestly we cannot hold these defendants to a limitation that is not likewise imposed on the prosecution. If the prosecution wishes to conduct its cross-examination of these witnesses before the commissioner, perhaps we can arrange that, and we will of necessity have to do that if we are to preserve this practice that has been generally accepted and followed in good faith by counsel generally. Now we will allow you to complete this cross-examination because we do not want to divide the cross-examination of this witness and have part of it before the Tribunal and part before the commissioner. But hereafter, if you cannot keep within the limitation, tell us in advance; we will make an order and transfer the cross-examination to the commissioner.

MR. MINSKOFF: Mr. President, may I say just one thing? The prosecution intends to keep well within the 20 percent allotment for the witnesses of each defendant on an average, including the present defendant's witnesses. [Schneider had been called as a witness by counsel for the defendant Duerrfeld.] The only thing we did ask was that in view of the fact that this particular witness would know more than the others, that we be given more time as to this particular witness, but that over-all we will not use even our full 20 percent time which has been the division up to now.

JUDGE SHAKE: That calls for a lot of bookkeeping here. In other words, we'd have to give you the benefit of more time on the cross-examination of one witness and take it from you on another, and rather than involve ourselves into such complicated calculation we will just transfer the cross-examination of these witnesses where you cannot keep within the time that has been generally accepted here—we shall transfer the cross-examination to the

*It was the practice of the Tribunal to have most cross-examinations of affiants conducted before commissioners appointed to take testimony. However, where a witness executed an affidavit and also appeared as a witness, it had been the practice to permit cross-examination on the affidavit as well.

commission. Now we will not do that here because we will not impose on the commissioner the matter of conducting a part of a cross-examination, but we still do stand by the proposition that in about 15 minutes or less you should be able to conclude this cross-examination.

MR. SPRECHER: Mr. President, I personally have always heard and also felt, from my very limited experience, that where cross-examination was conducted, no matter how efficiently it might be conducted, that it was very difficult to determine in advance how long it should last, particularly with a witness whom you haven't asked questions of in advance, or where the witness is not friendly to you even if you have asked him questions beforehand. It seems to me that it's very difficult for us to tell in advance how long it will take; and I feel that your rule might be construed under certain circumstances—and I don't think this is being unfair and I am certainly not referring to this witness in case anyone should think I am making a personal remark—might be construed as an invitation by some people to be more evasive than would otherwise be the case. Consequently, how can the prosecution know in advance that it could finish in 20 percent of the time?

JUDGE SHAKE: Perhaps that is a difficult matter, but certainly no one ought to be in a better position to know how long a cross-examination should continue than the party who is responsible for the cross-examination.

MR. SPRECHER: I can quite agree, Your Honor, but I don't think anyone short of God really knows in advance how long it should continue.

JUDGE SHAKE: Proceed with the trial.

[Thereafter the cross-examination continued for six more pages (tr. pages 11422-11427) when the following ensued.]

PRESIDING JUDGE SHAKE: Now, Mr. Prosecutor, you have now used better than twice the time, and 5 minutes more than the time that we fixed as the limitation of this cross-examination. The Tribunal will not hear any more cross-examination of this witness. We do not wish to have the prosecution feel that it has been treated unfairly and you may complete the cross-examination of this witness before the commissioner if you wish to pursue it further.

MR. MINSKOFF: There are only a few questions, Your Honors. We probably could save time if we finish it here.

JUDGE SHAKE: How long a time?

MR. MINSKOFF: Just about three questions.

JUDGE SHAKE: If it's only three questions we will indulge it rather than to burden the commissioner with it.

[Cross-examination and redirect examination were thereafter concluded, after which the following ensued.]

PRESIDING JUDGE SHAKE: Now gentlemen, the Tribunal will now excuse this witness and I think—you may go, Mr. Witness—I think it well that we have a definite understanding about this matter of cross-examination of these defense witnesses. -

We have been going on the assumption that counsel generally, including prosecution and defense, perhaps somewhat reluctantly in some instances, have acquiesced in the Tribunal's judgment as to the time that should be reasonably allowed for the presentation of the evidence, including the cross-examination of the witnesses. I may say, the Tribunal has very much appreciated the cooperation of all parties concerned in an effort to keep this trial within reasonable limitations. In the last two or three instances the prosecution has manifested some discontent over the time that was allowed for cross-examination. We are not disposed to be arbitrary with either the defense or the prosecution, but we have, however, got to adhere to the program we have mapped out or abandon it. And the Tribunal is not disposed to abandon it. It has not been with any feeling whatever that we felt obligated to put pressure on the prosecution to conclude its cross-examination short of the time that it had hoped to take in the last two or three instances. Now, it may be sometimes difficult for the prosecution to estimate in advance the time that it will require to make a reasonable cross-examination, but it is in a better position than anyone to do that because it has control over how much cross-examination it conducts. Henceforth we intend to adhere to the program we have laid down. However, if the prosecution feels at the conclusion of the examination of a witness in chief that it cannot keep its cross-examination within those limitations, it may waive its cross-examination before the Tribunal and ask that the cross-examination be concluded before a commission. We shall not split the cross-examination by conducting part here and part before the commission. And we shall necessarily have to impose upon the prosecution the obligation of making its choice of whether it will keep substantially within the limitations as they have been fixed, or whether it will desire to conduct the cross-examination before the commissioner.

Now, gentlemen, in all frankness and fairness, it is positively necessary that we adhere to the program that we have adopted.

MR. SPRECHER: Mr. President, the prosecution did, at the time that we had the discussions in chambers, agree that we thought we would be able to maintain an average of 25 percent of the time of the total examinations so that there would be three parts direct and one part cross-examination. But even at the time of our

agreement we understood that that would be a question of average.¹

Now, Mr. President, it is true that it has happened in the last several days that we asked to go beyond the time, but I think Your Honor will also agree that sometimes, especially with respect to defendants and witnesses things ran in the other direction. We were using less than 20 percent of the time. And we always understood that with respect to cross-examination you can allow a little leeway to straighten out our books and such things. We respectfully like to petition you, Mr. President, to allow us to do that and we give you our assurance that we will not go beyond that.

PRESIDING JUDGE SHAKE: We have not intended to be arbitrary. We realize that under some circumstances a little leeway is permissible, especially if counsel has saved some time in another instance, and the over-all is well within the time. That is very well. We recall also that one member of the staff of defense counsel came in and showed us that he had miscalculated his time and we allowed him a whole day, and you will recall that we had a Saturday session to afford him that opportunity. Now we hope it won't be necessary to have some night sessions in order to give the prosecution an opportunity to cross-examine these witnesses. If you find you cannot keep within the time limit, then we shall expect you to advise us before you start your cross-examination and we will transfer it to the commission. If in some particular instances you run over for a few minutes, a very few minutes, extremely few, we should not be too harsh about it—more especially if you have saved many minutes on the preceding witness. So now I think you understand our position. We are going to hold to the line as far as the control of this is concerned, and if the prosecution feels that we are working a hardship by enforcing the rule then you may take the cross-examination to Judge Crawford [one of the two commissioners of the Tribunal].

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE AT THE
END OF THE DIRECT EXAMINATION OF DEFENSE WITNESS
FRITZ HIRSCH, 21 APRIL 1948 ²

PRESIDING JUDGE SHAKE: Do any other defense counsel have

¹ In the RuSHA case the prosecution agreed to a specific time limitation with respect to cross-examination, 30 minutes for a defendant and 10 minutes for a defense witness. This agreement was made on the 11th day of the defense case in connection with a general agreement between the parties and the Tribunal on the time to be allotted to various groups of defendants for the completion of the defense case.

² Extract from mimeographed transcript, U.S. vs. Carl Krauch, et al., Case 6, pages 12020 and 12021. The transcript of the witness' direct examination appears in the mimeographed transcript, pages 11999-12022. His cross-examination before a commissioner of the Tribunal on 10 May 1948 appears on tr. pages 14195-14209.

any questions for this witness? If not, the prosecution may cross-examine.

MR. MINSKOFF: Mr. President, in view of the fact that the witness has consumed only about 1 hour, I would like to mention beforehand that the prosecution's examination will take about twice that time, and if the Court doesn't think that is proper we would like to go before the commissioner, because we won't have enough time to do it in court.

JUDGE SHAKE: Do I understand that you think you should have 2 hours for the cross-examination?

MR. MINSKOFF: That's right, Your Honor.

JUDGE SHAKE: Just a moment. Let me talk to my associates.

DR. SEIDL (counsel for defendant Duerrfeld): I may make one brief remark, Your Honor. The prosecution has suggested that the cross-examination might, under certain circumstances, take place before the commissioner. Personally, I would deem it appropriate that the cross-examination be carried through before this Tribunal. I think that it is not appropriate to discontinue the examination now and have the cross-examination before another Tribunal.

JUDGE SHAKE: That certainly is not the most desirable practice, and in instances where we had any advance notice of such a situation we would much prefer to transfer the whole examination to the commissioner. However, nobody is to be criticized because of this situation. Dr. Seidl didn't know, and the Tribunal didn't know, and perhaps the prosecution might not know until some time, some stage of the examination when they arrive at that conclusion. Under the circumstances, taking into account the time that the defendant is entitled to, in consideration of his case, the Tribunal is of the opinion in this instance that the cross-examination of this witness had better be referred to the commissioner where you will not be embarrassed by strict limitations of time.

Now, may I suggest to you that you perhaps should not undertake to have this cross-examination until the English transcript is available, so that Judge Crawford may have an opportunity of reading the testimony in chief of this witness before you start on your cross-examination. Otherwise he may find himself somewhat handicapped in understanding the cross-examination, which he is entitled to do, although he is only a supervisory or administrative official of the Tribunal. But you can arrange between yourselves the matter of the time when this cross-examination is to be conducted, and the Tribunal now orders that it be before Judge Crawford.

9. HOSTAGE CASE—STATEMENT OF THE PRESIDING JUDGE ADVISING A PROSECUTION WITNESS THAT HE IS NOT OBLIGED TO ANSWER QUESTIONS WHICH MAY INCRIMINATE HIM.

EXTRACT FROM THE TRANSCRIPT OF THE HOSTAGE CASE DURING THE DIRECT EXAMINATION OF GENERAL HANS GUSTAV FELBER, 11 AUGUST 1947*

MR. RAPP (associate counsel for the prosecution): When, Witness, did you, for the first time, in your capacity as Military Commander Southeast—when did you hear for the first time of so-called collective reprisal measures?

PRESIDING JUDGE WENNERSTRUM: Just a moment, please. I think probably the witness ought to be advised at this time that he is not obliged to answer questions that might incriminate him, that anything that he here says may be used against him in any subsequent prosecution or trial. I don't know whether the witness understands that in America that's the principle to be followed, and we deem it our duty to advise him of this at this time.

MR. RAPP: Your Honor, do I understand that this statement, as just made, is the advisement to the witness, or does Your Honor wish that I should tell him that again?

PRESIDING JUDGE WENNERSTRUM: I think it's sufficient, but we have no objection, I'm sure, to your advising him yourself, if you see fit to do so.

MR. RAPP: Witness, did you understand the words of the Judge, completely?

WITNESS FELBER: Yes.

Q. Are you aware of the importance of these words of the Honorable Judge?

A. Yes.

Q. Therefore, could I ask you to answer my previous question, when for the first time you heard of collective reprisal measures in your capacity as Military Commander Southeast?

A. The first knowledge which I received of this collective order—the first knowledge when I reported to the Fuehrer's Headquarters.

*Extract from mimeographed transcript, U.S. vs. Wilhelm List, *et al.*, Case 7, pages 1699 and 1700.

10. FARBEN CASE—ANNOUNCEMENT THAT A DEFENSE COUNSEL MAY TESTIFY WITHOUT BEING DISQUALIFIED AS COUNSEL

EXTRACT FROM THE TRANSCRIPT OF THE I. G. FARBEN CASE,
18 FEBRUARY 1948¹

DR. BERNDT (counsel for defendants ter Meer and Mann): I have one more general question. Am I now in a position to call one of my colleagues, a codefense counsel² as a witness without the man in question being endangered that he be excluded from the proceedings as defense counsel after his examination?

PRESIDING JUDGE SHAKE: I am not certain that I understand you. You wish to call a defendant to the stand?

DR. BERNDT: No, I want to call a defense counsel into the witness stand. I may perhaps do that. I can do that. I am allowed to do that. My only question is if such a counsel has been in the witness stand, will he then be in a position to resume his office as defense counsel?

PRESIDING JUDGE SHAKE: We see no reason why you may not do that. It's our view that that would not disqualify counsel from resuming his duties as counsel. You may call any one you see fit to the witness stand and insofar as it's a member of the staff of counsel we would not regard it as a disqualification of his right to continue to represent his client.

11. VARIOUS OATHS ADMINISTERED TO WITNESSES

a. Oath Administered to Defendant Karl Brandt, German National, in the Medical Case

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
3 FEBRUARY 1947³

(Karl Brandt, a defendant, took the stand and testified.)

JUDGE SEBRING: Hold up your right hand and be sworn, repeating after me: I swear by God, the Almighty and Omniscient, that I will speak the pure truth and will withhold and add nothing.

(The witness repeated the oath.)⁴

¹ Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, page 7298.

² The defense counsel was Dr. von Rospatt, associate counsel for defendant Krauch. His testimony is recorded in the mimeographed transcript, 30 April 1948, pages 13031-13035.

³ Extract from mimeographed transcript, U.S. vs. Karl Brandt, *et al.*, Case 1, page 2301. The testimony of the defendant Karl Brandt is recorded in the mimeographed transcript, 3, 4, 5, 6, and 7 February 1947, pages 2301-2661.

⁴ Since most of the witnesses in the Nuernberg trials were German nationals, this was the oath most frequently administered.

**b. Oath Administered to Defense Witness Russel Grenfell,
a British Subject, in the High Command Case**

**EXTRACT FROM THE MANUSCRIPT OF THE HIGH COMMAND
CASE, 28 MAY 1948¹**

DR. MECKEL (counsel for defendant Schniewind): With the permission of the Court, I will now call my next witness, who is the British Naval Officer, Captain Grenfell.

(Russel Grenfell, a witness, took the stand.)

PRESIDING JUDGE YOUNG: Witness, you will hold up your right hand. Do you solemnly swear by the Ever-Living God, that you will true answer make to all questions that may be propounded to you by Court or counsel touching upon the matter now on hearing before this Court or Tribunal? Do you so swear?

WITNESS GRENFELL: I do.

c. Oath administered to Prosecution Witness Prof. Dr. Berthold Epstein, a Czechoslovakian National, in the Farben Case

**EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
18 NOVEMBER 1947²**

(Professor Berthold Epstein, a witness, took the stand.)

PRESIDING JUDGE SHAKE: Mr. Witness, you will remain standing and I shall administer you the oath that prevails in your country. Raise your right hand, say I, and then state your name.

THE WITNESS: I, Professor, Dr. Berthold Epstein.

PRESIDING JUDGE SHAKE: You will now repeat after me: I swear a pure oath that to all questions asked here before this Tribunal I shall answer only the truth, nothing but the truth, and that knowingly I shall withhold nothing.

(The witness repeated the oath.)

¹ Extract from mimeographed transcript, U.S. vs. Wilhelm von Leeb, *et al.*, Case 12, page 4976. The testimony of the witness Russel Grenfell is recorded in the mimeographed transcript, 28 May 1948, pages 4976-4982.

² Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, page 3985. The testimony of the witness Epstein is recorded in the mimeographed transcript, 18 November 1947, pages 3985-3992.

d. Oath Administered to Prosecution Witness Dr. Robert Levy,
French National, in the Medical Case

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
17 DECEMBER 1946¹

(Dr. Robert Levy, a witness, took the stand.)

PRESIDING JUDGE BEALS: Will the oath be administered to this witness in French or German?

DR. LEVY: French.

PRESIDING JUDGE BEALS: Hold up your right hand. You will repeat the oath after me: I swear to speak without fear or favor, to say the truth, all the truth, and only the truth. I swear it.

(The witness repeated the oath.)

e. Oath Administered to Prosecution Witness Takis Spiliopoulos,
Greek National, in the Hostage Case

EXTRACT FROM THE TRANSCRIPT OF THE HOSTAGE CASE,
19 AUGUST 1947²

(Takis Spiliopoulos, a witness, took the stand.)

PRESIDING JUDGE WENNERSTRUM: The witness will arise and be sworn. I swear to speak the truth, and only the truth, in reply to whatever I am asked, without fear and without prejudice.

(The witness repeated the oath.)

12. RuSHA CASE—AFFIRMATION IN LIEU OF OATH BY
A MEMBER OF JEHOVAH'S WITNESSES

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
14 JANUARY 1948³

(Elfriede Simanowski, a witness, took the stand.)

DR. SCHMIDT (counsel for defendant Tesch): Before the President administers the oath, may I point out to you, Mr. President, that this witness belongs to Jehovah's Witnesses and that, according to her faith, she is not permitted to swear? Instead of

¹ Extract from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, page 551. The testimony of the witness Levy is recorded in the mimeographed transcript, 17 December 1946, pages 550-561.

² Extracts from the mimeographed transcript, U.S. vs. Wilhelm List, et al., Case 7, page 2273. The testimony of the witness Spiliopoulos is recorded in mimeographed transcript, 19 and 20 August 1947, pages 2273-2338.

³ Extract from mimeographed transcript, U.S. vs. Ulrich Greifelt, et al., Case 8, pages 3705 and 3706. The testimony of the witness Simanowski is recorded in the mimeographed transcript, 14 January 1948, pages 3705-3715.

taking the oath, this witness will attest that, before God and man, she will speak the pure truth.

PRESIDING JUDGE WYATT: Any objection on the part of prosecution to waiving the oath?

MR. SHILLER (trial counsel for the prosecution): The prosecution has no objection, Your Honor.

PRESIDING JUDGE WYATT: Very well, proceed.

DIRECT EXAMINATION

DR. SCHMIDT: May I then ask you, Witness, to please state that, before God and man, you will speak the pure truth?

WITNESS SIMANOWSKI: Before God and man, I am speaking the pure truth.

Q. Will you please give your personal data to the Court?

A. My name is Frau Elfriede Simanowski. My maiden name was Bagedonad. I was born on 5 August 1900, in Bromberg, in the Province of Poznan. My residence is now in Oberweiss, 72, which is near Germunden, Upper Austria, Salzkammergut.

Q. Are you a Reich German?

A. Yes, I am a Reich German. The Polish name, "Simanowski," is the name of my husband. My maiden name, "Bagedonad," comes from Lithuania, for the ancestors of my father were Lithuanians.

Q. Now, are you only a Reich German according to nationality, or do you feel as though you are a German?

A. No, I am a Reich German only according to nationality. I am not a patriotic German, because I belong to Jehovah's Witnesses. I do not recognize any difference in nations or in races; I love all men who are decent and honest.

13. RuSHA CASE—ARRANGEMENT WHEREBY A MENNONITE TESTIFIED WITHOUT TAKING AN OATH OR AFFIRMATION

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
17 DECEMBER 1947*

DR. SCHUBERT (counsel for the defendant Lorenz): May it please the Tribunal. I now would like to call the witness Professor von Unruh, whom I have already announced yesterday afternoon.

PRESIDING JUDGE WYATT: Let the witness take the stand.

DR. SCHUBERT: May it please the Tribunal, I would like to point

*Ibid., page 2714. The testimony of the witness von Unruh is recorded in the mimeographed transcript, 17 December 1947, pages 2714-2730.

out, before the witness is heard here, that the witness is a Mennonite. A Mennonite, as is well known, will refuse to take an oath. Therefore, according to German criminal law and court procedure, it was provided that members of that religious sect would just give an assurance that they would tell the truth instead of taking an oath. Since this Tribunal is not obliged to observe formal rules, I request that this witness be given the opportunity to assure the Tribunal that he will tell the truth.

PRESIDING JUDGE WYATT: Any objection on the part of the prosecution to simply allow the witness to testify without administering any oath?

MR. LAMB (associate counsel for the prosecution): We have no objection.

PRESIDING JUDGE WYATT: All right.

(Benjamin Heinrich von Unruh, a witness, took the stand.)

DR. SCHUBERT: Witness, please give the Tribunal your full name.

[The witness was not asked to give an affirmation in lieu of oath.]

G. Oral Testimony by Defendants

I. INTRODUCTION

In all of the Nuernberg trials, excepting the Krupp case, all or most of the defendants elected to testify in their own behalf. Testimony by the defendants was the most time-consuming aspect of the entire defense case, excepting in the Krupp trial. The order, scope, and manner of conducting examination of defendants afforded special problems, since ordinarily there were multiple defendants and a great variety of factual issues covering substantial periods of time.

The defendants were permitted to testify in the Nuernberg trials under oath, a privilege denied to a defendant in a criminal case, under German law. Under German law, defendants may make statements which are not given under oath, a right which was also accorded them in the Nuernberg trials under Article 24 (*j*) of the Charter of the IMT and Article XI (*i*) of Ordinance No. 7. A defendant was allowed to make one final statement not under oath after the closing statements of counsel, whether or not the defendant had elected to testify earlier. These final statements by defendants were made in narrative form and the defendant was never subjected to questioning at this time either by counsel or the Tribunals. The final statements of all defendants

who elected to make them have been reproduced in the earlier volumes of this series dealing with the individual cases.

The German practice of not permitting defendants to testify under oath led to difficulties where several defendants were being tried in the same proceeding and one defendant desired the testimony of another. This question was discussed during the testimony of the defendant Rothaug in the Justice case. Rothaug had been presiding judge of the Special Court in Nuernberg in the Katzenberger-Seiler case, a combined race pollution and perjury trial in which Katzenberger had been sentenced to death. An extract from the direct examination of Rothaug dealing with this point is reproduced in 2 below.

Since the practice of the IMT with respect to the testimony of defendants had great influence upon the course of the later trials, some reference should be made here to the IMT practice. In the IMT case the order concerning the presentation of the defense case declared that "The defendants' cases will be heard in the order in which the defendants' names appear in the indictment. * * * A defendant can testify only once. A defendant who wishes to testify on his own behalf shall do so during the presentation of his own defense. The right of defense counsel and of the prosecution under Article 24 (g) of the Charter to interrogate and cross-examine a defendant who gives testimony shall be exercised at that time" (this IMT order is reproduced in full at page 356). Three further announcements by the IMT concerning the examination of defendants are reproduced in 3 below. The first announcement declared that when a defendant took the stand on his own behalf, counsel for other defendants could question him concerning any relevant matter at the conclusion of the defendant's testimony on his own behalf. The second announcement, made after the Tribunal had allowed Goering to give extensive evidence without interruption on the history of the Nazi regime, stated that other defendants could not go over the same ground except insofar as necessary for their own defense. The third announcement required each defense counsel to call his client as his first witness unless there were exceptional reasons for a different order of proof. The prosecution cross-examined the defendants in the IMT case after all defense counsel had completed their initial examination of the defendants, the prosecution frequently introducing numerous documents during the cross-examination. The IMT modified its rule that a defendant could testify only once, upon at least three occasions, because of documents introduced upon cross-examination of the defendant or because of evidence introduced after the defendant had testified in the first instance. Extracts from the proceedings concerning

the recall of the defendants von Neurath, Funk, and Goering are reproduced in 4 below. The IMT also permitted the deferment of part of Goering's testimony in chief until a defense witness testified. (See "Trial of the Major War Criminals," *op cit.*, vol. IX, p. 365 and 366.) Request by defense counsel to introduce an affidavit by a defendant at a late stage in the trial, after the defendant had already testified, is treated in subsection H.

The Tribunals established pursuant to Ordinance No. 7 generally followed the IMT practice that a defendant, except for unusual circumstances, should take the stand only once. However, in most of the later trials one or more defendants were heard on more than one occasion, either by prearrangement or because the defense showed special need due to evidence taken after the defendant had been excused from the witness stand. The defense often offered affidavits by defendants as rebuttal to evidence received after the defendants in question had been excused from the witness stand (sub-sec. I).

In the Medical case all of the defendants elected to testify. (See "List of Witnesses in Case I," vol. II, this series, pp. 332-335.) In that case, the first before a Tribunal established pursuant to Ordinance No. 7, the Tribunal continued the IMT practice of having counsel for codefendants examine a defendant immediately after the defendant had testified in chief. Early in the defense case the Tribunal declared that a defendant could be recalled to testify concerning documents referring to him which were offered in evidence after he had testified in chief. Pertinent extracts from the transcript of the Medical case concerning these matters are reproduced below in 5 and 6. In the Medical case the prosecution offered a considerable number of documents in evidence in rebuttal, many of which had been marked for identification and used during cross-examination of defendants or defense witnesses. In surrebuttal, counsel for a number of the defendants introduced affidavits by their clients in evidence which discussed a number of the prosecution rebuttal documents. (See sec. XVIII I, concerning the employment of affidavits by defendants as a part of the defense case.) However, no defendant in the Medical case was recalled to testify orally before the Tribunal on these rebuttal documents. (See "List of Witnesses in Case I," vol. II, this series, pp. 332-335.) On several occasions the testimony in chief of defendants was interrupted briefly to permit the examination of a witness, but this is a distinct matter from recall to meet new evidence.

In most instances the defendant was the first witness called in the defendant's case in chief. However, there was no uniform practice in this regard, and in the Milch case, for example, the

testimony of 29 defense witnesses was taken before the sole defendant himself testified, and after Milch had testified only one new defense witness was heard and one defense witness recalled. (See "List of Witnesses in Case 2," vol. II this series, pp. 889 and 890.)

In the Pohl case, where again all of the defendants elected to testify, a rather unusual situation arose just after the defendant Hohberg had been excused from the witness stand. One or more of the German document books containing copies of documents introduced in evidence by Hohberg's counsel were not available for distribution to counsel for the codefendants while Hohberg was still on the witness stand. Thereupon counsel for defendant Georg Loerner alleged that this might occasion prejudice to the defense, and the Tribunal ruled that Hohberg could be recalled if it became necessary to testify further concerning these documents, a ruling which the protesting counsel declared was entirely satisfactory. The transcript of this discussion is reproduced in 7 below. Hohberg as well as seven other of the 18 defendants were recalled to testify on rebuttal. (See "List of Witnesses in Case 4," vol. V, this series, pp. 1258 and 1259.) The testimony of the defendant Pohl, the leading defendant in the Pohl case, was the longest of any defendant in any of the Nuernberg trials. Pohl first testified on 11 consecutive trial days, this testimony covers nearly 800 pages of transcript (pp. 1253-2040). Pohl was later recalled by the Tribunal for questioning by the Presiding Judge during the rebuttal case. After the Tribunal had concluded its examination of Pohl, Pohl's counsel asked a few questions without objection or interruption, but the Tribunal limited questioning by counsel for a codefendant to matters covered by the Tribunal's examination. Extracts from the transcript dealing with Pohl's recall are reproduced in 8 below.

In the RuSHA case there was a lengthy discussion of problems arising from lengthy examination of the defendant Greifelt, the first defendant to testify, by counsel for various codefendants. The discussion is reproduced in 9 below. All of the defendants elected to testify in the RuSHA case, and four of them were recalled as rebuttal witnesses. (See "List of Witnesses in Case 8," vol. V, this series, pp. 174-176.) In the Farben case, counsel for the defendant ter Meer indicated his intention of deferring the direct examination of his client on the spoliation charges (count two) until the document books of another defendant on this count were prepared and the documents therein offered in evidence. The prosecution made no objection to this proposal but stated its intention of cross-examining the defendant, as a party in interest, upon all the charges without regard to the contingency that the

defendant might later take the stand again. The Tribunal granted the defense request, declaring, however, that the prosecution could cross-examine the defendant on all counts, regardless of the deferment of direct examination on one count. Extracts from the transcript concerning this matter are reproduced in 10 below. In the Flick case, however, the Tribunal declared that when the prosecution asked a defendant questions on topics not covered by direct examination, the defendant became the prosecution's witness and that thereafter the prosecution could not attack the credibility of the defendant on the new topics. The pertinent extract of the transcript in the Flick case is reproduced in 11 below.

The opposing parties were both permitted to use documents during cross-examination which had not previously been distributed to the other side. No case has been found where the prosecution objected to this practice by the defense. An extract from the Einsatzgruppen case, where this practice was allowed over defense objections, is reproduced in 12 below. A similar ruling in the Hostage case is reproduced above on page 668.

Whether documents put to the witnesses were marked for identification or introduced in evidence depended in part upon the circumstances and in part upon the discretion of counsel. In the IMT case the defense was required to put in evidence an affidavit by the defense witness being examined on direct examination, when the affidavit was read to the witness and the witness was asked whether the contents were true. In a majority of cases, documents used upon cross-examination were not only marked for identification with an exhibit number, but ordinarily were introduced in evidence either at the time of use, or later. However, in the Einsatzgruppen case the prosecution was not required to offer an affidavit put to a witness on cross-examination, provided defense counsel were given access to the affidavit. Extracts from the transcript of the IMT and Einsatzgruppen cases containing the rulings just mentioned are reproduced in 13 and 14 below respectively.

Affidavits by defendants and interrogations of defendants before trial are treated separately below. Affidavits by defendants offered by the defense in lieu of testimony by the defendant are covered in the subsections treating generally of affidavits, interrogatories, and depositions (IMT case, sub-sec. H; later cases, sub-sec. I). Special rules came into force when the prosecution offered pre-trial affidavits of defendants in evidence, and such affidavits as well as pre-trial interrogations of defendants are likewise treated later in a separate subsection (sub-sec. J).

2. JUSTICE CASE — EXAMINATION OF DEFENDANT ROTH AUG CONCERNING DIFFICULTIES ARISING IN GERMAN CRIMINAL TRIALS WITH MULTIPLE DEFENDANTS BECAUSE DEFENDANTS CANNOT TESTIFY UNDER OATH

EXTRACT FROM THE DIRECT EXAMINATION OF DEFENDANT OSWALD ROTH AUG IN THE JUSTICE CASE, 21 AUGUST 1947¹

DR. KOESSL (counsel for defendant Rothaug): It has been asserted that you had coupled together the Katzenberger and Seiler proceedings so as to exclude the Seiler woman as a witness. What was the situation there?²

DEFENDANT ROTH AUG: Under the German code of procedure, there are always as many penal proceedings pending as there are defendants. Under certain conditions, such penal proceedings can be tried together for the purpose of uniform trial and decision. That is what we call joinder of penal cases. That joinder may be decided by the Court, concerning cases which are pending with it separately. But such joinder may be established by the prosecution itself—that is, done by the prosecution instituting proceedings by one indictment. With such combination of several proceedings in one indictment, the joinder has been established. That was what was done in the Katzenberger-Seiler case. The prosecution, by filing one indictment for both defendants, had already established the joinder prior to the files reaching the Court. The joinder of the two cases was therefore neither due to a file prepared by me nor to a file prepared by the Court.

Q. Would it have been possible for the prosecutor to proceed differently?

A. Naturally. He could have filed separate indictments. The question was merely whether that would have been correct from the technical point of procedure.

Q. What are the legal provisions on which a joinder of penal cases was based at the Special Court?

A. A joinder is based on Article XV, section 2 of the Competency Order.

Q. When do the conditions exist for a joinder, such as demanded by the law?

¹ Extract from mimeographed transcript, U.S. vs. Josef Altstoetter, et al., Case 3, pages 7408-7411. The complete testimony of the defendant Rothaug is recorded in the mimeographed transcript, 11, 12, 13, 14, 18, 19, 20, 21, 22, 25, and 26 August 1947, pages 6754-6917, 6928-7016, 7179-7395, 7406-7470, 7474-7636, and 7640-7648.

² The defendant Rothaug was the presiding judge of the Special Court in Nuernberg which tried the Katzenberger-Seiler case, a combination race defilement and perjury case, in which Katzenberger was sentenced to death. The opinion and sentence, signed by Rothaug and two other judges, is reproduced in volume III, this series, pages 653-664.

A. Such conditions can arise from all sorts of situations. They exist, in particular, if one offense developed from another offense, and if the judgment has to be based on the same facts. That was the case in the Katzenberger-Seiler affair, which we have been discussing.

Q. What was the reason for the prosecutor in this particular case to connect the two cases?

A. Both cases, as is proved clearly by the opinion of the Court, had to be decided on the basis of the same facts. Therefore, a joinder was altogether natural and corresponded to the customary treatment such as was applied on other cases as well.

Q. What was the legal nature of such a joinder?

A. It was purely a measure of technical procedure which not only in this case, but whenever it is adopted, has to be judged by standards of expediency.

Q. Is a defendant entitled to ask for not combining his case with that of another defendant because in the case of a joinder he loses evidence?

A. The defendant does not have such a claim. According to the general legal doctrine, which existed prior to 1933, a joinder is admissible even if as a result of a joinder one codefendant can no longer appear as a witness. But if it is decisive that the codefendant should appear as the witness, the two cases can be separated after all, so as to have an opportunity to examine the codefendant as a witness. But that is left entirely to the discretion of the Court, and the defendant has no claim to have that question decided in one definite way.

Q. When several penal cases are combined, does that mean that all possibility is excluded to examine one of the codefendants in the same proceedings as a witness? I would like you to supplement your previous answer and to tell us whether it is possible temporarily to separate proceedings.

A. Such temporary separation is allowed expressly by jurisdiction. Therefore, during one proceeding, temporarily a separation can be ordered. One codefendant can be examined as a witness, and after he has been examined the cases can be recombined.

3. IMT CASE—THREE ANNOUNCEMENTS BY THE TRIBUNAL CONCERNING THE ORDER IN WHICH DEFENDANTS SHALL TESTIFY, AND RELATED MATTERS

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
17 DECEMBER 1945¹

THE PRESIDENT (Lord Justice Sir Geoffrey Lawrence) : Counsel appearing for any defendant may question any other defendant as to any relevant matter, and may interrogate him as a witness for that purpose. If the other defendant takes the stand in his own behalf, the right shall be exercised at the conclusion of his testimony.²

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
29 MARCH 1946³

THE PRESIDENT: Before the examination of the defendant von Ribbentrop goes on, the Tribunal desires me to draw the attention of Dr. Horn and of the defendant von Ribbentrop to what the Tribunal has said during the last few days.

In the first place, the Tribunal said this: The Tribunal has allowed the defendant Goering, who has given the evidence first of the defendants and who has proclaimed himself to be responsible as the second leader of Nazi Germany, to give his evidence without any interruption whatever, and he has covered the whole history of the Nazi regime from its inception to the defeat of Germany. The Tribunal does not propose to allow any of the other defendants to go over the same ground in their evidence except insofar as is necessary for their own defense.

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE, 9 APRIL 1946⁴

THE PRESIDENT: The Tribunal has come to the conclusion that it will save time if the defendants are called first as the first witness in the case of each defendant; and, therefore, in the future the defendant must be called first unless there are some exceptional reasons, in which case defendant's counsel may apply to the Tribunal and the Tribunal will consider those reasons for calling the defendant in some position later than first witness.⁵

¹ Trial of the Major War Criminals, *op cit.*, volume IV, page 3.

² At this same time the IMT announced the following concerning witnesses called by other defendants. "Examination of witnesses called by other defendants: The same person has been asked as a witness by a number of defendants in some cases. It is only necessary that such witness be called to the stand once. He may then be interrogated by counsel for any defendant as to any material matter."

³ Trial of the Major War Criminals, *op. cit.*, volume X, page 230.

⁴ *Ibid.*, volume XI, page 88.

⁵ This announcement was made during the presentation of the case for defendant Keitel, whose case was the fourth to be presented.

4. IMT CASE—EXTRACTS FROM THE PROCEEDINGS CONCERNING THE RECALL FOR FURTHER EXAMINATION OF THE DEFENDANTS VON NEURATH, FUNK, AND GOERING

a. Recall of Defendant von Neurath

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE, 2 JULY 1946*

DR. VON LUEDINGHAUSEN [counsel for defendant von Neurath]: Mr. President, may I now make an application to the Court? It is to the effect that the Court should permit me to call again the defendant von Neurath to the witness stand for the following reason. As may be recalled, in the course of cross-examination Sir David Maxwell-Fyfe presented Document 3859-PS to the defendant, which document was a photostatic copy of a letter from the defendant, dated 31 August 1940, to the Chief of the Reich Chancellery, Lammers, with two enclosures. In this letter the defendant asked Lammers to submit the two enclosures to Hitler and to arrange, if possible, a personal conference or an interview on the question of alleged Germanization mentioned therein. The two enclosures of this letter to Lammers are reports and suggestions on the future form of the Protectorate and concern the assimilation or possible Germanization of the Czech people.

The Court will recall that the presentation of this rather extensive document—it has 30 or 40 pages in this photostatic form, if not more—surprised the defendant, and at that moment he could not recall the matter clearly enough to give positive and exhaustive information about these documents immediately. Nevertheless, in cross-examination, after a very brief look at these reports, he expressed doubts as to whether these reports, as presented here in photostatic form, were actually identical with the reports which were enclosed, according to his instructions, in the letter to Lammers to be submitted to Hitler. A careful examination of these photostatic copies was not possible in the course of cross-examination; and, of course, I myself, since I did not know the documents, was not able to comment upon them. Since Herr von Neurath was obviously overtired and exhausted after the cross-examination, it was not possible for me to examine the question and discuss it with him on the same day; that was possible only on the following day.

THE PRESIDENT: Yes, Dr. von Luedinghausen, the defendant may be recalled for the purpose of being questioned about these

*Trial of the Major War Criminals, *op. cit.*, volume XVII, pages 373 and 374.

two documents; but, of course, it is an exceptional license which is allowed on this occasion, because the object of re-examination is to enable counsel to elucidate such matters as this.

DR. VON LUEDINGHAUSEN: Yes.

THE PRESIDENT: You may call him.

b. Recall of Defendant Funk to Testify Concerning an Affidavit Introduced in Evidence during the Cross-Examination of a Defense Witness

**EXTRACTS FROM THE TRANSCRIPT OF THE IMT CASE,
12 AUGUST 1946¹**

DR. FRITZ SAUTER (counsel for defendant Funk): Mr. President, I beg to be granted permission to submit to the Tribunal an urgent application on behalf of the defendant Funk.

On Monday, 5 August 1946, that is to say a week ago today, the prosecution submitted an affidavit of the former SS Obergruppenfuehrer Oswald Pohl,² Document 4045-PS, alleging certain connections between the defendant Funk and the SS, particularly with reference to the so-called "gold deposits" of the SS in the Reichsbank [the Pohl affidavit had been introduced during the cross-examination of the defense witness Baron von Eberstein, an SS official, as Exhibit GB-549]; I was unable immediately to object to the use of this affidavit during the session of last Monday, since I was absent on that day because of illness. I had reported my absence in the appropriate manner to the General Secretary. On the same day, 5 August, Dr. Nelte, in an application to the Tribunal on my behalf, asked for permission to interrogate the witness Oswald Pohl in prison in order to obtain an affidavit from him. On 7 August 1946 I myself repeated that application, asking at the same time for permission to call the witness Oswald Pohl for cross-examination, and also to recall the defendant Funk himself to the witness stand to give testimony with reference to these new accusations.

Since the submission of these applications of mine, the SS judges Dr. Reinecke and Dr. Morgen were heard as witnesses for the SS here in court.³ Both of these witnesses have raised the gravest accusations against Oswald Pohl, although he was their SS comrade. The testimonies of these two witnesses, Dr. Reinecke

¹ Trial of the Major War Criminals, *op. cit.*, volume XXI, pages 1-3 and 18-20.

² Pohl was later tried and sentenced to death. See volume V, this series.

³ Dr. Guenther Reinecke and Dr. George K. Morgen appeared as witnesses for the SS. Their testimonies appear in "Trial of the Major War Criminals," *op. cit.*, volume XXI, pages 415-481; 487-515 respectively.

and Dr. Morgen, have furnished proof that the former Obergruppenfuhrer Oswald Pohl, a witness of the prosecution, first—

THE PRESIDENT (Lord Justice Sir Geoffrey Lawrence): Are you applying to cross-examine Pohl, or what?

DR. SAUTER: No. If you will permit me, Mr. President, I shall in a moment give you the reason why I do not wish to do so. I have just said that the examination of the witnesses Dr. Reinecke and Dr. Morgen has furnished proof, first, that this witness of the prosecution is a millionfold murderer; second, that he was the head of that clique of criminals which carried out the atrocities in concentration camps; thirdly, that Pohl, by every means at his disposal, attempted to prevent the discovery of these atrocities, and even committed new murders for this purpose.

All that has been ascertained from the testimony given under oath by the witnesses Dr. Morgen and Dr. Reinecke. Under these circumstances, Gentlemen of the Tribunal, the defense of the defendant Funk refuses to employ such a monster as a means of evidence. Therefore, as counsel for defendant Funk, I desist from calling this witness of the prosecution, Oswald Pohl, to the witness stand, because testimony coming from a man who murdered millions of innocent people—

THE PRESIDENT: Dr. Sauter, I understand that you are not making an application of any sort now; you are making what is in the nature of a—

DR. SAUTER: No, on the contrary, I refrain from doing so.

THE PRESIDENT: I see.

DR. SAUTER: Mr. President, I beg to have your permission to make another application. I said that the testimony of a man who murdered millions of innocent people, who made a dirty business out of murdering them, is in our conception completely without value for establishing the truth.

THE PRESIDENT: Dr. Sauter, the Tribunal thinks that this is an inappropriate time at which to make a protest of this sort, which is in the nature of an argument. If you are making an application, you can make an application. If you want to make a protest, you must make it later when the case for the organizations is at an end.

DR. SAUTER: Mr. President, may I say the following: We are now near the end of the submission of evidence, and I do not think that I can wait with this application until after the end of the trial; the application which I was going to make must be made now, so that the Tribunal will receive it in good time.

THE PRESIDENT: Dr. Sauter, if you would only come to your application we should be glad to hear it.

DR. SAUTER: Very well, Mr. President, I will do so at once.

I herewith apply that the Tribunal decide, first, that the affidavit of Oswald Pohl, dated 15 July 1946, namely, Document 4045-PS, should not be admitted in evidence against the defendant Walter Funk, and, secondly, that that part of the contents of the affidavit of Oswald Pohl, Document 4045-PS, which has reference to the defendant Funk, should be stricken from the record of the session of 5 August 1946.

Furthermore, as an additional application and as a precautionary measure, I beg permission to apply for the defendant Walter Funk to be recalled to the witness stand in order to give him an opportunity to express himself on these completely new assertions of Oswald Pohl.

Mr. President, I submitted this application to the General Secretary in writing this morning, but I do not know when the Language Division will pass it on to you. I have therefore considered it necessary to ask your permission to make this application orally during the proceedings, in order to avoid being told that I should have done so in good time here during the session, but had failed to do it. That is the application, Mr. President, which I beg to make.

THE PRESIDENT: The Tribunal would like to hear the prosecution on this application.

DR. ROBERT M. W. KEMPNER (assistant trial counsel for the United States): May I reserve our answer until I have an occasion to talk to the chief prosecutor, Mr. Dodd?

THE PRESIDENT: Very well.

DR. KEMPNER: I would like to state that even murderers sometimes tell the truth.

DR. SAUTER: Thank you, Mr. President.

* * * * *

THE PRESIDENT: Mr. Dodd, the Tribunal would like to hear the submission of the prosecution with reference to Dr. Sauter's application.

MR. THOMAS J. DODD (executive trial counsel for the United States): My Lord, I have the following statement to make to the Tribunal. I understand that the application asks for the striking of the Pohl affidavit, and the permission that Funk again take the stand. I should like to oppose the application to strike the Pohl affidavit. It seems to us that it is highly material in this case, and if anything—although I doubt very much even the necessity for recalling or calling Pohl for cross-examination—but if anything is necessary, that might be it. The defendant Funk, it seems to us, has had a rather full opportunity when he was on the stand. I asked him when he started to do business with the SS, if the

Tribunal will recall, and I think I went rather fully into all possible phases at the time of relationships between the defendant Funk and the SS, and there was a denial on the part of the defendant Funk. Furthermore, he will have an opportunity, I assume, in the last statement, to say something, if the Tribunal saw fit to permit it, with respect to anything new that might have arisen out of the Pohl affidavit.

THE PRESIDENT: Yes, but the Pohl affidavit is entirely new, is it not?

MR. DODD: Well, Sir, it is new, but it really covers only one new matter, and that is the matter of the textile business that we alleged went on between the SS and the Reichsbank and the defendant Funk. The matter of the jewelry and all the other things I think were gone into.

THE PRESIDENT: I did not mean that it dealt with entirely new subject matter, but it is the evidence of a new witness upon that subject matter.

MR. DODD: Yes, yes, it is.

THE PRESIDENT: And as to that the defendant Funk has not had an opportunity to deny it upon oath; it may be that the Tribunal will think it right to grant him that opportunity. There are two quite distinct questions, first of all, as to whether Pohl's affidavit should be struck out, and secondly, whether Funk should be called.

MR. DODD: Well, I certainly do not feel that the Pohl affidavit should be struck out, because it seems to us to be material, highly material. As the Tribunal will recall, there was considerable controversy about this relationship which we claimed between Funk and the SS. We called another witness, Pohl, and still another witness who was his subordinate, and I would assume that counsel would prefer to cross-examine Pohl. We are perfectly happy to have him do that; and then at a later date, if Funk has an opportunity, as I am sure he will, to make his statement, he could make his denial. I don't know what more he could say except that it isn't so, and I thought he had said that rather fully when he was on the stand and rather fully denied that he had really any relationship with Himmler or with the SS. I am also fearful, Mr. President, that if the Court permits this procedure in this case, there may have been some other instances where other defendants will want to be heard fully, and the thing will go on with surrebuttal, and I am afraid it will take much of the Tribunal's time.

[Dr. Sauter indicated a desire to be heard.]

THE PRESIDENT: Dr. Sauter, we have heard you fully upon the subject already.

DR. SAUTER: Mr. President, may I point out one fact? This witness Pohl arrived at the Nuernberg Prison on 1 June, that is, the first day of the sixth month; he was questioned in preparation for the affidavit on 15 July, that is —

THE PRESIDENT: Dr. Sauter, you have expressed yourself that you do not want to cross-examine him. What is the relevance of the fact that he arrived here at a certain time if you don't want to cross-examine him?

DR. SAUTER: Mr. President, my point of view is that on principle the prosecution cannot be permitted to present further evidence against a defendant whose case is completely closed. The witness Pohl arrived here on 1 June; on 15 July, that is 6 weeks later, he was examined for the affidavit. That was the same day on which I made my final plea for the defendant Funk.* Again several weeks later, the affidavit was finally submitted. I do not believe that it is compatible with justice if after a defendant's case is completely closed, the prosecution submit further evidence against the defendant, who at that stage no longer has an opportunity of commenting on it from the witness stand. The Pohl affidavit contains completely new allegations. For example, Pohl alleges that at a luncheon in the presence of 10 or 12 persons this gold teeth affair was discussed. That is something entirely new and, of course, completely improbable, and that is why I ask, Mr. President, that you permit us to have the defendant Funk examined on this point in this witness stand.

THE PRESIDENT: You must understand that it is a matter for the discretion of the Tribunal at what time they will end the evidence, and it is necessary that the evidence should be ended at some time. The Tribunal has heard fully what you have had to say, and they will now consider the matter.

DR. SAUTER: Thank you.

THE PRESIDENT: With reference to the application by Dr. Sauter, the affidavit by Pohl will not be struck out. It will remain upon the record. But in view of the particular circumstances of this case, the defendant Funk may be recalled to give evidence upon the subject, and he will be recalled after the evidence has been given on behalf of the organizations.

*Defense counsel for the individual defendants were required to make their closing statements before the conclusion of the submission of evidence on behalf of the accused organizations. The Pohl affidavit had been submitted in cross-examination of a witness called on behalf of the SS, one of the accused organizations.

c. Recall of Defendant Goering to Testify Concerning Evidence Upon Experiments Adduced after Goering Was First Excused from the Witness Stand

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
20 AUGUST 1946¹

THE PRESIDENT: In the next place, with reference to the application by Dr. Stahmer, dated 14 August 1946, the Tribunal will treat this application as an exceptional case, and they will allow the defendant Goering to be recalled to the witness box to deal with the evidence upon experiments which was given after the defendant Goering gave his evidence, and upon no other subject.

The Tribunal rejects the application to call another witness, and the Tribunal will hear the defendant Goering in the witness box now.

(The defendant Goering resumed the stand.)

[The further testimony of the defendant Goering is reproduced in Trial of the Major War Criminals, *op. cit.*, volume XXI, pages 302-317.]

5. MEDICAL CASE—STATEMENT BY THE TRIBUNAL CONCERNING THE PRACTICE OF ALLOWING COUNSEL FOR CODEFENDANTS TO EXAMINE A DEFENDANT IMMEDIATELY AFTER THE DEFENDANT HAS TESTIFIED ON HIS OWN BEHALF

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE DURING THE EXAMINATION OF THE DEFENDANT ROSE BY COUNSEL FOR DEFENDANT KARL BRANDT, 24 APRIL 1947²

MR. HARDY (associate counsel for the prosecution): May it please Your Honor, at the close of the direct examination by the defense counsel for the defendant Rose, Your Honor asked whether any of defense counsel wished to cross-examine the witness. Dr. Servatius now is cross-examining defendant Rose, and during the course of the cross-examination is bringing in new material which was not covered during the direct examination. I object to any further questioning along these lines concerning something other than what was brought out in direct examination.

DR. SERVATIUS (counsel for defendant Karl Brandt): Mr. President, I did not intend to cross-examine the witness, but to

¹ Trial of the Major War Criminals, *op. cit.*, volume XXI, page 302.

² Extract from mimeographed transcript, U.S. *vs.* Karl Brandt, *et al.*, Case 1, page 6361.

question him directly. If I did not have the opportunity to question him now, I would have to call him as a witness, but up to now it has been the rule that I can examine a defendant as a witness, and only when the direct examination is finished, if I am not the defendant's counsel, then only can I ask him about questions of the cross-examination. I believe that these questions are now permissible to him as a witness in direct.

PRESIDING JUDGE BEALS: It has been the practice of the Tribunal to allow defense counsel to examine defendants after they have finished their testimony in chief in their own behalf, as witnesses for the different defendants, whose counsel desire to examine. The prosecution has had the same privilege.

6. MEDICAL CASE—DISCUSSION OF CERTAIN CIRCUMSTANCES UNDER WHICH A DEFENDANT MAY BE RECALLED TO THE STAND

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE, 9 APRIL 1947* DURING THE CROSS-EXAMINATION OF DEFENDANT POPPENDICK

DR. FLEMMING (counsel for defendant Mrugowsky): Mr. President, the prosecution submitted this morning various documents in which the defendant Mrugowsky is mentioned. In my opinion the prosecution so far as the material is concerned which it is using against one specific defendant, this material must be submitted when the defendant is in the stand, otherwise the counsel for the defendant has no opportunity to defend himself against this material. Therefore, I ask the Tribunal either to order that the material now submitted against the defendant Mrugowsky should not be used against the defendant Mrugowsky, or that the defendant Mrugowsky later be again called to the stand so that he can make statements regarding this material. The same objection I raise also on behalf of Kauffmann for defendant Rudolf Brandt who was also mentioned this morning in one of the documents.

MR. HARDY (associate counsel for the prosecution): Your Honor, I am afraid that the defense counsel isn't aware of the concept of rebuttal evidence.

PRESIDING JUDGE BEALS: The documents to which defense counsel refers have merely been marked for identification; they have not yet been even offered in evidence. When they are offered in evidence, counsel for any defendant may be heard to interpose

*Ibid., page 5644.

any objection to the admission into evidence which he thinks may be well taken. The Tribunal will then rule upon the admissibility of the documents. Of course, if these documents are offered in evidence at this time or when they are offered, any defendant would have an opportunity to take the stand and explain anything in connection with those documents that might refer to him.¹

7. POHL CASE—STATEMENT BY PRESIDING JUDGE THAT DEFENDANT HOHBERG MAY BE RECALLED LATER IF NECESSARY SINCE COUNSEL FOR CODEFENDANTS DID NOT YET HAVE COPIES OF ALL DOCUMENTS USED DURING HOHBERG'S DIRECT EXAMINATION

EXTRACT FROM THE TRANSCRIPT OF THE POHL CASE,
18 JULY 1947²

DR. HAENSEL (counsel for defendant Georg Loerner, speaking just after defendant Hohberg had been excused from the witness stand): The rule applies that a document which you offer here must be shown to the other side, that is to say defense counsel must show it to the prosecution, and vice versa, 24 hours ahead of time. The document books by colleague Dr. Heim [counsel for defendant Hohberg] were submitted in the normal way to the Secretary General, but when paragraphs were read here in court from these document books, defense counsel had not yet received their copies. Therefore, the situation arose where, although the English translation was in the hands of the Tribunal and the prosecution had their copy, and they were aware of the contents, other defense counsel were not. That would not be too tragic normally if defense counsel were a united group, but if these document books contain things which concern the other defendants and even incriminate them — I need only recall the question of knowledge and a few other things which we heard through Dr. Seidl [counsel for defendant Pohl] about the document books — it is an extreme hardship and an impossible situation if the other defense counsel do not know what the documents say which are being given exhibit numbers.

¹ After the documents in question were offered and received in evidence as a part of the prosecution's rebuttal case, Dr. Flemming introduced in evidence an affidavit of defendant Mrugowsky (Document Mrugowsky 124, Mrugowsky Defense Exhibit 112) in which, as defense counsel stated, the defendant defined "his attitude towards the documents submitted after he left the witness stand." Relevant extracts from the transcript containing the offer of this affidavit and its admission in evidence are reproduced at page 804. None of the defendants took the stand in rebuttal, but one or more affidavits of a number of defendants were received in evidence as surrebuttal documents to meet evidence taken after their testimony in chief.

² Extract from mimeographed transcript, U.S. vs. Oswald Pohl, *et al.*, Case 4, pages 4585-4587.

And it is possible that the documents contain other things as well, which are regarded here as submitted already, but are not known to the defense.

To talk more about the term, "secret" does not mean "unknown." Secret means something which one man knows and the other man does not know. That is what secret means. We have the situation that we didn't know things and still don't know them, which were known to all the other participants of this trial. These things, not all of them documents, but quite a big portion of them, were made the subject of these proceedings. That is what my remark was aimed at. I therefore ask, in order to create a realistic trial situation, that we be allowed, now that we have revealed the secrets of the document books, to refer back to the contents of these documents. If that cannot be expressed here now, we would be in the disagreeable situation that we cannot refer back to documents already submitted, since, through the course of developments we were already put into the position that we are prevented from further questioning [the defendant] Dr. Hohberg concerning these document books, because he is no longer on the witness stand.

I have only expressed the subjective effects as to what happened to the document books, not a subjective accusation, and I do not wish to say that this has been caused by a deliberate interfering with fate, "*corriger la fortune.*" This is what I feel and I hope that the Tribunal will give us a chance to come back to these documents, if and when they are important to us.

PRESIDING JUDGE TOMS: Dr. Haensel, have you received a German copy of the so-called secret document book?

DR. HAENSEL: No, we have not received any at all.

JUDGE TOMS: Would you like one?

DR. HAENSEL: I would be delighted.

JUDGE TOMS: I am sure Dr. Heim will respond and see that you get one. Am I right, Dr. Heim?

Yes, he has it all ready for you. Then, if you find anything in it, about which you wish to ask Hohberg, he can be recalled to the witness stand. I hope this doesn't happen, but we won't prevent it, if it becomes necessary.

DR. HAENSEL: Thank you. That is entirely satisfactory.*

*Hohberg was recalled to testify again upon request of his own counsel. Altogether eight of the 18 defendants were recalled to testify. (see "List of Witnesses in Case 4," pages 1258 and 1259, volume V, this series.) The first defendant to be recalled, defendant Pohl, was recalled by the Tribunal on its own motion. Seven other defendants were recalled upon motion of defense counsel, and one of these defendants, Tschentscher, was recalled a second time by the Tribunal upon its own motion.

8. POHL CASE—RECALL OF DEFENDANT POHL BY TRIBUNAL FOR QUESTIONING BY PRESIDING JUDGE AND LIMITATION OF ENSUING EXAMINATION BY COUNSEL FOR A CODEFENDANT TO SUBJECT MATTER OF EXAMINATION BY THE TRIBUNAL

EXTRACTS FROM THE TRANSCRIPT OF THE POHL CASE,
25 AUGUST 1947*

PRESIDING JUDGE TOMS: The defendant Oswald Pohl is recalled as a witness by the Tribunal.

(Oswald Pohl, a defendant, recalled to the stand, and testified as follows):

JUDGE TOMS: I would like to remind you that you are still under oath.

DEFENDANT POHL: Yes.

Q. Now will you please answer my questions directly and briefly, and please do not say, "As I testified on direct examination." I know what you testified to, but just answer these particular questions right to the point, if you please?

A. Yes.

Q. Who appointed the concentration camp commanders?

A. Himmler.

Q. Who appointed the concentration camp administrative officers?

A. I did.

[The Presiding Judge examined the defendant until the morning recess.]

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE TOMS: The Tribunal has no further questions of this witness.

DR. SEIDL (counsel for the defendant Pohl): If the Tribunal please, I have only a very few questions to put to the witness connected with the interrogation of the witness by the Tribunal.

[Dr. Seidl asked only three questions of his client and all three were answered without objection.]

DR. SEIDL: I have no further questions.

PRESIDING JUDGE TOMS: Any other question by defense counsel?

DR. GAWLIK (counsel for defendant Bobermin and Volk): Witness, you were asked whether the OSTI [Eastern Industries] was a DWB [German Economic Enterprises, Ltd.] enterprise. I believe your answer was not entirely clear. What were the relations between OSTI and DWB? Who owned the capital? Was it DWB?

*Extracts from mimeographed transcript, U.S. vs. Oswald Pohl, et al., Case 4, pages 6759, 6760, 6784, 6785, and 6786.

DEFENDANT POHL: I said quite clearly that these were Reich enterprises. That was my answer, wasn't it? I did not say that they were owned by the DWB.

Q. The defendant Dr. Bobermin on cross-examination has further submitted a suggestion of promotion which stressed the special merits acquired by Dr. Bobermin in armament matters connected with the concentration camps. Is that motivation a correct one? Particularly, did Dr. Bobermin have any special tasks in that respect?

JUDGE TOMS: Now, this isn't a matter that was brought out by the Court's questioning at all.

DR. GAWLIK: May I ask then to make the witness my own witness.

JUDGE TOMS: No, not now; not at all. He was called on behalf of the Tribunal. You had a chance to make him your own witness long ago; and I think you've already covered the matter that you just questioned him about.

DR. GAWLIK: I'm extremely sorry, Your Honor. I thought that I could ask a witness on cross-examination and make him my own witness by putting questions to him which are outside the subject matter discussed in the examination.

JUDGE TOMS: But this witness is not called for your cross-examination. He is called by the Tribunal for its questioning; and if the Tribunal hadn't called him, you would have had no opportunity to ask him questions.

DR. GAWLIK: I have no other questions.

JUDGE TOMS: Anyone else now? No. The prosecution? No.

[The witness was excused.]

9. RU SHA CASE—DISCUSSION OF PROBLEMS ARISING UPON EXAMINATION OF A DEFENDANT BY COUNSEL FOR CODEFENDANTS BEFORE THE CODEFENDANTS HAVE TESTIFIED, AND THE RELATED QUESTION OF THE RECALL OF THE DEFENDANT AFTER CODEFENDANTS HAVE TESTIFIED

EXTRACT FROM THE TRANSCRIPT OF THE RU SHA CASE DURING THE EXAMINATION OF DEFENDANT GREIFELT BY COUNSEL FOR DEFENDANT SCHWARZENBERGER, 1 DECEMBER 1947*

DIRECT EXAMINATION

[The defendant Greifelt was first examined by his own counsel (tr. pages 1404-1690); then by counsel for defendant Lorenz (tr. pages 1690-1693); then

*Extract from mimeographed transcript, U.S. vs. Ulrich Greifelt, et al., Case 8, pages 1714-1717. The complete testimony of the defendant Greifelt is recorded in the mimeographed transcript, 24, 25, 26 November and 1, 2 December 1947, pages 1404-1750.

by counsel for defendant Creutz (tr. pages 1693-1697); then by counsel for defendant Meyer-Hetling (tr. pages 1697-1709). Thereafter Dr. Gawlik, counsel for defendant Schwarzenberger, asked a number of questions of Greifelt concerning Schwarzenberger's positions and responsibilities after which the following ensued.]

DR. GAWLIK (counsel for defendant Schwarzenberger): Did Schwarzenberger have any right to decide independently about the payments with regard to these agencies?

DEFENDANT GREIFELT: The right to dispose of these means had been given by the budget plan.

JUDGE O'CONNELL: May I suggest to counsel who is now interrogating, and also for the benefit of other counsel in subsequent examinations, would it not be well to defer until a particular defendant is called for that defendant to state the scope of his duties, what he did, and what he was obligated to do, rather than to take one witness and have him cross-examined on every phase of a particular defendant's scope of duties. It simply invites cross-examination by the prosecution on subjects relating to the charge before the particular defendant has himself testified. It simply contributes to some confusion. For instance, if the prosecution exercising its right of cross-examination undertakes to cross-examine this witness ultimately on what Schwarzenberger has done, that will be done before Schwarzenberger has uttered a word in his own defense. To some extent it takes away from the weight. It is also open to the defense ultimately on redirect to bring out anything which is challenged by cross-examination. Would it not be more advisable and helpful if each counsel for each defendant endeavored to restrain himself and be patient until his own client tells his story and tells the scope of his duties and his acts? Until they are attacked by the prosecution they stand admitted and if attacked ultimately by the prosecution there is then the right of redirect examination. I mention that as a helpful procedure which I think is going to be just and beneficial to the defense as it is going to be beneficial to the Tribunal in having the case presented in a manner where there is some sequence to it. For instance, personally, I will be interested in hearing from Schwarzenberger's own lips what his story is, what his duties were, what his obligations were, what his acts were, rather than to hear what another defendant, at this point, has to tell about Schwarzenberger. I mention Schwarzenberger simply as one. It applies to the others. I see no particular reason, simply because this witness may have a general knowledge of the duties of all and the acts of all, why the cross-examination should spread over all the defendants before the defendants themselves tell the story. That is simply in the nature of a suggestion, gentlemen. It is compatible with the pro-

cedure which is followed in American courts. I see no reason why it couldn't be followed here, and I think it would be a benefit to you. I am not directing this wholly to the present counsel who is interrogating. I intend it to be applicable to all, the counsel who will follow, and not only in respect to this particular defendant on cross-examination, so-called by defense counsel, but to each and all defendants as they are called.

After all, the first witness always tells the major portion of the story of any case, so why be tempted into a cross-examination of every particular thing rather than relying on the affirmative side of a defense, and each defendant has a right to present affirmatively his defense.

DR. GAWLIK: May I make some comment? I agree with Your Honor that this would be the best kind of procedure, but for the following reasons we don't adopt it. Until now it was the rule before these Tribunals that we were allowed once to direct questions to a codefendant and to a witness and when the defendant had left the stand when, while presenting our case, we were not allowed to direct questions to a codefendant regarding the case of our client. If I have the right during the presentation of the case on Schwarzenberger to examine the defendant Greifelt again as my witness, then I think it is more correct if we don't discuss our cases now, but if I don't have this right later on, if it is lost to me, then I must of course put all my questions which I want to put to the defendant Greifelt as my witness now, and we are only doing this because this was the general rule so far, but I agree with Your Honor that it is better, and makes the case more intelligible to the Court if there is a certain sequence of the discussion on cases. This is merely for the Court to decide whether I may later call Mr. Greifelt as a witness for my client, Mr. Schwarzenberger.

JUDGE O'CONNELL: I know of no rule to guide or control this Tribunal or any other Tribunal which will deny the right to a redirect if there is a redirect warranted, but I am in no way trying to abridge your right or the right of any defense counsel to examine this witness or any other witness to the fullest scope to which you are entitled; but I do press upon you, the advisable course when examining this or the other defendants, to wait and allow your own respective clients to tell the story of what their duties are and what the scope of their duties is and what their acts are, rather than trying to bring it out through another codefendant. That is a matter of judgment to be exercised by experienced counsel. Experienced counsel ought to know what is material to bring out through a codefendant and what is material to wait for until your own client tells his story when the Tribunal gets it direct, fresh from his lips.

DR. GAWLIK: Yes, could I ask for a ruling then? When discussing the case of my client Schwarzenberger am I going to be allowed to call Greifelt as a witness in my case? Judge Crawford will confirm that in the Doctor's case (Case 1, "Medical case") Tribunal I ruled that every defendant had to direct his questions at once to the defendant on the stand, and no defendant could twice enter the stand. But, if I am allowed to call Mr. Greifelt to the stand again after Schwarzenberger, I, too, believe it is more feasible to beg off my examination now.

JUDGE O'CONNELL: I shall allow the Presiding Justice to declare the ruling of the Court. The Presiding Justice speaks for the Tribunal, and therefore I will allow him to make such ruling as he desires.

MR. LAMB (associate counsel for the prosecution): May I say just a word there, may it please the Court. Our objection to the codefendant Greifelt testifying after Schwarzenberger and the other defendants have testified is because he is present in the courtroom and he would hear their testimony, and for that reason if he does testify later we would ask that he be required to testify before any of the other witnesses. We would ask that the Court rule that the codefendant Greifelt be required to testify before any of the other witnesses. We would ask that the Court rule that the codefendant Greifelt be required to testify before the defendant Schwarzenberger testifies.

PRESIDING JUDGE WYATT: I have an idea that you would be permitted to recall this witness to testify about anything that was not covered by your client himself. But, on such matters as are covered by your client himself, I do not think it would be permissible to recall him, and I do not think it would be worth anything to the Tribunal either then or now to have this witness go over the same things that your client will go over. So, my suggestion would be to you and to all other counsel that after your clients have testified and there are matters they do not know about or cannot clarify, then you would be permitted to call this witness for that purpose.*

*The defendant Greifelt did not appear a second time as a witness, but the defendants Hildebrandt, Hofmann, Meyer-Hetling, and Viermetz were recalled to testify a second time as surrebuttal witnesses. See "List of Witnesses in Case 8," pages 174-176, volume V, this series.

10. FARBEN CASE—AUTHORIZATION FOR DEFENSE COUNSEL TO DEFER DIRECT EXAMINATION OF A DEFENDANT ON ONE COUNT AND AUTHORIZATION FOR THE PROSECUTION TO CROSS-EXAMINE IMMEDIATELY ON THIS COUNT NOTWITHSTANDING THE DEFERMENT

EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE,
10 FEBRUARY 1948¹

DR. BERNDT (counsel for defendant ter Meer): Now, before I ask the defendant to continue, I should like to give a brief survey of the presentation of the case which I have in mind.

[Dr. Berndt then proceeded to outline his plan of presenting documents during the course of the direct examination of his client.]

DR. BERNDT: You will have noticed, Your Honors, that I have not mentioned count two. I should like to postpone examining my client on this point. In my opinion I am forced to do so because the document books of [defendant] Dr. von Schnitzler containing the main documents about Francolor are not available to me yet, and since my client was involved in all these cases as a technical expert, I cannot examine him on these questions until I have seen the evidence of the commercial men. Also, I myself still have some documents outstanding, so that I should like to postpone the examination on count two.

[At this point the direct examination of defendant ter Meer continued, and there was no further discussion of the point raised until the beginning of the session on the next day.]

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
11 FEBRUARY 1948²

PRESIDING JUDGE SHAKE: Any preliminary announcements from the prosecution?

MR. SPRECHER (chief, Farben trial team for the prosecution): Mr. President, yesterday Dr. Berndt stated that he did not plan at this time to interrogate the defendant ter Meer with respect to the subjects under count two. I thought it would only be fair to Dr. Berndt and to the defendant ter Meer to indicate at this time the intention of the prosecution to examine the defendant ter Meer concerning any subject whatsoever that we feel are important, since he is a party, and since we feel we must exercise our right

¹ Extracts from mimeographed transcript, Carl Krauch, *et al.*, Case 6, pages 6725 and 6726.

² *Ibid.*, pages 6740 and 6741.

in that connection when he is on the stand without reference to any contingent possibility that he may return to the stand.

JUDGE SHAKE: Do you have anything to say, Dr. Berndt?

DR. BERNDT: Yesterday I gave the reasons why I intended to examine Dr. ter Meer later, on count two. One reason is that the books of the defendant von Schnitzler are not yet ready. These books contain many documents referring to the East and to France. Without these books I do not believe that I can examine Dr. ter Meer thoroughly on this point. In order to avoid repetition, to avoid confusion, I planned to examine Dr. ter Meer only after the entire material on count two has been offered. Also material that has been promised me has not yet reached me because the gentleman in question was away.

JUDGE SHAKE: I think the Tribunal indicated that it would permit you to do that in view of the circumstances when the matter was mentioned yesterday. The Tribunal would much prefer, of course, that when a witness goes on the stand the party offering him, be he a witness proper or defendant, should complete the examination and that co-counsel for the defense should complete their examination and that the prosecution would complete its cross-examination all at one time. That would be much preferable. However, we realize that we are all laboring under some difficulties with reference to the processing of documents, and we are not disposed to handicap any defendant because of circumstances that are beyond control on his part or on the part of the Tribunal. However, what you have said, Dr. Berndt, is hardly an answer to what the prosecution has indicated and that is, as we understand, that he is stating that so far as they are concerned they propose to cross-examine the defendant for all purposes or to examine him, as you may say, for all purposes while he is on the stand. That, we take it, is within the rights of the prosecution. The only difficulty we see is this: if the prosecution does do that and then we grant you permission, as we are disposed to do, to use Dr. ter Meer later after your documentary material is available, it may result in another cross-examination on the part of the prosecution or another examination on the part of the prosecution. That's the reason why the Tribunal would very much prefer that the whole case be made out so far as a witness is concerned or a defendant is concerned who is on the stand, but unfortunately we are not in a position to cope with that because of the document situation. It seems to the Chair that the prosecution is within its rights, since this is a defendant, in interrogating him in any field it sees fit, and we can well appreciate your situation with reference to the postponing a part of your examination in chief because of the lack of books. Just a moment.

I have stated the views of the Tribunal on the subject and it doesn't call for any further comment at this time.

[During direct examination throughout the next several days, Dr. Berndt asked no questions concerning the spoliation charges (count two). When this aspect of direct examination was concluded on 17 February 1948, the Presiding Judge made the remark reproduced immediately below.]

EXTRACT FROM THE TRANSCRIPT IN THE FARBEN CASE,
17 FEBRUARY 1948¹

PRESIDING JUDGE SHAKE: The Tribunal understands the reservation that you have made with respect to count two of the indictment. We understand also that subject to that reservation you are now through with your examination of Dr. ter Meer.

[After defense counsel for other defendants had examined defendant ter Meer, the prosecution cross-examined him on all counts, including count two. Thereupon the following colloquy took place.]

EXTRACT FROM THE TRANSCRIPT IN THE FARBEN CASE,
18 FEBRUARY 1948²

PRESIDING JUDGE SHAKE: The prosecution has concluded its cross-examination, Dr. Berndt. Do you desire to interrogate the witness further?

DR. BERNDT: Yes, Your Honor, I have just a few questions.

JUDGE SHAKE: Now, before you do that, Doctor, we perhaps had better have an understanding about the scope of your examination. The prosecution went into some phases of the field that may involve the second count of the indictment. You have heretofore said that you would withhold your examination in chief of your client on that count until a later date. Now, you will necessarily have to decide as to whether or not you desire now to go into the phases brought out by the prosecution as it related to the second count in which event, of course, it would be obligatory on you to conclude that phase of the case or keep out of that field until such time as you desire to recall the witness. I think we had better have an understanding with you on that score before you start.

DR. BERNDT: I am quite clear about that, Your Honor. I shall adhere to my previously announced procedure and I will not interrogate my client with respect to count two before I have the other document books, in particular, [defendant] Dr. von Schnitzler's books. Consequently, I shall not touch upon count two today.

JUDGE SHAKE: That's entirely satisfactory. You may proceed.

¹ Ibid., page 7175.

² Ibid., pages 7298 and 7299.

II. FLICK CASE—STATEMENTS BY TWO JUDGES THAT PROSECUTION MAY NOT IMPEACH A DEFENDANT UPON A COLLATERAL POINT AND THAT WHEN PROSECUTION ASKS A DEFENDANT ABOUT NEW MATTERS THE DEFENDANT BECOMES THE PROSECUTION'S WITNESS

EXTRACT FROM THE TRANSCRIPT OF THE FLICK CASE DURING THE CROSS-EXAMINATION OF DEFENDANT KALETSCH, 22 SEPTEMBER 1947*

MR. LYON (chief, Flick trial team for the prosecution): Did I understand you correctly as saying that in addition to certain of the coal properties of AKW, Salzdetfurth received in cash 11 million reichsmarks and 2 million reichsmarks?

DEFENDANT KALETSCH: That's the way I remember it.

MR. LYON: Now I would like to possibly refresh your recollection or determine what your recollection is here. Did you upon an interrogation before trial discuss this question of what Salzdetfurth received?

PRESIDING JUDGE SEARS: Just a moment. This is direct examination.

MR. LYON: I had assumed that it was—

PRESIDING JUDGE SEARS: He hasn't said anything about any of these things.

MR. LYON: I had assumed that it would be perfectly proper for me to test his credibility, Your Honor, generally.

PRESIDING JUDGE SEARS: Not on a collateral point.

MR. LYON: Well, of course, if that is the ruling of the Court, I will withdraw the question.

PRESIDING JUDGE SEARS: Well, I should think so.

MR. LYON: But I am not sure that is the practice that has been followed in all courts here.

PRESIDING JUDGE SEARS: Maybe not, but of course, this isn't cross-examination at all.

MR. LYON: Well, Your Honor, I—

PRESIDING JUDGE SEARS: I never heard of asking a man a question and then putting something before him to contradict him when he is your own witness.

MR. LYON: Your Honor, I am afraid I did not proceed on the understanding that he was my witness.

PRESIDING JUDGE SEARS: Why, he certainly is your witness.

JUDGE RICHMAN: He is your witness when you are asking about

*Extract from mimeographed transcript, U.S. vs. Friedrich Flick, et al., Case 5, pages 7798-7800.

things that he hasn't testified to on direct examination. When you are asking him in cross-examination about things to which he has not testified on direct examination and things that are a part of your case in chief, which was what you were asking about, then he is your witness.

PRESIDING JUDGE SEARS: We don't want any misunderstanding about this. You don't claim that he testified anything about any of these matters, do you?

MR. LYON: Well, not matters identical with this certainly, Your Honor. It is the position of the prosecution that these are matters that are relevant to what he testified about.

PRESIDING JUDGE SEARS: Well, they may be relevant to it, but that doesn't make them cross-examination.

MR. LYON: Why, I certainly don't want to question the ruling of the Tribunal. I am perfectly happy to withdraw the question.

PRESIDING JUDGE SEARS: Well, of course, when you come to your side of the case, you are not absolutely bound by whatever this witness says. You are not bound absolutely by what this witness says.

MR. LYON: Yes, Your Honor.

PRESIDING JUDGE SEARS: If you have anything in rebuttal, of course, or any other testimony, you may offer it if you claim that it is wrong.

MR. LYON: Yes, Your Honor.

PRESIDING JUDGE SEARS: But to ask it in the ordinary way—well, of course, if you tried to attack his credibility, that's the very thing you can't do because you have gone farther than to cross-examine. You have made him your own witness. Now as to his credibility, you vouch for it so far as he testifies as to new matter. Of course, if he is mistaken, why you may correct that at the proper time.

12. EINSATZGRUPPEN CASE—OVERRULING OF DEFENSE OBJECTIONS TO THE USE OF DOCUMENTS DURING CROSS-EXAMINATION WHICH HAVE NOT PREVIOUSLY BEEN SHOWN TO DEFENSE COUNSEL

EXTRACT FROM THE TRANSCRIPT OF THE EINSATZGRUPPEN CASE DURING THE CROSS-EXAMINATION OF DEFENDANT NAUMANN, 17 OCTOBER 1947*

MR. FERENCZ (chief prosecutor): Let me hand you another one [The third of three documents handed to the defendant Naumann].

*Extract from mimeographed transcript, U.S. vs. Otto Ohlendorf, et al., Case 9, pages 873-877.

DEFENDANT NAUMANN: Oh, here I see the first thing that means something to me, namely the name "Operation Zeppelin." But this is the first thing in the three documents which means anything to me.

Q. But you do not recall from seeing the faces of these three people, that you ever ordered executions?

A. No.

Q. Allow me now—I will explain to the Tribunal what I have just given to the defendant.

MR. FERENCZ: I have just handed to the defendant three pages which appear to be a questionnaire or life history of three men. Each contains a picture of the man. It states when he was born, his name, etc. These are part of a file to which the last note attached is as follows, and I will now read—and I ask you, Naumann, if this reading recalls to your memory the execution of certain people by your order:

"SS Special Camp Wissokoje. Dated 5 December 1942. Memorandum. As a result of various things which"—

DR. GAWLIK (counsel for defendant Naumann): I have to object, Your Honor. I have to have a German copy of that document so I can tell whether this document is relevant before I can let it be accepted into the record, Your Honor.

MR. FERENCZ: Your Honor, I have only one copy of the document. The objection is a matter of relevance. I think the objection can be overruled. I will show the document to the defendant and to the defense counsel and introduce it in the Court as soon as I am finished reading a short paragraph.

PRESIDING JUDGE MUSMANNO: That answer your objections, Dr. Gawlik?

DR. GAWLIK: Yes, but Your Honor, I will ask that I be given a copy prior to the introduction of the document, because I can't judge whether the part that is being read is relevant, the reason it is being read, and whether it has anything to do with Naumann. I can't check it if I don't have the copy, the copy should be shown to me in advance. And we always used to do it that way before. We always received the German copy first.

MR. FERENCZ: I am just trying to refresh the defendant's recollection, Your Honor. I will show the relevance of this document in the first sentence.

PRESIDING JUDGE MUSMANNO: You see, Dr. Gawlik, Mr. Ferencz is not introducing a document in evidence at this moment. He is cross-examining the witness. He asked him if he recalls certain episodes, and the defendant has stated he has no recollection of any such episodes. Now, the prosecution is endeavoring to refresh his memory. Naturally, you have the right to see this

document, but Mr. Ferencz has the right to put the proposition to him before exposing the document to anybody, because it is only for the purpose of refreshing the recollection of the defendant.

MR. FERENCZ: I repeat my question. I will read to you a certain document to refresh your recollection about having ordered executions: "Special Camp Wissokoje. 5 December 1942. Memorandum. As a result of various things which happened in the meantime at the special camp Wissokoje, 'K' was given the special treatment on 25 November 1942 by order of SS-Brigadefuehrer Naumann of Einsatzgruppe B."* Does that refresh your memory?

DEFENDANT NAUMANN: No, it does not.

Q. I will read a little further: "More can be seen from the reports of SS Hauptsturmfuehrer Sauckel, to the RSHA, Amt VI, Department VI-CZ, signed Goebel, SS Unterscharfuehrer."

Do you remember anything about having ordered executions now?

A. No.

Q. Allow me to read one more memorandum.

DR. FICHT (counsel for the defendant Biberstein): Your Honor, for the defendant Biberstein I would like to object to this manner of introducing evidence. It was usual at all times that before a document was introduced at least no one could read anything from the document. During cross-examination it may be brought on that something is stated in the document, but not the whole document can be read. I am objecting to this on principle, for any further such cases.

DR. GAWLIK: And now I would like to see the document which was just read.

I believe that there will be no more misgivings about seeing the document.

MR. FERENCZ: You may show it to the defendant. Perhaps he will then remember.

PRESIDING JUDGE MUSMANNO: Up to this point there is nothing incorrect in the procedure, so Mr. Ferencz may continue.

Is there a question pending now?

MR. FERENCZ: Does that refresh your memory, Naumann?

DEFENDANT NAUMANN: In Wissokoje—the estate of Wissokoje belonged to Einsatzgruppe B—in the estate of Wissokoje there was a house which had been placed at the disposal of an official of Office VI, and this representative of Office VI received three to six Russians who stated that they were against the Bolshevists, and that by order of the Germans they wanted to carry out certain

*This document and a number of related documents are reproduced in section IX D, "Operation Zepplin," volume XIII, Case 11, this series.

actions against the Germans. This agency of Office VI was not subordinated to me. It was subordinated to the competent department of the RSHA, Reich Security Main Office. It received these instructions from there which did not concern me, and with which I had nothing to do. The leader of this commando, a Hauptsturmfuehrer, conducted independent negotiations, without having to report to me and without reporting to me. As for the execution of a man of this organization—I never did order such a thing because I didn't have the right to do so. It was up to Office VI.

Q. But now you do remember that there were killings going on around Camp Wissokoje?

A. No, I don't know that, either.

Q. You have read this memorandum stating that people were killed by order of SS Brigadefuehrer Naumann of Einsatzgruppe B. Is that you? Are you the person referred to?

A. Yes, it could not be any other Brigadefuehrer Naumann than myself.

Q. But you don't know anything about these killings?

A. No.

MR. FERENCZ. Thank you. Your Honor, this document has just been received from Berlin. We have not yet had it processed; as soon as we can put it into the hands of the Court we shall do so and introduce it as an exhibit at that time. We have three such documents.

PRESIDING JUDGE MUSMANNO: I would suggest you expedite the processing so that the Tribunal may be entirely current on these documents.

MR. FERENCZ: We will do it as rapidly as possible, Your Honor.

PRESIDING JUDGE MUSMANNO: The Tribunal will now be in recess for fifteen minutes.

(A recess was taken.)

THE MARSHAL: The Tribunal is again in session.

MR. FERENCZ: Before the recess we were discussing some documents which stated that the defendant Naumann ordered the execution of certain people. For purposes of identification I ask that these documents be given Prosecution Exhibit No. 175, and we will introduce them as soon as they can be processed.

13. IMT CASE—RULING THAT A DOCUMENT PUT TO A DEFENSE WITNESS ON DIRECT EXAMINATION MUST BE GIVEN AN EXHIBIT NUMBER AND INTRODUCED IN EVIDENCE

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE DURING THE DIRECT EXAMINATION OF DEFENSE WITNESS BUEHLER, 23 APRIL 1946¹

DR. SEIDL (counsel for defendant Frank) : I now ask you, are the contents of this affidavit [which defense counsel had just read into the record], made before an American officer, correct?

WITNESS BUEHLER : I can supplement it.

THE PRESIDENT (Lord Justice Sir Geoffrey Lawrence) : Before he supplements it, is it in evidence? Has it yet been put in evidence?

DR. SEIDL : It has the number 2476-PS.

THE PRESIDENT : That doesn't prove it has been put in evidence. Has it been put in evidence? Dr. Seidl, you know quite well what "put in evidence" means. Has it been put in evidence? Has it got a USA exhibit number?

DR. SEIDL : No, it has not a USA exhibit number.

THE PRESIDENT : Then you are offering it in evidence, are you?

DR. SEIDL : I don't want to submit it formally in evidence; but I do want to ask the witness about the contents of this affidavit.

THE PRESIDENT : But it is a document, and if you are putting it to the witness, you must put it in evidence and you must give it an exhibit number. You cannot put documents to the witness and not put them in evidence.

DR. SEIDL : In that case I submit this document as Document Frank 1.

14. EINSATZGRUPPEN CASE—RULING THAT A DOCUMENT PUT TO A DEFENDANT ON CROSS-EXAMINATION NEED NOT BE INTRODUCED IN EVIDENCE, PROVIDED DEFENSE COUNSEL HAS ACCESS TO THE DOCUMENT

EXTRACT FROM THE TRANSCRIPT OF THE EINSATZGRUPPEN CASE DURING THE CROSS-EXAMINATION OF DEFENDANT SIX, 27 OCTOBER 1947²

MR. FERENCZ (chief prosecutor) : I will give you part of Schellenberg's interrogation, and I will ask you again to read the

¹ Trial of the Major War Criminals, *op. cit.*, volume XII, page 76.

² Extract from mimeographed transcript, U.S. *vs.* Otto Ohlendorf, *et al.*, Case 9, page 1422.

questions concerning you, and the answers, and then you will be given an opportunity to explain it. It is question number 29.

DR. ULMER (counsel for the defendant Six) : Your Honor, may I again move that the prosecution be instructed to introduce these documents as evidence and to give them an exhibit number.

MR. FERENCZ: Your Honor, the defendant has asked to see the document so that he may be able to explain it. I have given him the document and it will depend upon his answer whether I choose to submit it as a rebuttal document or not. I submit we are not obligated to make a document of every piece of evidence we present to the defendant for the purpose of cross-examination.

PRESIDING JUDGE MUSMANN: So long as defendant and defense counsel are given every opportunity to see, study, and scrutinize the document, or paper, or memorandum, or whatever it may be that the prosecution is using, there is no necessity of making it an exhibit unless the prosecution desires to do so.

H. Affidavits and Interrogatories—IMT Case

I. INTRODUCTION

The role of "affidavit evidence" in the IMT case, as in the later 12 Nuernberg trials, was very extensive and very important. In each of the trials affidavits were introduced by both parties, though the defense introduced affidavits more extensively than did the prosecution. If affidavits had not been admissible, the Tribunals would have been denied the statements under oath of many important witnesses to the facts, and if all available witnesses had been required to testify before the Tribunal rather than to give their evidence through affidavits, the trials would have lasted much longer than they did and fewer trials would have been held. Because the practice developed before the IMT was constantly referred to in arguments in the later trials, and since the IMT developed numerous rules in connection with the admission of affidavits and interrogatories, a number of extracts of special interest from the record of the IMT are reproduced herein. These extracts have all been taken from various portions of "Trial of the Major War Criminals," the official English publication of the IMT record.

The Charter of the IMT did not contain any provision stating expressly that affidavits were admissible in evidence, but it did state in Article 19 that "The Tribunal shall not be bound by technical rules of evidence * * * and shall admit any evidence, which it deems to have probative value." When the first affidavit,

an affidavit by Ambassador Messersmith, was offered in evidence in the IMT case, the matter was argued, and both the probative value of such evidence and the means at hand to the defense to counter it were discussed. The prosecution pointed out that Ambassador Messersmith could not be brought to Nuernberg to testify. In admitting the affidavit, the President of the IMT stated:

“The question of the probative value of an affidavit as compared with a witness who has been cross-examined would, of course, be considered by the Tribunal. If, at a later stage, the Tribunal thinks the presence of the witness is of extreme importance, the matter can be reconsidered. I add this: If the defense wish to put interrogatories to the witness, they will be at liberty to do so.”

The transcript of the offer of the Messersmith affidavit, the ensuing argument, and the Tribunal's ruling is reproduced in 2 below. Several defense counsel later filed interrogatories for submission to Ambassador Messersmith, and a number of the interrogatories upon completion were introduced in evidence as defense exhibits.

On the same day that the Messersmith affidavit was received in evidence (28 Nov. 1945), the IMT rejected an affidavit by Kurt von Schuschnigg, the former Chancellor of Austria. The defense had argued that von Schuschnigg was present in Nuernberg and that he was considered of special importance for the defense. Excerpts from the transcript of the offer, argument, and ruling are reproduced in 3 below.

The next material on affidavits reproduced from the IMT case concerns the Pfaffenberger, Hoettl, and Hoellriegl affidavits. The Pfaffenberger affidavit was by far the most discussed affidavit in the IMT trial. Pfaffenberger, a German, had executed an affidavit before an American officer shortly after Germany's surrender, concerning the happenings at Buchenwald Concentration Camp, but at the time of offer of the affidavit and for some time thereafter, it was not known where Pfaffenberger was located or whether he could be produced as a witness in court. After the defense made its objection, the President of the IMT asked many questions concerning the prosecution's interpretation of various provisions of the Charter. The Chief Prosecutors of the United States and the Soviet Union, representatives of the Chief Prosecutors of Great Britain and France, and several defense counsel addressed the Tribunal on the question thus submitted. After deliberating the matter at a recess, the IMT admitted the affidavit, stating, however, that the defense could apply in writing for cross-examination if they wished. But the admission of the affi-

davit was not made contingent upon whether or not Pfaffenberger could be produced for cross-examination. Immediately thereafter the defense objected to the Hoettl affidavit, Hoettl being available for oral examination. The Tribunal admitted the affidavit, stating that the defense could apply in writing for cross-examination. Thereafter, Hoettl gave further affidavits and cross-affidavits both to the prosecution and the defense, but Hoettl did not testify orally. During the several weeks after the Pfaffenberger and Hoettl affidavits were admitted the prosecution offered a number of further affidavits which were received in evidence on the same basis. The defense protested against this as a general practice after the affidavit of one Hoellriegl was read in court, stating that it was unfair that affidavits be read so long before the affiants could be heard in court on cross-examination. The Tribunal admitted the affidavit. Hoellriegl was produced as witness several days later and cross-examined by counsel for two defendants. More than a month after the Pfaffenberger affidavit was admitted, Pfaffenberger was located, brought to Nuernberg, and the Tribunal and the defense notified by the prosecution that Pfaffenberger was available for cross-examination. The defense asked for time in which to determine whether they wanted to cross-examine Pfaffenberger. After the defense had discussions with Pfaffenberger outside of court, it was announced in court that the defense did not wish to cross-examine Pfaffenberger. Extensive extracts from the record concerning these three affidavits are reproduced in 4 below.

By the time the defense case began in the IMT trial, the principle of accepting affidavits in lieu of the testimony of available witnesses, as well as a means for obtaining the testimony of witnesses who were not available to give oral testimony, was well established. The hundreds of defense applications to the Tribunal for leave to adduce documents and witnesses and for assistance from the Tribunal in the production of evidence contained a high proportion of applications for interrogatories or affidavits. If the IMT deemed the evidence sought to be adduced by the interrogatories or affidavits to be relevant and not cumulative the applications were granted. The defense offered in evidence large numbers of these affidavits or interrogatories as exhibits. As an example of this procedure, reference is made to Doenitz Defense Exhibit 100, an interrogatory of Fleet Admiral Chester W. Nimitz of the U. S. Navy. The discussion concerning the application of defendant Doenitz for this interrogatory was quite lengthy and was joined in by the American member as well as the President of the IMT (Trial of the Major War Criminals, *op. cit.*, vol. VIII, pp. 549-552). Admiral Nimitz responded to this interrogatory in

Washington, D. C. on 11 May 1946, and when defense counsel offered it on 2 July 1946, the IMT requested that it be read in full (ibid., vol. XVII pp. 377-381). In its judgment the IMT referred to the Nimitz interrogatory in finding that the defendant Doenitz was not guilty of breaches of the international law of submarine warfare (ibid., vol. I, p. 313).

It often occurred that the IMT approved a witness to give testimony by interrogatories or affidavit for one defendant, and later approved that the same witness testify in person on behalf of another defendant. The IMT announced on 8 March 1946 that if the witness in such cases appeared to give his oral evidence before the interrogatory or affidavit was introduced, that then the defense was obliged to adduce all testimony orally from the witness and not use the interrogatory or affidavit (5 below). However, it later developed that considerable time could be conserved if affidavits were admitted in such cases, leaving it up to the prosecution to determine whether or not it would cross-examine on the topics covered by the affidavit. An example where this practice was employed at the instigation of the defense is shown by the extracts from the transcript of 7 June 1946 (6 below).

Where the defense introduced an interrogatory and the prosecution had obtained a cross-interrogatory from the same witness, the IMT ruled that the prosecution could not submit the cross-interrogatory without first serving the defense with copies thereof (7 below).

Late in the trial the IMT permitted the introduction by the defense of several affidavits by defendants concerning evidence taken after the defendant in question had testified in chief. This practice, which was followed extensively in some of the later Nuernberg trials, is illustrated herein by the extracts from the transcript of 15 August 1946 (8 below).

The admissibility of interrogations of defendants, which had been taken by representatives of the prosecution staff before trial, is taken up in subsection J.

The IMT declined to receive in evidence unsolicited letters which had been sent to defense counsel. In so ruling, the IMT stated that an application would be made in the ordinary way for leave to introduce an affidavit by the person who wrote the letter or to call him as a witness (9 below). In the later trials unsolicited letters were occasionally admitted when there appeared to be difficulties in procuring an affidavit promptly. For such a ruling from the Medical case, see subsection I 9.

2. MESSERSMITH AFFIDAVIT—ARGUMENT CONCERNING THE ADMISSIBILITY OF THE FIRST AFFIDAVIT OFFERED IN THE NUERNBERG TRIALS, RULING ADMITTING THE AFFIDAVIT, AND TRIBUNAL STATEMENT THAT THE DEFENSE MAY PUT INTERROGATORIES TO THE AFFIANT, IF IT CHOOSES

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
28 NOVEMBER 1945*

MR. ALDERMAN (associate trial counsel for the United States) : At this point, I should like to offer in evidence our Document 1760-PS, which, if admitted, would be Exhibit USA-57. This document is an affidavit executed in Mexico City on 28 August of this year by George S. Messersmith, United States Ambassador, now in Mexico City. Before I quote from Mr. Messersmith's affidavit, I should like to point out briefly that Mr. Messersmith was Consul General of the United States of America in Berlin from 1930 to late spring of 1934. He was then made American Minister in Vienna, where he stayed until 1937.

In this affidavit he states that the nature of his work brought him into frequent contact with German Government officials, and he reports in this affidavit that the Nazi government officials with whom he had contact were on most occasions amazingly frank in their conversation and concealed none of their aims.

If the Court please, this affidavit, which is quite long, presents a somewhat novel problem of treatment in the presentation of this case. In lieu of reading this entire affidavit into the record, I should like, if it might be done in that way, to offer in evidence, not merely the English original of the affidavit, but also a translation into German, which has been mimeographed. This translation of the affidavit into German has been distributed to counsel for the defendants.

DR. EGON KUBUSCHOK (counsel for defendant von Papen) : An affidavit of a witness who is obtainable has just been turned over to the Court. The content of the affidavit offers so many subjective opinions of the witness, that it is imperative we hear the witness personally in this matter.

I should like to take this occasion to ask that it be decided as a matter of principle, whether that which a witness can testify from his own knowledge may, without further ado, be presented in the form of an affidavit; or whether, if a witness is living and can be reached, the principle of oral proceedings should be applied, that is, the witness should be heard directly.

*Trial of the Major War Criminals, *op. cit.*, volume II, pages 349-352.

MR. ALDERMAN: If the Tribunal please, I should like to be heard briefly on the matter.

THE PRESIDENT (Lord Justice Sir Geoffrey Lawrence): You have finished what you had to say, I understand?

DR. KUBUSCHOK: Yes.

THE PRESIDENT: Very well, we will hear Mr. Alderman.

MR. ALDERMAN: May it please the Tribunal, I recognize, of course, the inherent weakness of an affidavit as evidence where the witness is not present and subject to cross-examination. Mr. Messersmith is an elderly gentleman. He is not in good health. It was entirely impracticable to try to bring him here; otherwise, we should have done so.

I remind the Court of Article 19 of the Charter:

“The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.”

Of course, the Court would not treat anything in an affidavit such as this as having probative value, unless the Court deemed it to have probative value; and if the defendants have countering evidence which is strong enough to overcome whatever is probative in this affidavit, of course the Court will treat the probative value of all the evidence in accordance with this provision of the Charter.

By and large, this affidavit and another affidavit by Mr. Messersmith which we shall undertake to present, cover background material which is a matter of historical knowledge, of which the Court could take judicial notice. Where he does quote these amazingly frank expressions by Nazi leaders, it is entirely open to any of them who may be quoted, to challenge what is said, or to tell Your Honors what they believe was said. In any event, it seems to me that the Court can accept an affidavit of this character, made by a well-known American diplomat, and give it whatever probative value the Court thinks it has.

As to the question of reading the entire affidavit, I understand the ruling of the Court to be that only those parts of the documents which are quoted in the record will be considered to be in the record. It will be based upon the necessity of giving the German counsel knowledge of what was being used. As to these affidavits, we have furnished them complete German translations. It seems to us that a different rule might obtain where that has been done.

THE PRESIDENT: Mr. Alderman, have you finished what you had to say?

MR. ALDERMAN: Yes, Sir.

DR. KUBUSCHOK: The representative of the prosecution takes the point of view that the age and state of health of the witness make it impossible to summon him as a witness. I do not know the witness personally. Consequently, I am not in a position to state to what extent he is actually incapacitated. Nevertheless, I have profound doubts regarding the presentation of evidence of such an old and incapacitated person. I am not speaking specifically now about Mr. Messersmith. I do not think the Court can judge to what extent old age and infirmity can possibly influence memory and reasoning powers; so, personal presence would seem absolutely indispensable.

Furthermore, it is important to know what questions, *in toto*, were put to the witness. An affidavit only reiterates the answers to questions which were put to the person. Very often conclusions can be drawn from unanswered questions. It is here a question of evidence solely on the basis of an affidavit. For that reason we are not in a position to assume, with absolute certainty, that the evidence of the witness is complete.

I cannot sanction the intention of the prosecution in this case to introduce two methods of giving evidence of different value; namely, a fully valid one through direct evidence of a witness, and a less complete one through evidence laid down in an affidavit. The situation is this: Either the evidence is sufficient, or it is not. I think the Tribunal should confine itself to complete and fully valid evidence.

THE PRESIDENT: Mr. Alderman, did you wish to add anything?

MR. ALDERMAN: I wish to make this correction, perhaps, of what I said. I did not mean to leave the implication that Mr. Messersmith is in any way incapacitated. He is an elderly man, about 70 years old. He is on active duty in Mexico City. The main difficulty is that we did not feel we could take him away from his duties in that post, combined with a long trip and his age.

THE PRESIDENT: That is all, is it?

MR. ALDERMAN: Yes.

THE PRESIDENT: The Tribunal has considered the objection which has been raised. In view of the powers which the Tribunal has under Article 19 of the Charter, which provides that the Tribunal shall not be bound by technical rules of evidence, but shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure and shall admit any evidence which it deems to have probative value, the Tribunal holds that affidavits can be presented, and that in the present case it is a proper course.

The question of the probative value of an affidavit as compared with a witness who has been cross-examined would, of course, be

considered by the Tribunal. If, at a later stage, the Tribunal thinks the presence of a witness is of extreme importance, the matter can be reconsidered. I add this: If the defense wish to put interrogatories to the witness, they will be at liberty to do so.

3. SCHUSCHNIGG AFFIDAVIT — RULING SUSTAINING DEFENSE OBJECTION AND TRIBUNAL STATEMENT THAT EITHER PARTY MAY CALL SCHUSCHNIGG

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
28 NOVEMBER 1945*

DR. LATERNSEER: In the name of the accused, Seyss-Inquart, I wish to protest against the presentation of written evidence by the witness von Schuschnigg for the following reasons: Today, when a resolution was announced with respect to the use to be made of the written evidence of Mr. Messersmith, the Court was of the opinion that in a case of very great importance it might possibly take a different view of the matter. With respect to the Austrian conflict this is the case, since Schuschnigg is the most important witness, the witness who was affected at the time in his position as Federal Chancellor. In the case of such an important witness, the principle of direct evidence must be adhered to, in order that the Court be in a position to ascertain the actual truth in this case. The accused and his defense counsel would feel prejudiced in his rights granted by the Charter should direct evidence be circumvented. I must, therefore, uphold my viewpoint, since it can be assumed that the witness von Schuschnigg will be able to confirm certain facts which are in favor of the accused Seyss-Inquart.

I therefore make the motion to the Court that the written evidence of the witness von Schuschnigg be not admitted.

THE PRESIDENT (Lord Justice Sir Geoffrey Lawrence): If you have finished the Tribunal will hear Mr. Alderman.

MR. ALDERMAN: May it please the Tribunal; at this point I am simply proposing to offer this affidavit for the purpose of showing the terms of the secret understanding between the German and Austrian Governments in connection with this accord. It is not for any purpose to incriminate the defendant Seyss-Inquart that it is being offered at this point.

DR. LATERNSEER: May I add to my opinion that the witness, von Schuschnigg, on 19 November 1945, was questioned in Nuernberg, and that if an interrogation on 19 November was possible, then a

*Ibid., pages 384 and 385.

short time later—that is now—it ought to be possible to call him before the Court, especially as the interrogation before this Court is of special importance.

THE PRESIDENT: The Tribunal will recess now to consider this question.

[A recess was taken]

THE PRESIDENT: The Tribunal has considered the objection to the affidavit of von Schuschnigg and upholds the objection.

If the prosecution desires to call von Schuschnigg as a witness, it can apply to do so. Equally, if the defense wishes to call von Schuschnigg as a witness, it can apply to do so. In the event von Schuschnigg is not able to be produced, the question of affidavit-evidence by von Schuschnigg being given will be reconsidered.¹

4. PFAFFENBERGER, HOETTL, AND HOELLRIEGL AFFIDAVITS—ADMISSION OF AFFIDAVITS SUBJECT TO DEFENSE APPLICATION FOR CROSS-EXAMINATION

EXTRACTS FROM THE TRANSCRIPT OF THE IMT CASE, 14 DECEMBER 1945; 2, 14 JANUARY 1946; 1 AND 4 FEBRUARY 1946²

[14 DECEMBER 1945]

DR. KAUFFMANN (counsel for defendant Kaltenbrunner): May I bring up two points with respect to yesterday's and all future presentation of evidence on the section dealing with crimes against humanity.

First, I request that the affidavit of the witness Pfaffenberger, which was submitted yesterday, be stricken from the record. The witness himself will later have to be cross-examined, since his affidavit is fragmentary in most important points. In many cases it does not appear whether his statements are based on personal observations or on hearsay, and therefore, it is too easy to draw false conclusions. The witness did not mention that the [Buchenwald Concentration] Camp Commander Koch and his inhuman wife were condemned to death by an SS court, among other things, on account of these occurrences.

[The occurrences referred to in Pfaffenberger's affidavit had to do with the making of lamp shades from human skin at Buchenwald Concentration Camp. The extract from this affidavit which had been read into the record on the previous day was the following: "In 1939 all prisoners with tattooing on

¹ Schuschnigg did not thereafter appear as a witness for either party, and the admissibility of his affidavit was never reconsidered.

² Trial of the Major War Criminals, *op. cit.*, volume III, pages 542-551, 571, and 572; volume IV, pages 296-298; volume V, pages 200 and 201; and volume VI, pages 460, 461, and page 505.

them were ordered to report to the dispensary [of the Buchenwald Concentration Camp]. No one knew what the purpose was; but after the tattooed prisoners had been examined, the ones with the best and most artistic specimens were kept in the dispensary and then killed by injections administered by Karl Beigs, a criminal prisoner. The corpses were then turned over to the pathological department where the desired pieces of tattooed skin were detached from the bodies and treated. The finished products were turned over to the SS Standartenfuhrer Koch's wife who had them fashioned into lamp shades and other ornamental household articles. I myself saw such tattooed skins with various designs and legends on them, such as 'Haensel and Gretel,' which one prisoner had on his knee, and designs of ships from prisoners' chests. This work was done by a prisoner named Wernerbach." (Trial of the Major War Criminals, *op. cit.*, volume III, page 515).]

It is, of course, possible to ascertain the complete facts by questioning the witness at a later stage of the trial. But until then the Tribunal and all members of the prosecution and the defense must be continually influenced by such dreadful testimony.

The contents of this testimony are so horrifying and so degrading to the human mind that one would like to avert one's eyes and ears. In the meantime such statements make their way into the press of the whole world, and civilization is justly indignant. The consequences of such prejudiced statements are incalculable. The prosecutor clearly recognized the significance of this testimony and exposed the sorry documents in yesterday's proceedings.

If weeks or months pass before such testimony is rectified, its initial effect can never be wholly eliminated; but truth suffers and justice is endangered thereby. Surely, Article 19 of the Charter does not envisage bringing about such a state of affairs.

Secondly, I should, therefore, like to suggest that at the present stage of the trial the testimony of witnesses who live in Germany and whose appearance here in court is possible should not be read in the proceedings. For at this stage of the trial the charges being made are even more terrible than those referring to wars of aggression, since the tortured lives and deaths of human beings are involved.

At the beginning of the trial the Tribunal refused to admit testimony of the witness Schuschnigg, and it is my opinion that what was valid then should be all the more valid at this stage of the trial.

I should like to emphasize my suggestion particularly with regard to the defendant Dr. Kaltenbrunner himself, since it was not until the spring of 1943 that he became Chief of the Reich Security Main Office, and since, in the opinion of the defense, many, if not all, of his signatures were forged and the entire executive function attached to the concentration camps and the things connected with them lay exclusively in Himmler's hands.

That, I hope to prove at a later date. I mentioned it now in order to justify my suggestion.

THE PRESIDENT: The Tribunal would like to hear counsel for the Chief Prosecutor of the United States.

MR. JUSTICE JACKSON: May it please the Tribunal, Mr. Dodd, who had charge of the matter which is under discussion, left for the United States yesterday; and I shall have to substitute for him as best I can.

This Tribunal sits under a Charter which recognized the impossibility of covering a decade of time, a continent of space, a million acts, by ordinary rules of proof, and at the same time finishing this case within the lives of living men. We do not want to have a trial here that, like the trial of Warren Hastings, lasted 7 years. Therefore, the Charter sets up only two standards by which any evidence, I submit, may be rejected. The first is that evidence must be relevant to the issue. The second is it must have some probative value. That was made mandatory upon this Tribunal in Article 19 [of the IMT Charter] because of the difficulty of ever trying this case if we used the technical rules of common law proof.

One of the reasons this was a military tribunal, instead of an ordinary court of law, was in order to avoid the precedent-creating effect of what is done here on our own law and the precedent control which would exist if this were an ordinary judicial body.

Article 19 provides that the Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure and shall admit any evidence which it deems to have probative value. That was made mandatory, that it shall admit any evidence which it deems to have probative value. The purpose of that provision, Your Honors, I may say, was this: That the whole controversy in this case—and we have no doubt that there is room for controversy—should be centered upon the value of evidence, and not on its admissibility.

We have no jury. There is no occasion for applying jury rules. Therefore, when a piece of evidence is offered, there are two questions which arise: Does it have probative value? If it has no probative value, then it should not encumber the records, of course. The second is, does it have relevancy? If it has not, of course it should not come in.

The evidence in question has relevance; no one questions that. No one can say that an affidavit, duly sworn, does not have some probative value. What probative value it has, the weight of it, should be determined on the submission of the case. That is to

say, if a witness has made a statement in an affidavit, and it is denied by Mr. Kaltenbrunner, and you believe that the denial has weight and credibility, of course, the affidavit should not be considered in the final consideration of the case. But we are dealing here with events that took place over great periods of time and great distances. We are dealing with witnesses widely scattered and a situation where communications are almost at a standstill.

If this affidavit stands at the end of this case undenied, unchallenged, it is not, then, beyond belief that you would give it value and weight. An affidavit might bear internal evidence that it lacked credibility, such as evidence where the witness was talking of something of which he had no personal knowledge. I do not say that every affidavit that comes along has probative value just because it is sworn to. But it seems to me that if we are to make progress with this case, this simple system envisioned by this Charter, which was the subject of long consideration, must be followed; that if, when a piece of evidence is presented, even though it does not comply with technical rules governing judicial procedures, it is something which has probative value in the ordinary daily concerns of life, it should be admitted. If it stands undenied at the close of the case, as many of these things will, then, of course, there is no issue about it; and it saves the calling of witnesses, which will take an indefinite period of time, as we have already seen. I may say that the testimony of the witness Lahousen, which took nearly 2 days, could have been put in, in this Court, in 15 minutes in affidavit form, and all that was essential to it could have been placed before us; and if it were to be denied you could then have determined its weight.

We want to adhere to this Charter. I submit it is no reason for deviating from the Charter that an affidavit recites horrors. I should have thought that the world could not be more shocked by recitals of horrors in affidavits than it has been in the documents that have proceeded from sources of the enemy itself. There is no reason in that for departing from the plain principles of the Charter.

I think the question of orderly procedure and the question of time are both involved in this. I think that the Tribunal should receive affidavits, and we have prepared them—we hope carefully, we hope fairly—to present a great many things that would take days and days of proof. I may say that this ruling is more important in subsequent stages of this case than it is on this particular affidavit.

There is another reason, perhaps. We have some situations in which a member of an accused organization, who is directly hostile to our position because the accusation would reach him

within the accused class, has made an affidavit or affidavits which constitute admissions against interest; but on some other issue he makes statements which we believe are untrue and incredible; and we do not wish to vouch for his general credibility by calling him as a witness, but we wish to avail ourselves of his admission. Those things we think, since we have to make our proof largely from enemy sources. All this proof and every witness 8 months ago were in the hands of the enemy. We have to make our proof from them. God alone knows how much proof there is in this world that we have not been able to reach. We submit that the orderly procedure here is to abide by this Charter and admit these affidavits. If they stand unquestioned at the end of the case, there is no issue about them. If they are questioned, then the weight is a matter which you would determine on final submission.

THE PRESIDENT: Mr. Justice Jackson, I have three questions I should like to ask you. The first is: Where is Pfaffenberger?

MR. JUSTICE JACKSON: That I cannot answer at the moment, but I will get an answer as quickly as I can. It is unknown to us at the moment. If we are able to ascertain, I will inform you at the conclusion of the noon recess.

THE PRESIDENT: The second point to which I wish to draw your attention is Article 16 (e) of the Charter, which contemplates cross-examination of witnesses by the defendants. The only reason why it is thought that witnesses who are available should not give evidence by affidavit is because it denies to the defense the opportunity of cross-examining them.

MR. JUSTICE JACKSON: I think that this provision means just exactly what it says. If we call a witness, they have the right of cross-examination. If he is not called, they have the right to call him, if he is available, as their witness; but not, of course, the right of cross-examination. The provision itself, if Your Honor notices, reads that they have the right to cross-examine any witness called by the prosecution; but that does not abrogate or affect Article 19, that we may obtain and produce any probative evidence in such manner as will expedite the trial.

THE PRESIDENT: Then the next point to which I wish to draw your attention is Article 17 (a). As I understood it, you were arguing that it was mandatory upon the Tribunal to consider any evidence which was relevant. Therefore, I draw your attention to Article 17 (a) which gives the Tribunal power to summon witnesses to the trial.

MR. JUSTICE JACKSON: That is right. I think there is no conflict in that whatever. The power of the Tribunal to summon witnesses and to put questions to them was introduced into this Charter through the continental systems of jurisprudence. Usually

there are not Tribunal witnesses in our procedure in the States. Witnesses are called only by one of the parties; but it was suggested by the continental scholars that in this kind of case, since we were utilizing a mixture of the two procedures, the Tribunal itself should have the right to do several things. One is to summon witnesses, to require their attendance, and to put questions to them. I submit that this witness, whose affidavit has been received, can be called, if we can find him, by the Tribunal and questioned.

The next provision — and it bears on the spirit of this — of Article 17 is that the Tribunal has the right to interrogate any defendant. Of course, under our system of jurisprudence the Tribunal would have no such right, because the defendant has the unqualified right to refrain from being a witness; but in deference again to the Continental system, the Tribunal was given the right to interrogate any defendant; and his immunities, which he would have under the Constitution of the United States, if he were being tried under our system, were taken away.

I submit that the perfect consistency in those provisions empowers the Tribunal on its own motion (Art. 17) to summon witnesses, to supplement anything that is offered, to put any questions to witnesses and to any defendant.

If any witness is called, the right of cross-examination cannot be denied; but that does not abrogate Article 19, which was intended to enable us to put our case before the Tribunal so that the issue would then be drawn by the defendants, and the weight of what we offer determined on final submission.

THE PRESIDENT: Lastly, there is Article 17 (e), which I suppose, in your submission, would entitle the Tribunal, if they thought right, after receiving the affidavit, to take the evidence of Pfaffenberger on commission.

MR. JUSTICE JACKSON: Yes, I think it would, Your Honor. I may say, in reference to that section—what, perhaps, may be surprising to those accustomed to our system of jurisprudence—that it was one of the most controversial issues we had in the framing of this Charter. We had in mind the authorization of what we call “masters” to go into various localities, perhaps, and take testimony, not knowing what might be necessary. Our practice, however, of sending “masters in equity” to take testimony and make recommendations was not acceptable to the Continental system, and we finally compromised on this provision which authorizes the taking of testimony by commissions.

THE PRESIDENT: Thank you.

GENERAL R. A. RUDENKO (Chief Prosecutor for the U.S.S.R.): Your Honors, I have come forward after my colleague, Mr. Jack-

son, to make my own statement, inasmuch as I think that the petition of the defense is fundamentally wrong and should not be complied with.

We are submitting our objections for the Tribunal's consideration. I fully share the viewpoint held by the Chief Prosecutor of the United States of America, Mr. Jackson, and in addition should like to point out the following: The defense counsel, in his petition, raises the question of whether the prosecution should refer to, or make public, documents containing affidavits of persons residing in Germany. A statement of this sort is completely out of order since, as is known, the defendants committed the greater part of their atrocities in all countries of Europe and it will be readily understood that the witnesses of these atrocities live in different parts of these countries; it is essential that the prosecution have recourse to the testimony of such persons, whether it be written or oral. Your Honors, we have entered a phase of the trial in which we have to set forth the atrocities connected with so-called war crimes and crimes against humanity, atrocities which were committed by the defendants over extensive areas. We shall submit as evidence documents originating from the defendants themselves or from persons who suffered at the hands of the war criminals; it would be impossible to summon all these witnesses to the trial so that they could give their evidence orally. It is absolutely necessary to have affidavits and written testimonies from these witnesses.

As His Honor, the President, has already remarked, Article 17 provides for the right of summoning witnesses to the trial. That is correct; but it is impossible to summon all the witnesses who could depose affidavits on the crimes committed by the defendants. I therefore refer to Article 19 of the Charter which reads:

"The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious"—and I emphasize, Your Honor, *expeditious*—"and nontechnical procedure and shall admit any evidence which it deems to have probative value."

I would ask the Tribunal to proceed according to this article, which definitely admits written affidavits of witnesses as evidence. That is what I wished to say by way of a supplement to the statement of Mr. Jackson.

MR. ROBERTS (leading counsel for the United Kingdom): May it please the Tribunal, as far as the British delegation is concerned, they desire to support what the American Chief Prosecutor has said, and we do not feel we can usefully add anything.

THE PRESIDENT: [To M. Faure of the French Delegation.] Do you wish to add anything?

M. EDGAR FAURE (deputy chief prosecutor for the French Republic): Mr. President, I wish simply to inform the Court that the French Prosecution is entirely in accord with the remarks of the American and Soviet prosecutors.

I think, as the representative of the American prosecution said, it is impossible to settle the question of evidence in this trial solely by hearing oral testimony in the courtroom, for under those circumstances it might be opportune to call to the witness stand all the inhabitants of the territories involved, which is obviously impossible. The defense will have every opportunity of discussing the documents which have been presented by the prosecution, including the written testimony.

THE PRESIDENT: I do not think that counsel for Kaltenbrunner was suggesting that every witness must be called, but that witnesses who were in Germany and available should be called and that their evidence should not be given by affidavit.

M. FAURE: The defense has the right of calling them as witnesses if it so desires.

DR. KAUFFMANN: May I add a few more words to this important question? The replies which have just been given illustrate that one of the main principles of the proceedings is that the trial should proceed speedily. That is also expressed in Article 19 of the Charter, and no one can hope more than we that this principle be followed; but it is nevertheless my opinion that another principle, the highest known to mankind, the principle of truth, should not thereby suffer. If there is a fear that truth will suffer through an over-hasty trial, then formal methods of procedure must take a secondary place. There are human principles which remain unspoken, which need not be spoken.

This spirit of truth is certainly contained in and governs Article 19; and the objections I raised to the testimony of this witness seems to me justified to such a degree that the important principle of speeding up the trial should give way to the principle of truth. Humanity itself is in question here. We want to establish the truth for our own generation and for that of our children. But if such testimony remains untold for months, then a part of mankind might well despair of all humanity and the German people, in particular, would suffer.

DR. FRIEDRICH BERGOLD (counsel for defendant Bormann): May it please the Tribunal, I should like to bring up one other point, which appears to me important, because it was apparently the real source of this discussion. According to our legal system it is the duty of the prosecution to produce not only the incriminating evidence but also evidence for the defense of the accused. I can well understand that my colleague, Dr. Kauffmann, protests

the prosecution's failure to mention a very important point; namely, that the German authorities indicted this inhuman SS leader and his wife and condemned them to death. It is highly probable that the prosecution knew of this and that these horrible exhibits of perverted human nature, which were presented to us, were found in the files of the German court.*

I believe the whole discussion would not have arisen if the prosecution had mentioned, as part of the ghastly evidence, the fact that the German authorities themselves passed judgment on the inhuman man and condemned him to death.

We find ourselves in difficulties because, in contrast to our own procedure, the prosecution for the most part simply presents incriminating evidence but omits to present the exculpatory evidence which may form part of any document or part of the testimony of a witness. If the German procedure had been followed in the present case and if the prosecution had stated that this man was condemned to death, then in the first place, the evidence against the defendant Kaltenbrunner would not have appeared so weighty, and secondly, public opinion would, on the whole, have been left with a different impression. My colleague Kauffmann could then have limited himself to proving at a later stage of the trial that Kaltenbrunner had, in fact, nothing at all to do with this affair; and the inhuman character of the proceedings and the dreadful impression which it made on us would have been avoided.

THE PRESIDENT: Will you explain the part of the German law to which you were referring, where you say it is the duty of the prosecution not only to produce evidence for the prosecution but also to produce evidence for the defense?

DR. BERGOLD: That is a general principle of German jurisprudence, established in paragraph 160 of the Reich Code of Penal Procedure.

[Paragraph 160 of the "Strafprozessordnung," official version 1926, provides as follows: "As soon as the Office of the Prosecutor [die Staatsanwaltschaft] has received knowledge either from a report or other sources of the suspicion of a criminal act, it shall investigate the facts for the purpose of deciding whether an indictment should be preferred. The Office of the Prosecutor has the duty to investigate not only incriminating, but also extenuating, circumstances, and it has to see to it that evidence is secured which is in danger of being lost."]

It is one of the basic principles of law in Germany to—

THE PRESIDENT: Give me that reference again.

*This statement of counsel led to an investigation by the American prosecution and to a statement to the IMT by Mr. Dodd on 14 January 1946, which is reproduced below.

DR. BERGOLD: Paragraph 160. German law incorporates this principle in order to enable an accused person to—

THE PRESIDENT: 160 of what?

DR. BERGOLD: Of the Reich Code of Penal Procedure. The same is true of Austria. In the Austrian Code of Penal Procedure there is a similar paragraph with which, however, I am not quite familiar. This principle is established to permit the whole truth of a case to be brought to light, since a defendant in custody is frequently not in a position to produce all the evidence in his favor. Therefore, under German law it is the prosecution's duty to present the exculpatory as well as the incriminating evidence in a particular case.

DR. KUBUSCHOK (counsel for defendant von Papen): The question arising out of Pfaffenberger's evidence does not specifically concern the defendant von Papen, because that part of the indictment does not apply to his case. I am therefore speaking only of the principle behind it. I believe that in practice the effect of the different opinions expressed by the prosecution and the defense cannot be of very great importance. Justice Jackson agrees with us that every witness whose affidavit is presented can, if available, be called to the stand by the defense. Thus, in all cases in which the defense holds that an affidavit is evidence of secondary value and as such insufficient, and that direct examination of the witness is necessary—in all such cases there would be duplication of evidence, namely, the reading of the affidavit and then the examination and cross-examination of the witness. This would undoubtedly delay the proceedings of the trial; and to prevent that the Tribunal would, in all such cases, rule against the reading of the affidavit. Consequently, it is futile for the prosecution to present affidavits of witnesses who can be expected to appear in person later in the proceedings.

I do not think that the prosecution should be worried about this. It is a matter of course that we—and we assume the same is true of the prosecution—that we, the members of the defense, want the trial to be as speedy as possible, but also want it to proceed cautiously to establish the full truth. But it is obvious, if evidence is introduced which is a potential cause of completely unjust findings, that such evidence will have to be clarified in a more complicated and time-consuming way when the witness is called in person.

THE PRESIDENT: The Tribunal will consider the objection that has been raised when the Court adjourns.

MR. JUSTICE JACKSON: May I have one word?

THE PRESIDENT: Mr. Justice Jackson, it is unusual to hear counsel who opposes an objection a second time.

MR. JUSTICE JACKSON: I merely want to give you the answer

to the question which you asked me as to the whereabouts of Pfaffenberger. My information is that these affidavits were taken by the American Army at the time it liberated the people in these concentration camps, at the same time the films were taken and the whole evidence that was available gathered. This witness was present at the concentration camp, and at that time his statements were taken. We do not know his present whereabouts, and I see no reasonable likelihood that we will be able to locate him within any short time. We will make an effort.

THE PRESIDENT: Thank you.

MR. ROBERTS: May it please the Tribunal, might I endeavor to assist? I think I have now obtained the German order to which the defense counsel referred, paragraph 160. It is, My Lord, of course, in German. Perhaps I might hand it up, and the court translators will no doubt deal with the paragraph.

MR. JUSTICE JACKSON: I think one bit of additional information should be furnished in view of the statements made here that we have information that we are withholding. Kaltenbrunner has been interrogated. At no time has he made such a claim, so I am advised by our interrogators; and under the Charter our duty is to present the case for the prosecution. I do not, in any instance, serve two masters.

* * * * *

(Afternoon Session)

THE PRESIDENT: The motion that was made this morning on behalf of the defendant Kaltenbrunner is denied, and the affidavit is admitted and will not be stricken from the record. But the Tribunal wished me to say that is open to the defendants' counsel, in accordance with the Charter and the Rules, to make a motion in writing, if they wish to do so, for the attendance of Pfaffenberger for cross-examination, and to state in that motion the reasons therefor.

DR. KAUFFMANN: May I now bring up a question similar, though in some respects different, from that of Pfaffenberger? I request that the evidence of Dr. Hoettl, which was read into the record this morning, be stricken out again for the following two reasons. As far as I know, Dr. Hoettl is here in Nuernberg —

THE PRESIDENT: One minute. Do you understand that the Tribunal has just denied the motion that you made this morning?

DR. KAUFFMANN: Yes, I understood that perfectly.

THE PRESIDENT: What is your motion now?

DR. KAUFFMANN: I should like to ask that the evidence of Dr. Hoettl be stricken from the record. My reasons for this request

are rather different from those given this morning in the Pfaffenberger case.

As can be seen from the affidavit, Dr. Hoettl was interrogated on the 26th of November, hardly 3 weeks ago. Moreover I gather that Dr. Hoettl is kept in custody here in Nuernberg. No delay would therefore be involved if this witness were called to the stand.

This man held a significant position in the SS, and for that reason I have already applied in writing that he be called as a witness. I am convinced that there is a large amount of important evidence which he can reveal to the Court. Dr. Hoettl's deposition is infinitely important. The death of millions of people is involved here. His affidavit is based largely on inferences, on hearsay; I believe that the facts are very different, and I would not like to apply later, after weeks or months, for the witness to be brought into court.

MAJOR WALSH (assistant trial counsel for the United States): If the Court please, excerpts from the affidavit of Dr. Wilhelm Hoettl were read into the record this morning for the purpose —

THE PRESIDENT: Wait — what was the number?

MAJOR WALSH: Document 2738-PS.

THE PRESIDENT: Yes, go on.

MAJOR WALSH: Dr. Hoettl's affidavit, Document 2738-PS, was in part read into the record this morning for the sole purpose of showing the approximate number of Jews, according to his estimates, that had met death at the hands of the German State. No other portion of his testimony was referred to, and the evidence offered was only for the sole purpose of establishing his estimate of the number. His position in the Party and in the State, as well as the position of Adolf Eichmann, the source of his information, was also stated into the record.

I believe that Dr. Hoettl, if he is desired for any other purpose by the defense, may be called by the defense, but the prosecution had no other purpose in utilizing his evidence.

THE PRESIDENT: Do you wish to add anything more?

MAJOR WALSH: That is all, Sir.

THE PRESIDENT: The Tribunal makes the same ruling in this case as in the case of Pfaffenberger, namely, that the affidavit is admitted in evidence, but that it is open to defendants' counsel to make a motion in writing for the attendance of the witness for cross-examination, and to state in that motion the reasons for it.

[A number of further affidavits and cross-affidavits by Hoettl were later introduced in evidence, both by the defense and the prosecution, but Hoettl never testified in person. Dr. Wilhelm Hoettl was a member of the SD (Security Service) and a subdepartment chief of Office VI, Foreign Intelligence Office,

of the Reich Security Main Office, the so-called RSHA. The defendant Kaltenbrunner, after 30 January 1943, was Chief of the Security Police and SD and head of the RSHA. Hoettl's various affidavits had principally to do with Kaltenbrunner, the RSHA, the SD, the Einsatzkommandos, and the relations between them. At the beginning of the presentation of evidence for defendant Kaltenbrunner, Dr. Kauffmann offered a further affidavit by Hoettl as Document Kaltenbrunner 2, and read this affidavit in its entirety to the Tribunal. (Trial of the Major War Criminals, *op. cit.*, vol. XI, pp. 228-231.) This defense affidavit made no express reference to the earlier affidavit offered by the prosecution. It began by stating: "I, the undersigned, Dr. Wilhelm Hoettl, make the following affidavit in answer to the questions put to me by attorney Dr. Kauffmann for presentation to the International Military Tribunal." On the same day the prosecution presented a cross-interrogatory by Hoettl, given in the form of an affidavit, which was also read into the record in its entirety. (Ibid., vol. XI, pp. 256-260.) This affidavit began by stating: "I, the undersigned, Dr. Wilhelm Hoettl, make the following affidavit in response to cross-interrogation relating to an affidavit executed by me on 30 March 1946 answering questions put by Dr. Kauffmann for presentation to the International Military Tribunal." This cross-affidavit was read during the examination of the defendant Kaltenbrunner, and Kaltenbrunner testified concerning it shortly after it had been read. (Ibid., vol. XI, p. 267.) Several months later, during the presentation of evidence on behalf of the SD, one of the accused organizations, the prosecution offered another affidavit of Hoettl concerning the SD (Document 2614-PS, Exhibit USA-918) in the cross-examination of a defense witness. (Ibid., vol. XX, p. 201.) The defense thereafter introduced a supplementary affidavit by Hoettl to Exhibit USA-918 as Document SD-37. (Ibid., vol. XXI, p. 323.)

[2 January 1946]

LIEUTENANT COMMANDER HARRIS (assistant trial counsel for the United States): [Presenting evidence against defendant Kaltenbrunner.] As will be shown hereafter, Kaltenbrunner was a frequent visitor to Mauthausen Concentration Camp. On one such visit in 1942 Kaltenbrunner personally observed the gas chamber in action. I now offer Document 2753-PS as exhibit next in order — Exhibit No. USA-515. This is the affidavit of Alois Hoellriegl, former guard at Mauthausen Concentration Camp. The affidavit states, and I quote:

"I, Alois Hoellriegl, being first duly sworn, declare:

"I was a member of Totenkopf SS and stationed at the Mauthausen Concentration Camp from January 1940 until the end of the war. On one occasion, I believe it was in the fall of 1942, Ernst Kaltenbrunner visited Mauthausen. I was on guard duty at the time and saw him twice. He went down into the gas chamber with Ziereis, commandant of the camp, at a time when prisoners were being gassed. The sound accompanying the gassing operation was well known to me. I heard the gassing taking place while Kaltenbrunner was present.

"I saw Kaltenbrunner come up from the gas cellar after the gassing operation had been completed."

[signed] "HOELLRIEGL."

On one occasion Kaltenbrunner made an inspection of the camp grounds at Mauthausen with Himmler and had this photograph taken during the course of the inspection. I offer Document 2641-PS as exhibit next in order — Exhibit No. USA-516. This exhibit consists of two affidavits and a series of photographs. Here are the original photographs in my hand. The original photographs are the small ones, which have been enlarged, and those in the document books are not very good reproductions, but the Tribunal will see better reproductions which are being handed to it.

DR. KAUFFMANN (counsel for defendant Kaltenbrunner): As the whole accusation against Kaltenbrunner personally has nevertheless been brought forward, I feel bound to make a motion on a matter of principle. I could have made this motion this morning just as well. It concerns the question of whether affidavits may be read or not. I know that this question has already been the subject of consultation by the Tribunal and that the Tribunal has come to a definite decision on this question. When I make this question again a matter for decision, it is for a special reason.

Every trial is somewhat dynamical. What was right at one time may be wrong later. The greatest and most important trial in history depends in many important points on the mere reading of affidavits which have been taken by the prosecution exclusively, according to its own maxims.

The reading of affidavits is not satisfactory in the long run. It is becoming, from hour to hour, more necessary to see, to hear for once, a witness for the prosecution and to test his credibility and the reliability of his memory. Many witnesses are standing, so to speak, at the door of this courtroom, and they need only to be called in. To hear the witness at a later stage is not sufficient; nor is it certain that the Tribunal will permit a hearing on the same evidential subject. I therefore oppose the further reading of the affidavits just announced. The spirit of Article 19 of the Charter should not be killed by the literal interpretation.

THE PRESIDENT: Is your application that you want to cross-examine the witness, or is your application that the affidavit should not be read?

DR. KAUFFMANN: The latter.

THE PRESIDENT: That the affidavit should not be read?

DR. KAUFFMANN: Yes.

THE PRESIDENT: Are you referring to the affidavit of Hoellriegl, Document 2753-PS?

DR. KAUFFMANN: Yes.

THE PRESIDENT: The Tribunal is of the opinion that the affidavit, which is upon a relevant point, upon a material point, is evidence which ought to be admitted under Article 19 of the Charter; but they will consider any motion which counsel for Kaltenbrunner may think fit to make for cross-examination of the witness who made the affidavit, if he is available and could be called.

[The affiant Hoellriegl was produced as a witness by the prosecution two days later, on 4 January 1946, and was cross-examined by counsel for defendants von Schirach and Seyss-Inquart. (Trial of the Major War Criminals, *op. cit.*, vol. IV, pp. 386-390.) At the beginning of the presentation of the defendant Kaltenbrunner's case, Dr. Kauffmann stated he did not wish to have Hoellriegl and three other witnesses recalled for cross-examination. (Ibid., vol. XI, p. 225.)]

[14 JANUARY 1946]

MR. DODD (executive trial counsel for the United States): I have one other matter that I should like to take up very briefly before the Tribunal this morning. It is concerned with a matter that arose after I had left the courtroom to return to the United States.

On 13 December we offered in evidence Document 3421-PS, and Exhibit Nos. USA-252 and 254. They were, respectively, the Court will recall, sections of human skin taken from human bodies and preserved; and a human head, the head of a human being, which had been preserved. On 14 December, according to the record, counsel for the defendant Kaltenbrunner addressed the Tribunal and complained that the affidavit, which was offered, of one Pfaffenberger, failed to state that the camp commandant at Buchenwald, one Koch, along with his wife, was condemned to death for having committed precisely these atrocities, this business of tanning the skin and preserving the head. And in the course of the discussion before the Tribunal the record reveals that counsel for the defendant Bormann, in addressing the Tribunal, stated that it was highly probable that the prosecution knew that the German authorities had objected to this camp commandant Koch and, in fact, knew that he had been tried and sentenced for doing precisely these things. And there was some intimation, we feel, that the prosecution, having this knowledge, withheld it from the Tribunal. Now, I wish to say that we had no knowledge at all about this man Koch at the time that we offered the proof; didn't know anything about him except that he had been the commandant, according to the affidavit. But, subsequent to this objection we had an investigation made, and we have

found that he was tried in 1944, indeed, by an SS court, but not for having tanned human skin nor having preserved a human head, but for having embezzled some money, for what—as the judge who tried him tells us—was a charge of general corruption, and for having murdered someone with whom he had some personal difficulties. Indeed, the judge, a Dr. Morgen,¹ tells us that he saw the tattooed human skin and he saw a human head in Commandant Koch's office, and that he saw a lampshade there made out of human skin. But there were no charges at the time that he was tried for having done these things.

I would also point out to the Tribunal that, we say, the testimony of Dr. Blaha sheds further light on whether or not these exhibits, Nos. USA-252 and 254, were isolated instances of that atrocious kind of conduct. We have not been able to locate the affiant.² We have made an effort to do so, but we have not been able to locate him thus far.

THE PRESIDENT: Locate whom?

MR. DODD: The affiant Pfaffenberger, the one whose affidavit was offered.

THE PRESIDENT: Very well, Mr. Dodd.

DR. KURT KAUFFMANN (counsel for defendant Kaltenbrunner): The statement just made is undoubtedly significant, but it would be of importance to have the documents which served to convict the commandant and his wife at the time. Kaltenbrunner told me that it was known in the whole SS that Commandant Koch and his wife had been taken to account also—I emphasize “also”—on account of these things, and that it was known in the SS that one of the factors determining the severity of the sentences imposed had been this proved inhuman behavior.

THE PRESIDENT: Wait a minute. As you were the counsel who made the allegation that Commandant Koch had been put to death for his inhuman treatment, it would seem that you are the party to produce the judgment.

DR. KAUFFMANN: I never had the verdict in my hand. I depended on the information which Kaltenbrunner gave me personally and orally.

THE PRESIDENT: It was you who made the assertion. I don't care where you got it from. You made the assertion; therefore, it is for you to produce the document.

DR. KAUFFMANN: Yes.

¹ Dr. Georg K. Morgen, an SS Judge, later testified as a defense witness. His testimony is recorded in “Trial of the Major War Criminals,” *op. cit.*, volume XX, pages 487-515.

² Several weeks later the affiant Pfaffenberger was located and brought to Nuernberg, as recorded in the transcript of the proceedings of 1 February 1946, which are reproduced below.

[1 FEBRUARY 1946]

MR. DODD: Mr. President, I ask to be heard briefly to inform the Tribunal that the affiant Andreas Pfaffenberger, whom the Tribunal directed the prosecution for the United States to locate, if possible, was located yesterday and he is here in Nuernberg today. He is available for the cross-examination which, if I remember correctly, was requested by counsel for the defendant Kaltenbrunner.

THE PRESIDENT: Was his affidavit read?

MR. DODD: Yes, Your Honor, it was.

THE PRESIDENT: It was read, and on the condition that he should be brought here for cross-examination?

MR. DODD: Yes, Sir. He asked for him to be brought, if I recall it.

THE PRESIDENT: Does counsel for Kaltenbrunner wish to cross-examine him now—I mean, not this moment—does he still wish to cross-examine him?

DR. KAUFFMANN: I believe that the defendant Kaltenbrunner does not need the testimony of this witness. However, I would have to take this question up with him once more, for up till today it was not certain that Pfaffenberger would be in court, and if he is to be cross-examined and to testify, I believe Kaltenbrunner would have to be present at the hearing.

THE PRESIDENT: It seems somewhat unfortunate that the witness should be brought here for cross-examination, and that then you should be saying that you don't want to cross-examine him after reading the affidavit. It seems to me that the reasonable thing to do would be to make up your mind whether you do, or do not, want to cross-examine him; and I should have thought that would have been done; and he would have been brought here if you want to cross-examine, and not brought here if you did not want to cross-examine. Anyway, as he has been brought here now, it seems to me that if you want to cross-examine him you must do so. Mr. Dodd, can he be kept here for some time?

MR. DODD: He can, Your Honor, except that he was in a concentration camp for 6 years; and we have to keep him here under certain security, and it is somewhat of a hardship on him to be kept too long. We would not like to keep him any longer than necessary. We located him with some difficulty with the help of the United States Forces.

DR. KAUFFMANN: In perhaps 2 or 3 days we might wish to cross-examine; perhaps 2 or 3 days.

THE PRESIDENT: I imagine that if after the affidavit had been read that you demanded to cross-examine him and that he has therefore been produced—well, in those circumstances it seems to

me unreasonable that you should ask that he should now be kept for 2 or 3 days when he is produced. Mr. Dodd, would it be possible to keep him here until Monday?

MR. DODD: Yes, he can be kept here until Monday.

THE PRESIDENT: We will keep him here until Monday, and you can cross-examine as you wish, Dr. Kauffmann. You understand what I mean; when an affidavit has been put in and one of the defense counsel said that he wants to cross-examine, he ought to inform the prosecution if, after reading and considering the affidavit, he finds that he does not want to cross-examine him; they ought to inform the prosecution so as to avoid all the cost and trouble of bringing a witness from some distance off. Do you follow?

DR. KAUFFMANN: I will proceed with the cross-examination on Monday.

THE PRESIDENT: Yes.

[4 FEBRUARY 1946]

MR. DODD: May it please the Court, with reference to the prospective witness Pfaffenberger, over the week end it occurred to us, after talking with him, that perhaps if defense counsel had an opportunity to talk to him we might save some time for the Court. Accordingly, we made this witness available to Dr. Kauffmann for conversation and interview; he has talked with him as long as he has pleased, and has notified us that in view of this conversation he does not care to cross-examine him, and as well other counsel for the defense have no desire to cross-examine him.

THE PRESIDENT: Then the witness Pfaffenberger can be released?

MR. DODD: That is what we would like to do, at the order of the Court.

THE PRESIDENT: Very well.

5. RULING REQUIRING DEFENSE COUNSEL TO ELICIT EVIDENCE BY ORAL EXAMINATION UPON APPEARANCE OF A WITNESS FROM WHOM DEFENSE COUNSEL HAVE OBTAINED AN INTERROGATORY OR AFFIDAVIT

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
8 MARCH 1946*

THE PRESIDENT (Lord Justice Sir Geoffrey Lawrence): * * *.

*Trial of the Major War Criminals, *op. cit.*, volume IX, page 1.

Third, cases have arisen where one defendant has been given leave to administer interrogatories to or obtain an affidavit from a witness who will be called to give oral evidence on behalf of another defendant. If the witness gives his oral evidence before the case is heard in which the interrogatory or affidavit is to be offered, counsel in the latter case must elicit the evidence by oral examination, instead of using the interrogatory or affidavit.

6. USE OF AFFIDAVIT BY A DEFENSE WITNESS TO SHORTEN HIS ORAL EXAMINATION

EXTRACTS FROM THE TRANSCRIPT OF THE IMT CASE, DURING THE TESTIMONY OF DEFENSE WITNESS VON BUTTLAR-BRANDENFELS, 7 JUNE 1946¹

DR. LATERNSEER (counsel for the General Staff and High Command [OKW], one of the accused organizations): Mr. President, I can shorten the examination considerably because I have an affidavit from the witness which he made on 20 May 1946.² If it is my turn, I propose to submit this affidavit to the Tribunal. But so that I may not be reproached for not having ascertained the facts when the witness was available in the courtroom, I will now ask the witness whether the contents of the affidavit of 20 May 1946 are correct.

[Turning to the witness.] Witness, are the contents of the affidavit which was given me, dated 20 May 1946, correct?

VON BUTTLAR-BRANDENFELS: They are correct.

* * * * *

MR. ROBERTS (Leading Counsel for the United Kingdom): My Lord, I do not propose to cross-examine. That, of course, will not be taken that the prosecution is accepting the truth of this evidence at all. But the whole question of atrocities in the East has been so thoroughly covered by evidence and by document, My Lord, I think it would be wrong and repetitious if I cross-examined.

THE PRESIDENT: Yes, Mr. Roberts.

MR. ROBERTS: My Lord, there was one other point. Dr. Laternser, in the interests of saving time, produced an affidavit of this witness dated the 20th of May 1946.

My Lord, of course, we are most anxious to assist Dr. Laternser in any effort on his part to save time, and we do not put any objection to this affidavit. But I am not quite certain as to what

¹ Ibid., volume XV, pages 569, 579 and 580.

² The witness had been called and was first examined on behalf of the defendant Jodl.

the affidavit is, and as to whether it has been put in as an exhibit—in which case it should be given a number—or whether it should go to the commission.¹

THE PRESIDENT: I don't think it necessary for it to be given an exhibit number. It was put to the witness, and he says the evidence was correct. That enables Dr. Laternser to refer to it hereafter.

MR. ROBERTS: Yes, My Lord. Then I propose the prosecution should get copies. Could that be conveniently arranged?

THE PRESIDENT: Of course.

MR. ROBERTS: My Lord, Mr. Dodd [executive trial counsel for the United States] is pointing out that we have not seen this affidavit; we do not know what it contains. But we will get a copy, and if we have any further application to make, we can make it.

THE PRESIDENT: When an affidavit is used in this way and put to a witness who is in the witness box, of course, the affidavit ought to be supplied to the prosecution in order that they may see what is in it, and so be able to cross-examine if they wish to do so.

MR. ROBERTS: Yes.

THE PRESIDENT: That has not been done in this case. The best course would be for the affidavit to be supplied to the prosecution, and they may, if they wish, apply to examine on it before the commission.

Do you think it is necessary? Perhaps you could see the affidavit soon and decide whether it is necessary to keep the witness here.

MR. ROBERTS: My Lord, I respectfully agree.

THE PRESIDENT: And we shall hold the witness in Nuernberg?

MR. ROBERTS: My Lord, we accept the invitation to examine the affidavit over the week end, and then, if necessary, we could make an application on Monday.

THE PRESIDENT: Yes; that is quite all right. Then, the witness can retire.

7. RULING THAT WHEN DEFENSE HAS INTRODUCED AN INTERROGATORY THE PROSECUTION MAY NOT READ OR SUBMIT A CROSS-INTERROGATORY IN EVIDENCE UNTIL DEFENSE HAS BEEN SERVED WITH COPIES

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE, 11 APRIL 1946²

¹ The affidavit concerned the charges against the General Staff and High Command of the German Armed Forces, and the IMT had directed that such evidence be taken on commission.

² Trial of the Major War Criminals, *op cit.*, volume XI, page 227.

MR. DODD (executive trial counsel for the United States) : We are faced with a new problem. I do not think this question has arisen heretofore. The prosecution submitted a cross-interrogatory to this man Dr. Mildner, and we are not quite certain as to just how we should proceed. Should we now offer our cross-interrogation, or at a later stage?

THE PRESIDENT: We think you should read it now.

MR. DODD: Very well.

DR. KAUFFMANN (counsel for defendant Kaltenbrunner) : Mr. President, may I just say one thing about that. This is the first time that I hear that the prosecution have also put questions which have been answered by the same witness. I think this is the first case of this kind which has been put before the Tribunal.

Would it not have been appropriate to have these answers communicated to me, since I have put my affidavit at the disposal of the prosecution a very long time ago?

THE PRESIDENT: They certainly should be. The Tribunal thinks they certainly should have been communicated to you at the same time that they were received.

DR. KAUFFMANN: Is the answer to be read nevertheless? I would rather like to raise formal objection to that and ask the Tribunal for a decision.

THE PRESIDENT: Mr. Dodd, why were these not submitted to Dr. Kauffmann?

MR. DODD: This cross-affidavit and interrogatory was taken only yesterday, and the material just was not ready until this morning. We regret that, and had it been ready it would, of course, have been turned over to him. If he would like to have some time to look it over, we, of course, would not object.

THE PRESIDENT: Dr. Kauffmann, in the circumstances we will postpone the reading of these cross-interrogatories in order that you may consider them, and, if you think it right, you may object to any of the questions or answers and we will then consider that matter.

DR. KAUFFMANN: Thank you.

8. ADMISSION OF AN AFFIDAVIT BY DEFENDANT FRANK OFFERED BY FRANK'S DEFENSE COUNSEL LATE IN THE TRIAL

EXTRACTS FROM THE TRANSCRIPT OF THE IMT CASE,
15 AUGUST 1946*

DR. SEIDL (counsel for defendant Frank) : The diary [of defendant Frank] does not show what happened to these SA men.

*Ibid., volume XXI, pages 203, 204.

Therefore, I have taken an affidavit of the defendant Frank which I ask to be permitted to submit in evidence here. It is very brief. It indicates that the men were tried and received severe punishment.¹

THE PRESIDENT: Are you offering the affidavit in evidence?

DR. SEIDL: I should like to offer this as Frank Exhibit 25.

THE PRESIDENT: Have you any other documents that you want to offer in evidence, or is this the only one?

DR. SEIDL: This is the only new document that I want to offer in evidence.

THE PRESIDENT: Very well, then. I think we may as well put it in now, and you will put it in as Frank-25. And you did not give us—

DR. SEIDL: Frank [Defense Exhibit] Number 25.

* * * * *

MR. THOMAS J. DODD (executive trial counsel for the United States): Mr. President, I do not wish to object to the submission of this affidavit, but I should like to observe that if other affidavits are offered by the defendants it may be necessary for the prosecution to have the right to cross-examine in this case. But it might very well call for cross-examination if they are now going to make an effort to put in further testimony on their own behalf under the disguise of an affidavit.

DR. SEIDL: Mr. President, my original intention was to ask permission to recall the defendant Frank to the witness stand and examine him on this question. If I submit an affidavit, this is done only to save time, and for no other reason. I would have preferred it the other way.

MR. DODD: I am not altogether sure, Mr. President, that this is done in the interest of saving time. I have some feeling it may be done in the interest of prolonging the time.

THE PRESIDENT: We do not need to hear any more, Dr. Seidl. We have admitted the document.

9. RULING DECLARING A LETTER TO DEFENSE COUNSEL INADMISSIBLE

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE²

DR. PANNENBECKER (counsel for defendant Frick): To comment on the question whether an official visitor to a concentration camp could always get a correct picture of the actual conditions exist-

¹ The affidavit was offered to explain or supplement a document offered by the prosecution during the cross-examination of a defense witness on the previous day.

² Trial of the Major War Criminals, *op. cit.*, volume XII, pages 165 and 166.

ing there, I ask permission to read an unsolicited letter which I received a few days ago from a Catholic priest, Bernard Ketzlick. This letter which I have submitted as supplement Frick Number

MR. JUSTICE JACKSON: Your, Honor, the prosecution makes objection to this because it is a character of evidence that there is no way of testing. I have a basket of such correspondence making charges against these defendants, which I would not think the Tribunal would want to receive. If the door is open to this kind of evidence, there is no end to it.

This witness has none of the sanctions, of course, that assure the verity of testimony, and I think it is objectionable to go into letters received from unknown persons.

DR. PANNENBECKER: May I say just one word on this subject? I received the letter so late that I did not have an opportunity to ask the person concerned to send me an affidavit. Of course, I am prepared to submit such an affidavit later, if such an affidavit should have greater probative value.

THE PRESIDENT: The Tribunal think that the letter cannot be admitted, but an application can be made in the ordinary way for leave to put in an affidavit or to call the witness.

I. Affidavits, Interrogatories, and Statements Not Under Oath—Medical Case

I. INTRODUCTION

The Charter of the IMT did not mention any particular type of evidence which was to be admissible in evidence, merely stating in Article 19 that the Tribunal "shall admit any evidence which it deems to have probative value." Ordinance No. 7, on the other hand, stated in Article VII that "affidavits, depositions, interrogations, and other statements," as well as diaries and letters, were to be admitted in evidence "if they appear to the Tribunal to contain information of probative value relating to the charges."

No particular line appears to have been drawn for the purpose related to admissibility between an affidavit and a deposition. The "other statements" which were admissible were not further defined in Ordinance No. 7, but Rule 21 of the Uniform Rules of Procedure set forth a "Procedure for Obtaining Written Statements" made in lieu of an oath and declared such statements to be admissible if certain conditions were met (sec. V, or subsec. C above). Rule 21 was designed primarily for the benefit of defense counsel, and the prosecution seldom introduced documents under

this rule, preferring to have statements by witnesses sworn to before persons authorized to administer oaths. In connection with admissibility and related rules of evidence, no distinction appears to have been drawn for any purposes as between an affidavit, a deposition, or a statement in lieu of oath made pursuant to the conditions established in Rule 21, and all three types of instruments were frequently referred to collectively as well as individually as "affidavits" during the trials. For purposes of convenience the term "affidavit" is frequently employed herein to describe an affidavit, a deposition, or a statement in lieu of oath made pursuant to Rule 21, and "affidavits" is sometimes used herein as a collective term for all three types of instruments.

With very few exceptions statements not under oath which were not executed pursuant to Rule 21 were excluded by the Tribunals, apparently for the reason that the offering party could readily take steps to have the declarant warned of the penalties of perjury and remove the defect without too much trouble, or because the Tribunals did not consider a mere signed statement by itself to have any probative value. Diaries and letters which were contemporaneous in time with the acts charged were generally admitted if they had probative value (subsec. D above, "Contemporaneous and Captured Documents"), but letters written after Germany's collapse were, with very few exceptions, excluded. A good number of the affidavits introduced in evidence were the result of interrogatories sent to persons whom inquiring counsel never saw face to face. Since interrogatories came to have special significance as a means for the cross-examination of affiants who could not be brought to Nuernberg for oral examination, this term has been incorporated in the title of this section.

The Medical case, as the first case tried under Ordinance No. 7, had far-reaching influence upon the practice with respect to affidavit evidence in the following 11 cases. Partly because of this fact, and partly because of the importance of tracing the broad outlines of the history of affidavit evidence throughout one case, a number of illustrative extracts from the record of the Medical case are reproduced immediately below. In the Medical case the first mention of the proposed use of affidavits was made by the defense. These first references were made in the defense motion for a postponement of trial, and again in the preliminary hearing which the Tribunal called to hear argument on the motion. (The motion and the transcript of the preliminary hearing are reproduced at pp. 453-466.)

At the preliminary hearing Dr. Servatius, representing Karl Brandt, the first-named defendant, stated that "It is my endeavor through sworn statements to replace the testimony of a number of

witnesses and to shorten the proceedings." As things developed two-thirds of the written exhibits offered by the defense in the Medical case were affidavits, and the defense offered nearly six times as many affidavits as did the prosecution.

Dr. Servatius himself offered 52 affidavits in presenting a total of 106 written exhibits in his defense of Karl Brandt, whereas the defense as a whole offered 601 affidavits out of a total of 904 exhibits. This compares with 104 affidavits offered by the prosecution out of a total of 570 exhibits offered by the prosecution. In numerous instances the same affiant executed two or more affidavits which were offered as separate exhibits on behalf of one or more defendants, and quite often the defense offered an affidavit by the same person who executed an affidavit introduced by the prosecution. In the Nuernberg trials the defense as a whole introduced several times as many affidavits as did the prosecution. Most of the objections with respect to the use of affidavit evidence, however, arose during the prosecution's case. This was partly because the general principles to be applied were fairly well settled by the time the defense case commenced, and partly because the prosecution and the Tribunals generally accepted the fact that the defense would rely heavily upon affidavits, and that this means of adducing testimony ordinarily conserved time.

In the Medical case the first two exhibits offered by the prosecution were the Coogan and Niebergall affidavits, which described the discovery and processing of the captured documents which the prosecution was about to offer in evidence. (See Sec. VII D, "Captured German Documents—Discovery, Registration, Reproduction of Copies, Safekeeping," where these affidavits are reproduced, and also D, above, "Contemporaneous and Captured Documents," where the purpose of the introduction of these affidavits is discussed.) There was no objection to the introduction of these affidavits and no application has been found in any of the trials in which the defense requested that either of these affiants appear for cross-examination.

On the first day of trial in the Medical case the Tribunal admitted in evidence more than 30 pre-trial affidavits by defendants. Most of these were received without objection, and what objections were made ran to alleged errors, rather than to the admission of the affidavits as such. Since pre-trial affidavits of defendants offered in evidence by the prosecution present distinct questions, they are taken up separately in subsection K. At this point it should be stated, however, that it was customary in the early stages of each of the trials to introduce affidavits by defendants which set forth a brief *curriculum vitae* of the defendants, and which discussed such matters as the organizational structure of

the principal organizations of the Nazi regime through which, or upon behalf of which, the alleged criminal conduct was committed.

Apart from the Coogan and Niebergall affidavits, the first affidavit by a person other than a defendant to be offered by the prosecution in the Medical case was an affidavit by Oswald Pohl. Counsel for the defendant Pokorny objected to the affidavit insofar as it concerned his client, alleging that the affidavit was not clear as to the medical experiments involving Pokorny, that the affiant Pohl was confined in the Nuernberg Prison, and that defense counsel desired to cross-examine Pohl. The prosecution argued that affidavits were admissible regardless of the availability of the affiant, that the affiant Pohl was about to be indicted and tried himself, that therefore the prosecution did not now desire to call Pohl as a witness, and that if the defense wished to call Pohl for cross-examination or as a witness in chief they could do so. The Tribunal admitted the affidavit, with the understanding that the defense could call Pohl as a witness if it chose. Pohl was not called to testify orally by either the prosecution or the defense, but Pokorny's counsel obtained a further affidavit from Pohl which supplemented the affidavit by Pohl which the prosecution had introduced. This affidavit was introduced as one of the exhibits in Pokorny's case, without objection by the prosecution. Extracts from the transcript concerning both Pohl affidavits are reproduced in 2 below.

The next fundamental discussion of affidavits in the Medical case arose with respect to three statements which were in fact not affidavits at all until after the prosecution obtained jurats to them sometime after their original offer and conditional admission in evidence. The three statements in question had been given by three Austrians—Bauer, Pillwein, and Tschofenig—to the Vienna police in connection with an investigation of the defendant Beiglboeck, and there was no showing that they had been made under oath. After looking at the police files from which these statements were taken, the Tribunal admitted the statements in evidence conditionally, subject to the prosecution's obtaining an affidavit concerning the circumstances under which the statements were obtained. The author of one of these statements (Pillwein) later executed a further affidavit for the defense, which was introduced as a Beiglboeck defense exhibit. Another (Tschofenig) was produced to give oral testimony by the prosecution and was cross-examined by the defense. During its rebuttal case the prosecution offered jurats to the three statements which had been admitted provisionally, and thus complied with the condition upon which they had been admitted. Pertinent extracts of the record concerning this matter are reproduced in 3 below.

A considerable number of the prosecution affiants were cross-examined orally before the Tribunal in the Medical case, and still others were cross-examined by interrogatories or by the submission of cross-affidavits introduced in evidence after defense counsel had examined the affiants outside of court and procured the cross-affidavits. In most cases the defense did not call the prosecution affiant for cross-examination or submit cross-interrogatories.

As described further in section XIII K, "Procurement of Witnesses for the Defense," interrogatories were frequently employed by the defense to elicit testimony from witnesses who could not be brought to Nuernberg, and sometimes when the tribunal approved a defense application for a witness with the limitation that an affidavit only was approved. The witness receiving such an interrogatory ordinarily executed in response an affidavit which was returned to defense counsel and then introduced in evidence. The formal parts of an affidavit executed in a foreign country in response to interrogatories submitted by defense counsel are reproduced in 4 below.

The defense in the Medical case elected to offer affidavits in a number of instances rather than to elicit oral testimony from witnesses for whom the defense had applied. Two pertinent extracts from the transcript which show the approval of the Tribunal of this practice are reproduced in section 5. In one instance, the Tribunal in the Medical case permitted defense counsel to offer in evidence an affidavit by a defense witness who had testified the day before, and who desired to testify further concerning an apparent contradiction between the testimony the witness had given and a written report of the defendant Romberg (6 below). Defense counsel in the Medical case, in most instances, rested the presentation of their respective cases with the request that they be permitted to later offer several affidavits in support of the evidence already adduced. The Tribunal granted such requests, reserving the right of passing upon the competency of the individual affidavits at the time the offers were in fact made. An example of a discussion between defense counsel and the Tribunal concerning this type of arrangement is reproduced in section 7. Ordinarily, affidavits in this category were offered late in the defense case. Usually, they were admitted in evidence when reservations had previously been made. The prosecution seldom requested cross-examination of the affiants to affidavits offered late in the case.

One of the most interesting uses of affidavits by the defense was the submission of affidavits by defendants. This was done for a number of purposes: so that counsel for one defendant could get

before the Tribunal the testimony of a codefendant upon a subject of particular interest to his client before the codefendant took the stand; to shorten testimony of a defendant with respect to technical matters, or explanatory statements with respect to other evidence or testimony which might be subject to the objection that it was argumentative and should be argued in briefs rather than covered by testimony from the witness stand; and to counter evidence developed after the defendant had testified. A number of extracts from the transcript of the Medical case illustrating each type of situation just mentioned are reproduced in 8 below.

Defense counsel offered a number of unsigned letters which had been written to defense counsel or addressed to the Military Tribunals and turned over to the defense because statements made therein were of interest to the defense. In the Medical case where defense counsel stated of record that such letters had not been solicited by the defense, the Tribunal admitted them in evidence (9 below).

2. DISCUSSION CONCERNING THE ADMISSION OF AN AFFIDAVIT BY OSWALD POHL OFFERED BY THE PROSECUTION, AND LATER OFFER BY THE DEFENSE OF A SUPPLEMENTARY AFFIDAVIT BY POHL

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
13 DECEMBER 1947*

MR. HARDY (associate counsel for the prosecution): I now introduce document NO-065, which is an affidavit of Oswald Pohl and is offered in evidence as Exhibit 127.

JUDGE SEBRING: On what page is that?

MR. HARDY: That is page 26 of Your Honor's document book. This affidavit refers to several experiments which we will deal with [during] its presentation. At this time I will read the affidavit:

“Medical Experiments—General”

“Medical experiments were conducted by order of Himmler. Representatives of the medical profession who knew how to sell him a medical problem as extremely important, or had good friends to intervene for them”——

DR. HOFFMANN (counsel for defendant Pokorny): Mr. President, I object to the reading of this affidavit as far as it has to do with my client. My client is mentioned insofar as experiments of Madaus are concerned. Pohl is here in the Nuernberg Prison

*Extract from mimeographed transcript U.S. vs. Karl Brandt, et al., Case 1, pages 406-408.

and is available at all times for testimony. His testimony on the subject of the experiments which concern my client is so unclear that I would like to cross-examine him under all circumstances. I, therefore, request that this document be not read.

MR. MCHANEY (chief prosecutor): If the Tribunal please, I would like very vigorously to object to his motion to exclude the affidavit secured from Oswald Pohl.* In the first place, Ordinance No. 7 clearly provides that affidavits are permissible before this Tribunal, and the availability of the witness is not set up as a rule for determination of admissibility. It is true that Pohl is now in the Nuernberg Jail. However, this man will be indicted and tried in this same courthouse. Prosecution does not wish to call him as a witness. If the defense attorney wishes to call Pohl for cross-examination to the extent he desires, regarding the statement made hereby shown, that is his privilege. We may at a later stage of the trial bring Pohl to the stand to testify on other matters of a more general nature than set forth in this affidavit. However, we are not prepared to call him at this time, and I would request the overrule of this objection on the grounds of his availability here.

They may call Pohl for cross-examination if they so wish as to any statement made in the affidavit, but I do not see [how] that runs against the admissibility of our document.

DR. HOFFMANN (counsel for defendant Pokorny): Mr. President, if Pohl is available at another time, then I will take back my motion.

MR. MCHANEY: If the Tribunal please, I do not wish to be understood as making any hard and fast commitment that we will or will not call Pohl as a witness for the prosecution. We may do so, but we have not finally decided that matter. Anyway, the witness Pohl will be available for cross-examination as to any matter contained in this affidavit, at any time, and if we do not call him then, of course, the defense attorney for the defendant Pokorny may avail himself of the right to call Pohl to the stand.

DR. HOFFMANN: Mr. President, it will depend on the testimony of Pohl whether it can be ascertained that experiments were made with the medicament which is charged to my client, or not. You will find in the document that Pohl does not express himself clearly. Thus I shall need Pohl in any circumstances, and I shall take back my motion only if I have the right to call him as a witness at a later date.

*Pohl was indicted on 13 January 1947 along with a number of his associates in the SS Economic and Administrative Main Office. Pohl was sentenced to death. See volume V, this series.

PRESIDING JUDGE BEALS: The objection to the admission of the affidavit at this time is overruled. It will be understood, according to the statement by the prosecution, that Pohl will be available to be called as a witness by the defendant.¹

[At this point the affidavit was read.]

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE DURING THE PRESENTATION OF DOCUMENTARY EVIDENCE ON BEHALF OF THE DEFENDANT POKORNY, 26 JUNE 1947²

DR. HOFFMANN (counsel for defendant Pokorny): The next document I put in evidence is Document 25. This will be Pokorny Defense Exhibit 25, and is on page 62. This is an affidavit of the affiant before Military Tribunal II, namely, Oswald Pohl, who, on seeing Document NO-041, Prosecution Exhibit 156, made additions to his statement of 14 July 1946, Document NO-065, to the following effect: "My letter of 7 September 1942 (NO-041), shows that I had employed SS Sturmbannfuehrer Lolling in connection with caladium. Now, I never heard any more from Lolling concerning experiments with caladium. Had experiments with caladium in fact been made, Lolling would have reported to me about them. As this was not the case, no experiments could have been made."

3. PROVISIONAL ADMISSION OF UNSWORN STATEMENTS FROM AUSTRIAN POLICE FILES SUBJECT TO THE PROSECUTION'S OBTAINING SWORN STATEMENTS THAT THE STATEMENTS WERE TRUE

**EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE,
16 DECEMBER 1946³**

MR. HARDY (associate counsel for the prosecution): I now turn to Document NO-910 which is Prosecution Exhibit 139. The next three exhibits, Your Honor, are affidavits. These affidavits were obtained by our document chief from the police files in Vienna, Austria. They were sent to us as part of the police files and have been duly authenticated by our document chief.

¹ It later appeared upon a further objection by defense counsel that the jurat on Pohl's handwritten statement had been inadvertently omitted. This defect was promptly corrected. Pohl had written out the statement in his own handwriting in his cell in Nuremberg Prison and handed it to representatives of the prosecution who had asked him to write a monograph on the subject of medical experiments. Pohl was not called to testify orally by either the prosecution or the defense. Defense counsel later introduced a supplementary affidavit by Pohl as shown by the extract from the transcript reproduced immediately following.

² Extract from mimeographed transcript, *U.S. vs. Karl Brandt, et al.*, Case 1, page 10146.

³ *Ibid.*, pages 489-493 and 496-498.

[The three documents in question were actually unsworn statements taken in the course of official business by the Viennese police authorities. The first was a statement by Ignatz Bauer, Document NO-910, Prosecution Exhibit 138; the second by Josef Tschofenig, Document NO-911, Prosecution Exhibit 139, and the third by Fritz Pillwein, Document NO-912, Prosecution Exhibit 140.]

We have anticipated, due to the fact that no certificate appears, they would be questioned by defense counsel. They were received in due course of business, and we offer them as true extracts of the Vienna police files.

DR. STEINBAUER (counsel for defendant Beiglboeck): I object strongly to the reading of Document 910. In order to save time I object at the same time to the reading of Documents 911 and 912. Article VII of Ordinance No. 7—even though Ordinance No. 7, Article VII, establishes that the Tribunal is not bound to any specific order of evidence, nevertheless the same article gives certain directives for the evidence. Such documents as this can be accepted in evidence, including affidavits. If you look at the index of contents of Document Book 5 you will see that all three documents are listed as affidavits. Then if you look at the documents themselves you will see that neither 910 or 911 indicates before whom these affidavits were given. One was taken down in Vienna and the other in Klagenfurt at different times. The least one could ask would be that there should be some mention of the authority, or some warning to tell the truth to the person who is testifying here. This is not the case in any of these three documents. The last document, 912, is headed "Police Main Office, Vienna, State Police Department III."

It is true that in Article VII of Ordinance No. 7 records of interrogations can be accepted as evidence if they are given before an authority of one of the United Nations. My country, Austria, unfortunately does not belong to the United Nations. I am an Austrian lawyer and know Austrian laws. Evidence cannot be accepted taken before an administrative authority, but only evidence taken before judicial authorities. Therefore, there is no obligation for these persons to tell the truth, and not even any request to tell the truth. The witness Pillwein who was the last one who was tested, interests me especially. If the Tribunal would only read these so-called affidavits, I, as defense counsel, would not have the right to cross-examine on the most important points. I have applied for Pillwein as a witness before this Court.* I, therefore, ask that all three of these so-called affidavits not be admitted in evidence.

*Dr. Steinbauer later introduced a further affidavit by Pillwein as Document Beiglboeck 32, Beiglboeck Defense Exhibit 21, as shown by the extract from the transcript of 1 June 1947 reproduced immediately following.

We are making every effort to bring before this Tribunal witness
JUDGE SEBRING: Mr. Secretary General, will you pass out the original documents?

MR. MCHANEY (chief prosecutor): If the Tribunal please, it appears that each time the prosecution wishes to introduce an affidavit we will be faced with this same question. I would like to say a few words generally first on that subject before getting down to the three affidavits now in question.

nesses to testify with respect to facts that they know of their own knowledge. However, we cannot bring before this Tribunal all the witnesses whom we have available to us. We have now examined, as I recall, two witnesses before this Tribunal. The witness Vieweg consumed approximately 4 to 6 hours of the Tribunal's time, as I recall, and was cross-examined by six or eight of the defense counsel. We propose to bring before this Tribunal between 15 and 20 witnesses. We also propose to ask this Tribunal to admit in evidence a substantial number of affidavits that have been taken from persons who were in a position to know the facts stated in the affidavits.

As to these three particular affidavits, you have heard the witness Vieweg testify concerning the sea-water experiments. We also had hoped to present at the conclusion of this portion of the case another witness, Heinrich Stoehr, who will testify about the sea-water experiments. We will, therefore, have had two witnesses before the Tribunal regarding the sea-water experiments. At the same time, we ask admission of three affidavits which are, in effect, cumulative evidence as to what the witnesses Vieweg and Stoehr have already testified or will testify to before this Court.

Obviously we cannot call into this Tribunal every person who has given an affidavit, and I submit that when the evidence given in the affidavit is cumulative, there is no reason whatsoever to refuse admission of the affidavit.

Now, as to the three particularly in question here, I think that it would be advantageous for us to look at them and see precisely what the objection is.

Now, defense counsel is apparently objecting that these affidavits are not sworn to; that is, that there is no notarization on the affidavits. Now, that is quite true. There is no notarization on them. Whether that is customary under Austrian law, I do not know. In our own country, affidavits, are, of course, generally excluded because they are hearsay. They are excluded because, firstly, it deprives the opponent of the right of cross-examination, and secondly, because they are extra-judicial statements not given under oath.

Now, unfortunately, we here have an affidavit which is subject to both of those objections. Normally our affidavits are under oath. The reason these are not is because they were obtained, as Mr. Hardy explained, from the police files of the Austrian police; and the reason for that is, because the defendant Beiglboeck was, as I understand it, at one time in the custody of the Austrian police. They conducted a very extensive investigation of this man, in the course of which they took the three statements which we now submit to the Court for admission.

Now, the only question is whether these affidavits are admissible before this Court. The probative value of them is something for Your Honors to decide, but I respectfully submit that they are certainly admissible under Ordinance No. 7, irrespective of the fact that they are not notarized, or sworn to, an extra-judicial statement not under oath. The defendant will not have the right to cross-examine that man, but Article VII clearly states that affidavits are admissible. I take it that it does not make any difference that both of the normal objections to hearsay are present in this case, while normally only one objection, the lack of the right of cross-examination, is present.

We got these affidavits only 7 days ago, after considerable difficulty. We had no opportunity to go any further into this matter, and so far as I can see, we do not wish to call these three people here to testify because of the lack of time, and we do not think that it is necessary in view of the fact that we will have two witnesses testify to the sea-water experiments.

JUDGE SEBRING: What preliminary proof has been offered to this Tribunal that Document 910, purportedly signed by I. Bauer, is in truth and in fact the statement of I. Bauer?

MR. MCHANEY: Well, Your Honor, there is no proof of that at all, and I submit that there would be very little more proof of it if we add an attestation to the bottom of them. It would normally be given by a notary public in Austria, about which, of course, this Tribunal and myself would have no knowledge at all; so unless he attached some certificate of some sort proving who he was, I would assume that we would be no further along even if there were an attestation on it.

JUDGE SEBRING: What preliminary proof is there that this in fact was a statement taken by the police of Vienna?

MR. MCHANEY: The only thing that we would call proof on that would be the certificate that is attached to the original document now before the Court, certifying that it was taken from the files of the police department in Vienna. Through the CIC detachment in Austria, in Vienna, we secured two files from the Austrian

police force. We have the complete files. From those we removed these three statements.

JUDGE SEBRING: Do you state now that you have those files in your possession officially?

MR. MCHANEY: Indeed we do. They were sent to us by the CIC in Vienna.

JUDGE SEBRING: Are they now in the possession of the prosecution?

MR. MCHANEY: Sir?

JUDGE SEBRING: Are they now in the possession of the prosecution?

MR. MCHANEY: They are. I understand that the Vienna police have requested that they be returned. I do not think they have been returned.

JUDGE SEBRING: Could you produce them before the Tribunal?

MR. MCHANEY: I think we could, Your Honor.

PRESIDING JUDGE BEALS: The Tribunal will reserve its ruling until any such record has been produced before the Tribunal.

* * * * *

MR. MCHANEY: If the Tribunal please, we were discussing, before the luncheon recess, the admission of Documents NO-910, NO-911 and NO-912. I am prepared now to submit, for the inspection of the Tribunal, the files sent us by the police in Vienna, and I have marked in these files the places at which the original affidavits appear. If these affidavits can be admitted provisionally at this time, the prosecution will endeavor to secure, from the Chief of Police or the official in charge of the Vienna police, an affidavit giving the circumstances under which these statements were obtained.

PRESIDING JUDGE BEALS: The Tribunal will examine the files you have just passed up. (Pause.)

The Tribunal is of the opinion that these documents may be received in evidence, subject to some later proof of the authenticity of the documents by evidence or proof from some official in Vienna. In view of that ruling, do any of the defense counsel desire to be heard in regard to the provisional admission of these documents?

DR. SAUTER (counsel for defendant Ruff): If it please the Tribunal, I should like to ask that the name "affidavit" should be corrected. We are here concerned, according to what the prosecution has said so far, with extracts from a police interrogation, and we are not concerned with an affidavit. I therefore ask that the defense be given the possibility to examine the documents in order

to enable them to test the authenticity and correctness of the statements set forth therein.

MR. MCHANEY: I am not sure that I understood all the remarks made by the defense counsel. We shall, of course, be quite glad to afford him the opportunity to inspect the statements in the original. As to whether they should be called affidavits or reports, I do not see that that is a matter of great materiality. They are not called anything in the document book itself. They are listed as affidavits in the index, but of course, that is not a part of the record of these proceedings. But we shall be glad to let him see the original reports.

PRESIDING JUDGE BEALS: As far as Exhibits 137 and 138 are concerned, they are simply what purports to be copies of signed statements made by certain persons whose names are signed to them. The last exhibit contains some sort of a copy of the certification that was taken before some officer. I would suggest that the matter be held in abeyance and the defendant's counsel be permitted to examine the records you have.

At the same time see what you can do toward supplementing these records, unless the present records before the Tribunal are satisfactory to the defendant's counsel.

MR. MCHANEY: Well, do you suggest then that we do not now offer these as exhibits?

PRESIDING JUDGE BEALS: I suggest the statements be offered at this time; that their admission in evidence be not ruled upon until defendant's counsel has had a chance to examine the documents which are now presented by the prosecution.

EXTRACT FROM THE MEDICAL CASE DURING THE PRESENTATION
OF EVIDENCE ON BEHALF OF DEFENDANT BEIGLBOECK, I
JUNE 1947*

DR. STEINBAUER (counsel for defendant Beiglboeck): As the next exhibit, I submit the affidavit of Fritz Pillwein of 5 May 1947, Document Book 2, Document 32, on page 117 to 124, and I assign [Beiglboeck Defense] Exhibit 21 to it.

PRESIDING JUDGE BEALS: The last exhibit from which you read—what is the exhibit number from which you read in your Document Book 1, the answer to the interrogatory?

DR. STEINBAUER: That was Exhibit 20, the Pillwein affidavit will be 21. I must read all of this document because the prosecution examined this witness, too.

[The affidavit was then read into the record.]

*Extract from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, page 8796.

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE,
1 JULY 1947¹

MR. HARDY: The next document is Document NO-910, which is Prosecution Exhibit 138, which was the statement of Ignatz Bauer, which was as you will recall, from the Vienna police files. The document now contains a jurat, as I had it sent down there, and a member of the CIC, Lionel A. Schaffro, called in Mr. Bauer and took his oath.

JUDGE SEBRING: Did it appear in a book?

MR. HARDY: Pardon, Your Honor?

JUDGE SEBRING: Did it appear in a document book?

MR. HARDY: Yes it did, Your Honor. Just a moment—138 was in Document Book 5, Your Honor. That's the sea-water documents. The next document, Your Honor, was an affidavit which was NO-911, which is Prosecution Exhibit 139, and similar to the Bauer affidavit. This affidavit of Tschofenig² also did not have a jurat thereon, and I have obtained that. That was in Document Book 5, the same situation.

PRESIDING JUDGE BEALS: What is the exhibit number of this document?

MR. HARDY: The exhibit number of that is 139. The next document, Your Honor, is an affidavit of Pillwein, which was NO-912, which is Exhibit 140 and like the other two documents did not have a jurat thereon and was admitted provisionally, and now these copies bear the jurat. That's Exhibit 140 and is also found in Document Book 5.

* * * * *

I think, Your Honor, that clears up all of the prosecution exhibits which were admitted provisionally and which were admitted for identification.

4. EXTRACTS FROM AN AFFIDAVIT EXECUTED IN HOLLAND IN ANSWER TO AN INTERROGATORY FROM COUNSEL FOR THE DEFENDANT HOVEN

PARTIAL TRANSLATION OF DOCUMENT HOVEN 13
HOVEN DEFENSE EXHIBIT 10

AFFIDAVIT

I, Philip Dirk, Baron van Pallandt van Eerde, born on 28

¹ Ibid., pages 10591-10593.

² Joseph Tschofenig had been called as a rebuttal witness by the prosecution 2 weeks previously and thereafter cross-examined concerning both his direct examination and his affidavit. His testimony is recorded in the mimeographed transcript, 17 June 47, pages 9329-9363.

December 1889, at Gravenhage, Holland, have first of all been warned that I am liable to punishment if I give a false affidavit. I declare on oath that my statement is true and has been made to be submitted as evidence to the Military Tribunal I at Nuernberg, Germany.

[Here follows 15 questions submitted by counsel, each followed by an answer of the affiant.]

I have made the above statement in German, consisting of 2 pages, and declare that this is the full truth to the best of my knowledge and belief. I have made this statement of my own free will, and I was not submitted to any duress or threat.

Eerde, Ommen, 22 March 1947

[Signed] PH. VAN PALLANDT V. EERDE

I herewith certify the above signature of Philip Dirk Baron van Pallandt van Eerde, residing at Eerde, Ommen, Holland given before the Mayor of Ommen, E. Nering-Boegel.

Ommen, 22 March 1947

[Signed] E. NERING-BOEGEL

I certify the above document as a verbatim and correct copy, Nuernberg, 12 May 1947.

[Signed] DR. GAWLIK

5. RULINGS UPON DEFENSE APPLICATIONS THAT THE DEFENSE BE PERMITTED TO OFFER AFFIDAVITS INSTEAD OF ELICITING ORAL TESTIMONY FROM PERSONS APPROVED AS DEFENSE WITNESSES

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
25 FEBRUARY 1947 *

DR. PRIBILLA (counsel for defendant Rostock): Mr. President, I have reached the end of the evidence on behalf of the defendant, Professor Rostock. In addition to the witnesses examined here, the Tribunal has approved the man, Rudolf Mentzel, the chief manager of the Reich Research Council. He was to testify to the organization of the Reich Research Council and particularly confirm that Professor Rostock had no influence on the business management of the Reich Research Council. The witness is in an English internment camp and, as I have learned, cannot be brought here as yet. According to the evidence, so far, I think it would be sufficient if I attempt to get an affidavit from this witness and dispense with his personal examination here.

* Extract from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, pages 3467 and 3468.

The same is true of the witness Margarete Baldow, who was approved. This witness is the chief nurse of Rostock's clinic. She knew nothing of the work of the Office for Science and Research, but she could testify to all Rostock's activity during the war at the clinic, and in particular she could give concrete information about the amount of work and the proportion of Rostock's work which the clinic represented in the last years of war.

Here, too, I believe that I can dispense with the personal examination of this witness, and I ask that the Tribunal permit me later to present affidavits from this witness. If I should succeed in finding the fourth assistant of the Office, and thereby all persons who worked with Rostock in the Office for Science and Research, I ask that the Tribunal permit me to hand in affidavits later.

PRESIDING JUDGE BEALS: If the witnesses referred to by counsel are found and brought to Nuernberg, they will be sworn and testify before the case is closed. If the witnesses are not available and are not brought to Nuernberg, affidavits on the part of those witnesses may be presented to the Tribunal and offered in evidence.¹

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
10 MARCH 1947²

DR. SEIDL (counsel for the defendant Gebhardt): Mr. President, three witnesses have been approached for the defendant Gebhardt. One of these witnesses has meanwhile arrived. This is Dr. Karl Brunner. In order to shorten the proceedings, I shall dispense with examining this witness before the Tribunal, and in agreement with the prosecution, I shall take the liberty of submitting an affidavit from this witness at a later period. The same is true of the other two witnesses, Professor Lothar Kreutz and Dr. Jaedicke. Here again I shall submit affidavits.

PRESIDING JUDGE BEALS: I understand from counsel for the defendant Gebhardt this course is taken pursuant to an agreement with the prosecution, is that right?

DR. SEIDL: Yes.

MR. MCHANEY (chief prosecutor): If the Tribunal please, the course suggested by Dr. Seidl would be highly satisfactory because the prosecution feels that in this way we will be able to shorten the proceedings substantially. Of course, we are not

¹ Dr. Pribilla later, on 27 June 1947, introduced an affidavit by Baldow (Document Rostock 12, Rostock Defense Exhibit 11), and an affidavit by Mentzel (Document Rostock 13, Rostock Defense Exhibit 12). The prosecution did not call these affiants for cross-examination. Neither Mentzel nor Baldow testified.

² Extract from mimeographed transcript, U.S. vs. Karl Brandt, *et al.*, Case 1, pages 4256 and 4257.

advised in great detail as to what these gentlemen will state in their affidavits, but I think the chances are very good that we will not find it necessary to cross-examine them or to bring them here. In an exceptional case that might be necessary. On the other hand, we could probably secure a cross-affidavit of some sort, so we are quite agreeable and pleased that Dr. Seidl is suggesting this course.

PRESIDING JUDGE BEALS: Counsel, where are the three witnesses you just named? Are they now in Nuernberg?

DR. SEIDL: One witness is in Nuernberg; that is, Dr. Karl Brunner. The other two witnesses are in internment camps in the British Zone. It is doubtful whether they can be brought here at all in the near future.

PRESIDING JUDGE BEALS: Under the circumstance, the arrangement outlined by counsel for the defendant Gebhardt has the approval of the Tribunal.¹

6. PERMISSION GRANTED THE DEFENSE TO RECALL A DEFENSE WITNESS OR TO SUBMIT AN AFFIDAVIT BY THE WITNESS CONCERNING APPARENT CONTRADICTIONS BETWEEN A DOCUMENT AND THE TESTIMONY OF THE WITNESS

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE, 20 FEBRUARY 1947²

DR. NELTE (counsel for defendant Handloser): Mr. President, before the examination of the witness Hartlenben continues, I should like to submit a request to you. Generalarzt Dr. Wuerfler, who was examined yesterday,³ asked me to tell the Tribunal the following:

In the cross-examination yesterday, the apparent contradiction between [the defendant] Dr. Romberg's report and his testimony has bothered this witness. He did not go home as was his privilege, but he stayed here to be available to the Tribunal for examination, if this is necessary to clear up the situation.

This morning he gave me an affidavit and asked the Tribunal to decide whether to clear up a misunderstanding as he sees it—whether he is to be heard again personally, or whether the Court

¹ Dr. Seidl later introduced affidavits by Karl Brunner (Document Gebhardt 21, Gebhardt Defense Exhibit 20) and Hans Jaedicke (Document Gebhardt 23, Gebhardt Defense Exhibit 22). No affidavit by Kreutz was offered by Dr. Seidl.

² Extracts from mimeographed transcript, U.S. vs. Karl Brandt, *et al.*, Case 1, pages 3213, 3214, 3237, and 3238.

³ Paul Wuerfler's testimony is recorded in the mimeographed transcript, 18 and 19 February 1947, pages 3104-3144.

would agree, of course after consultation with the prosecution, if I submit an affidavit from this witness. After reading this affidavit it seems valuable to me to have at least judicial notice taken of it, for it actually clears up a misunderstanding.

MR. HARDY (associate counsel for the prosecution): Such a procedure as this seems most unusual to me, Your Honor. I would like to have the opportunity of reading this affidavit. If the gist of the particular statements Dr. Wuerfler would like to make—I submit that he has been duly examined, was placed under oath, questions were directed to him in a very precise and frank manner, and his answers are on the record. Now, whether he wishes to change his testimony or not is something that I cannot understand from Dr. Nelte's remarks. I wish Dr. Nelte would be a little bit more specific.

PRESIDING JUDGE BEALS: If counsel for the defendant Handloser desires to place the witness again on the stand as his own witness recalled, counsel may do so.

DR. NELTE: Mr. President, if I could give the prosecutor an opportunity to decide by reading this brief affidavit, that will probably be the best solution for all of us. It is not a correction of his testimony, but an explanation of his testimony.

PRESIDING JUDGE BEALS: Counsel for the defendant will hand the affidavit to counsel for the prosecution and allow him to study it for a few moments.

MR. HARDY: Unfortunately, Your Honor, the affidavit is in the German language and I would have considerable difficulty in making it out at this time.

Could we postpone this until later in the afternoon? And I will have one of the members of my staff look this matter over.

PRESIDING JUDGE BEALS: The matter may be postponed, at any rate, until after the morning recess.

MR. HARDY: Thank You.

* * * * *

MR. HARDY: May it please the Tribunal, in connection with the petition of Dr. Nelte to recall the witness Wuerfler or to submit an affidavit by the witness, the prosecution strenuously objects to any such procedure. We submit again that the witness was on the stand here, he was elaborately examined by defense counsel and was cross-examined by the prosecution. There was redirect examination by defense counsel, and he had ample opportunity to clarify any statements made on cross-examination.

I further suggest to the Tribunal that approval of any such procedure as this would tend to create a precedent that any witness who has been impeached, or might tend to have been impeached,

could be recalled after consultation with the defense counsel, and it would go on forever. Therefore, the prosecution respectfully requests that this recalling of the witness Wuerfler or submission of this affidavit be disapproved.

INTERPRETER: Will the prosecutor please repeat the last sentence?

MR. HARDY: The prosecution respectfully requests that the recalling of the witness Wuerfler or the submission of an affidavit from this witness be disapproved.

PRESIDING JUDGE BEALS: The Tribunal understands the position of the counsel for the prosecution. It rules that counsel for the defendant Handloser may recall the witness Wuerfler for examination upon this one particular point. The witness, of course, will be subject to cross-examination by the prosecution. The weight of the testimony of the witness will be before the Tribunal to determine.

MR. MCHANEY (chief prosecutor): In view of the Tribunal's ruling, unless the Tribunal itself wishes to hear the witness, or unless there is any compelling reason on the part of defense counsel to have him appear personally, we will agree to the admission of the affidavit rather than take the necessary time of recalling him. I don't think we have any questions to put to him.

PRESIDING JUDGE BEALS: Counsel for the defendant Handloser may either recall the witness or submit the affidavit, as he pleases.

DR. NELTE: Since this case has already taken up so much time, I believe that my presentation of the affidavit will be sufficient, especially since, as I have previously stated, the affidavit does not contain any new facts but is only an explanation of the facts to which the witness testified.¹

7. PERMISSION GRANTED DEFENSE COUNSEL TO SUBMIT SEVERAL AFFIDAVITS BY UNIDENTIFIED AFFIANTS AFTER CONCLUSION OF CASE IN CHIEF FOR DEFENDANT GENZKEN

EXTRACT FROM THE MEDICAL CASE, 4 MARCH 1947²

DR. MERKEL (counsel for defendant Genzken): I only ask you to permit me, Your Honor, to submit perhaps two or three affidavits which deal with the same subject, as we have already been discussing, at a later stage. These are affidavits which I have not

¹ After the morning recess Dr. Nelte, counsel for defendant Handloser, offered Wuerfler's affidavit in evidence and it was received as Document Handloser 55, Handloser Defense Exhibit 42.

² Extract from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, page 3912.

yet been able to obtain. Perhaps two or three short statements which I would like to be able to offer subsequently.

PRESIDING JUDGE BEALS: These affidavits may be offered when they are ready to be presented, and they will then be considered by the Tribunal,¹

DR. MERKEL: And this concludes the submission of evidence in the case of the defendant Dr. Karl Genzken.

8. VARIOUS CIRCUMSTANCES UNDER WHICH AFFIDAVITS BY DEFENDANTS WERE ADMITTED IN EVIDENCE UPON OFFER BY THE DEFENSE

a. Admission of an Affidavit of a Defendant before the Defendant Has Testified upon Offer of Counsel for a Codefendant

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE, 26 MARCH 1947²

DR. FLEMMING (counsel for defendant Mrugowsky): Mr. President, in this connection I should like to submit an affidavit made by the codefendant Sievers, which is Document Mrugowsky 3 and can be found on page 37 of the document book. I offer it as [Defense] Exhibit Mrugowsky 11. I should like to omit the first paragraph and I read: "The defense counsel of the codefendant Mrugowsky has asked me about the remark I made on 16 December 1942, Document NO-647, [Prosecution] Exhibit 124—"

MR. HARDY (associate counsel for the prosecution): May it please, Your Honors, in due course the defendant Wolfram Sievers will take the witness stand.³ It seems to me that defense counsel for Mrugowsky can put this question to Wolfram Sievers at that time and can dispense with the admission into evidence of this document. I object to the admission into evidence of this affidavit of Wolfram Sievers.

DR. FLEMMING: Mr. President, may I say in this connection—
PRESIDING JUDGE BEALS: Objection by prosecution is overruled.

¹ Late in the defense case, on 27 June 1947, Dr. Merkel began the introduction of further evidence by stating: "Mr. President, Gentlemen of the Tribunal, in supplementation to my submission of evidence I should like to offer seven documents." The first document was an affidavit of Joachim Ruoff (Document Genzken 18, Genzken Defense Exhibit 17) and the next six documents (Genzken Defense Exhibits 18, 19, 20, 21, 22, and 23) were extracts from the testimony of two prosecution witnesses in the Pohl case. All seven documents were received in evidence without objection (*Tr. pp. 10284-10289*). Later, by written memorandum to the Tribunal, Dr. Merkel withdrew the last three exhibits mentioned.

² Extract from mimeographed transcript, U.S. *vs.* Karl Brandt, *et al.*, Case 1, page 5040.

³ Defendant Sievers testified later on 9, 10, 11, and 14 April 1947. His testimony is recorded in the mimeographed transcript, pages 5656-5869.

b. Admission without Objection of an Affidavit of Defendant Rose Offered by Defense Counsel during Direct Examination of Rose

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE DURING THE DIRECT EXAMINATION OF DEFENDANT ROSE, 18 APRIL 1947¹

DR. FRITZ (counsel for defendant Rose): Did you publish any medical scientific work?

DEFENDANT ROSE: Yes, these papers are contained in the list which was compiled by you. Since all my material was lost during the war this list is probably not quite complete, but only a few relatively unimportant papers may be missing. In addition to that, there are the yearly work reports about the activity of the Institute for Public Health at Chekiang during the 7 years in which I headed the institute; also, there are the work reports of the Tropical Medicine Department at the Robert Koch Institute from the years of 1937 up to 1944. They are printed in the yearly reports of that institute, and there you can also find all the work published by my collaborators.

DR. FRITZ: Mr. President, with reference to the activity concerning writing of technical literature by Professor Rose, I offer into evidence the affidavit by the defendant Rose dated 11 February 1947, as Rose Document 3, Rose [Defense] Exhibit 3. The document can be found in Rose Document Book 1, on pages 3 to 7. I do not intend to read that document.

[There was no objection to the admission of this affidavit, and under the common rule that in the absence of any objection a document offered would be considered as admitted in evidence, the affidavit became an exhibit in the case.]

c. Approval of a Defense Proposal that Defendant Rose be Permitted to File an Affidavit in Lieu of Further Testimony on One Aspect of the Charges

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE DURING THE DIRECT EXAMINATION OF DEFENDANT ROSE, 23 APRIL 1947²

DR. FRITZ (counsel for defendant Rose): Mr. President, I had intended to ask the defendant Rose various questions about the testimony of witnesses; for example, the witness Edith Schmidt, the witness Hirtz—testimony which these witnesses gave about

¹ Extract from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, pages 6086 and 6087.

² Ibid., pages 6309 and 6310.

the alleged experiments of Professor Haagen in the concentration camps Natzweiler and Schirmek, and in the interest of hastening proceedings; and in case the Tribunal agrees, I should like to reserve the right to present the expected answers of the defendant Rose to the Tribunal in writing, and then I could conclude the subject of Haagen and go on to malaria, which is the final item of the prosecution.

PRESIDING JUDGE BEALS: How long will your examination of the witness on the stand in the connection of the testimony of these other witnesses—how much time would that take?

DR. FRITZ: I would probably not finish this morning.

MR. HARDY: Would you have the defense counsel state his proposition again? I don't think I heard it clearly.

DR. FRITZ: I wanted to ask the defendant Rose a few questions now dealing with the testimony of various witnesses; for example, the witness Hirtz and the witness Edith Schmidt; the testimony of these witnesses about the alleged experiments of Professor Haagen in the concentration camps Natzweiler and Schirmek; but I would be willing, in order to shorten the proceedings to submit the statement to the Tribunal, in writing.

PRESIDING JUDGE BEALS: Counsel, when could you submit that written statement?

DR. FRITZ: Very soon, in a few days, I believe.

PRESIDING JUDGE BEALS: Of course, counsel for the prosecution should have an opportunity to cross-examine the witness upon that statement.

MR. HARDY: I might add, Your Honor, from my knowledge of the testimony of the witness mentioned, that any points which the defendant would bring out would be in the way of an argument; and I think it might be well for him to submit the affidavit, and if we determine after we see the affidavit, that we want to cross-examine on any points thereafter we can recall him to the stand.

PRESIDING JUDGE BEALS: That will be satisfactory. Counsel for defendant Rose may prepare that statement in writing and submit it to the Tribunal and the counsel as soon as possible.*

DEFENDANT ROSE: The prosecutor was quite right. It would essentially be an explanation of the testimony.

*No affidavit by defendant Rose was later offered in evidence by the defense, although a number of defense counsel did offer affidavits by their clients as surrebuttal evidence. See, for example, the extracts from the transcript immediately following.

d. Admission and Rejection of Affidavits by Defendants Offered by the Defense as Surrebuttal Documents

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE,
2 JULY 1947*

DR. FROESCHMANN (counsel for defendant Brack): Now, Brack Document Book 5 contains five documents. Two of these documents are affidavits by defendant Brack regarding documents which were put to him during cross-examination or put in very recently. These are Brack Documents 63 and 64.

MR. HARDY (associate counsel for the prosecution): Your Honors, I challenge the admissibility of affidavits concerning documents which we put to the defendant during cross-examination; he had ample time to explain the documents at that time; the purpose of them during the cross-examination were rebuttal in nature. The defense counsel had an opportunity to redirect the defendant, and did so. I don't think that it is necessary now or, I think, good practice to accept affidavits of that nature.

PRESIDING JUDGE BEALS: Counsel, when defendant Brack was under cross-examination and these documents were called to his attention, you had ample opportunity in redirect examination of the defendant Brack to cover these documents. What is the necessity for future documents now?

DR. FROESCHMANN: I did that in the redirect examination, too. I put a number of questions to the defendant Brack, which referred to these documents. Two of these documents were those documents that referred to the fact that Brack with one Wetzel, in October of 1941, negotiated regarding the extermination of the Jews; that is the allegation. On the basis of the documents then put in, I have in the meantime put forth considerable efforts to find where Wetzel was at this time. I even asked the prosecution to make the radio available to us, so that I should have that opportunity to find this Amtsgerichtsrat Wetzel and get in touch with him. I personally went to various camps in which internees were shown to me whose names were Wetzel, but I did not find that man. I believe, therefore, that it is Brack's right, in view of all that I found out in the meantime, to make supplemental explanations—and these are only supplemental explanations—in these documents. I consequently ask that these documents, 63 and 64, be accepted in evidence.

MR. HARDY: Your Honor, I don't see the necessity for the admission of this evidence. It is very apparent that Brack is now

*Extracts from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, pages 10611-10614, 10616-10619, 10624-10628, 10653, and 10671.

executing an affidavit in rebuttal to the documents, which were presented to him in cross-examination. I think we have taken ample time of the Tribunal in direct and redirect examination. I also believe that the charges against Brack are perfectly obvious, and he is not like some of the other defendants, having eight or nine charges against him. He has a minimum number of charges, namely, euthanasia and sterilization. They were presented and amply covered during cross-examination and redirect examination. This would now give a chance for the defense to open rebuttal evidence.

PRESIDING JUDGE BEALS: It would seem that the defendant Brack had ample opportunity to discuss these documents. Neither the defense nor the prosecution can keep on indefinitely presenting evidence when it has had ample opportunity to rebut them. These documents will not be received in evidence. The objection is sustained.

MR. HARDY: It is my suggestion that inasmuch as these documents are not admitted into evidence that the Translation Department will be given notice that Brack Documents 63 and 64 are not being received in evidence. This will save them [the Translation Department] that much trouble down below.

[The Tribunal had asked the defense to offer its surrebuttal documents even though the Translation Department had not yet been able to translate all of these documents. This situation, which is referred to several times during the following discussion, arose because a large number of defense surrebuttal documents had been delivered for translation during the last few days preceding the discussion, and because several concurrent trials likewise demanded a vast amount of translation in order to avoid adjournments.]

PRESIDING JUDGE BEALS: Very well, if you can send that word to the Translation Department.

DR. FROESCHMANN: I can quite understand the ruling of the Tribunal to the extent that it applies to documents presented during cross-examination, but some of these documents were put in last Saturday. Brack had not had an opportunity to answer them.

MR. HARDY: Your Honor, the documents put in last Saturday again were clearly rebuttal. The defendant Brack was the last one to take the stand on euthanasia and since then no other affidavits or other witnesses were presented concerning the question of euthanasia since he left the stand. The other was rebuttal evidence. It seems to me that the defense counsel is not aware of the theory of rebuttal evidence.

PRESIDING JUDGE BEALS: Documents and all evidence of this nature might be admitted for the purpose of attacking the credibility of a witness or attacking a document, but insofar as it concerns rebuttal evidence which the defendant had an ample

opportunity to introduce, it is not admissible. The Tribunal, not having the documents before it, is somewhat under a handicap, but from the explanation made it does not appear that these documents are admissible.

* * * * *

DR. SAUTER (counsel for defendant Blome): I have only one more document to put in for Blome, an affidavit by the defendant Blome dated 1 June 1941, correctly certified. It has not yet been translated, but is in that process. This affidavit concerns itself with a document which the prosecution put in on last Friday, namely, the document in which a file note is contained regarding a conference with business manager, Dr. Haubold, of the Foreign Department of the Reich Chamber of Physicians, and in some way or other this is supposed to incriminate the defendant Blome.

Of this Foreign Department of the Reich Chamber of Physicians there had never been any mention before last Friday in this trial; Dr. Blome has drawn up an affidavit to that effect and it is very brief. I quote—

MR. HARDY: Your Honor, I question the admissibility of this before he starts reading it, inasmuch as the prosecution has charged Dr. Blome with medical experimentation in general. Dr. Blome has denied any knowledge of medical experimentation and when examined by me on cross-examination many, many weeks ago, emphatically denied any knowledge of these matters; and this document which is introduced by the prosecution in rebuttal clearly shows Professor Blome had some interest in the matter and had some knowledge, and in the eyes of the prosecution it is a perfectly proper rebuttal document.

DR. SAUTER: This point of view by the prosecution in this very last moment in the taking of evidence makes a matter of principle of this whole business, and I cannot understand how it is possible or permissible for the prosecution on the last day (or next to the last day) of a trial that has lasted months to put in a whole lot of new documents with new charges, and then say these are all rebuttal documents, and, therefore, the defendant has no right nor occasion to make any statement regarding them. In this document, which was put in last Friday, a brand new assertion was contained, namely, the assertion that there was a Foreign Department in the Reich Chamber of Physicians; and this is the assertion that Blome was responsible for it in a criminal way, because we are dealing in this trial only with crimes. Now the prosecution just states, in a more or less stereotyped way, this is not a charge against Dr. Blome; but obviously all of these documents are put in to incriminate the defendant, and it seems

to me that justice demands that the defendant make new statements regarding these documents. These documents could have been put in months ago as well as last Friday. We are not allowed to throw in such documents at the last moment, and consequently, I don't think the prosecution should have the right to put in whole volumes of documents to which we can make no objection; that would be unjust, and Mr. President, if that is considered to be just, we should leave this room with the feeling that the defendants were not given their full rights in this regard.

DR. SAUTER: No.

PRESIDING JUDGE BEALS: Counsel, was this document, to which you refer, put in by the prosecution, exhibited to the defendant Blome while on the stand by way of cross-examination?

PRESIDING JUDGE BEALS: Well, if this document which the prosecution recently put in was not exhibited to the defendant Blome on cross-examination, the Tribunal will receive the document now, offered by defendant Blome.

DR. SAUTER: This affidavit by Blome makes a statement regarding the new charges that were made against him last Friday in a new document. He says, and I quote the affidavit. It is very short:

[Dr. Sauter then read parts of the affidavit.]

This is Document Blome 27, and it will be Blome Defense Exhibit 25. That concludes my defense, Your Honors.

* * * * *

DR. FROESCHMANN (counsel for defendant Brack): The ruling of the Tribunal on the application by my colleague Sauter makes me believe that perhaps the Tribunal misunderstood me. I cannot talk as loudly as my colleague Dr. Sauter, so perhaps I did not make myself so clear.

The other affidavit that I wanted to put in for my client contained four short statements regarding four documents put in on Saturday, in which Brack is accused outright of crimes against humanity, and these are new crimes insofar as he is accused of having participated in the extermination of Jews. In one document it is said that a mentally ill person died in Lublin; there was the statement that there was a euthanasia station in Lublin, and that in this euthanasia station this Jewish woman was killed; this is a main claim.

PRESIDING JUDGE BEALS: Counsel, I understood from you that these documents that you were offering on behalf of the defendant Brack were in refutation of documents which had been exhibited to defendant Brack while he was on the witness stand, and which

were then marked for identification and were later introduced in evidence by the prosecution. Is that correct?

DR. FROESCHMANN: No, Your Honor. The first Brack affidavit referred to the documents put to Brack during cross-examination, and this the Tribunal rejected. Then Saturday, Mr. Hochwald for the prosecution put in new documents which had not been put to Brack during his cross-examination, in which these assertions are made — namely, that in the Lublin matter that I just mentioned, he helped kill a Jewish insane woman; secondly, that in 1942 at a conference of the Reich Ministry of Justice, Brack delivered a lecture which Brack also has not been able to make a statement about, because this was not put to him before; thirdly, a document was put in by Boehm.

PRESIDING JUDGE BEALS: I do not remember that Mr. Hochwald introduced any new documents. I might be wrong. I thought he was merely explaining documents which had heretofore been submitted as exhibits for the prosecution.

MR. HARDY: Your Honor, defense counsel has stated that these are new charges. I wish to call Your Honor's attention to the indictment. In the indictment —

PRESIDING JUDGE BEALS: Counsel, the question is not altogether as simple as that. As to documents which were exhibited to the defendant in the course of cross-examination and were marked as prosecution exhibits for identification, the defendant then had a full opportunity to answer those documents on redirect examination. If other documents were offered later which were not exhibited to the defendant while the defendant was on the stand, or offered by way of rebuttal, and very properly, the Tribunal is disposed to allow the defendant to deny those documents if they had not been called to the defendant's attention while the defendant was on the stand. That was the occasion of the ruling on the document offered by Dr. Sauter.

MR. HARDY: Well, Your Honor, suppose the situation be this—that we withdraw all the rebuttal documents and put them in when defense has completed the case.

DR. FROESCHMANN: Then I may assume that this second affidavit of mine may be put in and accepted in evidence because reference to the document was not put to Brack's attention during the time he was here on the stand.

MR. HARDY: The prosecution requests, Your Honor, that the Tribunal peruse the documents we put in rebuttal in connection with the euthanasia case to see whether or not they are rebuttal evidence. The prosecution contends they are. Therefore, these documents are not admissible.

PRESIDING JUDGE BEALS: If they were exclusively rebuttal

evidence and brought in no new matters, they should not now be denied.

MR. HARDY: The only question is that Dr. Froeschmann is trying to bring up that we did not charge Brack with extermination of the Jews. We specifically charged him with extermination of the Jews in the indictment. The theory of the euthanasia case was that euthanasia was [planned] and eventually existed in the extermination of the Jews as outlined in the indictment. He has known from the first day he received it. It is nothing new, Your Honor.

DR. FROESCHMANN: If the prosecution now states that Brack is not being charged with participating in the extermination of the Jews, then it is clear that I do not have to do any refuting here. But Mr. Hochwald explicitly stated last Saturday that Brack was charged in participating in extermination of the Jews, and I consider it my duty as defense counsel to give my client the opportunity to make statements about these new charges or documents from the prosecution.

PRESIDING JUDGE BEALS: It seems clear, Counsel, that the charge was in there against the defendant Brack in all stages of the proceedings, including the indictment, and when Brack took the stand in his own behalf he had the opportunity to give full testimony concerning the charges given in the indictment.

DR. FROESCHMANN: Yes, but these are new documents, Your Honor — Document NO-3356, Prosecution Exhibit 552.

PRESIDING JUDGE BEALS: Those documents, Counsel, according to the prosecution (I have not read them recently), are simply in rebuttal to evidence of defendant Brack. He had a full opportunity to testify. Prosecution presents further evidence to the effect that the testimony of defendant Brack is incorrect. They have that right in offering rebuttal evidence. Brack on the stand had the opportunity to tell his story. Prosecution on rebuttal has the right to show his story is incorrect. That cannot be carried on indefinitely by then denying what Brack had the right to testify to when he was on the stand.

DR. FROESCHMANN: In my opinion these documents are not rebuttal evidence, but are brand new statements, brand new material.

PRESIDING JUDGE BEALS: They are entitled to do that, of course, on rebuttal to bring in any evidence in rebuttal. That is the purpose of rebuttal evidence — to bring in any evidence which tends to prove that the evidence by the defendant on the stand was incorrect.

DR. FROESCHMANN: Well, but then the defense ought to have a chance to state his opinion about this new evidence, because it

might be an obvious error. How am I going to have a chance to refer in my brief to that which might be wrong? I fully agree here with Dr. Sauter.

MR. HARDY: Your Honor, isn't my understanding correct, that in rebuttal evidence, that if we introduce any evidence on new topics, that the Tribunal will exclude this new evidence in its judgment? If we have offered any new documents they are clearly inadmissible, and if one of the documents would be a new factor it seems to me the Tribunal won't pay any attention to such new evidence anyway.

PRESIDING JUDGE BEALS: On rebuttal, as stated by the prosecutor, the prosecution must limit evidence to rebuttal, refuting evidence by the defense. If there is new material in it the Tribunal is justified in ignoring it. Counsel in his brief may call attention to the fact that it is not proper rebuttal evidence and should be ignored — if there is such evidence.

The Tribunal will now be in recess, and we will see what can be done to clear up these documents.

* * * * *

PRESIDING JUDGE BEALS: * * * Dr. Froeschmann, if you will again offer the second document that you offered this morning, which the Tribunal rejected, that second document will be admitted in evidence.

* * * * *

DR. FROESCHMANN: Mr. President, I have handed Document Brack 64, during the recess, to the prosecutor and explained its contents to him with the use of an interpreter. It is dated 30 June 1947. It will be marked Brack Defense Exhibit 55 and I am handing it to the Tribunal.

PRESIDING JUDGE BEALS: This document will be received in evidence by the Tribunal.

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE, 3 JULY 1947¹

DR. FLEMMING (counsel for defendant Mrugowsky): I further submit an affidavit of the defendant Mrugowsky himself, which is Mrugowsky 124, and will become Mrugowsky [Defense] Exhibit 112. Mrugowsky here defines his attitude towards the documents submitted after he left the witness stand. It particularly deals with the documents submitted during examination of the co-defendants Rose and Poppendick.² When the first of these docu-

¹ Ibid, pages 10678-10680.

² In this connection see the extract from the transcript of 9 April 1947, reproduced above at page 729.

ments was submitted I objected to their admission because Mrugowsky would not be able to define his attitude towards them. The Tribunal then said I would be able to call him to the witness stand at a later date. I waited until all the material was presented and then did not ask to have him recalled to the witness stand. Instead, I asked him to write an affidavit wherein he defines his attitude toward a number of these documents put in by the prosecution after he left the witness stand, and here he mentioned —

MR. HARDY (associate counsel for the prosecution): I must object to the introduction of this affidavit. This affidavit deals with matters that prosecution introduced in evidence during cross-examination of Mrugowsky. I asked him specifically, questions concerning these matters, and he denied my questions, and answered in the negative to my questions, and inasmuch as I did not wish to introduce such documents at that time, I didn't impeach his credibility as I did with the other documents, but in this particular instance I saved the documents to use on Rose's cross-examination and one in Poppendick's cross-examination. They are merely rebuttal documents refuting the testimony of Dr. Mrugowsky, and I gave him ample opportunity to tell this Tribunal about any connection he had with the Robert Koch Institute and Rose, and I gave him ample opportunity to do that on cross-examination, and he didn't do it and it completely refutes his testimony.

DR. FLEMMING: Mr. President, in this connection, let me say that Mrugowsky had no opportunity to reply to these documents submitted, in Poppendick's, Rose's and the other codefendant's cross-examinations that took place after his own examination. In Dr. Rose's examination, for instance, the documents — Exhibits 491 and 492 — were submitted; one is a letter by Rose to Mrugowsky and the other is a letter from Mrugowsky to Rose. The prosecution could just as well have offered these two documents when Mrugowsky himself was examined. Then he would have been able to reply to these documents and would have been able to explain how these letters originated and what the individual points contained therein mean. When Mr. Hardy maintains now that he already asked Mrugowsky on the witness stand about the contents of these letters, it is not correct. Mrugowsky, of course, was not in a position to define his attitude towards the subjects contained in the letter, inasmuch as they were not submitted in evidence.

It is important to reply to the various subjects and quotations contained in the documents.

[Discussion concerning two other documents offered by defense has been omitted.]

PRESIDING JUDGE BEALS: Mrugowsky Document 124, the affidavit of the defendant Mrugowsky, will be admitted in evidence and the objection of prosecution is overruled.

9. ADMISSION IN EVIDENCE OF THREE UNSOLICITED LETTERS SENT TO DEFENSE COUNSEL

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
11 FEBRUARY 1947¹

DR. SERVATIUS (counsel for defendant Karl Brandt): * * * Then the Secretary General sent a letter to me, asking me to submit it to the Tribunal.² This is a letter of a woman physician, Louiza Ernwein, of Muehlhausen, who, as a French woman, was confined in a concentration camp. This letter is addressed to the Tribunal. The witness says that Brandt had helped her in order to get her out of the concentration camp into a position as a physician. The essential points of this statement are that she thought of turning to the defendant Brandt for help, and that means that she considered him a person who did not belong to the circle who held the extreme SS views. This letter cannot be submitted by me as an affidavit, since I have not yet received an answer from the witness. However, I ask you to admit it. The letter is here available in the French language; and I ask the Tribunal to admit it.

PRESIDING JUDGE BEALS: Do I understand that this letter was delivered to the Secretary General of the Tribunal?

DR. SERVATIUS: The Secretary General had this letter handed to me by Lt. Garrett and asked that I translate it and then submit it.

PRESIDING JUDGE BEALS: I also understand that the letter was received without solicitation of any kind; this witness was unknown to counsel, as I understand it?

DR. SERVATIUS: Yes, she was unknown to me.

MR. HARDY (associate counsel for the prosecution): Your Honor, there are three such letters in this document book. One is attached to Karl Brandt Document 31, one to Karl Brandt Document 37, and then this last one which was referred to here [the first two documents were affidavits executed in proper form, followed by a letter which the affiant had written to defense counsel. The last document consisted only of a letter written to the Tri-

¹ Extract from mimeographed transcript, U.S. vs. Karl Brandt, *et al.*, Case 1, pages 2800-2802.

² Letters addressed to the Tribunals or to the Secretary General of the Tribunals, if they indicated that the authors could give evidence concerning a particular case, were turned over to the interested defense counsel.

bunal, which had been transmitted on to the defense]. I object to the admissibility of any of the three of these letters because of the fact that they are not affidavits; they are not statements in due form; they don't bear any semblance to a legal instrument to be admitted into evidence before this Tribunal.

PRESIDING JUDGE BEALS: Referring to the other letters mentioned by counsel for the prosecution, I would ask counsel for the defendant Brandt if these other letters were received by him without solicitation on his part or without his knowledge of the writers.

DR. SERVATIUS: I received these other letters also without my solicitation. The people concerned wrote to me on their own initiative. That is why I attached these letters to the affidavits which I then asked for formally. I merely attached these letters in order to show that these people approached me from their own initiative.

PRESIDING JUDGE BEALS: The letters referred to may be admitted in evidence. The Tribunal will give them whatever weight is deemed proper to place upon them; but they will be received in evidence as exhibits on behalf of defendant Karl Brandt.

J. Affidavits, Interrogatories, and Statements Not Under Oath—Selections from the Record of Cases Other Than the IMT and Medical Cases

I. INTRODUCTION

The selections from the record of the IMT and Medical cases, which are reproduced in subsections H and I above, show the basic procedures and practice evolved with respect to affidavit evidence in the first two Nuernberg trials. Rulings in the later trials for the most part show a continuity of practice, although many supplementary rules were developed, and although in two or three of the later cases there was a departure on some points from earlier practice. To demonstrate or even illustrate in this volume every type of ruling in every case and to show each variation between the cases has been impossible, both for limitations of space and limitations of editorial staff. The extracts from each of the last eleven cases included in this section are set forth in the order in which the indictment issued in the cases from which the selections are taken.

As previously stated, affidavits or depositions were the principal means of eliciting the testimony of persons who were not available for oral testimony before the Tribunal. In the Milch case (Case

2) the defense desired the testimony of several persons who had been sentenced to life or a term of years by the IMT. These persons were prisoners under the control of the Allied Control Council for Germany, and the Control Council would not permit them to appear publicly, even though they were still in Nuernberg Prison at the time in question. Arrangements were therefore made for these prisoners to be examined by defense counsel and a representative of the prosecution in the presence of one of the judges. The transcript of the interrogation was then presented to the Tribunal in the form of a written deposition. The discussion concerning the arrangements for this type of deposition in the case of defense witness Albert Speer in the Milch case is reproduced in subsection 2. Later, after Speer was transferred to Spandau Prison in Berlin, arrangements were made in the Flick case for the taking of his testimony before a commissioner in Berlin (see sec. XVII C, "Flick case — Two Orders of the Tribunal Concerning the Taking of the Testimony of Defense Witness Albert Speer before a Commissioner.")

In the Justice case (Case 3) the Tribunal made a general ruling early in the defense case that a defense witness testifying orally was to be examined by all counsel desiring his testimony, and that affidavits should not later be offered except under special circumstances. The announcement is reproduced in full in 3 below. In its judgment the Tribunal in the Justice case stated: "Some affidavits have been presented by the prosecution, but they are few in number in comparison with the hundreds offered by the defense."

The admissibility of an affidavit in most of the cases was conditioned upon producing the witness for cross-examination if he were available. In the earlier cases, if the affiant could not be produced for cross-examination, the Tribunal still admitted the affidavit for whatever value the Tribunal might consider it to have, in view of other related evidence and consideration of the fact that cross-examination had not been possible. An example of this type of ruling in the Pohl case (Case 4) is reproduced in 4 below. The Tribunal admitted the affidavit of Rudolf Hoess, formerly the commander of Auschwitz Concentration Camp, who was on trial in Poland for war crimes and could not be produced for cross-examination. Affidavits by two other concentration camp commanders who were imprisoned in the American Zone were admitted subject to affiants being produced for cross-examination.

The Tribunal in the Flick case (Case 5) followed the practice of allowing the prosecution to introduce an affidavit by a person whom the prosecution might desire to produce for oral testimony later, with the understanding that if the affiant was not called by

the prosecution, the defense could apply for cross-examination to be conducted during the defense case. A discussion of this matter, which arose in connection with the prosecution affiant von Hannecken, is reproduced in 5 below. Von Hannecken was later examined by the defense during the defense case at great length.

In the Farben case (Case 6) the Tribunal admitted affidavits, provided the affiant, upon defense request, was made available for cross-examination. If the affiant could be produced for oral examination, the cross-examination took place either before the Tribunal or commissioners of the Tribunal. If the witness could not be brought to Nuernberg the cross-examination was effected by means of cross-interrogatories. If an affiant did not respond to a cross-interrogatory, his affidavit was stricken from evidence. Under this rule the Tribunal in the Farben case permitted the use of an affidavit, notwithstanding the fact that the affiant was readily available for oral examination, the Tribunal declaring that this, in fact, extended an advantage to the defense by giving them comparatively more time to prepare cross-examination (6 below). The defense, in its turn, introduced more than five times as many affidavits as did the prosecution. The Tribunal, in its judgment in the Farben case, noted that the prosecution introduced 419 affidavits as against 2,394 for the defense. In many cases several affidavits by the same affiant were introduced in evidence, and frequently both the prosecution and the defense introduced affidavits by the same affiant. The fact that the defense introduced hundreds of affidavits during the later part of the defense case produced a situation in which it was not feasible for the prosecution to call any substantial number of these affiants for cross-examination in view of the deadline set by the Tribunal for the conclusion of the taking of evidence. Under these circumstances the prosecution stated that it would not call further affiants for cross-examination, but that, on the other hand, it was not waiving their cross-examination. Two discussions concerning these developments near the end of the Farben trial are reproduced in 7 below.

In the judgment in the Hostage case (Case 7) the Tribunal stated: "Hundreds of affidavits were received under the rules of the Tribunal. All affidavits were received subject to a motion to strike if the affiants were not produced for cross-examination in open court upon demand of the opposite party made in open court."

In the Hostage case, after the prosecution requested that the defense indicate those cases in which it would request cross-examination of affiants as soon as possible, the Tribunal ruled that the defense could make such requests at any time prior to the commencement of the defense case. The defense stated its

agreement to this practice. The pertinent discussion on this point is reproduced in 8 below.

In the RuSHA case (Case 8) the defense requested that prosecution affiants be produced for cross-examination during the prosecution's case in chief, but the Tribunal ruled that cross-examination was to be conducted during the defense case. The Tribunal further ruled that cross-examination would be limited to matters contained in the affidavit and that the prosecution would be permitted no further direct examination of the affiant when he was produced for cross-examination. Two announcements by the Tribunal in the RuSHA case on these matters are reproduced in 9 below.

In the Einsatzgruppen case (Case 9) the Tribunal permitted the prosecution during cross-examination of a defendant to use an affidavit by a person whom the defense desired to call as a defense witness. The Tribunal, however, stated that the affidavit should not be offered in evidence during cross-examination, and that the question of its admissibility would be dependent upon development after the affiant appeared as a defense witness (10 below).

In the Krupp case (Case 10), contrary to the practice in the Flick, Hostage, and RuSHA cases, the Tribunal encouraged the cross-examination of a prosecution affiant directly or shortly after the prosecution offered the affidavit in evidence. This led to rather extensive discussion in court, during which the defense indicated its preference for the practice adopted in the Flick case (11 below). In its judgment the Tribunal in the Krupp case stated: "Ordinance No. 7, referred to above, provides that affidavits shall be deemed admissible. Exercising its right to construe this ordinance, this Tribunal announced at the beginning of the trial that it would not consider any affidavit unless the affiant was made available for cross-examination or unless the presentation of the affiant for cross-examination had been waived, and this ruling has been strictly adhered to."

In a number of instances the defense in the Ministries case (Case 11) failed to comply with the procedure for obtaining written statements prescribed by Rule 21 of the Uniform Rules of Procedure. The Tribunal, therefore, entered a general order concerning the admissibility of various types of evidence. The part thereof which pertains to written statements and affidavits is reproduced in 12 below. The Tribunal required strict compliance with the requirements of Rule 21, unless it was shown that observance was unduly burdensome. The practice of the defense in employing affidavits by defendants for various purposes has already been taken up at some length in the extracts from

the record of the Medical case (sub-sec. I 8). In the Ministries case an affidavit by defendant Woermann was introduced in evidence on surrebuttal by counsel for the defendant Keppler, and Woermann was cross-examined concerning this affidavit before a commissioner of the Tribunal (13 below).

In the High Command case (Case 12), the trial in which the last of the indictments was filed in Nuernberg, the Tribunal announced that prosecution affiants who were available to testify orally should be produced in person for cross-examination upon defense request, but that the defense would be required to submit cross-interrogatories to affiants who could not reasonably be brought to Nuernberg (14 below).

When an affiant was produced for cross-examination the party which had offered the affidavit ordinarily conducted a short direct examination, asking the witness if he had any additions or corrections to make in his affidavit, and occasionally developing some further matters. However, in some instances it was merely announced that the affiant was present for cross-examination and the opposing party immediately proceeded with cross-examination.

2. MILCH CASE—DISCUSSION CONCERNING THE ARRANGEMENTS FOR TAKING THE TESTIMONY OF ALBERT SPEER ON DEPOSITION

EXTRACT FROM THE TRANSCRIPT OF THE MILCH CASE, 3 FEBRUARY 1947¹

DR. BERGOLD (counsel for defendant Erhard Milch): Your Honors, first of all before I continue I should like to bring up a question. It concerns the interrogation of the witness Speer whom I have asked for.² As a consequence of a misunderstanding between me and Major Teich [an official of the Nuernberg Prison], I understood that I had the choice either of calling Speer as a witness or of receiving from him an interrogatory. I then said that I should like to call him as a witness. This was on Friday, in the presence of one of the judges. I believed this was a preparatory discussion. However, I was just informed by the Marshal of the Court that I had not construed it correctly: Speer cannot, at least at the moment, appear in this Court as a witness because the Control Commission has not given its approval.

¹ Extract from mimeographed transcript, Case 2, U.S. vs. Erhard Milch, pages 625-630.

² Albert Speer was one of seven defendants in the IMT Case who were sentenced to life or to imprisonment for a term of years. The control over these prisoners was in the hands of the Allied Control Council for Germany. At the time in question all were still in Nuernberg Prison. Later they were transferred to Spandau Prison in Berlin.

On the assumption that is now the last word, I must have the opportunity to consult with Speer at some length. On Friday I received some information from him. If I must speak with him outside the presence of the Court, then I must have a whole day at my disposal in which to do so, and consequently must ask the Tribunal to explain how Speer's testimony is to be submitted later as evidence before this Tribunal. I am not entirely clear on this point yet, whether it is probably true that an interrogatory in the presence of one of the judges is sufficient, or whether there must be an affidavit from him which probably then is to be read in the Court. At least I cannot construe it, so I would be obliged if the Tribunal would give me its opinion on the subject.

PRESIDING JUDGE TOMS: The witness, Speer, is in the exclusive control of the Allied Control Council, and this Court is without authority to produce him in court as a witness without consent of the Allied Control authority. That authority did, however, consent that he be subjected to interrogatories, and that, I believe, has been done; has it not?

DR. BERGOLD: No. I believed that the discussion I had with him was only a preparatory discussion, according to Major Teich who spoke to me in English. I misunderstood what he said. Consequently, I must have the chance to consult with Speer in detail. On Friday there were many questions that I really wanted to put to him, but did not have the opportunity to do so.

PRESIDING JUDGE TOMS: If evidence is to be produced at all, it will have to be done by interrogatories which will be transcribed and made a part of the documents in this case.

The fact that one of the members of the Court was present when the previous interrogatory was being put to him, does not mean that his testimony was taken by the Court. The Allied Control Council requested that a representative of this Court be present at the time the interrogatories were put to him, and Judge Musmanno volunteered to represent the Tribunal in that respect, but that did not constitute the taking of testimony before the Court, obviously.

DR. BERGOLD: I quite understand that. In other words, I must submit an affidavit of this interrogation.

PRESIDING JUDGE TOMS: Well, whatever you wish to submit must be in some other way than by calling the witness personally as a witness.

DR. BERGOLD: In that case, I must ask the Tribunal to give me a day at my disposal during which I can really interrogate Speer in the presence of one of the judges, and I must ask the Court that court reporters be present, because my secretary is not capable of taking down an interrogation correctly; I have

tried that and it was not successful. There were so many errors in her report that I could do nothing with it.

I should then suggest, Your Honors, that if Major Teich is agreeable to this proposal, and the Court is also, that tomorrow the witness Speer, in the presence of court reporters, should be interrogated; and that the record of this interrogation I shall then submit before the Tribunal. Is that agreeable to the Tribunal?

PRESIDING JUDGE TOMS: Do you wish to be heard, Mr. Denney?

MR. DENNEY (chief trial counsel for the prosecution): Just this, Your Honor, that I understand that the Court has ruled that when Dr. Bergold interrogates any of the present prisoners who were defendants in the case before the International Military Tribunal a member of the Court will be present, and I assume, at least from the three interrogations that have already been held, that the prosecution will be allowed to be represented. At the time that Speer was interrogated I didn't know about it until very shortly before it happened and, not knowing what the subject of the interrogation was going to be, I was unable to prepare any cross-interrogatories. And, in view of what Dr. Bergold tells me about his German transcript not being very accurate, I don't know just what sort of record we will have from that. In the case of the two which were held on Saturday of the witnesses Neurath and Raeder [also defendants in the IMT case], I believe that I was able to cover everything there that was necessary. However, there again we didn't have a court reporter to take it down, although we did have the interpreter from the regular staff of court interpreters. I would suggest that at any future interrogations which we have with these people that both German and English court reporters be assigned as well as interpreters, so that all that will be necessary when we come to present the results of the interrogation to the Court will be to just bring the transcript up and read it into the record, providing that is agreeable with Your Honors and Dr. Bergold.

PRESIDING JUDGE TOMS: The Allied Control Council merely requires that a representative of the Tribunal be present. It doesn't say that all of the judges must be present so, perhaps, that representative we could have. I think this ought to be handled just as you would be handling a deposition. Questions and answers will be taken down verbatim and read to the Court in lieu of the testimony of the witness. Did you have much opportunity to cross-examine him, Mr. Denny?

MR. DENNEY: With the witness Speer? No, Your Honor.

PRESIDING JUDGE TOMS: Apparently the direct examination of Dr. Bergold is not as complete, as he questions here—

DR. BERGOLD: Because as I said, I thought it was merely a preparatory investigation or interrogation.

PRESIDING JUDGE TOMS: Well, perhaps with the new idea in mind it would be better to start again.

DR. BERGOLD: Yes.

PRESIDING JUDGE TOMS: And this time with competent reporters and translators and adequate cross-examination producing a deposition or interrogation for the prosecution and the defense. Could that be done at all?

DR. BERGOLD: Yes.

MR. DENNEY: Your Honor, we will have to suspend, if we did it tomorrow. Of course, Dr. Bergold knows best. If he wants to do it tomorrow I have no objection. I would appreciate it if I could get his questions at least some time in advance, because it's going to be easier.

PRESIDING JUDGE TOMS: Is it to be determined by submitting specific interrogations and cross-examination, or is it going to take the nature of an examination, as if the witness were on the stand?

MR. DENNEY: We can do it which ever way Your Honor wishes.

PRESIDING JUDGE TOMS: The latter plan is the most expeditious.

MR. DENNEY: Yes, it certainly is.

DR. BERGOLD: I would like to suggest that it is done in the form as if it were a hearing of a witness, because if I have to write out all of the questions I would use more time and would again request more time. Therefore, I would like to suggest that we hear him tomorrow as if he were a witness.

PRESIDING JUDGE TOMS: The other members of the Tribunal agree that the best way to get this testimony is to examine this witness in the same manner as if he were on the witness stand, by direct examination and cross-examination, then if you have forgotten some interrogation why—I mean, if you have forgotten to put it down on paper you can still cover it. Judge Musmanno has volunteered to represent the Tribunal at any time tomorrow. When will you do it?

DR. BERGOLD: As soon as possible. Any time is convenient to me after 9 o'clock.

PRESIDING JUDGE TOMS: How about you, Mr. Denney?

MR. DENNEY: I am sorry. I didn't hear what you said.

PRESIDING JUDGE TOMS: At what hour. What hour would be convenient for you to attend the questioning?

MR. DENNEY: Dr. Bergold agrees that 9:30 will be all right if that's convenient with the Tribunal.

PRESIDING JUDGE TOMS: Very well then, the Court will not convene tomorrow, but its business will go on as usual in taking

this testimony. I presume it will take less time to do it this way than if the witness were here in court. Now, what about the other witnesses who have been interrogated?

DR. BERGOLD: Raeder and Neurath, perhaps they can be heard or interrogated later. After Speer I should like to continue with my other witnesses, and Neurath can be interrogated later should it even be necessary. I can perhaps renounce them as witnesses. I do not know yet for sure.

PRESIDING JUDGE TOMS: We will leave that question to be determined later.

JUDGE MUSMANNNO: I am suggesting in the interests of saving time that you might indicate to Mr. Denney the general subjects you intend to cover. Then he will be prepared with any documents which he might want to have in cross-examination.

DR. BERGOLD: I can inform him, yes. I wish to interrogate Speer about the Central Planning, about the Fighter Staff, and about the general position that Milch occupied within the German war machine.

JUDGE MUSMANNNO: That doesn't leave much out.

DR. BERGOLD: That is true, to be sure, and I think it will take quite a while, too.

PRESIDING JUDGE TOMS: Let us have it understood, Dr. Bergold, that no one will be present at this taking of testimony except those who are necessary; yourself, Mr. Denney—

DR. BERGOLD: I shall be there alone, on the condition that German reporters are present so that I do not need to bring my own secretary.

PRESIDING JUDGE TOMS: A German reporter and an American reporter and an interpreter, yourself, Mr. Denney, and Judge Musmanno.

DR. BERGOLD: Very well. May I ask in which room this will take place tomorrow:

THE MARSHAL: I will let you know.

DR. BERGOLD: Thank you.

JUDGE MUSMANNNO: He will let us know the room number.

DR. BERGOLD: I may then continue with my presentation?

PRESIDING JUDGE TOMS: One more question. Do you expect that examination to take longer than the morning? That is, will you finish it by noon?

DR. BERGOLD: No, I believe I shall also need the afternoon.

PRESIDING JUDGE TOMS: Very well.

DR. BERGOLD: Of course I do not know how many questions are going to be asked in the cross-examination.

PRESIDING JUDGE TOMS: Well, it will take some time to transcribe it also to get it ready to present to the Tribunal.¹

3. JUSTICE CASE—GENERAL RULING THAT A DEFENSE WITNESS TESTIFYING ORALLY SHOULD BE EXAMINED BY ALL COUNSEL DESIRING HIS TESTIMONY AND THAT AFFIDAVITS BY THE WITNESS SHOULD NOT BE OFFERED LATER EXCEPT UNDER SPECIAL CIRCUMSTANCES

EXTRACT FROM THE TRANSCRIPT OF THE JUSTICE CASE,
8 JULY 1947²

PRESIDING JUDGE BRAND: Before we proceed further, the Tribunal has considered a practical problem concerning the examination of witnesses for the defense and the employment of affidavits. We are sure that counsel for both sides have recognized, and do recognize, that an affidavit is a very poor substitute for direct examination.

We have concluded that when a witness is physically present in court, and present in the course of the presentation of the defendants' case, of the defense, we will expect all defendants who desire to examine that witness by their attorneys, to do so in order that it will not be necessary to call the witness back to the witness stand in connection with the case of each separate defendant.

We have concluded that no other procedure is practicable. Unless, therefore, special circumstances are made to appear, defense counsel should not expect to introduce affidavits as a part of their defense from any witnesses whom they have had opportunity to directly examine in person in open court.

If affidavits were received after a witness had personally appeared, then it would be within the right of the prosecution to bring back that witness who had already appeared from cross-examination, and the evils which we are attempting to avoid would again appear. The result might be that one witness would be recalled half a dozen or a dozen times, and that cannot be allowed.

Now, we fully recognize, gentlemen, the fact that the defense counsel, each of you, would prefer to present the case of your particular defendant as a separate unit; and, we also understand

¹ The testimony of Speer, von Neurath, and Raeder was taken on deposition and the transcript of the interrogations made a part of the official transcript of the case. See "List of Witnesses in Case 2," volume II, this series, pages 889 and 890.

In the Flick case, after Speer had been transferred to Spandau Prison in Berlin, his testimony was taken in Berlin before a commissioner of the Tribunal. See section XVII C.

² Extract from mimeographed transcript, *U.S. vs. Josef Altstoetter, et al.*, Case 3, pages 4877-4879.

that the prosecution would prefer, if possible, to prepare the cross-examination as to each separate defendant. But, we have concluded that it will not be practicable to do that.

Both sides are having the fullest opportunity which the law can give, when you have the chance to examine the witness in behalf of your client in open court.

The necessity for an expeditious trial requires us to enforce this procedure, and you may rest assured that the Tribunal will allocate the testimony to the proper defendant's case, even though it may be presented in this manner.

4. POHL CASE—ADMISSION OF AN AFFIDAVIT OF ONE AFFIANT NOT AVAILABLE FOR CROSS-EXAMINATION AND PROVISIONAL ADMISSION OF AFFIDAVITS BY TWO AFFIANTS ON THE CONDITION THAT THE PROSECUTION PRODUCE THEM FOR CROSS-EXAMINATION

EXTRACT FROM THE TRANSCRIPT OF THE POHL CASE,
9 APRIL 1947¹

MR. ROBBINS (chief prosecutor): I offer now as Prosecution Exhibit 51, Document 3868-PS, appearing on page 35 of the English document book. This is an affidavit by Rudolf Hoess [commander of Auschwitz Concentration Camp] regarding Auschwitz extermination camp. This was quoted from by Mr. McHaney in his opening statement, and I do not propose to read from it now.

DR. KRAUSS (counsel for defendant Tschentscher): Your Honors, the prosecution intends now to submit the statement by the concentration camp commander, Hoess. Document Book 3 contains later, to wit, at the end, the statement by another concentration camp commander, Pister, and a statement by an SS administrative officer, also from the concentration camp, named Barnewald.² These three witnesses are alive. The statements contain partly obvious inaccuracies. Therefore the defense must have the possibility to correct these statements through cross-examination. It can be seen already today that the prosecution must produce these three witnesses for cross-examination. I want you to consider, Your Honors, that these three statements should not be introduced as evidence, and, instead of that, to have the prosecution bring these three witnesses here for oral examination to start with. Should, in spite of this, the statements be read,

¹ Extract from mimeographed transcript, U.S. *vs.* Oswald Pohl, *et al.*, Case 4, pages 129-131.

² Otto Barnewald and Hermann Pister, former officials of the Buchenwald Concentration Camp, were later tried at Dachau and both were sentenced to death (U.S. *vs.* Josias Prince zu Waldeck, *et al.*).

then I wish to reserve the right for cross-examination and I ask already today that the prosecution be advised to put these three witnesses at our disposal for cross-examination.

DR. SEIDL (counsel for defendant Pohl) : Your Honors, I agree with the statement of my colleague. However, I wish to draw your attention to the following facts to that. The witness, Rudolf Hoess, was examined as a witness last year by the International Military Tribunal. At that time there was the opportunity to examine the witness in a cross-examination. Therefore, I suggest, with reference to this affidavit of the witness Hoess, that this should not be admitted; and, also, leave it to the prosecution to choose between submitting an excerpt from the records of the International Military Tribunal with reference to this witness, Hoess, or not using his testimony. With reference to the other affidavits I mentioned before—of the witnesses Barnewald and Pister—I suggest not to admit these affidavits, because these witnesses can be brought here easily. At the present moment they are in Dachau. Should the Tribunal admit these two affidavits as evidence, then please only by seeing to it that this be dependent on the fact that the prosecution bring these two last witnesses here before this Tribunal for cross-examination.

PRESIDING JUDGE TOMS : Is it known where these witnesses are? Is it true that the three men are now in Dachau?

MR. ROBBINS : Rudolf Hoess, I know, is standing trial in Warsaw. The other two, I believe, are in Dachau.

Your Honors, may I simply state for the record that under Article VII, this objection does not go to the admissibility, but merely to the probative value of these affidavits.

PRESIDING JUDGE TOMS : I understand; but it involves a rather fundamental principle of American jurisprudence; that is, a right to be confronted by your witness and to cross-examine him if he is available. It appears that the witness Hoess is not available. However, the defense may offer in evidence the cross-examination of this witness before the International Military Tribunal. That is the best that can be done. We cannot produce this man. As to the other two witnesses, we will admit these affidavits conditionally only if these two witnesses are produced here and an opportunity given for cross-examination. They are available; they are under the control of the American Government, and it is a simple matter of transportation. This right of cross-examination is a valuable one, and so long as the witnesses are accessible and can be produced—they should be. These affidavits will be admitted now, but only upon the condition that the two witnesses will later be produced and an opportunity given to cross-examine them.

5. FLICK CASE—DISCUSSION OF THE PROCEDURE OF PERMITTING CROSS-EXAMINATION OF A PROSECUTION AFFIANT DURING THE DEFENSE CASE, AND RELATED MATTERS

EXTRACT FROM THE TRANSCRIPT OF THE FLICK CASE,
14 MAY 1947*

MR. SEARS (associate counsel for the prosecution): The next document offered by the prosecution is NI-6019. It is an affidavit by General von Hanneken, the Plenipotentiary for Iron. I forgot—

PRESIDING JUDGE SEARS: This document is received in evidence as Prosecution Exhibit 389, and the Secretary General will note this in his minutes.

DR. DIX (counsel for defendant Flick): Mr. President, I don't know whether as far as the proceeding is concerned I am legally obliged now to say the following, which I intend to say in order not to lose my right for a cross-examination. But I am obliged respectfully to say at this point, considering the contents of this affidavit of General Hanneken, that the defense will surely insist on a cross-examination of General Hanneken, and I should like to announce this cross-examination now in order to give the prosecution the opportunity to grant priority to the direct examination of General Hanneken over the reading of his affidavit before this Tribunal; because on the part of the defense a cross-examination will be probable, and surely will occur if we don't succeed in clarifying the incorrectness of this affidavit by other documents. I only wanted to respectfully announce this already at this moment.

PRESIDING JUDGE SEARS: Do you expect to call General von Hanneken? I ask the prosecution. Do you anticipate that General von Hanneken will be called as a witness for the prosecution?

MR. SEARS: I am just consulting with Mr. Lyon about that.

We would like to reserve the right to call the General. We thought that all he has to say is covered in this affidavit, but we, of course, will produce him for cross-examination, and we would like then to reserve the right to ask questions on direct examination as well, if he is produced for cross-examination.

PRESIDING JUDGE SEARS: Well now, if he is not called by the prosecution and the prosecution relies on the affidavit in the place of oral testimony, then the defense may proceed in the usual way by filing an application for his examination or cross-examination. The application should be made with the approval of the Tribunal. That is done because the records have to be kept in that way,

*Extract from mimeographed transcript U.S. vs. Friedrich Flick, et al., Case 5, pages 1590-1592.

because if he is here, presumably he would be examined in open court. The Court, however, has determined that in cases of this kind, if it sees that an examination before a commissioner will be adequate for the defense, then it reserves the privilege—it reserves the right of having the cross-examination taken before a commissioner.¹ Of course, if you are going to go outside of the matters that are in this affidavit, and produce evidence in chief from the witness, then you should, before the close of the case, call General von Hanneken as a witness.

We don't want to limit you to an oral examination except under extraordinary circumstances. That is, if we can make progress by taking the affidavit, we prefer to go on that way and then let you supplement, if you wish to by calling General von Hanneken.

MR. SEARS: That would be satisfactory, Your Honor. This document, I believe, has been received.

PRESIDING JUDGE SEARS: If, of course, a new matter is brought out on the cross-examination, then, of course, the opportunity would be given to the prosecution to explore that new matter by something in the nature of rebuttal, or it is actually a new matter, by something in the nature of a reply to the new matter in the cross-examination. That will, I think, take care of itself when the time comes.

MR. SEARS: I understand the Court, then, to rule that we have the right to call General von Hanneken up to the end of the trial as our witness?

PRESIDING JUDGE SEARS: Yes.

MR. SEARS: If we should find that necessary.

PRESIDING JUDGE SEARS: Yes, but, of course, you ought not to go over the matter that is here, because that would be mere duplication.

MR. SEARS: No, we wouldn't have to do that.

PRESIDING JUDGE SEARS: Yes. You could explain or amplify anything that is in the affidavit. What I mean to say is, there shouldn't be a repetition of the matter in the affidavit. I am sure you will agree with me on that.²

MR. SEARS: Agreed. This document has been received as Exhibit 389 then, I take it?

PRESIDING JUDGE SEARS: Yes.

¹ The Tribunal in the Flick case did not direct any testimony to be taken on commission except in the case of Albert Speer, who could not be brought to Nuernberg. See section XVII C.

² Von Hanneken was called to testify during the defense case, and his testimony is recorded in the mimeographed transcript, Case 5, U.S. vs. Friedrich Flick, et al., 21, 22, and 23 July 1947, pages 4058-4226. He was asked no questions on direct examination by the prosecution, but he was examined at length by defense counsel concerning his affidavit and many related matters. After cross-examination by the defense counsel, the prosecution asked very few questions concerning three documents discussed during cross-examination (tr. pages 4205 and 4206). Thereafter several defense counsel again examined the witness at length (tr. pages 4206-4226).

6. FARBEN CASE—ADMISSION OF AFFIDAVITS OFFERED BY THE PROSECUTION OVER DEFENSE OBJECTION THAT THE AFFIANTS WERE IN NUERNBERG AND AVAILABLE FOR ORAL EXAMINATION

**EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
17 NOVEMBER 1947 ***

DR. SEIDL (counsel for defendant Duerrfeld): Mr. President, last Friday the prosecution announced that four witnesses would be examined today. In the meantime, we have received copies of the affidavits of these four witnesses and have seen that these affidavits were prepared 3 or 4 days ago, here in Nuernberg. Under these circumstances, I make application that these affidavits not be accepted in evidence by the Tribunal, but, in view of the fact that the affidavits have been prepared only a few days ago, I request the Tribunal that the direct examination of the witnesses be carried out in the courtroom. There is no reason that I can see why an affidavit should be offered in evidence here if the witness has been here for several days and there is a possibility to have him examined before the Tribunal. The principle has been held in all Military Tribunals, up to now, that the best evidence should be taken if there are various methods of evidence available. The best evidence is the direct examination of the witness himself, and I cannot see why in this case there should be a piece of paper between the witness and the Tribunal, since the witness is here himself.

Mr. President, I should like to add that these four affidavits are a typical example of the fact that, with the aid of such affidavits, conclusions and statements from hearsay and personal opinions are included which would certainly not be permitted to come into the record in the same form if the witness were examined.

MR. SPRECHER (chief, Farben trial team for the prosecution): Mr. President, Dr. Seidl, who was present in the first case, knows as well as any one else in this courtroom that hearsay was not excluded from that case, and that there are findings in the IMT decision which are based on hearsay. So much for the last part. I don't think that there's any help at this time in raising that issue as a collateral issue in connection with another old problem here, which is this whole question of having affidavits introduced as a means of clarification of this record, as a means of giving advance notice to the defense counsel, and as a means of conserving Your Honors' time. If there's anything you would further like to hear on the matter we would be glad to give it,

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, et al., Case 6, pages 3888-3890.

but we don't consider that anything new whatsoever has been raised.

PRESIDING JUDGE SHAKE: This objection presents the same question that has been repeatedly before this Tribunal, and we think it is sufficiently clear that we have ruled that the prosecution may use affidavits in evidence. As to any advantage being taken of the defense by reason of the use of affidavits, the situation is really quite the contrary. Counsel for the defense is in better situation to protest the interests of their clients when they have the benefit of having had an affidavit in their possession for the length of time required by the rules of this Tribunal, than they would be if they were presently and immediately confronted with the necessity of conducting a cross-examination at the end of an examination in chief. The Tribunal is not impressed with the thought that this deprives the defendants of any substantial right. As to the effect of conclusions, opinions, and hearsay, that is quite a different matter. As we have observed before, the basis for some of those rules of which you are all more or less familiar is that evidence of that character may be harmful when it goes before a jury of laymen. We can assure you again that this Tribunal considers itself competent to distinguish between evidence that has no probative value and evidence that has probative value.

The objection to the introduction of the exhibits is now overruled.

7. FARBEN CASE—DISCUSSION CONCERNING THE CROSS-EXAMINATION OF NUMEROUS DEFENSE AFFIANTS BECAUSE OF THE ADMISSION OF SEVERAL HUNDRED AFFIDAVITS OFFERED BY THE DEFENSE NEAR THE DATE SET FOR THE CLOSE OF THE EVIDENCE

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
7 MAY 1948*

MR SPRECHER (chief, Farben trial team for the prosecution): Mr. President, just one further statement. Within the last two weeks the defense has introduced into evidence several hundred affidavits. We obviously have had no time to read and analyze all these affidavits. Actually we have not even counted them to date. We will attempt to review the whole situation over this weekend, and on Monday, with your permission, we will make a statement

* Ibid, pages 13835-13838.

with respect to our position concerning the cross-examination of these affiants.*

PRESIDING JUDGE SHAKE: We will be glad to hear you and to give you an opportunity, Mr. Prosecutor, to state whatever you think is proper. But in that connection we would remind you that the Tribunal has already indicated 12 May as the dead line for the closing of this case, and that you should not plan a program that involves the examination of any witness or the cross-examination of any witness after that time.

MR. SPRECHER: Mr. President, the requirements of actual cross-examination with respect to even a very few affidavits is something over which we, as a matter of even the most restrained discretion, have very little control. Up until 2 weeks ago we had endeavored to rely principally upon the contemporaneous documents and a very, very limited amount of cross-examination of a very limited number of defense affiants. That decision was made because of our belief that, as of that time, and given the problems of this trial, we were exercising good discretion in so conducting ourselves. But since that time (we must be very honest), we feel in performing our function, in stating to you that it has been very difficult, in fact impossible, to keep up with the continued influx of affidavits which have been put in. Many of them have been put in in only the last few hours of this trial.

PRESIDING JUDGE SHAKE: Mr. Prosecutor, the Tribunal well appreciates your predicament. The problems have worried all of us, including the prosecution and the counsel for the defense and the Tribunal, with reference to the great volume of evidence with which we all have to deal. I said what I did because I would not want you to be misled to anticipate that there would be any departure from the very definite announcement and commitment the Tribunal made to the effect that this evidence, under all circumstances and conditions, would be concluded on or before 12 May. I do not say it unkindly, but this is not altogether an unanticipated problem so far as the Tribunal is concerned, and recourse to the record will indicate that a number of times, before any cross-examination of witnesses was commenced, the Tribunal was reminding counsel of the problem that would likely arise and urging you gentlemen to get under way the cross-examination of these witnesses and to use the facilities of the then designated commissioners, or others that might be designated, if necessary, to accommodate you. Now, we do realize the very tremendous

* The Tribunal had directed that the cross-examination of all affiants to affidavits introduced during the defense case be conducted before *commissioners* of the Tribunal (sec. XVII E). Since there were only two commissioners of the Tribunal available for taking the cross-examination of these affiants, the commission facilities were already highly burdened.

problem that you have on your hands, but we do warn you that you must not expect or anticipate any departure from the previous announcement that the evidence in this case will be positively closed on 12 May, and this applies to proceedings before the commissioner as well as before the Tribunal.

MR. SPRECHER: With respect to any congestion before the commissioner, Mr. President, I only want to state this: The congestion derives from the several hundred affidavits put in during the case of the last defendant, namely, the defendant Duerrfeld, one of the last defendants. I should say; and that the schedule is not congested by any requests we have made for cross-examination of affiants whose affidavits were put in before that time.

PRESIDING JUDGE SHAKE: Well, perhaps that is all that needs to be said. I take it that there is no doubt in the minds of you gentlemen as to the policy of the Tribunal and it's not necessary for us to repeat it, and I tell you again, do not expect any deviation from it. In other words, the die is cast on that issue. We shall close this evidence on 12 May, and whatever is not done will not be done. I have no doubt that with the diligence and loyalty and devotion to your causes that you gentlemen have shown on both sides of the case, we could continue this case quite indefinitely and receive much more evidence that would be just as competent as a lot that we have already received, in our judgment.

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
10 MAY 1948*

MR. SPRECHER: Mr. President, something has come up in connection with the commission, to which I would like to call your attention because it is a pressing problem for us in these last days; and while I'm on that, I'd like to make another statement I have promised you. On Friday the prosecution called attention to the fact that the defense had introduced several hundred affidavits within the last 2 weeks which we had not as yet had a chance to read and analyze. We said that today, with the permission of the Tribunal, we would make a statement on our position with respect to the cross-examination of these affiants. The Tribunal said it would be glad to hear this statement, but made it unequivocally clear that under all circumstances, the evidence in this case would close on 12 May, including the cross-examination of defense affiants before the commissioner. Under the circumstances, the only course open to the prosecution is to examine as many wit-

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, pages 14075-14078.

nesses as possible before the commissioner during the remaining 3 days for the taking of evidence. It appears that we shall not even have time to examine all the affiants who were requested before last week. Hence, it would be a futile act for us to tell you what our program would be if we had an opportunity to carry it out. What is important, Mr. President, is that right now there are affiants whom we have called to appear in Nuernberg but that, for some reason or other, they were not before the commissioner at the time designated and the commission had to go in recess. Now, in view of the fact that we have only these last few hours to cross-examine a very few of these hundreds upon hundreds of defense affiants, we do think that is a somewhat serious situation, and we know from Lieutenant Pace that there are a number of these affiants in Nuernberg or, in any event, that they have come to Nuernberg—unless they have left on their own volition or upon somebody else's stimulation.

PRESIDING JUDGE SHAKE: Gentlemen, that is a regrettable situation, of course. For whatever time yet remains and for whatever witness are or can be made available, the Tribunal feels that the prosecution is entitled to conduct its cross-examination up until the close—the time when the evidence in this case is to be closed—and the Tribunal will expect counsel for defendants who are responsible for these witnesses to see that they are present before the commissioner at the time designated, so that there may be no unnecessary interruption of the rights of the prosecution to cross-examine these witnesses.

Gentlemen, I think we are ready now for another volunteer from counsel for defense to close up the evidence.

Just a moment. We'll hear Dr. Dix.

DR. RUDOLF DIX (counsel for defendant Schmitz): In regard to the latter statements, Your Honors, I know from information of my colleagues that those affiants whom the prosecution wants to cross-examine have been waiting here in Nuernberg for quite some time to be examined. In other words, I assume with certainty that none of them have left, and those who have been called are ready. At any rate, the defense did everything within its power to procure these affiants for cross-examination for the prosecution.

DR. SEIDL (counsel for defendant Duerrfeld): About the question of the examination of affiants, I want to say that a difficulty has arisen this morning because one witness, Dr. Savelsberg, apparently was sick. He didn't appear. And on last Saturday, when the commissions were in session also, no new session was given notice of so that the two defendants, Ambros and Duerrfeld, who wanted to participate, weren't present either. Therefore, I ask

you to rule that the defendant Duerrfeld be excused immediately in order to attend the commissioner's hearing, which is to start right away.

PRESIDING JUDGE SHAKE: That, of course, is proper and the defendant Duerrfeld is excused.

8. HOSTAGE CASE—PROSECUTION REQUEST THAT THE DEFENSE MAKE TIMELY REQUESTS FOR THE CROSS-EXAMINATION OF PROSECUTION AFFIANTS, AND RULING THAT THE DEFENSE MAY MAKE SUCH REQUESTS AT ANY TIME BEFORE THE COMMENCEMENT OF THE DEFENSE CASE

EXTRACT FROM THE TRANSCRIPT OF THE HOSTAGE CASE,
27 AUGUST 1947*

MR. RAPP (associate counsel for the prosecution): With Your Honor's permission, since we are talking for a minute about these prospective witnesses [affiants who may be called for cross-examination], I would like to call to your attention that it is in every and all instances difficult for us to produce these witnesses, that is, merely administratively difficult. We will get them if we possibly can, but I would like to have defense counsel cooperate with us in putting in these applications early, not a week before their case is finished. We are getting these applications, and then if we cannot produce them, that will be held in some way against us.

I think defense counsel should realize that there is a lot of red tape involved in getting these witnesses from foreign countries. I believe that is a reasonable request, and we are trying everything in the world we can to get these people, but we are often depending on foreign governments and a lot of other agencies, and defense counsel should realize that.

PRESIDING JUDGE WENNERSTRUM: In connection with Mr. Rapp's statement, it should be kept in mind that presenting these documents also presents the responsibility of bringing these witnesses here for cross-examination. That is one thing.

MR. RAPP: That is correct, Your Honor.

PRESIDING JUDGE WENNERSTRUM: Second, in connection with your statement as to the request for cooperation on the part of the defense counsel, it seems to the Tribunal that at the close of the prosecution's case the defense counsel will know what witnesses, if any, they wish to have brought here for cross-examination; and it will be the Tribunal's ruling, subject to later modification, if

*Extract from mimeographed transcript, U.S. vs. Wilhelm List, *et al.*, Case 7, pages 2777 and 2778.

necessary, that any request for the production of witnesses should be made prior to the commencement of the defense's case, defense's testimony.

There will be a recess period. As to how long it will be we have not yet decided, but it will at least give you time to make your request.

MR. RAPP: Very well, Your Honor.

PRESIDING JUDGE WENNERSTRUM: Is there any objection to that on behalf of the defense counsel?

DR. LATERNER (counsel for defendants List and von Weichs): No.

PRESIDING JUDGE WENNERSTRUM: Defense counsel have indicated that they have no objection, so let your conduct be accordingly.

9. RuSHA CASE—RULINGS THAT THE DEFENSE MAY CALL PROSECUTION AFFIANTS WHO ARE AVAILABLE FOR CROSS-EXAMINATION DURING THE DEFENSE CASE, AND THAT THE PROSECUTION WILL BE PERMITTED NO FURTHER EXAMINATION OF THE WITNESS

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
10 NOVEMBER 1947*

PRESIDING JUDGE WYATT: The office of the Secretary General has submitted to the Tribunal requests from defense counsel with reference to certain witnesses, the testimony of these witnesses having been offered by the prosecution in affidavit form. The request was made that the prosecution be required to call such of these witnesses as are available for the purpose of cross-examination by the defense. The Tribunal is not inclined to grant this request because it would unnecessarily delay the closing of the prosecution's case. However, any witness from whom the prosecution has submitted an affidavit, that is available, the defense will be permitted to call that witness for the purpose of cross-examination; and the witness will be called by the defense, not as a defense witness, but as a prosecution witness, with the privilege of the defense cross-examining. And if the defense makes application for any of these witnesses, simply show in the application that an affidavit has been offered by the prosecution by the witness involved, and the Court will approve the subpoenaing of the witness.

* Extract from mimeographed transcript, U.S. vs. Ulrich Greifelt, *et al.*, Case 8, pages 1161 and 1162.

EXTRACT FROM THE TRANSCRIPT OF THE RuSHA CASE,
4 DECEMBER 1947¹

PRESIDING JUDGE WYATT: Now, the prosecution saw fit in its direct case to introduce a number of affidavits executed by witnesses who were available as witnesses. The Tribunal has laid down the rule that the defendants will be permitted to cross-examine such of these witnesses as are available, but the cross-examination will be limited to the matters contained in the affidavit, and the prosecution will be permitted no further examination of the witness.

10. EINSATZGRUPPEN CASE—RULING THAT THE PROSECUTION MAY USE AN AFFIDAVIT OF A PERSON APPROVED AS A DEFENSE WITNESS IN CROSS-EXAMINING A DEFENDANT, BUT THAT THE ADMISSIBILITY OF THE AFFIDAVIT DEPENDS UPON DEVELOPMENTS AFTER THE AFFIANT TESTIFIES

EXTRACT FROM THE TRANSCRIPT OF THE EINSATZGRUPPEN CASE DURING THE CROSS-EXAMINATION OF DEFENDANT BLOBEL, 30 OCTOBER 1947²

MR. HOCHWALD (associate counsel for the prosecution): I would like to refresh your memory. Your Honors, I offer Document NO-5384 as Prosecution Exhibit 180.

DR. HEIM (counsel for defendant Blobel): Your Honor, I object to this document. It is an affidavit by a certain Hartel which the prosecution submits as Exhibit 180. I request that this document only be admitted if I am given an opportunity to see the affiant, a certain man Hartel, and to cross-examine him here on the witness stand. Upon the principle of the best proof it is appropriate that Hartel, who as far as I know is in the prison here, be brought into this courtroom to be examined here on direct examination.

PRESIDING JUDGE MUSMANN: What do you have to say to that, Mr. Hochwald?

MR. HOCHWALD: If the Tribunal please, I do think that this affidavit is perfectly admissible. If the defense wants to cross-examine Hartel on the affidavit, the defense is at liberty to do so. He only needs to file a request of that kind with the Secretary General.

PRESIDING JUDGE MUSMANN: If the affiant is available to the defense for cross-examination and may be called by the defense

¹ Ibid, page 1963.

² Extract from mimeographed transcript, U.S. vs. Otto Ohlendorf, et al., Case 9, pages 1697-1699.

for cross-examination, of course, no harm may be done the defense by the introduction of the affidavit.

MR. HOCHWALD: To the best of my knowledge, Your Honor, Hartel is here in the jail and can be called for cross-examination by the defense any time.

DR. HEIM: Thank you.

PRESIDING JUDGE MUSMANNO: Proceed.

MR. HOCHWALD: I want to read to you from this affidavit.

DR. FICHT (counsel for defendant Biberstein): Your Honor, may I point out the fact that Hartel has been permitted as a witness to be called by the defense and I, therefore, object to the admission of the document, because this person will be examined as a witness here anyhow, and according to the principle of the best evidence he should be examined here himself and not by having his affidavit introduced.

PRESIDING JUDGE MUSMANNO: Let's hear what the prosecution has to say in reply.

MR. HOCHWALD: If the Tribunal please, Dr. Ficht himself has said that Dr. Hartel will be a witness for Biberstein. That means that he will be available to the defense for cross-examination, and from what he said on behalf of the defendant Biberstein it seems to me impossible for the prosecution to receive from this witness the information on which the affidavit is introduced, as the case of Biberstein has nothing whatsoever to do with a meeting which took place between the defendant Blobel and the affiant; so from the contention of Dr. Ficht alone it is perfectly clear that we are at liberty to put in the affidavit. When Dr. Ficht calls his witness to the stand Dr. Heim will have ample opportunity to cross-examine the witness on the affidavit, but we do not intend and see no reason to bring this witness into court in order to let him testify on two very short excerpts.

PRESIDING JUDGE MUSMANNO: We would recommend this procedure: That the prosecution counsel proceed to examine the witness on the statements made by one Hartel and to the extent deemed necessary on that subject. He may read what Mr. Hartel has already stated, but the affidavit itself should not be introduced as an exhibit at this moment. After Hartel has appeared and testified, then the prosecution may determine whether to present the affidavit or not, because it may be that the witness will repeat what he said in the affidavit, and then, of course, the affidavit is superfluous. He may deny it and then the affidavit may be introduced to impeach him.*

*Hartel appeared as a defense witness and his testimony is recorded in the mimeographed transcript, 24 November 1947, pages 2867-2938. During direct examination Hartel was questioned about the affidavit he had executed for the prosecution, and during cross-examination by the prosecution the affidavit was offered and received in evidence.

MR. HOCHWALD: I thank you very much, Your Honors. May I then reserve Prosecution Exhibit 180 for Document NO-5384?

PRESIDING JUDGE MUSMANNO: That reservation will be given to you.

11. KRUPP CASE—DISCUSSION CONCERNING THE MANNER OF GIVING NOTICE OF REQUESTS FOR CROSS-EXAMINATION OF PROSECUTION AFFIANTS AND THE PROPER TIME FOR CROSS-EXAMINATION TO TAKE PLACE

EXTRACT FROM THE TRANSCRIPT OF THE KRUPP CASE, 8 DECEMBER 1947¹

PRESIDING JUDGE ANDERSON: As to the request of the representative of the defense to clarify the matter of saving their rights when cross-examination of a witness is waived, the members of the Tribunal have considered this question and announce the following as a general rule: Where a witness testifies orally from the witness stand, he shall be cross-examined at the conclusion of the direct examination. When it is desired to cross-examine an affiant whose affidavit has been admitted in evidence, it shall be done following the reading of the affidavit, if the affiant is then available. If the affiant is available and not cross-examined at that time, whether the Tribunal will require him produced for cross-examination at some subsequent date will depend upon the particular circumstances of each case, including a reasonable showing as to why the affiant was not cross-examined at the time he was available for the purpose. This ruling is made in anticipation of the probability that some of the affiants will have come from a distance in order to be available for cross-examination, and the ruling, of course, presupposes that in every instance where the prosecution offers an affidavit in evidence, a copy thereof will have been furnished counsel for the defense at least 24 hours prior to the time the affidavit is offered. Where the defense desires to cross-examine an affiant and he is not available at the time his affidavit is introduced, he must be produced for that purpose before the defense will be required to proceed with its case. Otherwise, the affidavit will not be considered by the Tribunal in reaching their final conclusion on the merits.²

¹ Extract from mimeographed transcript, U.S. vs. Alfred Krupp, *et al.*, Case 10, page 17.

² This announcement was made just before the prosecution's opening statement. The practice as here announced was discussed and to some extent revised after the prosecution began its presentation of evidence. (See the extracts following.)

EXTRACT FROM THE TRANSCRIPT OF THE KRUPP CASE,
9 DECEMBER 1947*

MR. THAYER (chief Krupp trial team for the prosecution) : The prosecution offers as Prosecution Exhibit 6, Document NIK-8710, to be found on page 36 of the English Document Book 1, and on page 40 of the German. This is an affidavit by an official of the Krupp firm in charge of such records, by the name of Haupt, concerning the work history at Krupp of the defendant Loeser.

I offer as Exhibit 7 —

JUDGE DALY, PRESIDING: Now, before we proceed with Exhibit 7, the one just offered may be marked Exhibit 6. Oh, I beg your pardon.

DR. BEHLING (counsel for defendant Loeser) : Your Honor, I want to reserve the right to ask for the affiant Haupt, who signed these documents, for cross-examination; and I would like to give preliminary notice that I shall ask the prosecution to put the witness at my disposal at the given time.

MR. THAYER: Any of the witnesses or persons who do sign affidavits, who are affiants for the prosecution, may be called by the defense, of course, for cross-examination. We have suggested to the defense that this particular witness, Haupt, inasmuch as we have a great many of his affidavits throughout the case, might be called later on; then he can be cross-examined on all points at the same time, because a great deal of the corporate organization material is from this man.

JUDGE DALY, PRESIDING: Is that satisfactory, Counselor?

DR. BEHLING: Personally I am in agreement with that. I do not know whether my colleagues have any objection to this ruling for any other reasons.

DR. KRANZBUEHLER (counsel for defendant Krupp von Bohlen und Halbach) : I do not think that there are any basic objections to this ruling. After the ruling the Tribunal made yesterday it was felt that the defense counsel must immediately apply that the witness be called in for cross-examination, because otherwise it might possibly imply a waiving of the right of cross-examination.

JUDGE DALY, PRESIDING: In view of the statements made by counsel it will appear of record that no rights will be waived in connection with the particular affiant.

*Extract from mimeographed transcript, U.S. *vs.* Alfried Krupp, *et al.*, Case 10, pages 130 and 131.

EXTRACTS FROM THE TRANSCRIPT OF THE KRUPP CASE,
10 DECEMBER 1947*

JUDGE WILKINS, PRESIDING: Mr. Kaufman, we have been discussing this matter of the request of defense counsel to you to produce an affiant later, after you have offered the affidavit. What was your suggestion with reference to the matter? You mentioned a matter of serving the copy of the affidavit 15 days in advance.

MR. KAUFMAN (deputy chief of counsel for the prosecution): Our suggestion is that we will, wherever possible, serve a copy of the affidavit 15 days in advance of the day on which we produce or we intend to introduce the affidavit, and then we would suggest that within 5 days after we serve affidavit on the defense they inform us whether or not they are able to tell us at that time if they wish the affiant to be present on the 15th day.

JUDGE WILKINS, PRESIDING: Within 5 days after service of the affidavit upon them?

MR. KAUFMAN: Yes, that would give us 10 days to bring the witness down here and to make the arrangements in the witness house for taking care of these witnesses and feeding them and so on, and also to be sure that we wouldn't have too many witnesses at the same time.

JUDGE WILKINS, PRESIDING: Is that the procedure that you have followed thus far?

MR. KAUFMAN: Here? We have attempted to, yes, and in most instances I think we have lived up to it, but not in all instances. We have been serving the affidavits in advance of the time we have offered them here in evidence.

* * * * *

JUDGE WILKINS, PRESIDING: The Tribunal thinks that this is a very good rule to follow, although we don't intend to bind the prosecution to a 15-day period prior to offering the affidavit, but we think that it is a good rule to follow, wherever practicable.

MR. THAYER: That is the way—

JUDGE WILKINS, PRESIDING: I also think that it is a good rule that the defense indicate within five days after the receipt of the affidavit whether either one or all of the defendants would like to have you produce that particular affiant for cross-examination. We feel, too, that it will aid us in the logical presentation of the evidence and an understanding of the evidence if the particular affiant is produced immediately after the affidavit is produced and

*Ibid., pages 282, 284, 285, and 290-293.

portions read from it, or as soon thereafter as may be practicable under all of the circumstances.

MR. THAYER: Thank you, Your Honor, that is our thinking also. We would like to do it just that way, produce the affiant immediately after the offer of his affidavit; and another advantage which it would have would be to prevent the accumulation of a large number of witnesses until the end of the prosecution's case, and then ask us to produce them all at once for cross-examination.

JUDGE WILKINS, PRESIDING: We understand you have a situation with reference to the housing and feeding of the particular witnesses, but we also would appreciate having the witnesses called soon after the presentation of the affidavits, because it would be of greater assistance to us.

Judge Anderson asked me to state that the reason we got into this discussion before we recessed was his desire to ease the minds of defense counsel that they had to get up and make the request each time when an affidavit was produced, because you appreciate that we lost considerable time yesterday by several of you having to get up after an affidavit had been read. And so we now think and we feel that we would like to adopt this as a course to follow, the suggestion made by Mr. Kaufman as to the procedure that is being followed. We think it is a fair one. That is, as far as practicable a copy of the affidavit will be served on defense counsel 15 days prior to the time that the affiant is produced as a witness here, and that within 5 days after receipt of the affidavit defense counsel should indicate to the prosecutor whether they desire to call that particular affiant for cross-examination. Then, when the affidavit is produced by the prosecution and read, or at the commencement when the prosecutor is ready to present the affidavit, he should then indicate if the witness is then available; and if he is not available just when he will be available for cross-examination, so that if he is available at the time the affidavit is presented, then we would like the particular witness called immediately following the presentation of the affidavit, or as soon thereafter as may be practicable under all the circumstances.

* * * * *

DR. KRANZBUEHLER (counsel for defendants Krupp and Ihn): If it may please the Tribunal, Your Honor just asked what the usual practice was in the other trials. In the Flick case the defense counsel had the right until the end of the case of the prosecution to say which witnesses they wanted called for cross-examination and which affiants. These affiants would then be produced by the prosecution during that section of the defense to

which they belonged according to their testimony. This procedure has the disadvantage that the cross-examination does not come into the case of the prosecution, but into that of the defense.

On the other hand, it has one great advantage. At the end of the prosecution's case in chief, the defense can really see which affiants they need for cross-examination; therefore, in the end there will be substantially fewer cross-examinations in this procedure than when the defense is obligated to declare in advance which affiants they want called for cross-examination. This procedure has another advantage. There are quite a number of witnesses who will testify not only for the prosecution but also for the defense, although they may testify on different subjects.

According to the procedure proposed so far, such witnesses would have to appear twice, that is, once in the prosecution's case in chief and then in the defense's case. They even may have to appear repeatedly in the case of the prosecution, because we do not know, for example, whether a witness who is called by the prosecution on count one of the indictment, may not also have to testify on count two and three. Therefore, we have to call him separately on every count for cross-examination. Therefore, it may happen that this same witness has to appear three or four times. This difficulty would be avoided by adopting the procedure would also be a safeguard that the witness would appear in the as handled in the Flick case. At the same time this procedure connection where he belongs according to his testimony. For instance, a cross-examination on count one of the indictment would take place in that section of the defense which deals with this count.

Therefore, I would ask the Tribunal to consider whether it would not be practical to adopt the procedure which was adopted in the Flick case. In my opinion it was very practical.

MR. KAUFMAN: If Your Honor pleases, I just want to say in the reference to the Flick practice, what we propose here really is a combination, Flick practice and something else. The Flick practice has proved too loose in the opinion of all the prosecutors around here, and we believe that a system of postponing cross-examination beyond the prosecution's case is too extreme; but as you will remember, when it came to certain witnesses who were called yesterday, who we knew would be called later on, we ourselves informed the defense that they would be, and we suggested to them that they should not inform us of their decision to cross-examine, and as we informed them then, they would be cross-examined later.

In other words, we anticipated this very point, and perhaps we could formalize it. I didn't include it in my first statement, but

we will formalize it now and state that in addition to what I outlined in connection with the 15-day rule, we will undertake to advise the defense in advance whether or not the affiant will be called by us, if we then know, on subsequent counts or on subsequent occasions, so that it will—

PRESIDING JUDGE ANDERSON: Just state that again.

MR. KAUFMAN: Giving the defense counsel 15 days' notice of our intention to produce, or of our intention to produce an affidavit, we shall also advise defense counsel whether or not the affiant will also be called upon for the further introduction of an affidavit, a further affidavit in another part of a case.

PRESIDING JUDGE ANDERSON*: At a later time.

MR. KAUFMAN: So that if there is that contingency, the defense will be under no duty to exercise any discretion as to whether or not they want to call the witness, because they won't have to.

PRESIDING JUDGE ANDERSON: What would you suggest with respect to this? Assuming that you have offered an affidavit which goes along to count one of the indictment and the defense would combine their cross-examination to what the witness has deposed to, but when you come to present your case on the other counts of the indictment that that particular witness who had already been cross-examined with respect to the charges in count one, might know something that the defense would like to cross-examine him about with respect to count two, in view of the evidence that you have produced with respect to that count. Now, would the prosecution then produce the witness?

MR. KAUFMAN: I propose that as a general matter, we would suggest to the defense that the witness be not produced in the first instance, and that he would be produced at a subsequent time.

PRESIDING JUDGE ANDERSON: I understand.

JUDGE WILKINS, PRESIDING*: Well, we have taken up considerable time on this. We will terminate it now very briefly. We think that this rule that has been followed is a very fair procedure, and for the time being we intend to put it in effect in the following. We think that 10 days—or 15 days, rather, serving of an affidavit prior to the calling of a witness is a good rule to follow, although by doing so we do not want to indicate that we are binding the prosecution to that length of time in all cases. That it is fair and reasonable to expect the defense to be able to decide within 5 days after receiving a copy of the affidavit whether they desire to cross-examine the particular affiant; and in cases where they are able to do so, they should indicate to the prosecutor within 5 days after the service of the affidavit whether they desire

* Judge Anderson was the President of the Court, but Judge Wilkins was presiding during this session.

to have the affiant called.

In any event, 10 days later, or whatever time it may be—certainly not sooner than 10 days—the affidavit will be produced; and if the defense hasn't indicated theretofore that they desire the witness to be produced but they now feel they have the desire to have the witness produced, they should so indicate at that time so that the prosecution may make arrangements. In other words, we desire so far as practicable to have a witness appear as soon after the filing of the affidavit as possible under all circumstances. We recognize there may be exceptions, but let's follow the rule for the time being at any rate.

You may proceed.

12. MINISTRIES CASE—GENERAL ORDER OF THE TRIBUNAL CONCERNING COMPLIANCE BY THE DEFENSE WITH THE UNIFORM RULES OF PROCEDURE ON AFFIDAVITS AND STATEMENTS IN LIEU OF OATH

MILITARY TRIBUNAL
TRIBUNAL IV, CASE 11

United States of America
 against
Ernst von Weizsaecker, *et al.*, }

ORDER *

The prosecution has interposed objections to the receipt of a very considerable number of documents offered by the defendant Weizsaecker. The documents in question fall into several categories, books, publications, diaries, affidavits, statements, and so forth. Inasmuch as the same questions are likely to arise with respect to other documentary exhibits, the Tribunal has considered the question involved and, in the absence of special circumstances affecting the probative value of a particular document which may in its judgment justify deviation, announces the following rules:

[The first four paragraphs of this order concerns books, publications, and contemporaneous diaries and are reproduced in subsection E 3.]

5. Affidavits and written statements. Rule 21 prescribes the procedure for obtaining written statements. Counsel for the defense have submitted a surprisingly large number of affidavits and statements which do not comply with this rule and no showing has been made excusing non-compliance. Such affidavits and written statements will be received only upon condition that proper authentication be obtained before the case of the defendant

*U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 76, pages 3301 and 3302.

in whose behalf they are offered is closed. The utmost diligence must be exercised in obtaining such authentication. If, in the exercise of this diligence, defense counsel are unable to obtain the proper authentication and if showing is made to the Tribunal under Rule 22 that compliance with Rule 21 is impossible or unduly burdensome, the Tribunal will consider the admissibility of specific documents.¹

6. It will not be necessary for defense counsel to withdraw the affidavits and statements heretofore offered in order to obtain proper authentication. It will be sufficient if the person who executed the document in question appears before any official who, under the rules, would have been authorized to certify to such statement in the first instance, and executes a true and correct copy of such statement, pursuant to and in conformity with the requirements of Rule 21. The copy of such statement shall contain a recital to the effect that it is a true and correct copy of the exhibit offered before the Tribunal, and authentication of which, as offered, was insufficient.

[Signed]
WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

Nuernberg, Germany
27 July 1948

13. MINISTRIES CASE—ADMISSION IN EVIDENCE OF AFFIDAVITS BY TWO DEFENDANTS AS SURREBUTTAL EVIDENCE, AND ARRANGEMENTS FOR THE CROSS-EXAMINATION OF ONE DEFENDANT ON HIS AFFIDAVIT BEFORE A COMMISSIONER OF THE TRIBUNAL

EXTRACT FROM THE TRANSCRIPT OF COMMISSION II IN THE
MINISTRIES CASE, 28 OCTOBER 1948²

DR. SCHUBERT (counsel for the defendant Keppler) : I have two surrebuttal documents on behalf of my client, Wilhelm Keppler.³ The first document is Document Keppler 245, an affidavit of [the defendant] Dr. Ernst Woermann, which will now become Keppler Defense Exhibit 224. Furthermore, there is my Document 246, an affidavit of the defendant Wilhelm Keppler, which is my

¹ Rules 21 and 22 of the Uniform Rules of Procedure are reproduced in section V.

² Extract from mimeographed transcript, U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, page 26656.

³ The order of the Tribunal directing that all rebuttal and surrebuttal evidence be taken on commission is reproduced at page 620.

Exhibit 225. I herewith turn over the two original exhibits to the representative of the Secretary General.

The prosecution has told me that they want to cross-examine Woermann concerning the affidavit. I would therefore like to call the defendant Woermann, who is present here, to the witness stand.

COMMISSIONER STEGNER: Very well. Call Woermann.
(Ernst Woermann took the stand and testified)

[After the defendant testified on direct examination that he had no additions or corrections to make in his affidavit, he was cross-examined by the prosecution concerning the affidavit.]

14. HIGH COMMAND CASE—DISCUSSION CONCERNING THE PRODUCTION OF AVAILABLE AFFIANTS FOR CROSS-EXAMINATION AND THE SUBMISSION OF CROSS-INTERROGATORIES TO AFFIANTS WHO CANNOT REASONABLY BE PRODUCED FOR ORAL EXAMINATION

EXTRACT FROM THE TRANSCRIPT OF THE HIGH COMMAND CASE, 24 FEBRUARY 1948*

MR. HORECKY (associate counsel for the prosecution): The next offer is NOKW-643 at page 108, page 95 of the German, and offered as Prosecution Exhibit 795. It is a sworn statement of von Tippelskirch, the former Chief of the Quartermaster Department in the Wehrmacht, and it outlines the extent and purpose of the official contact between the defendant Warlimont and Rosenberg's Ministry.

PRESIDING JUDGE YOUNG: Admitted.

MR. HORECKY: I pass now to document—

PRESIDING JUDGE YOUNG: Just a minute.

DR. LATERNER (counsel for defendant von Leeb): If the Tribunal please, in the name of the defense, I wanted to state that we should like to reserve the right to cross-examine the affiants of these affidavits. This is a statement I would like to make in order to safeguard our rights.

PRESIDING JUDGE YOUNG: Are these affiants available?

MR. HORECKY: I think so, Your Honor. As far as we are informed, the affiant, von Buttler-Brandenfels is in Bavaria, and von Tippelskirch is believed to be in British custody.

PRESIDING JUDGE YOUNG: If they are available they should be produced for purposes of cross-examination.

*Extract from mimeographed transcript, U.S. vs. Wilhelm von Leeb, *et al.*, Case 12, page 1022.

MR. HORECKY: We shall certainly make all efforts if the defense desires so.

DR. LATERNER: If the Tribunal please, I didn't state just now that we want to have the affiants here for cross-examination. All I wanted to do is, I wanted to reserve the right that if we think it is necessary for us to have them here for cross-examination, we will request this to be done later; but now I want to avoid that these affiants be brought here in vain.

PRESIDING JUDGE YOUNG: Yes, you may so indicate to the Tribunal, and unless you so indicate, then there will be no requisition that they be produced. You let us know if you desire to cross-examine them and that will then be the order.

EXTRACT FROM THE TRANSCRIPT OF THE HIGH COMMAND
CASE, 9 MARCH 1948*

PRESIDING JUDGE YOUNG: That brings up one matter then that we probably may as well clear up at this time. The Tribunal has a memorandum from the prosecution's office noting there has been a request by Dr. von Keller, for defendant Lehmann, to cross-examine Colonel Kellogg, who made an affidavit submitted in connection with [Prosecution] Exhibit 1232. It is suggested by the prosecution that interrogatories be prepared in this case. Now, with respect to this matter, it will be covered with what the Court is about to announce with respect to all of the other affiants whose affidavits have been admitted: Those that the prosecution cannot procure, the Tribunal desires the prosecution to furnish to the Tribunal and to counsel a list immediately—that is, not this minute, but during the day, as you doubtless know who they are; furnish that list also to defense counsel, and defense counsel then will submit written interrogatories or cross-interrogatories on these, to these affiants, to the Secretary General's office; and an attempt will be made to procure their answer to these cross-interrogatories as soon as possible. The Tribunal didn't feel that it was necessary to fix a time for defense counsel to do that, as doubtless the defense is interested in having this done as soon as possible. The Tribunal suggests that this should be gotten out of the way, if you desire this testimony, as soon as it is reasonably possible to do so.

Does any counsel have any questions?

DR. SURHOLT (counsel for defendant Reinecke): If it please the Tribunal, this ruling of the Tribunal, is it supposed to apply to those affiants also who are living in Germany and who might be made available?

* Ibid., pages 1612-1615.

PRESIDING JUDGE YOUNG: If there are any of these affiants that can be made available, then the order of the Court has been that they should be produced here in court, and if you have any information about any of these defendants or affiants that are available, you should furnish that to the prosecution. The Tribunal will see that they give every effort that they can to procure them here for examination; but, if they cannot be procured, whether in Germany or elsewhere, then the Tribunal will use its utmost endeavors to see that you take their cross-examination by written interrogatories.

DR. SURHOLT: Thank you, Your Honor.

PRESIDING JUDGE YOUNG: Now, there is one matter pending on a written application that the Tribunal has not disposed of, I think. You had something on this matter of affidavits?

DR. VON KELLER (counsel for defendant Lehmann): If Your Honors please, I have one brief matter to mention on behalf of the defendant Lehmann. In a written application I requested that the affiant Colonel Kellogg be produced for cross-examination. Colonel Kellogg has executed an affidavit concerning the film "The Nazi Plan."* I had intended to cross-examine Colonel Kellogg on this subject because the defense is very interested in knowing—and it is very important for them to know—according to what aspects that film was compiled. The defense is interested to know why certain matters were not shown in this film, and also where the balance of the films which was not shown are to be found now. I believe that the defense is entitled to produce those parts of the films and those parts of documents which the prosecution has not submitted. This applies, for instance, to the other parts of the diplomat's box of which Colonel Kellogg has only selected one portion.

PRESIDING JUDGE YOUNG: You—

DR. VON KELLER: I am sure all these points can be ascertained more easily in a cross-examination than in written interrogatories. Therefore, it was my original suggestion to cross-examine Colonel Kellogg orally. I don't know the extent of the rights of the defense. I don't know whether the prosecution is obliged to produce an affiant and whether the defense is entitled to move that an affidavit be stricken. In this case that would apply to the affidavit executed by Colonel Kellogg, if Colonel Kellogg is not produced here for cross-examination. I believe the interrogatory is merely a substitute, and the defense would have to agree to be satisfied with that substitute. I would be obliged if the Tribunal

*The Tribunal had approved the presentation in open court of the film "The Nazi Plan" which contained various extracts from captured German files. Col. Kellogg was the American officer who certified to the circumstances under which the film had been made.

would give me some legal information concerning the rights of the defense.

PRESIDING JUDGE YOUNG: The Tribunal has ruled heretofore that these affidavits, under the basic authority, are admissible, and that would be true whether, as the Tribunal has ruled, whether or not the affiants are available for cross-examination;* but, in the interest of giving the fullest disclosure and giving the defense the advantage of that, if they are reasonably available, then the Tribunal also ruled that they should be produced in court; and, in lieu of that, if they cannot reasonably be produced in court, then, that the prosecution, if it desires, may take their testimony on cross-interrogatories. That is the ruling that the Tribunal has heretofore made and to which it still adheres. I wonder if you have taken it up with the prosecution to see if there is available here other film that you may wish to show. I don't know whether it's all been shown or not, but I think the Tribunal would not feel that merely for cross-examination with respect to other parts of the film, that it would be reasonable to call an affiant from the United States to Germany to testify to what seems to be merely a formal affidavit, particularly when doubtless his answer can be obtained on written interrogatories.

K. Affidavits and Interrogations of Defendants Made Before Trial and Introduction in Evidence by the Prosecution

I. INTRODUCTION

In each of the 13 Nuernberg trials the Tribunals admitted in evidence, upon offer by the prosecution, the transcript of pre-trial interrogations of defendants or pre-trial affidavits by defendants which had been drawn up and sworn to after preliminary interrogations. These interrogations were conducted by members of the prosecution staff or by members of other allied agencies before the defendants had been indicted and before they had been granted defense counsel.

Article 15 (c) of the Charter of the IMT declared that one of the duties of the chief prosecutors was "the preliminary examination of all necessary witnesses and of the defendants." Article 16 (b) provided that "During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him." Pursuant to these

*The Tribunal in the High Command case followed the majority rule that affidavits of deceased affiants were admissible in evidence. See sub-section L 1.

provisions concerning "preliminary examination" all of the defendants in the IMT case had been interrogated before their indictment by members of the staff of the chief prosecutors. The interrogation of defendants and witnesses at Nuernberg is discussed at some length in a separate chapter in General Taylor's "Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10," at pages 58-62.

The IMT admitted the transcript of pre-trial interrogations offered in evidence by the prosecution. The question first arose when the prosecution offered extracts from an interrogation of the defendant Goering during the prosecution's case. The defense objected on the ground that the defendant was in court and could be called to the stand to testify. The Tribunal, in overruling the objection, stated that several provisions of the Charter of the IMT provided for preliminary examinations of the defendants, and that in the opinion of the Tribunal these preliminary interrogations could be put in evidence (2 below).

The IMT ruled that the prosecution could not read from a pre-trial interrogation of a defendant without first showing it to the defendant's counsel, and that if the prosecution read parts of the interrogation into the record, the defense was at liberty to read other parts. Two extracts from the IMT proceedings concerning these matters are reproduced in 3 and 4 below.

Ordinarily the prospective defendants in the IMT case were not asked to execute affidavits embodying the substance of their pre-trial interrogations. After the defendants in the IMT case had been indicted, however, prosecution and defense counsel collaborated in working out proposed written statements by the defendants containing undisputed matter on the personal history of the defendants. These were submitted to the defendants by defense counsel for correction, verification, and signature, and the prosecution thereafter introduced these statements in evidence early in the IMT trial. These statements usually contained a brief recital of the defendant's life, the positions he held, the organizations of the Nazi Party to which he had belonged, and similar matters.

In the interrogations which were made in preparation for the later trials, the interrogators frequently submitted narrative statements to prospective defendants which embodied the main features developed by prior interrogations. The prospective defendant was asked to correct or supplement the statement, and then to swear to the truth of the contents of the statement. The last paragraph of these statements almost invariably contained the following paragraph or a paragraph of similar effect:

“I have read the above affidavit in the German language, and declare that it is true and correct to the best of my knowledge and belief. I was given the opportunity to make changes in the above affidavit. This affidavit was given by me freely and voluntarily, without any promise or reward, and I was subjected to no compulsion or duress of any kind.”

Pre-trial affidavits obtained under these circumstances were introduced in the trials following the IMT case more frequently than the transcript of the pre-trial interrogations. However, it often turned out to be important to introduce in evidence the exact phraseology which had been used by the interrogator and the defendant during the pre-trial interrogations, either because the defendant claimed that the phraseology used had been suggested by the interrogator, that the defendant had been misled, or that the defendant had given the statement under duress. The transcript of the interrogations was often used during cross-examination of defendants, whether or not a pre-trial affidavit had been introduced in evidence.

During the first trials following the IMT case, the objections to the admissibility of pre-trial affidavits by defendants generally pointed to alleged errors in the affidavits which defense counsel desired to indicate without waiting to submit counter-proof at some time in the future. This type of objection is illustrated by the objection to the first pre-trial affidavit of a defendant which was offered in the Medical case, the first trial under Ordinance No. 7. On the first day of the prosecution's presentation of evidence the prosecution offered evidence to show the positions held by the defendants in the various medical services of Germany. At that time more than 30 charts and affidavits by the defendants, which had been drawn up after interrogations by the prosecution staff before trial, were offered and received in evidence. (The transcript of the proceedings relating to the offer of the first chart, which was accompanied by an affidavit of the defendant Karl Brandt, is reproduced in 5 below.) It will be noted that there was no objection on the ground that this type of affidavit was inadmissible as such, that the defendant was being deprived of any alleged right of not giving testimony against himself, or that the defendant had not been advised that the statement he made might later be used against him in a criminal trial. Objections of this type were not made by the defense during the first trials, presumably because the IMT had admitted in evidence the pre-trial interrogations of defendants, because it did not occur to defense counsel to assert that certain Anglo-Saxon rules of criminal evidence were applicable in the Nuernberg trials, or because the defense

counsel were not completely aware of the rules of criminal evidence in various jurisdictions in America.

The first basic attack by the defense upon the admissibility of pre-trial affidavits by defendants was made in the Farben case in connection with the prosecution's first offer of an affidavit by the defendant von Schnitzler. Defense counsel argued that to admit such affidavits would be to compel the defendant to give evidence against himself, and that this was not permissible under Anglo-Saxon law. Counsel cited the Fifth Amendment to the Constitution of the United States of America. The Tribunal rejected this argument, stating that the affidavit was admissible as evidence in the nature of an admission, unless it was shown that it had been executed under duress. The prosecution then explained the manner under which the affidavit had been taken. The Tribunal then suggested that defense counsel determine whether he wished to raise an issue of fact as to duress. Subsequently a written motion was filed and read into the record and there was further argument, after which the Tribunal ruled that "as a matter of law, no showing of duress has been charged, sufficiently charged, much less has one been established." The defense motion to exclude the affidavit was overruled and the affidavit was admitted in evidence.

Since the pre-trial affidavits of a number of the defendants in the Farben case contained statements incriminating other defendants, the defense sought a ruling by the Tribunal with respect to the effect of these affidavits against other defendants in the event the defendant-affiants did not elect to take the witness stand in their own defense, and hence were not subjected to cross-examination by counsel for the codefendants. The Tribunal declared that under such circumstances the affidavits would be considered only against the defendant-affiants who executed them, and not against their codefendants. The defendants von Schnitzler, Lautenschlaeger, and Schmitz did not take the stand. The Tribunal, in response to a defense motion near the end of the trial, thereupon declared that the affidavits of von Schnitzler and Lautenschlaeger would not be considered against the other defendants. A statement by the defendant Schmitz posed a special problem, in that it had been introduced as a part of an affidavit by the defendant ter Meer. Ter Meer discussed the Schmitz statement both in his affidavit and in his testimony upon both direct and cross-examination. The Tribunal ruled that the Schmitz statement under these circumstances would be considered as to all defendants.

Judge Hebert dissented from the Tribunal's ruling concerning the affidavits of the defendants who did not take the stand, stating

that in his opinion they were admissible as against all defendants. Judge Merrell, the alternate member of the Tribunal, stated that he shared the view of Judge Hebert.

Later the Tribunal revised its ruling with respect to the Schmitz statement, declaring that it was stricken except to the extent necessary for an understanding of the ter Meer affidavit. The Tribunal stated that the Schmitz statement had been obtained under duress, since Schmitz had been shown a copy of a military ordinance which made it a criminal offense to refuse to give information to Allied authorities. In its judgment the Farben Tribunal summarized its rulings on these points, and further discussed the affidavits of the defendant von Schnitzler with respect to their probative value. (Various extracts from the Farben record on the matters noted above are reproduced in 6 below.)

In the Krupp case, where no defendant took the stand to testify to the merits of the case on his own behalf, the Tribunal followed the same rule as in the Farben case. (An extract from the judgment of the Tribunal concerning its application of the rule is reproduced in 7 below.) In most of the trials all of the defendants took the stand in their own defense and no other instances have been found where this question was squarely raised.

In the Flick case the pre-trial affidavits of defendants were admitted without objection during the prosecution's case, and some pre-trial affidavits of defendants were used during cross-examination of the defendants, but not offered in evidence at that time. During rebuttal the prosecution sought to introduce a pre-trial affidavit of the defendant Flick, which had been used by the prosecution on cross-examination. Thereupon a lengthy discussion ensued upon the initiative of the Tribunal. A number of statements were made at that time by the presiding judge which appear to have been contrary to the general theory upon which pre-trial affidavits of defendants were admitted in other cases, such as that the affidavit was not in the nature of an admission; that the prosecution made the defendant its witness by introducing the affidavit before the defense case began, and that the prosecution thereupon vouched for the credibility of the defendant. However, the presiding judge stated near the end of this discussion that Common Law rules were not binding upon the Tribunal, and the affidavit was admitted subject to a later defense motion to strike. (Two extracts from the Flick record on these matters are reproduced in 8 below.) The defense later filed a brief motion to strike all affidavits, and a brief motion to strike all documents offered in rebuttal, but no special mention was made to pre-trial

affidavits of defendants. The Tribunal denied these motions on the day of rendering judgment.

The practice of admitting in evidence, upon prosecution offer, the pre-trial affidavits by defendants continued until the end of the trials. (The transcript of the High Command case (Case 12) containing the defense objection to the first pre-trial affidavit offered, the ensuing discussion, and the Tribunal's ruling, is reproduced in 9 below.)

When the prosecution used a pre-trial interrogation of a defendant upon cross-examination of the defendant, the prosecution was required to furnish defense counsel with a copy of the statement before the defendant was excused from the stand. (A ruling from the Hostage case to this effect is reproduced in 10 below.) In many, if not in most instances, a pre-trial interrogation used during cross-examination was marked as an exhibit and introduced in evidence.

In the RuSHA case several witnesses, including two or three of the defendants, testified that an interrogator had used threats and coercion in the interrogations which preceded their signing of affidavits which the prosecution had offered in evidence. In its judgment the Tribunal stated that these affidavits had been excluded from evidence, and no consideration given to them (11 below). Apart from this ruling and the ruling in the Farben case reproduced at page 866, no instance has been found where an affidavit was stricken on the ground that the statement was involuntarily.

(Materials concerning the use by the defense of affidavits by defendants have been reproduced above in subsections H, I, and J.)

2. IMT CASE—ADMISSION OF PRE-TRIAL INTERROGATIONS OF DEFENDANT GOERING OFFERED BY THE PROSECUTION

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE, 6 DECEMBER 1945*

LT. COL. GRIFFITH - JONES [junior counsel for the United Kingdom]: Having thus summarized for the convenience, I hope, of the Tribunal, the timing of events during that last week [before the German invasion of Poland], I would ask the Tribunal to refer briefly to the remaining documents in that document book. I first put in evidence an extract from the interrogation of the defendant Goering, which was taken 29 August 1945.

*Trial of the Major War Criminals, *op. cit.*, volume III, pages 246 and 247.

DR. STAHLER [counsel for defendant Goering]: As defense counsel for the defendant Goering, I object to the use of this document, which is an extract from testimony given by the defendant Goering. Since the defendant is present here in court, he can at any time be called to the stand and give direct evidence on this subject before the Tribunal.

THE PRESIDENT [Lord Justice Sir Geoffrey Lawrence]: Is that your objection?

DR. STAHLER: Yes.

THE PRESIDENT: The Tribunal does not understand the ground of your objection, in view of Article 15 (c) and Article 16 (b) and (c) of the Charter. Article 15 (c) provides that the chief prosecutors shall undertake, among others, the duty of "the preliminary examination of all necessary witnesses and of the defendants"; and Article 16 provides that:

"In order to ensure fair trial for the defendants, the following procedure shall be followed: *** (b) During any preliminary examination *** of a defendant he shall have the right to give any explanation relevant to the charges made against him; (c) A preliminary examination of a defendant *** shall be conducted in, or translated into, a language which the defendant understands."

Those provisions of the Charter, in the opinion of the Tribunal, show that the defendants may be interrogated and that their interrogations may be put in evidence.

DR. STAHLER: I was prompted by the idea that when it is possible to call a witness, direct examination in court is preferable, since the evidence thus obtained is more concrete.

THE PRESIDENT: You certainly have the opportunity of summoning the defendant for whom you appear to give evidence himself, but that has nothing to do with the admissibility of his interrogation—his preliminary examination.

3. IMT CASE—RULING PERMITTING THE PROSECUTION TO READ AN ENGLISH TRANSLATION OF A PRE-TRIAL INTERROGATION OF DEFENDANT RAEDER AFTER SHOWING TRANSLATION TO DEFENDANT'S COUNSEL

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
27 NOVEMBER 1945*

MR. ALDERMAN [associate trial counsel for the United States]: If the Tribunal please, at this moment I have a new problem about

*Ibid., volume II, pages 321 and 322.

proof which I believe we have not discussed. I have in my hand an English translation of an interrogation of the defendant Erich Raeder. Of course he knows he was interrogated; he knows what he said. I don't believe we have furnished copies of this interrogation to defendants' counsel. I don't know whether under the circumstances I am at liberty to read from it or not. If I do read from it, I suggest that the defendants' counsel will all get the complete text of it—I mean of what I read into the transcript.

THE PRESIDENT [Lord Justice Sir Geoffrey Lawrence]: Has the counsel for the defendant Raeder any objection to this interrogation being read?

DR. SIEMERS [counsel for defendant Raeder]: As far as I have understood the proceedings to date, I believe that it is a question of a procedure in which either proof by way of documents or proof by way of witnesses will be furnished. I am surprised that the prosecution wishes to furnish proof by way of records of interrogations, taken at a time when the defense was not present. I should be obliged to the Court if I could be told whether, in principle, I, as a defense counsel, may resort to producing evidence in this form, i.e., present documents of the interrogation of witnesses; that is to say, documents in which I myself interrogated witnesses the same as the prosecution, without putting witnesses on the stand.

THE PRESIDENT: The Tribunal thinks that if interrogations of defendants are to be used, copies of such interrogations should be furnished to defendants' counsel beforehand. The question which the Tribunal wished to ask you was whether on this occasion you objected to this interrogation being used without such a copy having been furnished to you. With regard to your observation as to your own rights with reference to interrogating your defendants, the Tribunal considers that you must call them as witnesses upon the witness stand and cannot interrogate them and put in the interrogations. The question for you now is whether you object to this interrogation being laid before the Tribunal at this stage.

DR. SIEMERS: I should like first of all to have an opportunity of seeing every record before it is submitted in court. Only then shall I be able to decide whether interrogations can be read, the contents of which I as a defense counsel am not familiar with.

THE PRESIDENT: Very well, the Tribunal will adjourn now and it anticipates that the interrogation can be handed to you during the adjournment and then can be used afterwards.

4. IMT CASE—RULING THAT WHERE PARTS OF A PRE-TRIAL INTERROGATION ARE OFFERED BY THE PROSECUTION THE WHOLE INTERROGATION MUST BE FURNISHED DEFENSE COUNSEL SO THAT DEFENSE COUNSEL CAN OFFER OTHER PARTS

EXTRACT FROM THE TRANSCRIPT OF THE IMT CASE,
12 DECEMBER 1945*

MR. DODD [executive trial counsel for the United States]: Despite the fact that the defendant Rosenberg wrote this letter with this attachment, we say he nevertheless countenanced the use of force in order to furnish slave labor to Germany, and admitted his responsibility for the “unusual and hard measures” that were employed. I refer to excerpts from the transcript of an interrogation under oath of the defendant Rosenberg on 6 October 1945, which is Exhibit USA-187, and I wish to quote from page 1 of the English text starting with the ninth paragraph.

THE PRESIDENT [Lord Justice Sir Geoffrey Lawrence]: You haven't given us the PS number.

MR. DODD: It has no PS number.

THE PRESIDENT: I beg your pardon. Has a copy of it been given to Rosenberg's counsel?

MR. DODD: Yes, it has been. It is at the end of the document book, if Your Honors please, the document book the Tribunal has.

DR. ALFRED THOMA [counsel for the defendant Rosenberg]: In the name of my client, I object to the reading of this document for the following reasons:

In the preliminary hearings my client was questioned several times on the subject of employment of labor from the eastern European nations. He stated that the defendant Sauckel, by virtue of the authority he received from the Fuehrer, and by order of the Delegate for the Four Year Plan, had the right to give him instructions; that he (the defendant Rosenberg) nevertheless demanded that recruiting of labor be conducted on a voluntary basis; that this was in fact carried out; and that Sauckel agreed, provided that the quota could be met. Rosenberg further stated that on several occasions in the course of joint discussions his Ministry demanded that the quota be reduced, and that in part it was, in fact, reduced.

This document which is now going to be presented does not mention all these statements, it only contains fragments of them. In order to make it possible both for the Tribunal and the defense to obtain a complete picture, I ask the Tribunal that the prose-

*Ibid., volume III, pages 424-426.

cutation be requested to present the entire records of the statements and, before submitting the document officially, to discuss the retranslation with the defense so as to avoid misunderstandings.

THE PRESIDENT: I am not sure that I understand your objection. You say, as I understand it, that Sauckel had authority from Hitler. Is that right?

DR. THOMA: Yes.

THE PRESIDENT: And that Rosenberg was carrying out that authority.

DR. THOMA: Yes.

THE PRESIDENT: But all that counsel for the prosecution is attempting to do at the moment is to put in evidence an interrogation of Rosenberg. With reference to that, you ask that he should put in the whole interrogation?

DR. THOMA: Yes.

THE PRESIDENT: Well, we don't know yet whether he intends to put in the whole interrogation or a part of it.

DR. THOMA: I know only one thing: I already have in my hand the document which the prosecution wishes to submit, and I can see from it that it contains only fragments of the whole interrogation. What in particular it does not contain is the fact that Rosenberg always insisted on voluntary recruiting only, and that he continually demanded a reduction of the quota. That is not contained in the document to be submitted.

THE PRESIDENT: If counsel for the prosecution reads a part of the interrogation, and you wish to refer to another part of the interrogation in order that the part he has read should not be misleading, you will be at liberty to do so when he has read his part of the interrogation. Is that clear?

DR. THOMA: Yes. But then I request the Tribunal to ask counsel for the prosecution if the document which he intends to submit contains the whole of Rosenberg's statement.

THE PRESIDENT: Mr. Dodd, were you going to put in the whole of Rosenberg's interrogation?

MR. DODD: No, Your Honor, I was not prepared to put in the whole of Rosenberg's interrogation, but only certain parts of it. These parts are available, and have been for some time, to counsel. The whole of the Rosenberg interrogation in English was given to Sauckel's counsel, however, and he has the entire text of it, the only available copy that we have.

THE PRESIDENT: Has counsel for Rosenberg not got the entire document?

MR. DODD: He has only the excerpt that we propose to read into the record here at this time.

DR. THOMA: May I say something?

THE PRESIDENT: Mr. Dodd, the Tribunal considers that if you propose to put in a part of the interrogation, the whole interrogation ought to be submitted to the defendant's counsel, that then you may read what part you like of the interrogation, and then defendant's counsel may refer to any other part of the interrogation directly if it is necessary for the purpose of explaining the part which has been read by counsel for the prosecution. So before you use this interrogation, Rosenberg's counsel must have a copy of the whole interrogation.

MR. DODD: I might say, Your Honor, that we turned over the whole interrogation to counsel for the defendant Sauckel; and we understood that he would make it available to all other counsel for the defense. Apparently, that did not happen.

DR. THOMA: Thank you, Mr. President.

5. MEDICAL CASE—ADMISSION IN EVIDENCE OF THE FIRST PRE-TRIAL AFFIDAVIT BY A DEFENDANT WHICH WAS OFFERED BY THE PROSECUTION

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE, 10 DECEMBER 1946*

MR. MCHANEY (chief prosecutor): Before proceeding to the introduction of evidence on the substantive crimes charged in the indictment, the prosecution would like to admit proof on the positions held by the defendants. For this purpose we have secured affidavits from the defendants giving their personal histories. During the course of the presentation of these affidavits there will be occasion to discuss the organizations within which certain of the defendants were active, such as the medical service of the Armed Forces, the Luftwaffe, or the SS. In order that the Tribunal may more easily comprehend these rather complicated organizations, we have had charts prepared and signed by certain of the defendants who held an important office within the particular organization. These charts have been enlarged for use in the courtroom, and with the Tribunal's permission they will be placed, at the appropriate time, on the screen behind the witness box. One of them is now there. The courtroom charts are reproductions of the charts which will be submitted in evidence, except that they do not show the certification by the defendants or any notes which may be on the original. This matter is, of course, included in the translations, which Your Honor has received. Mr. Horlik-Hochwald, one of our associate prosecutors,

*Extracts from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, pages 83, 84, and 86-88.

will assist in the presentation by using a pointer to indicate the particular part of the chart under discussion. I shall discuss together those of the defendants who were active in the same organization, and the chart of that organization will then be before the Tribunal.

I would first like to take up the defendants Karl Brandt and Rostock, who worked together in the Office of the Reich Commissioner for Health and Medical Services. I offer Document NO-645, as Prosecution Exhibit 3, which is the chart of organization of the Office of the Reich Commissioner for Health and Medical Services. Karl Brandt was the Reich Commissioner, and he has drawn this chart for us.

[At this point there ensued a discussion of procedural matters relating to the offer, objection to, and admission of exhibits generally.]

MR. MCHANEY: We have offered without objection from the defense counsel, Document NO-645, as Prosecution Exhibit 3, which is the chart of the organization of the Office of the Reich Commissioner for Health and Medical Services.

DR. SERVATIUS (counsel for defendant Karl Brandt): Mr. President, I must raise an objection against the presentation of this document; at least to the extent that it has only a limited admissibility. This chart has been sworn to only to a limited extent by the defendant Karl Brandt. He has crossed out that this was a table of organization, and he has stated, as marked on the chart, that it only shows the working channels, that it shows the connection between the different offices. For example, it is obviously incorrect to show Doctor Conti in the organization chart as Chief of the Civilian System of Health, because such a position did not exist; neither was it true that the Chief of the Medical Services, Handloser, was under anyone's control or that the Reich physician was subordinated to Handloser. This chart is composed of two other charts, and the statement of defendant Karl Brandt refers only to the fact that it is a composition, and his affidavit states:

"I, Professor Karl Brandt, having been duly sworn, herewith state that I was General Commissioner and Reich Commissioner for the Medical and Health Service."

Nothing else has been stated. Therefore, I would like to avoid the impression this chart makes of showing subordination, and thereby shows the supervisory duties which the defendant Karl Brandt might have had under such circumstances. This is my statement.

MR. MCHANEY: If Your Honors please, if I may answer Dr. Servatius' objection at this time before the next gentleman speaks. I think that his remarks run more to the meaning or interpreta-

tion to be given to this chart, rather than to its admissibility. At the time of his objection we had not yet proceeded to explain how we interpret this chart and what it means; but as to its admissibility, it was drawn and signed by the defendant Karl Brandt and a translation of his statement is now before the Tribunal. As I stated, this did not appear upon the large courtroom chart because there is not sufficient room; and we did not consider it desirable to put the statements on the large courtroom charts which are not in evidence themselves. They are simply being used to make the presentation a bit more clear.

DR. HANS PRIBILLA (counsel for defendant Rostock): I also have to object against that chart. To a large extent it is a correct picture, but it only covers a limited period of time. I believe such charts are very dangerous. They make a certain suggestion, and it is believed that things have been that way during the whole time about which the whole trial centers for the time being. This chart can be acknowledged if at the same time, besides these names the date could be shown. Yesterday the prosecution said that Professor Rostock was a serious and competent scientist, the head of the University Clinic at Berlin.

Professor Rostock did maintain that position until the end of the war. First he was in charge of a very important and large surgical clinic. From this chart it appears as if the defendant had only been an associate of Karl Brandt. In addition to this, the indictment deals with his crimes which cover a period of time from 1939 until 1945. My objection is: One can understand this chart only if one considers at the same time that the defendant Rostock, for example, during the whole time, was head of one of the largest clinics in Germany, and also that he only moved into Professor Brandt's office in February 1944.

PRESIDING JUDGE BEALS: Speak more slowly.

DR. PRIBILLA: There is not very much for me to add. I only would like to ask the High Tribunal to consider this, and to remember that Rostock was only an associate from 1944 on. In 1944 the war had already progressed to such a stage in Germany that no uniform order existed any more; and it can be very well imagined that not everything that happened in other offices came to the knowledge of this office.

MR. MCHANEY: If Your Honors please, I am offering it.

PRESIDING JUDGE BEALS: The objection to the admissibility of this exhibit will be overruled. It will be admitted in evidence. If at any time in the future defendants desire to, they are not bound by this statement in the exhibit as the exhibit for the prosecution; and they may make any showing they like, either by cross-examination or when their case is opened. Proceed.

6. FARBEN CASE—VARIOUS EXTRACTS FROM THE RECORD CONCERNING THE ADMISSIBILITY OF PRE-TRIAL AFFIDAVITS BY DEFENDANTS

a. Discussion and Rulings at the Time of the First Offer of an Affidavit Executed by a Defendant Prior to Trial

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE, 28 AUGUST 1947*

MR. DUBOIS (deputy chief counsel for the prosecution): The documents which we have just offered were designed to show the nature of the program of the Nazi Party, with which we charge that Farben allied itself. Now, before we submit the documents concerning this alliance, we would first like to submit some documents which will give a general picture of Farben.

The first document, which is Document NI-5196, which appears on page 54 of the document book, and which the prosecution offers as Exhibit 11, is an affidavit of the defendant von Schnitzler made on 18 March 1947. Now, this affidavit, and other affidavits of the defendant von Schnitzler which will be offered in evidence, embody certain statements made by the defendant before American and Allied investigators in 1945. The defendant von Schnitzler was then given an opportunity to reread all such statements a few months ago and to make such qualifications to such statements as he might then desire. So that each of these affidavits contains a recital of his previous statement and, toward the end the qualifications, which he desired to make a few months ago, appear. I might also point out that the affidavits of the defendant von Schnitzler, including this one, cover many subjects and will be referred to several times throughout the trial. Although this whole affidavit is now offered in evidence, I will call the special attention of the Tribunal and the defense counsel to those portions of it which we are particularly interested in at this time. Pages 1 and 2 particularly show — of the affidavit which is on pages 54 and 55 of the document book — the power and force of Farben.

DR. SIEMERS (counsel for defendant von Schnitzler): May it please the Tribunal. As defense counsel for Mr. von Schnitzler I should like to object to the submission of this affidavit, which contains altogether 24 pages. First of all, I should like to point out a formal matter. As stated by the prosecutor, in this affidavit of 1947 numerous affidavits of 1945 are incorporated. I consider such a proceeding inadmissible. I must in this case know the

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, et al., Case 6, pages 224-236.

complete contents of the affidavits of 1945, and not just parts thereof.

Then, I must deal with a fundamental question. My objection is founded on the following three aspects:

First, I believe, that according to Anglo-Saxon law, the affidavit of a defendant should not be admitted, in the course of a trial, against him. May I point out, and excuse myself, that, as a German counsel, I do not know the law as well as the prosecution and the Tribunal; but, as far as I understand the Anglo-Saxon trial procedure, and as far as I have become familiar with it during the Nuernberg trials, the possibility to call the defendant as witness on his own behalf is given to a defense counsel. However, we may also forego calling him. If the prosecution brings the affidavit of a defendant, then the defendant, who is really a witness of the defense, becomes a witness of the prosecution. The prosecution is quite able to examine Mr. von Schnitzler when he is called to the witness box by me as his defense counsel. I do not believe that the prosecution is entitled at this time to submit statements by Mr. von Schnitzler without having heard him and without having given him an opportunity to make statements about these former declarations. This question has already been discussed in other trials. May I mention that one of the presiding judges pointed out to the prosecution that, according to his opinion, it was not usual to submit such affidavits.

May it please the Tribunal, I now come to the second point which is decisive, I believe. We are concerned with an affidavit here in which the prosecution, or the former interrogators, have caused Mr. von Schnitzler to make statements against himself. I believe that this is inadmissible. I refer to the American Constitution, that is, Amendments to the Constitution, Article V. I have given the English text of this article to the interpreter because the wording is decisive, and I myself shall read it in the German translation. Article V reads:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The decisive sentence is that nobody shall be compelled to make statements against himself.

In the book, "*Federal Criminal Law*,"* by William Atwell, it is stated on this point, at page 56, under paragraph 7, which bears the title "Witness against Self," I quote:

"That clause of Amendment V, which declares that no persons shall be compelled in any criminal case to be a witness against himself, is not limited to the defendant. It is a privilege that can be claimed by any witness. *** There is nothing more barbarous than to compel disclosures which will degrade and convict the person so compelled."

We are here concerned with an affidavit, or, in reality, a number of affidavits, intended to make Mr. von Schnitzler testify against himself. I therefore ask the Tribunal to reject this affidavit because of my objection, which is based on the American Constitution.

As a third point, I should like to supplement my second point and stress the following: I object to the manner in which these affidavits were taken. I know that this is not the time to bring the counterproof; that will be done later. However, in order to understand my train of thought, I should like to give you a few short details. On 7 May 1945, the time at which these affidavits were made, Mr. Nixon, a member of the competent commission, said to Mr. von Schnitzler: "You shall be subject to any third degree measures, except physical torture." It was pointed out to him that he would be punished, and that the interrogators had already complained that the interrogations were inadequate. The treatment in the penitentiary at Preungesheim was of a nature to increase the physical and mental pressure on my client, and it was such as to violate the sentence of the Constitution of the United States of America, so that we have to speak about compulsion in the sense of the Constitution.

May I insert here that I also make this objection on behalf of the defense counsel for the defendant Ilgner at the same time? Ilgner has given a joint affidavit with von Schnitzler, as can be seen from page 17 of this affidavit, and this was done on 15 August 1945. Ilgner was also in Preungesheim, and the same details are applicable to him which I just mentioned. With Ilgner you have to take additionally into consideration that he was actually beaten. The treatment was so severe that one cannot speak of a free testimony.

I do not wish to give you all the details. For instance, the regrettable arrest of Mr. von Schnitzler's wife, which influenced him emotionally to such an extent that he was no longer able to stand such interrogations.

*St. Louis, Missouri, Thomas Law Book Co., 1929.

I should like to point out, furthermore, that in the interrogations here in Nuernberg, too, it was not pointed out that Mr. von Schnitzler need not testify against himself; but on the contrary, it was pointed out to him from former interrogations he could be held liable for perjury, and that he might no longer be protected by the law. It was also pointed out to him that he was compelled to make statements by reason of Rule 1 of the American Military Government, paragraph 33. This allusion I consider inadmissible and wrong. This rule mentions the duty of each German to supply information, but does not deal with testimony concerning their own crimes. Therefore, I am of the opinion that this affidavit must be rejected by reason of my objection.

This is not the time, and it is useless now, to point out all these places in the affidavit which, by the very way they are worded, show how insecure and how mentally unstable Mr. von Schnitzler was during the interrogations. I do not consider it proper that such an affidavit—the contents of which I cannot object to at this time—should be submitted now, at the beginning of these far-reaching proceedings. The prosecution may examine Mr. von Schnitzler later, but should not create an incorrect and incomplete picture of the facts and the statements made by Mr. von Schnitzler.

MR. DUBOIS: May it please the Tribunal, I first would like to make a few comments on the legal aspects raised here, and then have Mr. Sprecher explain to the Tribunal the manner in which the affidavits of the defendant von Schnitzler were recently taken.

Now, first, I think there is considerable confusion in the minds of the defense counsel on the relationship between the American rule relating to self-incrimination and the question of the admissibility of an affidavit. Quite apart from the question as to whether the American Constitution and the American rules apply here, even assuming that certain American rules were to be applied here in the interest of the objectives for which they were designed, it is clear, I believe, that no statement of this character would be inadmissible in the courts of the United States. Professor Wigmore gives a good summary of this distinction between statements given before a trial and the question of whether or not a witness can be called at the trial to testify against himself.

PRESIDING JUDGE SHAKE: Counsel will pardon the interruption, but we do not believe anything would be accomplished by discussing with the Tribunal the application of the American principles, so far as the legal objection to the admission of this affidavit is concerned that you are discussing. In other words, this is not requiring the defendant to give evidence against himself. He may, throughout this trial, and to the adjournment, sit mute in the box, if he sees fit, and the prosecution cannot call him to the stand; but

this is in the nature of an admission which is an entirely different category and I feel, on behalf of the Tribunal, that you would help us most if you would discuss the factual situation here as to whether or not there was any coercion on this defendant in the taking of this affidavit.

MR. DUBOIS: I would like Mr. Sprecher to explain, in detail, just the manner and method of the taking of this affidavit.

MR. SPRECHER (chief, Farben trial team for the prosecution): May it please the Tribunal, Document NI-5191, which appears on pages 107 and following in Document Book 2—I'm sorry, I didn't realize we had a new document book here. In Document Book 2—

DR. PELCKMANN (counsel for defendant von Knieriem): I object formally to reference to a document from Document Book 2, since all defense counsel received Document Book 2 only yesterday in the afternoon and the 24-hour rule has not been observed.

PRESIDING JUDGE SHAKE: Perhaps we can expedite matters a bit if the Tribunal may address an observation to counsel for the defendant who first spoke.

We have a very high regard for the integrity of counsel, and on most matters we take your word, incidentally, but there are certain features of practice that must be observed here. There is nothing before this Tribunal at this time challenging the circumstances under which this affidavit was obtained. I may say that, assuming what counsel said about the defendant having been under restraint, there would have to be a formal showing to the Tribunal on that issue before the Tribunal would feel free to interrupt the proceeding to go into what might be termed a collateral issue. If counsel can say to the Tribunal that he does, in good faith, wish to make a showing to this Tribunal, by a formal pleading, that this affidavit, now offered in evidence, was obtained under duress and coercion to such an extent that it is not the free and voluntary act of the defendant, the Tribunal will accord him an opportunity to make that showing in the protection of the fundamental rights of this defendant. Otherwise, we are clearly of the opinion that, as an admission, it is admissible, notwithstanding the fact that the defendant could not be called to testify against himself.

MR. SPRECHER: Your Honor, the document I was about to refer to, before Dr. Pelckmann made his objection in the middle of a sentence I was making, was a statement of the defendant von Schnitzler himself concerning the very circumstances under which the affidavits were taken in the year 1945; and the prosecution, after it has been asked by the Tribunal to do something, would particularly appreciate having a little leeway to try to comply as officers of this court, so that we can really comply with your wishes without interruption.

Now, the affidavit which is embodied in NI-5191 does state to the Tribunal some of the circumstances under which the defendant von Schnitzler was treated in 1945, from his point of view, and I do not see anything in that statement which would indicate that, at that time, there was any duress whatsoever upon the defendant von Schnitzler. He was interrogated by representatives of the Allies over a long period of time. He claims that on occasion a number of things were done by American soldiers or by other persons in the jail unbecoming to a man of his age. We do not wish to make this a forum for testing whether or not the defendant von Schnitzler, at one time or other, had to scrub floors on his knees and skinned his knees, which is one of his claims; but the general statement as to how he worked at that time and the friendliness that he established between himself and the actual interrogators will appear in this statement, and I, unless you request it, do not intend to go into the details of it. But the main point that I wish to make is that, at the time this affidavit—NI-5191—was made, which was in March of this year, all these prior statements and affidavits—many of them in the handwriting of the defendant von Schnitzler himself which he sometimes volunteered, which he sometimes was asked to make, concerning many topics—these were all laid before the defendant von Schnitzler again in my presence, and he read from them as long as he chose. When he was done he made his further comments in an interrogation, and thereafter, from the record of the interrogation, which he also initialed, either the defendant von Schnitzler or myself drew up some statements concerning further qualifications which the defendant von Schnitzler had, concerning the statements he had made in 1945.

Now, Dr. Siemers did not honor us with any statements concerning any duress at that time, and I don't think that it is quite fair to say that this affidavit which we are introducing here, which is an affidavit of March 1947, which merely incorporates by reference some statements made in the year of 1945, was obtained under duress. I think it is something of an uncalled-for inference against the American authorities as a whole, and we sincerely feel injured in that respect. Now we have really tried here to get before Your Honors the truth in this whole matter in the best way we know, and we have this morning, I think, had perhaps around one-half hour out of the total morning, during which we could start to get before you certain facts which might lead towards the truth. I have hesitated to rise before, when certain statements were made this morning concerning the prior practice in the IMT case. I had the very great honor of being there also. No references were made to the actual rulings, and I certainly had some

disagreements with some of the statements which were made. But I did not think it would be helpful to try to make this a forum for great debate concerning these general principles which allegedly had a certain fixed and final purpose in the IMT case. Your Honors, I have made myself available to all these defense counsel on all these matters whenever they have asked me any questions during the past several months, and I shall continue to do so, in the very great hope that we may be able to avoid a lot of dilatory practice and so that we can get forward with the evidence, which I trust is the purpose of all of us in this courtroom.

PRESIDING JUDGE SHAKE: With due regard and due respect to the observation of the counsel for the prosecution, the Tribunal can hardly classify as dilatory the statement of reputable counsel that his client was coerced into signing an affidavit offered in evidence against him. The situation would not be aided by the fact that the affidavit might recite that it was freely given. For instance, if a man should sign an affidavit before us here, reciting that he freely and voluntarily made it, and yet it was shown that he signed it at the point of a gun under threat of death if he did not sign it, the situation would not be aided by the fact that the affidavit recited that it was freely made.

I think we can bring this matter to focus by asking counsel for the defendant, as an officer of this court, if he feels that there is such a serious question, with reference to his client having been coerced into signing this affidavit, that he would be justified in asking time to present it by written motion, verified by his client and raising an issue of fact as to whether or not the affidavit was freely executed.

DR. SIEMERS: May it please the Tribunal, the matter is not quite so simple. Mr. Sprecher is undoubtedly right when he says that one must make a distinction between the interrogations in 1945 and those in 1947. As far as I am able to survey the complex state of affairs, in 1945, as I already mentioned, doubtful measures were used. I emphasize that as far as I can see, in the interrogations here by the prosecution in 1947 this is not applicable at all—that is to say, such doubtful methods were not used, a fact which I realize quite clearly, and I did not expect anything otherwise from this prosecution.

However, I should like to object here to the fact that this is an affidavit which constitutes a combination of the former and the present affidavits, and in which I am not even able to take in all the details at a glance. It is extremely difficult, for the very scope of this subject is very large. All the affidavits available to me at present are in German, while the originals are in English. If I believe that the present proceedings of the interrogation also do

not agree with Article V [of the Amendments to the Constitution], with the fundamental rights of my defendant, then I base this [belief] on the well-known fact that in such matters an extreme mental pressure may exist, and that the statements I am making here refer to 1947. This is part of the affidavits, except that the defendant was not told: "You do not have to testify against yourself." If—

PRESIDING JUDGE SHAKE: If counsel will pardon the interruption, the only matter now before the Tribunal is the admission of an affidavit dated 18 March 1947; and unless counsel is in a position to say that in good faith he wishes to raise an issue as to whether or not his client was under coercion and restraint when he executed the affidavit of 18 March 1947, there is nothing before the Tribunal.

DR. SIEMERS: Mr. President, then I would like to ask you to be kind enough to see that the prosecution makes available to me the original which is made in English, and that I be afforded the opportunity to look over the original, and these originals of 1945 which I do not know, so that I can discuss them with my client and ask him about them. These are documents which have not yet been submitted here. Then I would be able to inform the Tribunal definitely about my point of view.

PRESIDING JUDGE SHAKE: The Tribunal deems that a reasonable request, and the prosecution will be asked for the time being to withdraw the offer of Exhibit 11 to afford counsel for the defense the opportunity to see the original and to discuss the matter with his client, to determine whether or not he wishes to raise an issue of fact as to whether the affiant was under coercion or restraint on 18 March 1947 when he executed the document.

b. Ruling of the Tribunal upon the Defense Motion That the Pre-Trial Interrogations of the Defendant von Schnitzler were not Voluntary Statements¹

**EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
2 SEPTEMBER 1947²**

PRESIDING JUDGE SHAKE: The Tribunal will once again reiterate what it has already said, that it is its mature conclusion that the voluntary admission of the statement of a defendant, made before trial, does not violate the legal concept that a defen-

¹ This ruling was made after Dr. Siemers, counsel for the defendant von Schnitzler, had read into the record a motion which quoted at considerable length from the first interrogation of the defendant von Schnitzler in Nuernberg on 18 February 1947. The prosecution had replied, quoting further extracts from the interrogation and later interrogations of the defendant. This argument is recorded in the mimeographed transcript, *U.S. vs. Carl Krauch, et al.*, Case 6, pages 298-316.

² *Ibid.*, pages 316 and 317.

dant, in a criminal prosecution, may not be required to give evidence against himself. We trust that it will not be necessary to state that again during the course of this hearing.

We are presently concerned only with the question as to whether the affidavit offered in evidence by the prosecution was executed under such circumstances as to force the conclusion that it was not freely and voluntarily made. Counsel will recall that, when the objection was offered, it was stated from this bench that the charge would have to be directly asserted and established in order to obtain a ruling to the effect that the affidavit was inadmissible. On the basis of the record before us, we must and do hold that, as a matter of law, no showing of duress has been charged, sufficiently charged, much less has one been established. That is to say, taking and accepting the facts asserted as true, they do not disclose that this defendant was under duress or suffering from coercion at the time of the execution of the affidavit offered by the prosecution.

We should like to take advantage of the opportunity to say to counsel that a charge of fraud and duress is a serious charge and ought not to be made ill-advisedly. A considerable part of the time of the Tribunal has been consumed in what now appears to have been an idle inquiry. We cannot believe that counsel for the defendant would have asserted this charge if he had been in full possession of the facts, or if he had inquired of his client the surrounding circumstances before he made the objection; and we offer the further observation that, so far as the record before us now stands, there is no basis whatever in law or in fact for the conclusion that the prosecution was guilty of any improper conduct in the obtaining and the offering of the affidavit.

The objections to the introduction of the affidavit are now overruled and the record may show the affidavit in evidence.*

*On 29 April 1948, counsel for the defendant von Schnitzler moved that the Tribunal reconsider its earlier decision with respect to the admissibility of affidavits of the defendant von Schnitzler which were executed in the year 1947. On 1 June 1948, the Tribunal reaffirmed this ruling and its earlier rulings of 28 August 1947 in the following language:

"PRESIDING JUDGE SHAKE: The Tribunal now reaffirms its ruling made at the beginning of this case, namely, on 30 August 1947, with reference to the exclusion of affidavits made in 1947 by reason of an attempt to show duress in 1945 and 1946. The Tribunal will stand on the ruling made then and the ruling is now the ruling of the Tribunal. (*Tr. p. 14541.*)

* * * * *

"Just one thing further; in ruling on these motions of Dr. Siemers, I omitted to say that his motion to strike from the evidence the exhibits consisting of statements of Dr. von Schnitzler, which were offered by the prosecution and which are enumerated in his motion, is likewise overruled. The Tribunal will not strike those affidavits from the evidence." (*Tr. p. 14546.*)

The ruling mentions the date "30 August 1947." Actually the Tribunal did not sit on 30 August 1947, and the initial rulings with respect to the affidavits of the defendant von Schnitzler were made on 28 August and 2 September 1947, as indicated by the extracts from the transcript reproduced immediately above.

c. Ruling that the Pre-Trial Affidavits of One Defendant Will Not Be Considered as Evidence against Codefendants when the Defendant-Affiant Does Not Elect to Testify and Therefore Cannot be Cross-Examined by Counsel for the Codefendants

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
2 DECEMBER 1947*

PRESIDING JUDGE SHAKE: One of the matters that the Tribunal has had under consideration relates to some inquiries that were propounded by counsel for the defense concerning the matters of cross-examination of defendants whose affidavits have been introduced in evidence by the prosecution.

We are now stating for the record the view of the Tribunal on that subject.

A number of affidavits, given by various defendants, have been introduced in evidence as a part of the prosecution's case in chief. These affidavits were admitted by the Tribunal upon the theory that, at least against the makers, they constituted admissions of the individual who made them. These affidavits also contain statements involving defendants other than the makers.

This Tribunal has previously ruled that the broad, general principle that a defendant is entitled to interrogate those who testify against him is applicable in this trial. According to this principle, a defendant against whom evidence is presented in the form of an affidavit of another defendant is entitled to interrogate the maker of the affidavit.

The Tribunal is also mindful of another principle of fundamental right which is, that a defendant may not be compelled to take the witness stand against his will and thus risk becoming a witness against himself.

It therefore becomes our duty to resolve and apply the two principles that we have just stated with respect to the cross-examination of one defendant who has given an affidavit containing evidence against a codefendant.

As to this matter we have reached this following conclusion:

One defendant has no right to call another defendant to the witness stand over the latter's objection. If a defendant voluntarily takes the witness stand, he thus becomes a witness for all purposes, and he may be cross-examined by the prosecution. If the defendant on the stand has given an affidavit that has been introduced by the prosecution, which contains evidence against

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, pages 4493 and 4494.

another defendant, the latter may cross-examine him within the scope of the matters set forth in the affidavit, which are adverse to the defendant in whose behalf the cross-examination is being conducted.

If the prosecution has introduced in evidence the affidavit of a defendant who does not take the witness stand and thus does not become subject to interrogation by other defendants, the Tribunal, upon proper motion, will enter upon the record an order to the effect that the affidavit will not be considered as evidence against defendants other than the affiant.

[Judge Hebert later in the day stated that "I am not prepared, however, to say that if an eventuality should arise in which one of the defendant should elect not to take the stand, that his affidavit should not be considered in evidence for all purposes and against all defendants." Judge Hebert's full statement, which was made in connection with the Tribunal's ruling concerning the affidavits of deceased affiants, is reproduced in full in subsection L 2 f.]

d. Order Granting the Defense Motion that Affidavits of Defendants Who Did Not Testify Will Not Be Considered as to Other Defendants, and Dissent of Judge Hebert to This Order

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
11 MAY 1948*

PRESIDING JUDGE SHAKE: Since the rulings which the Tribunal is about to make may have some direct or indirect influence on the subsequent procedure in the trial, even at the risk of consuming a little time, we should like to clear the decks of some pending matters. Judge Morris has a motion on which he will rule on behalf of the Tribunal.

JUDGE MORRIS: The motion now under consideration is that filed 5 May 1948, by Dr. Rudolf Dix, representing all of the defendants; and with respect to statements heretofore made by the Tribunal as to affidavits of defendants who have not taken the witness stand and therefor have not subjected themselves to examination and cross-examination. The motion proposes that these affidavits be stricken with respect to defendants other than the affiants.

The Tribunal rules with respect to such affidavits, being those of the defendants von Schnitzler and Lautenschlaeger, that the consideration of the affidavits of these affiants who have not taken the witness stand is restricted to the affiants, and such affidavits are not considered as evidence against defendants other than the affiants themselves.

*Ibid., pages 14249-14255.

The motion also includes an affidavit of [defendant] Dr. ter Meer, Document NI-5187, being Prosecution Exhibit 334, dated 22 April 1947, in which Dr. ter Meer sets forth a quotation from a statement given to him by [defendant] Dr. Schmitz, which the affiant ter Meer discusses at considerable length in his affidavit.

It is the opinion of the Tribunal, and it therefore rules, that the entire affidavit of Dr. ter Meer, who did go on the witness stand, is admissible in evidence and will be considered with respect to all defendants, and that the statement of Dr. Schmitz will not be stricken therefrom as requested by the motion.

JUDGE HEBERT: For the record I wish to make one brief statement. I recognize that the ruling just entered by the Tribunal is procedurally proper at this time as being consistent with the theory upon which this case has been tried to date, and because it is in harmony with the ruling of the Tribunal that was previously announced on this general subject. But for the record it will be recalled that when this matter was earlier under consideration, I stated at that time that I was not prepared to say that, in the event a situation should develop in which one of the defendants should not take the witness stand, his affidavit might not be considered in evidence for all purposes and against all defendants.

Since that time, I have had the opportunity to give further consideration to the general question involved, and I deem it a matter of considerable importance in relation to the procedure in the conduct of war crimes trials generally. Based upon my subsequent studies, I am more firmly convinced than ever that the entire series of rulings of the Tribunal, with reference to the admissibility of affidavits, is in error and in derogation of the provisions of Military Ordinance No. 7.

I am convinced that one of the principal purposes in providing for the admissibility of affidavits, in derogation of the ordinary hearsay rule, was to provide a means for the perpetuation of evidence in the form of affidavits, in recognition of the very practical problem that the affiants might not be produced when the trial was in progress. I say that that is one of the purposes. I think there were other purposes, such, for example, as to facilitate the presentation of evidence and of course the negative also—the hearsay rule.

The entire series of rulings is predicated upon the idea that unless the affiant, where the prosecution introduces an affidavit, is subjected to cross-examination, the affidavit is not admissible, because cross-examination is deemed to be a matter of right, and the affiant is considered as a witness giving testimony against the defendants.

I believe that that is in violation of the rule of construction that

you should attempt to give effect and force to all provisions in construing a statute or a procedural ordinance of the type that is here involved, and that this is not the correct interpretation of Military Ordinance No. 7; or, to sum up, that affidavits are admissible, even though the affiant cannot be produced for cross-examination, regardless of the reason for which he cannot be produced—whether he is not available within the jurisdiction, whether he is deceased (as in the case of the Hoess affidavit), or whether he is a defendant who claims the privilege against self-incrimination and does not elect to take the witness stand.

So, with those reservations, and recognizing, however, that inasmuch as this case has been tried upon the theory that these statements in affidavits would be disregarded insofar as codefendants are concerned, I express my disagreement generally with the ruling.

JUDGE MERRELL (alternate member of the Tribunal): Having in mind my contingent responsibility as an alternate member of this Tribunal, it is incumbent upon me to state, for the record, my position on the question concerning the admissibility of evidence as to which the Tribunal, by a majority of its members, has just made a ruling.

[The full statement of Judge Merrell is reproduced in section XXII C.]

PRESIDING JUDGE SHAKE: I merely wish to state for the record that I concur with the views expressed and the ruling made on behalf of the Tribunal by Judge Morris.

e. Order of the Tribunal concerning the Inadmissibility of the Statement of Defendant Schmitz

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY

24 MAY 1948

[Stamp] Filed: 25 May 1948

United States of America

vs.

Carl Krauch, *et al.*,

Defendants

ORDER*

CASE 6

On 12 May 1948, Dr. Rudolf Dix, on behalf of the defendant Hermann Schmitz, filed a motion to strike from the Prosecution Exhibit 334 (an affidavit of the defendant ter Meer) the affidavit

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 52, pages 2690-2692.

of the said Schmitz contained therein. A brief review of the pertinent parts of the record is necessary.

On 5 May 1948, Dr. Rudolf Dix, counsel for the defendant Schmitz, filed a motion in which it was stated that in May 1945, Major Tilley, acting for the United States Government, conducted an interrogation of said Schmitz during the course of which he "called the defendant's attention to the fact *that he would incur 20 years' imprisonment if he should not say the truth, or not testify at all.*" (Our emphasis.)

Said motion further recited that on 11 September 1945, one Lawrence Linville conducted a further interrogation of the defendant Schmitz in the course of which the following occurred:

"Q. I call your attention to Ordinance No. 1, Article No. 2, Section No. 33, as issued by the Military Government. (Handing a copy of the Ordinance to the witness, who reads the indicated section.)

"A. Yes. I have read it."

On 10 May 1948, the prosecution stipulated on the record (*Tr. p. 14053*) as follows:

"For the purpose of this proceeding, we will stipulate on the basis of Dr. Dix' statement, that such an interrogation did take place as indicated in his motion."

The following also appears on page 14054 of the transcript:

"The President: Do we understand, Mr. Prosecutor, that you are willing to stipulate for the purposes of the matter under controversy that the interrogation, the questions and answers that were contained in the showing made by Dr. Dix, are correctly reported to the Court in Dr. Dix' statement?

"Mr. Sprecher: That is correct, Mr. President."

Military Government Ordinance No. 1, referred to above, was promulgated 16 August 1945, and provided as follows:

"The following offenses *are punishable by such penalty other than death* as a Military Government Court may impose:

* * * * *

"33. Knowingly making any false statement, orally or in writing, to any member of, or person acting under the authority of, the Allied Forces in a matter of official concern, or in any manner defrauding, *or refusing to give information* required by, Military Government." (Our emphasis.)

At the time the above-described incidents occurred the defendant Schmitz was under detention by the American Military authorities, having been arrested on 7 April 1945.

The question to be decided is, therefore, whether the purported

statement of the defendant Schmitz contained in Prosecution Exhibit 334 can be regarded as his voluntary statement against interest.

The ruling announced for the Tribunal by Judge Morris on 11 May 1948 (*Tr. p. 14249-14250*) had reference to the admissibility of affidavits made by defendants who did not take the witness stand, generally, and was not directed to the subject of any alleged duress or coercion under which such affidavits were obtained.

There is no more fundamental concept of enlightened jurisprudence than that one charged with crime may not be compelled by force, fear, threats, or intimidations to give evidence against himself. Indeed, most modern judicial systems recognize that a defendant in a criminal case may refuse to testify in his own behalf without the risk of creating any inference or presumption of his guilt. This Tribunal is not disposed to ignore these basic human rights.

It 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.

We conclude, therefore, that the statement of the defendant Schmitz, bearing date of 17 September 1945, appearing in the affidavit of the defendant ter Meer, Prosecution Exhibit 334, is inadmissible as the voluntary statement of the defendant Schmitz. The said statement of the defendant Schmitz will not be considered as evidence of the facts purported to be set forth therein, and remains in the record only insofar as it may be necessary for a proper understanding of the statements of the defendant ter Meer as set forth in his affidavit, Prosecution Exhibit 334.

[Signed] CURTIS G. SHAKE
Presiding Judge

[Signed] JAMES MORRIS
Judge

Dated this 24th day of May 1948.

f. Statements from the Judgment of the Tribunal in the Farben Case Concerning Pre-Trial Affidavits by Defendants*

PRESIDING JUDGE SHAKE: *Interlocutory Rulings*: It is deemed

* Extracts from mimeographed transcript, U.S. vs. Carl Krauch, et al., Case 6, 29 July 1948, pages 15643, 15644, 15697, and 15698.

appropriate to call attention to some of the more significant rulings made by the Tribunal during the progress of the trial.

* * * * *

(b) During the presentation of its case in chief, the prosecution offered a number of statements made by defendants prior to the filing of the indictment. These offers were objected to on the ground that such defendants would thereby be compelled to give evidence against themselves, in contravention of fundamental principles of enlightened criminal jurisprudence. The Tribunal ruled: (1) That, if voluntarily given, such statements were competent as admissions against interest; but (2) that if the defendants making such statements did not take the witness stand and thereby subject themselves to cross-examination, such statements would not be regarded as evidence against the other defendants, but that the Tribunal would limit its consideration thereof to the defendants making such statements. In one instance the Tribunal rejected the purported statement of a defendant upon a showing that the same was given while said defendant was under duress.

* * * * *

JUDGE MORRIS: Von Schnitzler has been in confinement since he was arrested on 7 May 1945. He was interrogated many times during the course of his imprisonment. His utterances, some of great length, appear in 45 written statements, affidavits, and interrogations, a number of which have been introduced in evidence. His counsel sought to have all of these statements stricken upon the ground that they were given under threats, duress, and coercion. He claimed that his client had been mistreated, insulted, and humiliated while in prison, and that this treatment resulted in his mental confusion to the extent that he eagerly cooperated with the interrogators in the hope of better treatment and with considerable disregard in many instances for actual facts. We do not think that the showing discloses such duress as would warrant us in excluding this evidence upon the ground that the statements were involuntary, although the circumstances under which they were given undoubtedly greatly depreciate their probative value. The statements themselves disclose that von Schnitzler was seriously disturbed and no doubt somewhat mentally confused by the calamities that had befallen Germany, his firm of Farben, and himself personally. He was extremely voluble. He talked and gave statements in writing to his interrogators with seeming eagerness and in such detail as to both facts and conclusions that we regard selected passages that contain seemingly damaging recitals as having questionable evidentiary value. Some of his later statements change and purport to correct former ones. His

eagerness to tell his interrogators what he thought they wanted to know and hear is apparent throughout; as, for instance, this statement which has been emphasized by the prosecution: "In June or July 1939, I.G. Farben and all heavy industries well knew that Hitler had decided to invade Poland if Poland would not accept his demands."

Von Schnitzler did not take the witness stand. Pursuant to a ruling of this Tribunal during the course of the trial, his statements are evidence only as to the maker, and are excluded from consideration in determining the guilt or innocence of other defendants. Aside from these statements, the evidence against von Schnitzler does not approach that required to establish guilty knowledge.

7. KRUPP CASE—STATEMENT FROM THE JUDGMENT CONCERNING THE TRIBUNAL'S CONSIDERATION OF PRE-TRIAL AFFIDAVITS OF DEFENDANTS IN VIEW OF THE FACT THAT NONE OF THE DEFENDANTS ELECTED TO TESTIFY UPON THE ISSUES¹

PRESIDING JUDGE ANDERSON: The Tribunal ruled to the effect that the contents of affidavits made by defendants would only be considered as evidence against the respective affiants and not as against any other defendant unless such affiant or affiants took the witness stand and became subject to cross-examination by the other defendants or their counsel. None of the defendants took the stand to testify upon the issues in this case, and hence such affidavits have only been considered in accordance with the ruling made.

8. FLICK CASE—DISCUSSION OF THE EFFECT OF THE USE BY THE PROSECUTION OF PRE-TRIAL AFFIDAVITS AT VARIOUS STAGES OF TRIAL

EXTRACTS FROM THE TRANSCRIPT OF THE FLICK CASE DURING THE PRESENTATION OF REBUTTAL DOCUMENTS BY THE PROSECUTION, 6 NOVEMBER 1947²

PRESIDING JUDGE SEARS: Let's see, you produced Flick as a witness did you not, or did he go on first in his own defense?

[This discussion arose at the beginning of the presentation of a number of documents which the prosecution intended to introduce as rebuttal documents.

¹ U.S. vs. Alfred Krupp, et al., Case 10, volume IX, this series, page 1328.

² Extracts from mimeographed transcript, U.S. vs. Friedrich Flick, et al., Case 5, pages 10074-10079 and 10084.

Many of these documents had been used during cross-examination of defendants and defense witnesses, at which time they had been marked for identification but not offered in evidence. One of the documents was an affidavit of the defendant Flick, Document NI-3122, marked as Prosecution Exhibit 767 for identification, which had been used during the cross-examination of defendant Flick.]

MR. LYON (chief, Flick trial team for the prosecution): He went on first in his own defense, Your Honor.

PRESIDING JUDGE SEARS: Weren't there any affidavits of Flick?

MR. LYON: Yes, Your Honor.*

PRESIDING JUDGE SEARS: Then you produced him as a witness?

MR. LYON: I am not entirely sure I understand the implications in your statement, Your Honor.

PRESIDING JUDGE SEARS: Well, when you produce an affidavit it is the same as though you call a man to the witness stand.

MR. LYON: With respect to defendants, I had always assumed that it was a form of admission, Your Honor.

PRESIDING JUDGE SEARS: Those weren't admissions. Of course, if they were admissions, casually, in a conversation, yes; but not when you introduce an affidavit. It could be a confession, but a confession has to be under certain formalities, and you can't show an admission by an affidavit of the admitting party obtained by the prosecution. In the state of New York he would be clearly a witness. I know there are some divergent rulings on the matter.

JUDGE RICHMAN: In the State of Indiana the affidavit wouldn't be admissible at all.

PRESIDING JUDGE SEARS: No, it wouldn't be admissible at all in the State of New York, either, because you have to produce the witnesses.

JUDGE RICHMAN: In the State of Indiana this interrogation would not have been permitted, either.

MR. LYON: Your Honor, I am not quite clear whether a question is being put to me—

PRESIDING JUDGE SEARS: Well, as to what the purport of these matters are?

MR. LYON: Well, I can explain them one by one, Your Honor, if the Court desires.

PRESIDING JUDGE SEARS: All right.

MR. LYON: I had considered the possibility of offering the entire [document] books *en bloc*, but I take it the defense would not be agreeable to that.

JUDGE RICHMAN: The Court wouldn't either.

MR. LYON: The first document which appears in the book, page

* At this point reference is made to several pre-trial affidavits of the defendant Flick which the prosecution had introduced during its case in chief.

1, is some sworn statements by the defendant Flick. It is rather lengthy.

JUDGE RICHMAN: Are you offering it in evidence?

MR. LYON: Your Honor, I would like to offer it in evidence, I will explain the portions that I would particularly point to, if Your Honor desires.

DR. DIX (counsel for defendant Flick): I have to object, Your Honor. This is a questionnaire dating a long, long time back, an interrogation of the defendant Flick, and I don't see any reason whatsoever that it is introduced now in rebuttal. As I understood Mr. Lyon, in cross-examination of the prosecution, it had received a number for identification because the prosecution put a part of this questionnaire to the witness. However, it was not introduced in evidence.

[During the cross-examination of defendant Flick the following colloquy had taken place (*Tr. p. 3609*):

"MR. ERVIN (deputy chief of counsel for the prosecution): If Your Honors please, there are a few documents which will be referred to in cross-examination. I would like to adopt the practice of marking these for identification and submitting them in a document book in rebuttal. I would therefore ask to have the completed questionnaire of the defendant Flick, which is sworn to on 29 November 1946, marked as Prosecution Exhibit 767 for identification.

"PRESIDING JUDGE SEARS: 767.

"MR. ERVIN: I believe that is the next number in order.

"PRESIDING JUDGE SEARS: For identification. It may be so marked.

"MR. ERVIN: I have furnished the defendant with the original in his handwriting of the portion of which I am to read."]

It doesn't have an exhibit number yet. I don't think, Your Honor, that such a document should be admitted in rebuttal. Also, Your Honor, I know that the legal conceptions concerning the admissibility of affidavits made by the defendants and the introduction of them in the case in chief are much divergent in the United States—

PRESIDING JUDGE SEARS: Yes, they are.

DR. DIX: And it should be examined also whether it isn't a basic principle of American law to have the defendant in the case in chief only heard if he agrees and his defense counsel agrees, and whether this principle should not be complied with because it is violated if, in the case in chief, a previous affidavit of the defendant is introduced. But first of all, I object because I think that this document should by no means be admitted in rebuttal.

MR. LYON: Your Honor, I think Dr. Dix' statements are based on one conception with which the prosecution would differ. There is such a thing as introducing documents on cross-examinations which is a familiar practice, at least in some states. It hasn't been followed at Nuernberg for technical reasons having to do with the difficulties of processing documents, and the practice that has been followed has been to postpone the formal introduction of documents, used on cross-examination which the prosecution does desire to introduce into evidence, because it is just not practical to submit separate documents.* I think Mr. Ervin stated when the first document was used, that that was the practice that had been followed here and that for mechanical reasons we would do the same, so that it seems to me it is not necessary for the prosecution to prove that it is strict rebuttal material if it is the kind of document which could be introduced on cross-examination.

JUDGE RICHMAN: Now, wait a minute, not if it is the kind of document that could have been used; it was actually used on cross-examination.

MR. LYON: I say if it could have been introduced into evidence, Your Honor.

JUDGE RICHMAN: Well, I understood you to say that you thought you were entitled to introduce it if it is the kind of document that could have been used on cross-examination.

MR. LYON: In that case I did not make myself clear, Your Honor. I recognize that there are many uses for documents on cross-examination which do not necessarily entitle them to be introduced into evidence. On the other hand, there is a practice in some jurisdictions of introducing certain documents in the course of cross-examination. But here it is just a mechanical matter, and impractical to introduce documents on cross-examination, in view of our language difficulties and the processing problems; so that it seems to me the tests to be made here are whether the document is admissible either as a rebuttal document or as the kind of document that could be introduced into evidence in the course of a cross-examination.

PRESIDING JUDGE SEARS: Well, this whole statement is not contradictory of anything that has been proved, is it?

MR. LYON: It is contradictory to several things that the—

PRESIDING JUDGE SEARS: Not the whole statement.

MR. LYON: Oh no, Your Honor.

*With respect to the practice of the earlier trials, see the extract from the Medical case (Case 1) concerning exhibits marked for identification during the cross-examination of defendant Poppendick. This extract is reproduced in subsection G 6. In the trials following the Flick case it was generally customary to offer in evidence documents used during cross-examination, at the time of their use during cross-examination, rather than as a part of rebuttal. This was also the practice in the IMT case.

PRESIDING JUDGE SEARS: Well, can't you take out certain parts here?

JUDGE RICHMAN: What parts do you think are contradictory to anything that has been stated by the witness?

MR. LYON: There are, I should say, three or four points, Your Honor, which I will be glad to explain. First, on direct examination, the witness Flick said that he contributed a million marks toward the defeat of Hitler in an election of 1932. His prior statement had given a figure of only five hundred thousand marks, which is no small difference. It goes to the facts and also, in the opinion of the prosecution, goes to the credibility of the witness. Furthermore, an affidavit was submitted by the defense by a man named Gehlofen which was said to indicate, as explained by Flick, that an additional five hundred thousand marks had been contributed. To this extent the document is proper rebuttal material, in our opinion.

Furthermore, all this evidence—

PRESIDING JUDGE SEARS: Do you think it really makes any difference whether he gave a million or five hundred thousand?

MR. LYON: I think it makes a difference with respect to his credibility, Your Honor.

PRESIDING JUDGE SEARS: Well, but you produced affidavits from him, so you vouch for his credibility even though he was a defendant. I know there is a difference of rulings in different jurisdictions on that. With us, the jurisdiction I am familiar with, you are bound by the credibility of the defendant in a civil case if you call him as a witness.

MR. LYON: Your Honor, that is not a practice that has been followed by any Tribunal in Nuernberg, and I must confess it has taken me very much by surprise.

PRESIDING JUDGE SEARS: It was the rule in England, and it is based on an English law. There was a case in New York on it in 1949 or 1950. It was a civil case.

MR. LYON: Well, if it is a matter of trying to suggest to the Court what in our opinion would be a desirable rule—

PRESIDING JUDGE SEARS: You have that right because we are not bound by the rules of common law.

MR. LYON: It is certainly the view of the prosecution that such a rule is in no way necessary to protect the rights of the defendant and would place an artificial, or fictional assumption upon the testimony of the defendant to the effect that the prosecution endorsed it or was bound by it. It seems to us that it aids in the ascertainment of the truth to introduce into evidence admissions of as much as the defendants are willing to admit.

Certainly, we don't necessarily expect to—

PRESIDING JUDGE SEARS: Well, there can't be any necessity for 30 pages of record here on that point.

[Here followed a further discussion until the afternoon recess concerning what the defendant Flick had testified upon cross-examination and to what extent he had been questioned at that time about particular statements in the affidavit.]

(Afternoon Session)

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE SEARS: I observe that all the defendants are present in the courtroom.

Mr. Lyon, we have all too little time to give a final examination to this question, but we want to say first that a mere repetition of the same testimony from the same person does not add to its strength, and it would be treated if it were the same thing as stated before. It would be taken as mere repetition of the single statement, that is, it doesn't add anything. Secondly, as we haven't had time to consider this matter, we will receive this affidavit subject to a motion to strike.¹

9. HIGH COMMAND CASE—ADMISSION OF THE FIRST PRE-TRIAL AFFIDAVIT OF A DEFENDANT WHICH WAS OFFERED BY THE PROSECUTION

EXTRACT FROM THE TRANSCRIPT OF THE HIGH COMMAND CASE,
27 FEBRUARY 1948²

MR. DOBBS (associate counsel for the prosecution): The next offer of the prosecution appears at page 218 of the English book, 333 in the German. It is Document NOKW-2615, dated 19 November 1947. It is the affidavit of [defendant] von Leeb, concerning his attendance at certain conferences. It is offered as Prosecution Exhibit 1103.

DR. LATERNSEER (counsel for defendant von Leeb): If it please the Tribunal, I have, in the most emphatic manner, to object to the presentation of this document. This document came about under illegal conditions. Field Marshal von Leeb was not cautioned that in his capacity as a defendant he was to be interrogated nor was he cautioned that he ought to insist on a defense counsel. On the contrary, at that time I already acted as his defense counsel

¹ Although the defense did later make a motion to strike all affidavits offered by the prosecution and did make as well a motion to strike all documents offered by the prosecution in rebuttal, no special mention was made in either of these motions of the affidavit here in question. The Tribunal denied these general motions in a ruling made just prior to the rendition of the judgment. This ruling is reproduced in full in section VI G.

² Extract from mimeographed transcript, *U.S. vs. Wilhelm von Leeb, et al.*, Case 12, pages 1246-1248.

and I had on several occasions asked for talks with my client, which requests were refused by the prosecution each time.* Although I endeavored to talk to my client and although this was refused, he was interrogated by the prosecution for their purposes. According to the rules of Anglo-American procedure, I think this is illegal and a document obtained under such illegal conditions ought not to be admitted by the Tribunal.

PRESIDING JUDGE YOUNG: On matters of this sort, the Tribunal is of the opinion that the American rule is not controlling. Subject to any showing with respect to the manner in which this was procured from the defendant, which is permissible and proper, the document will be admitted and the objection will be noted on the document.

MR. DOBBS: The next offer of the prosecution—

DR. LATERNSEER: If it please the Tribunal, may I put a question? If I have understood Your Honor correctly, for the appraisal of such questions of law, American rules do not apply and do not control. May I ask then which rules are to be applied to supplement Ordinance No. 7, so that we at least know the legal foundations for the proceedings?

PRESIDING JUDGE YOUNG: Well, I am not sure that this isn't admissible even under the American rules; but the rule of a fair trial which has to be gleaned from all of the evidence and from a showing on both sides is the proper rule the Court thinks to apply in this case. All of the circumstances may be gone into by you and shown as to how this was procured and then, and only then, can the Court determine—under any rule—whether this ought to be received. Your objection that the defendant was not warned and not told will be indicated on this document and you may cover it and make a full showing in your defense.

DR. LATERNSEER: If it please the Tribunal, I had asked for the rules which might be applied, if Ordinance No. 7 were not to be adequate, and if it were to be insufficient, then it ought to be supplemented by some kind of legal system. As Your Honor just stated that the Anglo-American rules did not control and were not decisive, then I, and all of us defense counsel would be interested in knowing upon the basis of what legal system this ordinance might be supplemented, because Ordinance No. 7 does not rule on all questions of law.

PRESIDING JUDGE YOUNG: If you want it tied down to Ordin-

* Dr. Laternser was approved as von Leeb's counsel on 16 December 1947 by an order of Executive Presiding Judge Shake. This was approximately 2 weeks after von Leeb had been indicted and nearly 1 month after the affidavit in question had been executed. Apparently Dr. Laternser refers, therefore, to an arrangement which he had made with von Leeb without approval of the Allied authorities, since war criminal suspects and prospective defendants were not granted defense counsel until after they had been indicted.

ance No. 7, the Tribunal is admitting this because, as the document stands, the Tribunal is of the opinion that it has some probative value, and that's the real rule of evidence that we will give for admission, that is, subject to your right to show the circumstances. As I have tried to point out, the Tribunal thinks this does have probative value.

EXTRACT FROM THE TRANSCRIPT OF THE HIGH COMMAND CASE,
3 MARCH 1948*

PRESIDING JUDGE YOUNG: In view of certain matters that have been before the Tribunal in the past few days, the Tribunal deems it proper to make the following statement:

Certain of the defendants executed affidavits which have been put in evidence by the prosecution. When these affidavits were offered in evidence, counsel for defense objected to the introduction thereof, alleging they were executed under such circumstances as would render them inadmissible in evidence; that when they were taken, the defendants were not advised they need not make any incriminating statements, but, to the contrary, were told by the interrogator they were being used as witnesses. As repeatedly pointed out during the course of this trial, this Tribunal is not bound by technical rules of evidence, and may consider all evidence which it deems to have probative value. We think the affidavits in question were properly received in evidence. Some, if not all, recite they were executed without duress. There is no evidence to the contrary, nor do these affidavits disclose any intrinsic infirmity that bars their reception in evidence. Consequently, we are forced to adhere to our ruling of competency. However, we desire to point out to counsel that they have the right to offer any evidence, as distinguished from the statements of counsel, tending to show these affidavits were obtained by duress or by promise of immunity which, if sustained, would result in the rejection of these affidavits by this Tribunal; or that the statements contained therein were rashly or inconsiderately made, and do not conform to the facts. If and when such countervailing evidence is produced, it would then become the duty of the Tribunal to determine whether or not the affidavits should be considered, and if so, what probative value they have. While we are on the subject of evidence, we desire to advert to a complaint made at a former day of this trial that we were not applying the rules of evidence used in the courts of the United States. Again we point out to all counsel for the defense

*Extract from mimeographed transcript, U.S. vs. Wilhelm von Leeb, *et al.*, Case 12, pages 1348 and 1349.

that the basic authority for the creation of this Tribunal provides that we are not bound by technical rules of evidence of any jurisdiction, but shall admit any evidence which we deem to have probative value—that is, that which tends to prove or disprove any fact material to the prosecution or the defense. We have applied that rule to the evidence offered by the prosecution. The same rule will, of course, be applied to the evidence offered by the defense.

10. HOSTAGE CASE—RULING THAT THE PROSECUTION FURNISH DEFENSE COUNSEL THE TRANSCRIPT OF A PRE-TRIAL INTERROGATION OF A DEFENDANT WHEN A STATEMENT IN THE INTERROGATION IS USED UPON CROSS-EXAMINATION

EXTRACT FROM THE TRANSCRIPT OF THE HOSTAGE CASE DURING THE CROSS-EXAMINATION OF DEFENDANT LIST, 23 SEPTEMBER 1947*

MR. FENSTERMACHER (chief prosecution): Field Marshal, this is your order of 5 September 1941, is it not?

DEFENDANT LIST: Yes.

Q. Do you recall being interrogated on 16 January 1947 and being shown this order at that time?

A. I was not shown the whole of this order. I was only shown a small paragraph.

Q. Were you shown paragraph "f"?

A. Yes, that is right.

Q. Were you asked this question at that time, and did you give this answer: Question: "In paragraph 'f' you brought, in accordance with your Christian and ethical feelings—"

DR. LATERNSENER (counsel for defendants List and von Weichs): Records are being used here of which I have no copy. If they are used in cross-examination I must be given a copy if only for the reason that I am enabled to examine the translation for its correctness, and therefore I ask, Your Honor, that the prosecution refrain from asking questions regarding these records until he has given me a copy in English and German.

PRESIDING JUDGE WENNERSTRUM: Is this to be offered in evidence?

MR. FENSTERMACHER: No, it is not, Your Honor.

PRESIDING JUDGE WENNERSTRUM: Then, what's the purpose of it?

*Extract from mimeographed transcript, U.S. vs. Wilhelm List, et al., Case 7, pages 3439 and 3440.

MR. FENSTERMACHER: To have the witness explain and clarify exactly the inconsistencies between what he said in an interrogation and what he testified to on direct and cross-examination.

PRESIDING JUDGE WENNERSTRUM: The objection will be overruled, but I think before the witness is excused, the counsel for the defendant should be furnished a copy, and it should be furnished now.

MR. FENSTERMACHER: I will be glad to do that, Your Honor.

DR. LATERNER: Your Honor, I ask your pardon for coming again to this matter. Actually I need this copy now in order to follow the actual proceedings. I always place a certain value on following the proceedings, and I can't do that at this moment.

PRESIDING JUDGE WENNERSTRUM: The request will be denied. The nature of the question is apparently directed towards the credibility or the extent of the witness' remembrance, and that matter may be gone into briefly. As stated before, the counsel for the defense should have this copy before the witness is discharged.

II. RU SHA CASE—STATEMENT FROM THE JUDGMENT OF THE TRIBUNAL CONCERNING THE EXCLUSION OF AFFIDAVITS OF WITNESSES WHO TESTIFIED THAT THEY HAD EXECUTED THE AFFIDAVITS UNDER THREATS AND DURESS*

PRESIDING JUDGE WYATT: During the course of the trial several witnesses, including some defendants, who made affidavits that were offered as evidence by the prosecution, testified that they were threatened, and that duress of a very improper nature was practiced by an interrogator. The affidavits referred to were excluded from the evidence and have not been considered by the Tribunal.

L. Affidavit of Deceased Affiants and Interrogations of Deceased Persons

I. INTRODUCTION

No affidavits or interrogations of deceased persons were offered in evidence in the IMT case. In most of the later Nuernberg trials affidavits or interrogations of deceased persons were received in evidence. The deceased persons involved were usually persons who had been executed pursuant to sentence in war crimes trials,

*U.S. vs. Ulrich Greifelt, *et al.*, Case 8, volume V, this series, page 88.

or persons who had committed suicide after interrogations concerning, or indictment charging, alleged participation in war crimes.

Until the Tribunal in the Farben case (Case 6) ruled to the contrary, all the tribunals, before whom the question was raised, had held that the affidavits and interrogations of deceased persons were admissible in evidence. These tribunals noted that the circumstance that the affiant was not available for cross-examination would be taken into account in considering the probative value of the evidence. The argument and re-argument on this question in the Farben case was the most thorough-going of all the cases, and it summarized and cited the decisions of the prior Nuernberg cases as well as other authorities. Section 2 contains a number of items from the record of the Farben case on this matter: the offer and objection to the first affidavit of a deceased person offered in evidence; the later oral argument before the Tribunal; the Tribunal's ruling and statement in declaring such affidavits inadmissible; the prosecution's motion for reconsideration of the Tribunal's ruling; the defense reply to the prosecution's motion; and the statement of the Tribunal in overruling the prosecution's motion for reconsideration, together with the dissent of Judge Hebert from the ruling of the majority.

After the Farben ruling, the Tribunal in the Krupp case likewise declared that the affidavits of deceased affiants were inadmissible. However, the Tribunals in the Einsatzgruppen, Ministries, and High Command cases later admitted such affidavits over defense objection, thus following the precedents prior to the ruling in the Farben case.

2. FARBEN CASE—REJECTION OF AFFIDAVITS AND INTERROGATIONS BY DECEASED PERSONS

a. Prosecution Offer of an Affidavit by Fritz Sauckel, Defense Objection and Setting the Question Down for Argument

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
31 OCTOBER 1947*

MR. VAN STREET (associate counsel for the prosecution): The next document is Document NI-1098 which we ask to be marked in evidence as Prosecution Exhibit 1291.

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, et al., Case 6, pages 3195 and 3196.

[This document was an affidavit by Fritz Sauckel, former Plenipotentiary General for Labor Allocation, who had been sentenced to death by the IMT and subsequently executed.]

This is found at page 20 of the English and 23 of the German.

DR. HELLMUTH DIX (counsel for defendant Schneider): I merely wanted to point out that the affiant Sauckel is no longer alive and that, therefore, he is not able to be cross-examined. Therefore, I must object to the use of this affidavit.

PRESIDING JUDGE SHAKE: That presents a matter of some novelty, so far as this Tribunal is concerned. The President thinks that perhaps we had better go along with the introduction of the other documentary proof and pass this at this time until some convenient time when we can hear your views on it and the Tribunal will have an opportunity to confer. In any event, the Chair would not want to assume the responsibility of speaking for the Tribunal on a matter of that kind. Is it agreeable, gentlemen, to assign that a number, for identification, mark it in your index, as we shall in ours, that the matter has been temporarily passed and we will take it up at the convenience of counsel and discuss it at some later time?

MR. VAN STREET: Very well, Your Honor.

MR. SPRECHER (chief, Farben trial team for the prosecution): Mr. President, could I suggest that Tuesday morning would be a convenient time, as far as the prosecution is concerned, to present a short statement concerning what we think precedent and practice is, and to give any citations in a very short form to Your Honors, and may I ask also, whether or not that is convenient to the defense?

PRESIDING JUDGE SHAKE: Would that time suit the convenience of counsel for the defense? Next Tuesday morning at the opening, to hear your views on that matter?

DR. HELLMUTH DIX: I merely wanted to remark that in the case of the affidavit Hoess [Rudolf Hoess, formerly commandant of Auschwitz Concentration Camp, had been sentenced to death by a war crimes tribunal in Poland] one of the next documents, the same applies. Then I won't have to make a separate objection.

PRESIDING JUDGE SHAKE: Is that the next succeeding document?

MR. VAN STREET: No.

PRESIDING JUDGE SHAKE: Very well then. The understanding will be that if counsel for the prosecution will call our attention to the other affidavit, we'll consider them in the same category and hear your views on it briefly at the opening of next Tuesday's session.

b. Oral Argument concerning the Admissibility of Deceased Affiants

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
4 NOVEMBER 1947*

PRESIDING JUDGE SHAKE: I believe, counsel, that this is the time when the Tribunal said they would hear brief statements from you with reference to the admissibility of some three affidavits. Is that correct? Did you so understand?

MR. SPRECHER (chief, Farben trial team for the prosecution): Yes, Mr. President.

PRESIDING JUDGE SHAKE: Did the defense so understand that we would hear your statements with reference to the admissibility of the exhibits marked for identification 1291, 1293, and 1294? We understand from the observations that were made at the time these exhibits were offered by the prosecution that the basis of the question now before Tribunal is the admissibility of these affidavits inasmuch as the affiants are now deceased. Is that correct? We shall hear the objections from counsel for the defense.

DR. SEIDL (counsel for defendant Duerrfeld): Mr. President, Your Honors, last Friday the prosecution offered an affidavit of the former Plenipotentiary General for Labor, Fritz Sauckel, dated 23 September 1946. This affidavit bears the document number NI-1098 and is in Document Book 67 of the prosecution and page 20 of the English text and page 23 of the German text. I make the motion that this affidavit, signed by Fritz Sauckel during the period between the presentation of evidence and the judgment of the IMT, be not admitted in evidence. Fritz Sauckel was condemned to death by the IMT. The judgment was executed on 16 October 1946. The prosecution is therefore unable to produce the affiant for cross-examination. A modern criminal trial should be guided by the principle that the proceedings should be direct and oral. This means that on principle, witnesses should appear directly before the court for examination. This principle is valid in German criminal procedure, but American criminal procedure also is obviously directed by this principle. According to this principle, the submission of an affidavit in evidence is not admissible if the witness cannot be made available for cross-examination. I refer, in this connection, to the work of Wharton, "Evidence in Criminal Cases," volume 3, 11th edition (1935) [The Lawyers Co-operative Publishing Co., Rochester, N. Y.] page 2162 and I quote:

*Ibid., pages 3235-3247.

“To a defendant charged with a grave crime, the right of cross-examination should be extended liberally.”

There then follows a reference to a decision. Then Wharton continues and I quote:

“The constitutional right of the accused to meet the witnesses against him face to face includes the right to cross-examine every witness not called by himself, and requires their personal presence so that they may be cross-examined by him. If, therefore, a witness dies after giving damaging testimony and before opportunity for cross-examination is had, his testimony in chief becomes incompetent and mistrial should be ordered.”

In the case of the witness Sauckel there is a further consideration that he was examined on several questions on the witness stand before the IMT; questions on the subject of this affidavit. Both defendants and prosecution had the opportunity at the time to cross-examine the witness. If the prosecution attaches significance to the testimony of this witness, they need only present excerpts from the transcript of the IMT. As to the admissibility of such excerpts the defense will raise no objections.*

The same objection must be made to this statement of Rudolf Hoess, made on 12 March 1947—this statement is also in Book 67 of the prosecution, this is Document NI-4434, page 37 in the English document book. Hoess was condemned to death by a Polish court and the sentence has already been executed. Therefore, he cannot be called for cross-examination. In this case, however, there is also the following consideration; the prosecution has already pointed out that this document NI-4434 is not, as the index of document book 67 maintains, an affidavit. The document is only a statement which has not been sworn to. The assertion of the prosecution that according to the Continental European criminal procedure the swearing of the witness was not possible because he, himself, was a defendant, does not apply here. It is true, that according to the European criminal system, swearing in is not admissible in cases in which the person concerned is a defendant. This does not, however, make it impossible for him to be sworn in in other trials and in which he is not a defendant himself; not even when a criminal proceeding is in process against him at the time. In Germany and in other countries of Europe many persons are examined and sworn in as witnesses today although criminal proceedings have already begun against them. The swearing in of Rudolf Hoess could, therefore, have taken place. Without, of course, anticipating the decision of the Court, I should like to add that in these previous trials the

*See, however, the objections interposed to the prosecution's offer of extracts from the testimony which Karl Lindemann gave in the Flick case, reproduced in subsection M 3.

military tribunals in Nuernberg have refused to admit unsworn statements.

Now, the prosecution, in connection with the statement of Rudolf Hoess of 12 March 1947, has submitted an affidavit [Doc. 4434A, Pros. Ex. 1294] of the interrogator and the stenographer who were present when the statement of Rudolf Hoess was taken down, and who testified that Rudolf Hoess stated that the statements which he signed contained the full truth.* It need not be especially emphasized that the submission of such an affidavit cannot, by any means, replace the oath which is missing. If such procedures were to be considered admissible then the value of the oath would be completely destroyed. The oath must not be made by someone else, but by the witness himself.

PRESIDING JUDGE SHAKE: Counsel, in your statement you refer to the fact that other tribunals of this agency have passed upon this matter. I may say to you that under the procedure that we follow here, this being your objection, you have the opening and the close of the argument. We shall now hear what the prosecution has to say, but I wish to advise you that there is no impropriety whatsoever when you call to our attention specifically the precedents of the other tribunals. On the contrary, this Tribunal would be inclined and disposed to give weight to well-considered rulings of other tribunals that stand on the same plane as this. If, therefore, in your concluding argument you are in a position to give us a reference to the rulings of other tribunals of like character, in dealing with this same matter, you may not only do so but we would be very happy to have you do so. We will now hear the prosecution.

MR. SPRECHER: May it please the Tribunal, the objection to the Hoess affirmations particularly indicates the importance of your ruling in this case, since Hoess was the commander of the Auschwitz murder factory in connection with which we allege the defendants to have been criminally involved. Hoess has given a number of highly relevant affidavits which we propose to offer. Some of them are in the form of affidavits, since they were taken before the time he was under actual trial before the Polish court, and we submit that these affidavits and affirmations which we propose to offer, will assist the Tribunal in sizing up the full truth concerning the Auschwitz complex in this case. Of course, it should be pointed out, that the defendants in these war crimes trials have also offered such affidavits as, for example, an affidavit

*The Hoess statement was followed by a certificate of the interrogator and interpreter which stated as follows: "We, the undersigned herewith declare that Rudolf Hoess signed his name on all three pages of this document by his own hand in our presence, after having carefully read, in our presence, every page including the corrections as they now appear."

by Hermann Goering in the Flick case, now being heard [Document Flick 87, Flick Defense Exhibit 82].

Your Honors will recall that Dr. Nelte (counsel for defendant Hoerlein) on 21 October 1947 at pages 2405-2406 of the transcript, pointed out that at that time: "the defense with respect to the basic settlement of this question has made no decision as yet whatsoever."

At that time you recall the question before Your Honors was: where the affiant could not be produced for cross-examination, but there was some possibility that cross-interrogatories might be submitted. Now, from discussions with some of the defense counsel I know they have at least planned to use some of these statements, and I only place that before the Tribunal to indicate that this is a ruling which may go both ways.

Now, even though we discussed before you the general problems confronted here before, and even though Judge Hebert, I believe, summarized the position of the prosecution beforehand, with your permission I would like to cite some of the precedents that have developed here and give you the page numbers, since we think it's a rather grave and weighty problem. Is that satisfactory, Mr. President?

PRESIDING JUDGE SHAKE: Yes, we would like to have it.

MR. SPRECHER: So far as we have been able to ascertain, the exact question did not come up before the IMT, but we submit that the ruling and observations of the President of the IMT on the Messersmith affidavit are actually in point. Your Honors may want to refer to page 352, volume II of the official English printed version of the "Trial of the Major War Criminals."* The basic rule stated by President Lawrence there has ever since been followed by the American Military Tribunals so far as we can ascertain. I won't quote the entire extract of his statements in that ruling but only one question—only one point. After ruling that it was admissible he said: "The question of the probative value of an affidavit as compared with a witness who has been cross-examined would, of course, be considered by the Tribunal."

PRESIDING JUDGE SHAKE: Pardon me, Counsel. As I understand, you are not asserting that that was a case where the affidavit of a deceased was involved.

MR. SPRECHER: No, Your Honor, it was where the witness was beyond the jurisdiction of the Court and could not be called.

PRESIDING JUDGE SHAKE: Were there any steps taken there to provide the defense with an opportunity to get counter-affidavits or submit affidavits, or do you know?

*The discussion of the Messersmith affidavit in the IMT case is reproduced in subsection H 2.

MR. SPRECHER: As I understand it, they were offered the opportunity but did not exercise the privilege.*

PRESIDING JUDGE SHAKE: Very well. I hope you will pardon the interruption. I want to get the facts.

MR. SPRECHER: It seems to me, as I pointed out, that it isn't exactly in point, but I thought the observation would be helpful because it's at least a parallel case. Now, the provisions of Article 16 (e) of the Charter of the IMT and Article IV (e) of Ordinance No. 7 both give the defense "the right to cross-examine any witness called by the prosecution." Words of art are used in the concluding phrase, "any witness called by the prosecution." We submit that the right as such, applies only where a person is called as a witness. Of course, where an affiant is available and if the prosecution should refuse to produce him, the tribunal could certainly order the affiant produced under other provisions of Article IV of Ordinance 7, and I think that has been rather clear from your practice so far. The provisions of the IMT Charter and Ordinance No. 7 are likewise very similar in that the Tribunals are not bound by the technical rules of evidence, many of which grew up around the jury system of trials.

Article 19 of the Charter and Article VII of Ordinance No. 7 are the provisions in point. Article VII, however, contains the explicit provision that affidavits "shall be deemed admissible if they appear to the Tribunal to contain information of probative value relating to the charges." Although we submit that the plain language of the Ordinance allows no other construction than that these affidavits are admissible if they contain relevant declarations, some further review of the actual precedents before the American Military Tribunals acting pursuant to Article VII seems in order. The first ruling on the exact point, so far as we know, came up before Military Tribunal I in Case 1, the so-called Medical case, on 6 January 1947. It may be found in the official transcript of that case at page 1093. The affidavit was by Dr. Erwin Schuler alias Dr. Erwin Ding. The affidavit in the record appears to have been signed by Schuler before he went back to his original identity. It bears Document Number NO-257 and was admitted as Prosecution Exhibit 283. Dr. Ding gave this affidavit concerning medical experiments in July 1945 to an American officer; and thereafter in the same year Dr. Ding committed suicide. When the affidavit was offered in the Medical trial in January 1947, defense counsel objected on the ground that the affiant could not be called as a witness but the affidavit was admitted over this objection (*Tr. pp. 1091-1093*). The Ding

*Several counsel in the IMT case did submit cross-interrogatories to Messersmith, as Dr. Seidl points out later in this argument.

precedent has been followed ever since at Nuernberg so far as we can ascertain. In the so-called Pohl case (Case 4) before Tribunal II, the Tribunal admitted two affidavits by Rudolf Hoess, the same affiant who comes into question with respect to one or two of the documents here, after it had been determined the Hoess could not be produced as a witness.

At that time Hoess was under trial in Poland and Judge Toms remarked that he could not be brought here at that particular time; the case is not 100 percent in point but still the same principle applies.

The first affidavit by Hoess was [Prosecution] Exhibit 51, Document 3868-PS. The objections to the offer and the ruling can be found at pages 129-131 of the official mimeographed transcript in that case. Later another affidavit by Hoess was also admitted, namely, [Prosecution] Exhibit 297, Document NI-034, at the transcript pages 571-575: If I am not mistaken, Dr. Seidl participated in that trial [as counsel for defendant Pohl] and also entered an objection at that time.

Now in the Justice case an affidavit of Carl Falck [Prosecution] Exhibit 147, Document NG-401, was admitted even though Falck was dead. That affidavit was offered at page 970 and admitted at pages 976 and 977. Now, thereafter, in the only other war crimes case in Nuernberg so far involving industrialists, the Flick case, Case 5 before Tribunal IV, both the prosecution and the defense offered without objection affidavits by affiants previously executed as war criminals. The prosecution introduced the Sauckel affidavit, the very same affidavit as is now before us, as Exhibit 71 [Document NI-1098], and that is at page 326 of the transcript. The defense offered an affidavit by Hermann Goering [Document Flick 87, Flick Defense Exhibit 82].

PRESIDING JUDGE SHAKE: Mr. Prosecutor, in that connection am I right in assuming that in American jurisdictions where the rule obtains, that a defendant is entitled to be confronted with the witnesses, and which, as counsel for the defense pointed out, might have some application under these circumstances, isn't it generally recognized that that is a right that can be waived by a defendant? In other words, it doesn't go so far as to invalidate the proceedings if a defendant is not confronted by a witness providing he has expressly waived the privilege. Is that correct in your view? Why, I can illustrate it in this way. In the jurisdiction in which I have lived we have this rule, and yet a defendant may go out and take a deposition. The prosecution cannot, because the prosecution is required to produce the witness; but it has been held in our jurisdiction—and I use that only for purposes of illustration—that that is a constitutional guarantee that can be waived by a defen-

dant, and that he may, if he wishes, give notice and go out and take a deposition to be used in his defense. Is that a correct general rule as you understand it under American-English jurisprudence?

MR. SPRECHER: Mr. President, may I have just a moment to consult with my colleagues?

PRESIDING JUDGE SHAKE: Certainly.

MR. SPRECHER: We are, indeed, of the general opinion that Your Honor has stated the rule properly as it applies generally.

PRESIDING JUDGE SHAKE: Very well. Thank you.

MR. SPRECHER: Now the prosecution here, under Ordinance No. 7, in connection with the Sauckel affidavit, could ask Your Honors to take judicial notice of it because it is a part of the record of another case,¹ but we think that the issue really runs much deeper than that and that this is not only a question of getting the affidavit before you in one way or another; and, indeed, it wouldn't answer some of the other questions we have here including the Hoess matter now before us. The Hoess affidavits which have so far been received in evidence in other cases are different affidavits than the one now in question, but it should be pointed out, Mr. President and Honorable Members of the Tribunal, that so far as the record shows in each of the cases I have mentioned this morning, which we think are precedents, no such question of judicial notice was raised, and hence the ruling was squarely upon the issue. Now the adjective law on the point seems to us clear and to have been codified in both the IMT Charter and in Ordinance No. 7. Of course, it just is not so that constitutional rights *per se* and as such run in favor of these defendants, and there is another case in point which we don't propose to go into here, and which has been answered satisfactorily even in proceedings going to the United States Supreme Court.² But we think that this codification in the IMT Charter and Ordinance No. 7, which prescribes the matter for such cases such as these in international law, is in line with the modern trend, at least where the triers of fact are jurists and not laymen; and we submit that the provisions are necessary for a full and complete inquiry after the truth, and that the opposing party, whoever it may be, can in many ways contest the weight to be given to the affidavit.

PRESIDING JUDGE SHAKE: The prosecution will hear counsel for the defense, concluding the argument.

DR. SEIDL (counsel for defendant Duerrfeld): Mr. President, Your Honors, I have very little to answer to the statements of the prosecutor. In general I can merely refer to what I have already

¹ Article IX of Ordinance No. 7 provided that the Tribunals "shall also take judicial notice of * * * the records and findings of military or other Tribunals of any of the United Nations."

² In re Yamashita, 66 S. Ct. 340 (1946).

said. First of all, Mr. Sprecher referred to Ordinance No. 7 of the Military Government for Germany which, in addition to Control Council Law No. 10, is the legal basis for the present trials. Military Government Ordinance No. 7 does not answer the question which is to be answered here and now. Ordinance No. 7 merely gives very general directives for a fair proceeding, and on this question as well as a number of other important questions it does not comment at all.

Second, Mr. Sprecher referred to the case of Ambassador Messersmith. I should like to say that this case cannot be used for comparison here. Ambassador Messersmith was still alive during the trial of the IMT. At that time he was Ambassador to Mexico. The Court accepted his affidavit at that time because he was still alive, and all the defense counsel were given the opportunity to send questionnaires to the witness which were then answered before a commission. It is not true that the defense took no advantage of this opportunity. I myself [as counsel for defendant Frank] sent a questionnaire to Ambassador Messersmith, and I know that a number of the other defense counsel took advantage of this right. If the International Military Tribunal had recourse to questionnaires, this was done for the explicit reason that Ambassador Messersmith was in Mexico and because of sickness could not appear before the Court.

Third, the prosecutor said that the affidavit of Rudolf Hoess was accepted in evidence before Military Tribunal II in Case 4. This was not the same affidavit which is the subject of this discussion. Moreover, at the time when this other affidavit was offered in evidence, Hoess was still alive. The Court accepted the affidavit with the provision that the prosecution would produce the affiant Hoess for cross-examination if the defense requested this. But for various reasons the defense did not take any advantage of this right. Consequently, at the time the question did not come up as to whether this affidavit, which at first had been admitted, should be stricken from the record later.

Fourth, the Prosecutor referred to a case in the so-called Flick trial, Case 5. As far as I am informed the defense did not object to the admission of the Sauckel affidavit. I do not know why no objection was raised, but I can imagine that the defense made no objection because they intended to offer an affidavit of Hermann Goering, who is also dead. In any case, this case cannot be considered a parallel.

On the other hand, I can remember that in Case 4, another case, the affidavit of a witness was not admitted—a witness who had died in the meantime—and I can remember very definitely that statements were rejected which were not sworn to. This occurred

before the IMT as well as before Tribunal I in Case 1, Tribunal II, Case 4; and as far as I know, before other tribunals as well.

PRESIDING JUDGE SHAKE: Before we close this argument, the President would like to ascertain if any of the members of the Tribunal have any question to ask either the prosecution or the defense.

Very well, we will declare this argument concluded, and I am sure that counsel will appreciate the fact that the Tribunal will wish to confer before making a ruling on the admissibility of the exhibits now under consideration.

c. Ruling of the Tribunal Declaring that the Affidavits of Deceased Affiants are not Admissible

EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE, 7 NOVEMBER 1947*

PRESIDING JUDGE SHAKE: I am further authorized by the Tribunal to say that the Tribunal has decided upon principle that the affidavits of deceased persons heretofore offered in evidence will not be admitted in evidence in this proceeding. For the information of counsel, we reserve the right at a subsequent session, perhaps today, to state to you definitely and concretely the reasons for our ruling. We announce it now because of the fact that in the presentation of the documents yesterday and subsequent to the original objection, we observed that a number of documents, marked for identification only, that raised the same question as that embraced in the objection. The ruling of the Tribunal is that the objections to those documents where the affiants were deceased, and, consequently, not available for cross-examination will be sustained and we shall state on the record a little later the reasons for our views on that subject.

* * * * *

PRESIDING JUDGE SHAKE: The Tribunal would like to take a moment to close the record with respect to the matter upon which we ruled this morning. I have reference to the ruling relating to the cross-examination, or rather, the admissibility of documents of affiants who are deceased. We ruled on the matter and, at that time, stated that we would later read into the record a brief comment as to the basis for our ruling. In order to have this matter behind us, I should like to do that at this time if I may.

The statement of the Tribunal is as follows:

*Extracts from mimeographed transcript, U.S. vs. Carl Krauch, et al., Case 6, pages 3484, 3485, 3542, and 3543.

The question of the admissibility in evidence of an affidavit subscribed and sworn to by an affiant who has died since the execution of the instrument and is, therefore, not available for cross-examination. Article IV of Military Government Ordinance No. 7 sets forth the procedure to be followed in order to insure a fair trial for the defendants. Paragraph (e) of this Article states:

“A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.”

Article VII provides that the Tribunal shall not be bound by technical rules of evidence and may admit in evidence certain documents, including affidavits. It also provides that:

“The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.”

The right of a defendant who is being tried in a criminal action or proceeding to interrogate witnesses who testify against him is a fundamental right and not merely a rule of evidence. The tribunal may determine, as a matter of judicial discretion, the manner in which that right of interrogation may be exercised. That discretion does not extend to the abolition of the right, nor may convenience or expediency dictate its denial. To permit the introduction in evidence against a defendant and over his objection of an affidavit of a deceased witness would deny to that defendant the right to cross-examine one who had testified against him, and the admission of such an affidavit may not be justified upon the ground of expediency or that it is a matter that falls within the discretion of the Tribunal.

This statement constitutes the reasons for which the objection to the introduction of the affidavit was sustained.

Thank you very much.

d. Prosecution Motion Requesting the Tribunal to Reconsider Its Ruling Declaring Inadmissible the Affidavits of Deceased Affiants

MOTION FOR THE RECONSIDERATION OF A RULING BY THE TRIBUNAL*

1. Motion is made that the Tribunal reconsider and set aside its ruling of 7 November 1947 (*Tr. pp. 3484, 3542 and 3543*) rejecting the prosecution's offer of affidavits by deceased affiants.

2. On 31 October 1947, the prosecution offered an affidavit of

*U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 48, pages 916-924.

Fritz Sauckel, Prosecution Exhibit 1291, for identification, Document NI-1098. Dr. Dix (for defendant Schneider) objected on the ground that the affiant Sauckel was dead and therefore could not be cross-examined (*Tr. p. 3196*). Document NI-4434, affidavit of Rudolf Hoess, also deceased, was also marked at this time for identification only as Prosecution Exhibit 1293 (*Tr. p. 3197*). The Tribunal reserved decision on the objections and heard arguments on 4 November 1947 (*Tr. pp. 3236-3247*). In the arguments by defense counsel at this time various assertions concerning prior practice were made without citing pages in the transcript (as the prosecution had done), and in the view of the prosecution, the practice of the other tribunals was not described with full accuracy by defense counsel. The Tribunal sustained the objections of defense counsel on 7 November 1947, stating "upon principle that the affidavits of deceased heretofore offered in evidence would not be admitted in evidence in this proceeding" (*Tr. p. 3484*). The Tribunal made the following comments as the basis for its ruling later the same day (*Tr. pp. 3542 and 3543*) :

[Here the motion quoted the statement of the Tribunal reproduced in subsection c.]

3. It is respectfully submitted that this ruling and the reasons given therefore are contrary to the rulings of the Military Tribunals in four other cases: Case 1 (Medical), Case 2 (Milch), Case 3 (Justice), and Case 4 (Pohl). The pertinent pages of the rulings of the other tribunals are cited hereinafter, since all of them were not cited in the oral argument (*Tr. pp. 3236-3247*) :

(1) *Case 1 (Medical)*

Document NO-257, an affidavit of Dr. Erwin Ding, alias Dr. Erwin Schuler, who committed suicide after giving the affidavit, was admitted over objection and after argument as Prosecution Exhibit 283 (*Case 1, Tr. p. 1093*). The argument of the defense was, just as in this case, a denial of the alleged right of cross-examination. The Tribunal referred to this affidavit or to facts recited in the affidavit in its decision.* (The Ding precedent has been followed ever since in Nuernberg until the ruling of this Tribunal.)

(2) *Case 2 (Milch)*

Document 3721-PS [Prosecution] Exhibit 41-A, an interrogation of Fritz Sauckel, who was executed as a major war criminal, was objected to by the defense (*Case 2, Tr. pp. 134 and 135*). The Tribunal deferred ruling until it could confer with Tribunal I on the Ding precedent (*Tr. p. 138*). On 7 January 1947, Tribunal II admitted the affidavit (*Tr. p. 194*), stating:

* U.S. vs. Karl Brandt, et al., Case 1, volume II, this series, pages 247, 287, and 288.

"The Court has determined that under the Charter and the Ordinance, this exhibit is admissible. Its weight, however, in view of the peculiar circumstances attending it is of course still for the Tribunal to determine. *This ruling is made after conference with the judges of Tribunal I, who had a similar problem presented, and which made the same ruling as this Tribunal now makes.*"

Document NOKW-311, an interrogation of Hermann Goering, who committed suicide after having been sentenced to death by the IMT, was also admitted over objection as Prosecution Exhibit 62 (*Case 2, Tr. p. 280*). The Tribunal again made appropriate references to the Charter of the IMT and Ordinance No. 7.

(3) *Case 3 (Justice)*

Document NG-401, an affidavit of Carl Falck, deceased at the time of offer, was admitted over defense objection as Prosecution Exhibit 147, the Tribunal noting that "those portions which appear to be the experiences of the witness (affiant) will be considered" (*Case 3, Tr. pp. 976 and 977*).

(4) *Case 4 (Pohl)*

Document 3868-PS, an affidavit of Rudolf Hoess, who was being tried in Poland at the time of the offering and could not be produced for cross-examination, was admitted over defense objection as Prosecution Exhibit 51. The president of the Tribunal, Judge Toms, stated that the affiant could not be produced. Therefore, the case is as much in point as where the affiant cannot be produced because he is dead (*Tr. pp. 129-131*).

Document NI-034, another affidavit of Rudolf Hoess, was later admitted without objection as Prosecution Exhibit 297 (*Case 4, Tr. pp. 571-575*). In its judgment¹ this Tribunal stated that it had received "proof" from Hoess.²

4. The prosecution, the defense, and the Tribunal in Case 5 (Flick) followed the principle of the admissibility of the affidavits of deceased affiants. The Tribunal admitted Document NI-1098, an affidavit of the deceased war criminal, Fritz Sauckel, as [Prosecution] Exhibit 71 (*Case 5, Tr. p. 326*), and a Goering interrogation as Flick [Defense] Exhibit 82 (*Case 5, Tr. p. 9334*). The prosecution offered the affidavit by the deceased Sauckel, and the defense offered the interrogation of the deceased Goering. Both were received without objection. The defense also read testimony of Sauckel before the IMT (Burkart [Defense] Docu-

¹ U.S. vs. Oswald Pohl, et al., Case 4, volume V, this series, page 973.

² In the Pohl case the first exhibit of the defendant Hans Loerner was an affidavit of Wolfram Sievers (Document Hans Loerner 1, Hans Loerner Defense Exhibit 1), one of the defendants in the Medical case who had been sentenced to death and executed at the time the affidavit was offered and received in evidence.

ment 663). The Tribunal stated that it had knowledge of this testimony and the document was not given an exhibit number.

5. The Model Code of Evidence of the American Law Institute [American Law Institute, Philadelphia, Pa. (1942)] adopted and promulgated on 15 May 1942, follows the modern trend away from the exclusionary rules, and makes no exception for jury or criminal cases:

“Rule 503. Admissibility of Evidence of Hearsay Declaration.

“Evidence of a hearsay declaration is admissible if the judge finds that the declarant:

“(a) is unavailable as a witness, or

“(b) is present and subject to cross-examination.”

(Note: For explanations of the reasons supporting Rule 503, see excerpts from the Model Code of Evidence published by the Library Branch entitled “Hearsay Evidence,” etc., 29 November 1947.)

6. The law of the Charter of the International Military Tribunal and the law of Ordinance No. 7, concerning rules of evidence are fundamentally the same (cf. Articles 16, 19, and 21 of the Charter [IMT] with Articles IV, VII and IX of Ordinance No. 7). Both clearly do not permit a number of the exclusionary rules of criminal evidence which have been defended principally because of the Anglo-Saxon system of jury trials, where the triers of fact were laymen and it was felt that the inability of the jurors to weigh certain types of hearsay evidence was such that its admission would be prejudicial to a fair trial of defendants. Both contain the provision that all evidence which has probative value shall be admitted. This does not mean that the Tribunals should not seek to have the parties produce the best evidence available, consistent with expeditious trial. But both the Charter and the Ordinance recognize the necessity for liberal rules of evidence concerning events transpiring in the Third Reich where the lips of many potential witnesses were sealed by violence and many records have disappeared either by intention or by the fortunes of war. Rules of evidence permitting a full inquiry under such circumstances are often as necessary for the defense as they are for a full presentation of all the surrounding circumstances by the prosecution.

7. Under both the Charter (Art. 21) and Ordinance No. 7 (Art. IX), the Tribunals must take judicial notice of governmental documents and reports of the United Nations, and this naturally includes consideration of the facts and conclusion of facts stated in such documents and reports. Obviously no “right of cross-examination” exists in such cases, and the IMT and the Military

Tribunals in Nuernberg have judicially noticed many such documents.

8. The question of the right of cross-examination was directly raised in the IMT case when a French prosecutor produced Mr. Van der Essen, a member of the Belgian Inquiry Commission, who testified to matters to which he was not a direct witness. He stated that he himself had heard witnesses and that he verified that these testimonies were authentic (Trial of the Major War Criminals, *op. cit.*, vol. VII, p. 2). The defense objected (*ibid.*, p. 1). The Tribunal admitted the testimony (*ibid.*, pp. 13 and 14), but declared that the governmental report should also be put in evidence. What is important is that the IMT considered the matter only from the view of the weight to be given to this testimony, which admittedly was largely based upon hearsay and the testimony of others, and not from the point of view of admissibility.

"In the first place the Tribunal is not confined to direct evidence from eyewitnesses, because Article 19 provides that *the Tribunal shall admit any evidence which it deems to have probative value.*

* * * * *

"As to the weight which is to be attached to the witness' evidence, that, of course, is a matter which will have to be considered by the Tribunal. It is open to the defense to give evidence in answer to the evidence of Mr. Van der Essen and also to comment upon or criticize that evidence, and so far as his evidence consisted of his own conclusions drawn from facts which he had seen or evidence which he had heard, the correctness of those conclusions will be considered by the Tribunal, conclusions being matters for the final decision of the Tribunal.

"For these reasons the motion of counsel is denied." (*ibid.*, pp. 13 and 14).

9. Where the testimony or affidavit of a deceased witness or affiant is part of the record of one of the Military Tribunals of the United Nations, the Tribunal must take judicial notice of the testimony or affidavit under Article VII of Ordinance No. 7. This is similar to the old German rules of criminal procedure.

10. The German Order of Criminal Procedure of 1870, paragraph 251 (Reichsgesetzblatt, 1870, Part I, p. 322) provided:

"If a witness, expert, or codefendant has died, or become insane, or if his whereabouts could not be determined, the record of his earlier interrogation by a judge may be read. The same holds for the already convicted co-defendants.

"In the cases designated in paragraph 223 the reading of the record of the earlier interrogation is permissible, provided it has taken place after the opening of the main proceeding, or in

the preliminary proceeding, under observation of the regulations of paragraph 193.

"The reading can only be ordered by a ruling of the court; its reason must be made known and it must be noted whether the oath has been taken by the interrogated person. Nothing is changed hereby in the rules regarding the necessity of taking the oath for those cases in which another interrogation is possible."

Hearsay evidence is admissible under German law as under civil law generally. The German Supreme Court (Reichsgericht) at Leipzig, repeatedly held that a witness may testify on what he heard from other persons, e.g., a policeman on what other persons told him (see Loewe-Rosenberg 1929, note 6 to par. 250).

11. The rules of evidence before Military Tribunals and Commissions have generally admitted all evidence which would have probative value in the mind of a reasonable man. The regulations prescribed by General MacArthur, governing the procedure for the trial of Yamashita by the Commission directed that the Commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the Commission's opinion would have probative value in the mind of a reasonable man," and that in particular it might admit affidavits, depositions, or other statements (In re Yamashita, 66 S. Ct. 340, 349 (1946)). The order of the President of the United States of 2 July 1942 (7 Federal Register 5103), appointing a military commission of the trial of the alleged saboteurs, which was in issue in the Quirin case, includes the provision that "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man" (Law Reports of Trials of War Criminals, Published for United Nations War Crimes Commission by His Majesty Stationery, 1947, English Edition, Vol. I, p. 117; *Ex Parte Quirin*, 317 U. S. 1 (1942)). Regulations for the trial of war criminals in the Mediterranean theater of operations were made on the 23 September 1945 in Circular No. 114, by command of General McNarney. These regulations provide *inter alia* that:

"a. If any witness is dead or is unable to attend or to give evidence, or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by, or attributed to, such witness."

By command of General Eisenhower, a directive regarding military commissions in the European Theater of operations was made by an order of 25 August 1945. In paragraph 3 thereof, provision is made that technical rules of evidence shall not be

applied but any evidence shall be admitted which, in the opinion of the president of the commission, has any probative value to a reasonable man. Similar provisions are contained in the regulations governing the trial of war criminals made by General MacArthur on 24 September 1945 for the United States Armed Forces, Pacific, and by the "Regulations Governing the Trials of Accused War Criminals" of 5 December 1945 which superseded those of 24 September 1945, same being found in Regulation 16 of the earlier, and Regulation 5 (d) of the later regulations (Law Reports of Trials of War Criminals, *op. cit.*, vol. 1, p. 117). The regulations of 24 September 1945 formed the basis of the trial of the Japanese General Yamashita. Nontechnical rules of evidence have also been followed by British military commissions for the trial of war criminals, based on the Royal Warrant dated 14 June 1945, Army Order 81/45, with amendments. The Royal Warrant, by Regulation 8, has relaxed rules of evidence otherwise applied in English courts. Under Regulation 8 (i) a military court "may take into consideration any oral statement or any document appearing on the face of it to be authentic provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible in evidence in proceedings before a Field General Court Martial" (Law Reports of Trials of War Criminals, *op. cit.*, vol. 1, p. 108). Pursuant to this provision, military courts have frequently admitted affidavits where the affiant was never subjected to cross-examination (The Peleus Trial, the Scuttled U-Boats Case, the Dreierwalde Case, the Zyklon B Case; "Law Reports of Trials of War Criminals," *op. cit.*, vol. I, pp. 14, 59, 85, 96).

12. It is important to keep clearly in mind that we are applying international penal law and that we should not, and cannot, approach these questions solely from the standpoint of any single judicial system. International law has made substantial strides in the development of both substantive and adjective law, and in both fields international law must be derived from a variety of legal systems, including both civil and common law. Many auxiliary principles and doctrines in international law must be drawn from a variety of legal systems. These and other internationally constituted tribunals cannot work exclusively in the medium of German law, or American law, or even a combination of the two. That is not the genius of international law. As Mr. Justice Jackson stated before the International Military Tribunal:

"As an International Tribunal, it is not bound by the procedural and substantive refinements of our respective judicial or constitutional systems, nor will its rulings introduce prece-

dents into any country's internal system of civil justice" (Trial of the Major War Criminals, *op. cit.*, vol. XIX, p. 398).

TELFORD TAYLOR

Brig. Gen. U.S.A.

Chief of Counsel

Nuernberg, 29 November 1947.

**e. Remarks of Defense Counsel in Opposition to the
Prosecution's Motion for Reconsideration**

**EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
2 DECEMBER 1947¹**

DR. SEIDL (counsel for defendant Duerrfeld): Mr. President, Your Honors, I gather from what Mr. Sprecher said yesterday, that the prosecution has made written application to have the affidavits of deceased affiants admitted into evidence. As I have heard, this application is as yet only available in English, and therefore I am not able to comment on this application in detail. I should merely like to make two brief remarks.

When the prosecution offered affidavits of deceased affiants a few weeks ago, the defense objected. The defense explained their objection in detail and the Court sustained the objection. By way of explanation of this ruling the Tribunal made a very clear and definite statement. Therefore, I can see no compelling reason why this ruling of the Tribunal should be changed.

I should like to point out two facts which in my opinion are against a revising of this ruling. One is the impression given by the cross-examination of various witnesses, and above all, the cross-examination of the witness Oswald Pohl.² I am of the opinion that nothing has happened since this ruling of the Tribunal, which would indicate the necessity of changing this ruling.

I have the impression that a great deal has happened since then, which would justify the decision that the ruling of the Tribunal should be confirmed and upheld. The right of cross-examination is a basic right of every defendant. I need not repeat that after the examination of the witness Oswald Pohl by the prosecution, and after cross-examination by the defense, not much was left of the affidavit.

I should like to point out one more thing, however. If the

¹ Extract from mimeographed transcript, U.S. vs. Carl Krauch, *et al.*, Case 6, pages 4485-4487.

² The prosecution had introduced an affidavit by Pohl (NI-382, Pros. Ex. 1292) and he had been called for cross-examination by the defense. Pohl's testimony is recorded in the mimeographed transcript, 21 and 24 November 1947, pages 4188-4232. Dr. Seidl had been defense counsel for Pohl in the Pohl case (U.S. vs. Oswald Pohl, *et al.*, Case 4, volume V, this series).

prosecution attempts anew to introduce affidavits of deceased persons into evidence in this trial, they are thinking primarily of three affidavits, those of the affiants Sauckel, Entress, and above all, the affidavit of the former commander of Auschwitz, Rudolf Hoess.

I must object to the last affidavit, not only because the affiant has died in the meantime, but I also must present a statement of affairs to the Court which speaks against the admissibility of this affidavit, NI-034.

I have in my hand an affidavit of SS Obergruppenfuehrer Karl Wolff commenting on the contents of the Hoess affidavit. The Affidavit of Rudolf Hoess states, among other things, that in the spring of 1941, together with the Reichsfuehrer SS, Obergruppenfuehrer Wolff —

MR. SPRECHER (chief, Farben trial team for the prosecution) : Mr. President, I do not think this is a question which can be illuminated by defense counsel before Your Honors have ruled on the question of the admissibility, that is attempting to show something which might run against the weight of the affidavit. We have indeed stated in our arguments, both orally and in the motion, that that is indeed one of the resources upon which counsel for the defense can call with respect to the weight to be given to the affidavit of the deceased person, and also in combating the facts or declarations made by the deceased affiants, but it scarcely seems to us under any theory, that it can be considered in connection with the question of the admissibility of those affidavits.

PRESIDING JUDGE SHAKE: The Tribunal would like to say to counsel for the defense and for the prosecution that it expects to dispose of this matter today. It would suit our convenience better, however, if we might make it a special order of business for 1:30. At that time we will take the matter up, and if there is any occasion, the Tribunal would like to be further advised with reference to the views of counsel. We will give you an opportunity at that time. Is that satisfactory?

MR. SPRECHER: Yes, Your Honor.

f. Tribunal Ruling Overruling the Prosecution's Motion for Reconsideration and Dissenting Opinion of Judge Hebert

EXTRACT FROM THE TRANSCRIPT OF THE FARBEN CASE,
2 DECEMBER 1947*

PRESIDING JUDGE SHAKE: Counsel, may we please interrupt

*Extract from mimeographed transcript, U.S. vs. Carl Krauch, et al., Case 6, pages 4532 and 4533.

your cross-examination temporarily? May we interrupt you just for a little bit, please?

The Tribunal is now ready to rule on the motion of the prosecution to reconsider and set aside its ruling of 7 November 1947, appearing at transcript pages 3484, 3542 and 3543, rejecting the prosecution's offer of affidavits by deceased affiants. After due consideration, it is the opinion of a majority of the members of the Tribunal that the motion is not well taken, and it is now overruled.

JUDGE HEBERT: Merely for the record, I should like the record to note that I disagree with the ruling entered. In my opinion the motion to reconsider for the reasons advanced fully in the prosecution's motion should now be granted. It is my view that to make admissibility of affidavits conditional upon the ability to produce a witness for cross-examination is not the proper interpretation of Article IV (e) and Article VII of Military Ordinance No. 7. And for this reason, without dwelling upon it in further detail, I cannot concur in the ruling; and believe that the previous ruling of the Tribunal in that regard should be reversed, as is suggested in the motion which has been filed.

Now, closely related hereto is the ruling of the Tribunal this morning with reference to the cross-examination of defendants who have given affidavits implicating other defendants.

[Judge Hebert refers to an earlier ruling of the Tribunal concerning the affidavits of defendants who do not take the stand. This ruling, reproduced in full in subsection K 6 c, stated in part: "If the prosecution has introduced in evidence the affidavit of a defendant who does not take the witness stand and thus does not become subject to interrogation by other defendants, the Tribunal, upon proper motion, will enter upon the record an order to the effect that the affidavit will not be considered as evidence against defendants other than the affiant."]

I concur in the ruling of the Tribunal on that subject, although I recognize that that ruling is predicated upon a conception of a right of cross-examination which is different from my own, but I concur in the ruling because, in my opinion, it works out a practical means of handling the situation in the balance of the trial insofar as a means of affording cross-examination of defendants who have given affidavits implicating other defendants is provided by that ruling. I am not prepared, however, to say that if an eventuality should arise in which one of the defendants should elect not to take the stand, that his affidavit should not be considered in evidence for all purposes and against all defendants. With that reservation, I concur in the other aspect of the ruling which is related to the first matter announced by the President (subsection c above).

M. Circumstances Under Which Testimony Given in Another Nuernberg Trial Was Admitted in Evidence

I. INTRODUCTION

The "records" of other military tribunals are mentioned in Ordinance No. 7 as one of the types of evidence which were to be deemed admissible (Art. VII) and also under the provisions dealing with judicial notice (Art. IX). Concerning the judicial notice of the "record" of other tribunals, reference is made to section XVI, "Judicial Notice."

Extracts from the testimony in one of the Nuernberg trials were often introduced in evidence in another trial, usually to cover a single point or several relatively minor matters. This conserved time and avoided the difficulties attendant upon giving notice of the calling of a witness and the taking of his testimony. The first offer of extracts from testimony taken by another Nuernberg tribunal of concurrent jurisdiction was made near the end of the Medical case (Case 1) by the defense. Counsel for defendant Genzken, pursuant to leave from the Tribunal to submit supplementary defense documents, offered seven documents as exhibits. The last six of these were extracts from testimony given by two different witnesses in the Pohl case (Case 4). These exhibits were received in evidence without objection by the prosecution (sec. 2). On the next day, during the prosecution's rebuttal case, the Tribunal received in evidence a further extract from the testimony in the Pohl case which the prosecution offered without objection by the defense. In the Farben case (Case 6), however, the defense objected to an offer by the prosecution of an extract from the testimony heard in the Flick case (Case 5). The Tribunal in the Farben case admitted the extract as a sworn statement on the same theory that it admitted affidavits in evidence, provided the prosecution produced the witness for cross-examination upon demand of the defense (sec. 3).

2. MEDICAL CASE—FIRST OFFER AND ADMISSION OF EXTRACTS FROM THE TESTIMONY OF A WITNESS IN ANOTHER TRIAL

EXTRACTS FROM THE TRANSCRIPT OF THE MEDICAL CASE DURING THE PRESENTATION OF SUPPLEMENTARY DOCUMENTS ON BEHALF OF DEFENDANT GENZKEN, 27 JUNE 1947*

*Extracts from mimeographed transcript, U.S. vs. Karl Brandt, et al., Case 1, pages 10284-10286.

DR. MERKEL (counsel for defendant Genzken): Mr. President, Gentlemen of the Tribunal. In supplementation of the submission of evidence I should like to offer seven documents. The first document, Genzken Document 18 is to be found on page 40 of the document book. This is offered as Genzken Defense Exhibit 17. This is an affidavit signed by the witness Ruff.

[Counsel then read from the affidavit.]

* * * * *

All the other documents are extracts from the Pohl trial which is Case 4 in courtroom 2. All of these are certified by Major Schaefer [Chief of the Defense Center].

The first of this series of documents is Document Genzken 19-A, and can be found on page 41 of the document book. It will be Genzken Defense Exhibit 18. This is the interrogation of witness Dr. Kogon by the prosecution in Case 4. I quote the last question on page 41:

“Q. And in 1943 Block 50 was abandoned and was used for the production of typhus vaccine?”

“A. We entered the block on 15 August 1943. It had been arranged especially for the purposes of production of typhus vaccine, and the production had been changed.”

This shows that Block 50, the vaccine production station, was only used as from 15 August 1943. If the Tribunal will remember, as of 1 September 1943 the institute for the production of vaccine was no longer under the jurisdiction of Genzken, but under the jurisdiction of the Reichsarzt SS Grawitz. The block was only occupied on 15 August 1943. The actual production of vaccine must have started much later, certainly after 1 September 1943.

The next document will be Genzken 19-B, and will become Genzken Defense Exhibit 19. This you will find on page 43 of the document book. Here we have the cross-examination of the same witness, Dr. Kogon, by defense counsel Dr. Seidl. As it is well known, Balachowsky had submitted an affidavit to the prosecution, Document NO-484 which was Prosecution Exhibit 291. On page 65 of Document Book 12 of the prosecution, there Balachowsky speaks about a main committee on typhus research and alleges Genzken was a member of that committee.

Other documents have already established that no such main committee existed. It has been proved that Dr. Balachowsky had not sufficient knowledge about the situation in Block 50 and Block 46, and it is for that reason I am going to submit that document, No. 19-B. I merely read the last question on page 43:

“Q. On the basis of your statement, I must assume that Dr.

Balachowsky also was well informed about the conditions in Block 46 and Block 50?

"A. Not so well, not even approximately so well as I was."

The next document will be Genzken Document 19-C, which will be Genzken Defense Exhibit 20. This you will find on page 44 of the document book and it is also an excerpt from the cross-examination of witness Kogon by defense counsel Seidl:

[Counsel then read further from the Kogon testimony in the Pohl case, and thereafter introduced extracts from the testimony of the witness Ackerman in the Pohl case as three separate exhibits (Genzken Defense Exhibits 21, 22, and 23). There was no objection by the prosecution, and all these exhibits were admitted in evidence.]¹

3. FARBEN CASE—ADMISSION OF TESTIMONY TAKEN IN ANOTHER TRIAL SUBJECT TO PRODUCING THE WITNESS FOR CROSS-EXAMINATION UPON DEMAND OF THE OPPOSING PARTY

EXTRACTS FROM THE TRANSCRIPT OF THE FARBEN CASE, 21 NOVEMBER 1947²

MR. SPRECHER (chief, Farben trial team for the prosecution): The next document, NI-12401, may go in as Prosecution Exhibit 1593. This is an excerpt from the Flick case, of which we should like Your Honors to take judicial notice. In order to assist you in taking judicial notice of that matter we have incorporated these pages of the examination of Lindemann, another member of the SS Circle [of Friends of Himmler].³

DR. FLAECHSNER (counsel for defendant Bueteifisch): Mr. President, I don't know whether the document in its present form in which it was submitted to the Tribunal is proper material for judicial notice. It's true that Lindemann testified as a witness in the Flick case and Lindemann is still available to the prosecution now. If they want to refer to his testimony they can certainly

¹ On the next day of the Medical trial, 28 June 1947, the prosecution offered as a part of its rebuttal case a further extract from the testimony of Kogon (witness in the Pohl case) as Document NO-3680, Prosecution Exhibit 536. In support of this offer the prosecution stated: "It is the testimony of Eugen Kogon, who also appeared in this court as a witness, and it clarifies certain matters concerning the typhus experiments and the poison-bullet experiments conducted at Buchenwald concentration camp." There was no objection by the defense and the exhibit was admitted in evidence (*Tr. p. 10360*).

² Extracts from mimeographed transcript, U.S. *vs.* Carl Krauch, *et al.*, Case 6, pages 4178-4181 and 4187.

³ Karl Lindemann testified on three different days (11, 12, and 13 June 1947) before Tribunal IV in the Flick case. His testimony, recorded in the transcript of Case 5, U.S. *vs.* Friedrich Flick, *et al.*, pages 2907-3015 and 3109-3113, covers approximately 114 mimeographed pages. The excerpt which the prosecution offered here in the Farben case was only 3 pages and was calculated to show the character of a meeting attended by Lindemann and the defendant Bueteifisch at which Himmler had addressed the "Himmler Circle of Friends" at the front.

get an affidavit from him or have him examined in chief before the Tribunal. However, if the record of the testimony in another case is presented it should be presented in its entirety, but not even that requirement has been met in this document. The testimony and examination of Lindemann was very much in detail in the other case and such a detailed examination, of course, brings to light various aspects. This excerpt here contains solely a very short part of the examination by the prosecution in that case.*

PRESIDING JUDGE SHAKE: May I inquire, Mr. Prosecutor, on what theory or what authority you assert the claim that this Tribunal should take judicial notice of the testimony of a witness before another tribunal as distinguished from the proposition that this Tribunal might take judicial notice of the judgment of another tribunal?

MR. SPRECHER: May I have just a second?

PRESIDING JUDGE SHAKE: Yes.

MR. SPRECHER: May I refer to Article IX of Ordinance No. 7 with respect to the conditions under which this Tribunal is authorized to operate? There the statement is made that "The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including *** the records and findings of military or other tribunals of any of the United Nations." And then there's a statement in Article VII — I am sorry, Your Honor, Article IX is not really so much in point as Article VII. Article VII states that the following shall be admissible if the tribunal deems them to have probative value: affidavits, and then later, "the records, findings, statements and judgment of the military tribunals," etc. We think the provision about "the records" of other tribunals is in point. With respect to the question of merely putting before the court an excerpt of this document, an excerpt of the testimony of the witness Lindemann, it is of course up to the discretion of defense counsel to bring before the court any other parts thereof. Actually our sole purpose in presenting that, was this speech which Himmler made at the time the Circle of Friends visited the front and the fact that Lindemann states [defendant] Buetefisch was present.

PRESIDING JUDGE SHAKE: Do you think that article goes so far as to mean that in the trial of this case, without producing a given witness, you could go down and bring up the transcript of what he did testify in some other tribunal to furnish your proof here

* As counsel for defendant Steinbrick, another member of the Circle of Friends, in the Flick case, Dr. Flaechsner had been one of several counsel to cross-examine Lindemann (*Tr. pages 2940-2980*).

and not produce the witness for cross-examination, and take the position that this Tribunal should consider the testimony of a witness in another tribunal as an establishment of fact here?

MR. SPRECHER: Whether or not Your Honors gave weight to the matter —

PRESIDING JUDGE SHAKE: I am talking about admissibility now, not weight. This is a pure case of admissibility.

MR. SPRECHER: I am sorry. I misunderstood the last part of your question. You stated in order to establish the fact and that, of course —

PRESIDING JUDGE SHAKE: I mean is it calculated to establish it?

MR. SPRECHER: Yes.

PRESIDING JUDGE SHAKE: So as to be admissible?

MR. SPRECHER: Yes. Indeed, Your Honor, we think it's the type of evidence which, if not answered by the defense, would be a proper basis upon which you should make a finding.

PRESIDING JUDGE SHAKE: Even though that witness was presently available here in Nuernberg and could be brought here in person and subjected to cross-examination? Do you think that the prosecution could simply produce a transcript of this evidence before some other tribunal and that they will stand on this transcript to establish the fact and not produce the witness at all?

MR. SPRECHER: We don't think, Your Honor, that Article VII allows any other construction.

PRESIDING JUDGE SHAKE: Perhaps it doesn't, but personally I would like to be pretty sure of that before we so hold.

MR. SPRECHER: Mr. President, I only want to say this. If Your Honors, and apparently you do have some questions about the weight you would give to this matter — if Your Honors so indicate we shall be glad to produce Lindemann and have another examination and another cross-examination of him here but, frankly, in connection with the limited purpose for which this is offered I think the prosecution has not only been within its rights under Article VII but has exercised a sound discretion as to how to present expeditiously the issues here. Now, if defense counsel want Lindemann produced, they are free to produce him also. The defense case is not far away. Lindemann can certainly be made available. I think it's merely another means of prolonging the trial. And the point we want to establish —

PRESIDING JUDGE SHAKE: This goes to a pretty important subject and something more involved than a pure matter of time.

MR. SPRECHER: Mr. President, may I ask that we at this time mark it for identification and then that you have time to think it over and then perhaps we might discuss it. I don't think that this is a matter where Ordinance No. 7, which we think is rather plain

upon its face, should be lightly passed upon. We feel quite as strongly about this as we did as to the admissibility of affidavits as such, and I am speaking in that regard for the Chief of Counsel, and I am only indicating to you by making that remark, that we do consider it rather important in view of the principles of adjective law which, of course, touches upon the substantive rights of these defendants in many points and the adjective law which should be adopted in proceedings of this kind.

PRESIDING JUDGE SHAKE: Very well. The document NI-12401 is marked for identification only, as Prosecution Exhibit 1593, and the Tribunal will take under advisement the question of its admissibility in evidence, and would be glad to be advised as promptly as possible the views of counsel for the prosecution and the defense with reference to how they consider the matter.

[The offer of evidence proceeded until the morning recess after which the presiding judge made the following statement.]

PRESIDING JUDGE SHAKE: The Tribunal feels sufficiently advised with reference to the document marked for identification as Prosecution Exhibit 1593, being Document NI-12401, purporting to be excerpts from the testimony of one Karl Lindemann before Tribunal IV, to rule on that matter at this time and to save you gentlemen the burden of briefing. The Tribunal will admit the document in evidence as a sworn statement of the witness, upon the same theory that it admits affidavits in evidence, provided the prosecution produces the witness for cross-examination, if cross-examination is requested by the defense, and with the further provision that if there is such a request and the witness is not produced for cross-examination, the Tribunal will subsequently sustain a motion to strike it from the record.

MR. SPRECHER: Mr. President, may we ask the defense to indicate their desires as soon as possible?

PRESIDING JUDGE SHAKE: Yes, that is entirely proper, and will you make known to the prosecution, as soon as you can, whether or not you desire to have this witness produced?

Perhaps the Tribunal should say one thing further. There was some observation made by counsel for the defense with reference to this being excerpts from the testimony of this witness. We think, in fairness to the defense, we should say that if the defense desires to offer any other part of the testimony of this witness before Tribunal IV, that it will be received if it is pertinent to any question involved in the trial of this case.

[The defense did not offer further extracts from the testimony of Lindemann before Tribunal IV in the Flick case, and Lindemann was not called for cross-examination by the defense.]

N. Rejection of a Defense Request to Conduct a Medical Experiment Under the Supervision of the Tribunal

I. INTRODUCTION

In the Medical case (Case 1) a number of the defendants were charged with high-altitude experiments upon inmates of the Dachau Concentration Camp (see par. 6 (A) of the indictment, vol. I, this series, p. 11). The defense on several occasions applied for permission to carry out an experiment under the supervision of the Tribunal, with the participation of defendants, to show the effects of using low-pressure chambers upon human beings. The Tribunal rejected these applications (2 below). No further instance has been found of an application to conduct an experiment as a part of the proof in any of the Nuernberg trials.

2. MEDICAL CASE—REJECTION OF DEFENSE REQUEST TO CONDUCT EXPERIMENTS WITH LOW-PRESSURE CHAMBERS UNDER THE SUPERVISION OF THE TRIBUNAL

EXTRACT FROM THE TRANSCRIPT OF THE MEDICAL CASE,
30 APRIL 1947*

DR. SAUTER (counsel for defendants Ruff and Blome): Mr. President, this brings me to the end of the submission of my documents, and I further make the application which I have already made in the past that we carry out here a practical experiment using a low-pressure chamber, in order to convince ourselves here how such an experiment is being carried through and what its effects are. In Heidelberg, not too far from here, there is such a low-pressure chamber. The defendant Dr. Ruff and other defendants have already worked in this low-pressure chamber. This mobile low-pressure chamber, located in Heidelberg, can be brought to Nuernberg without any difficulty. Some such experiment can be carried out in a courtyard of the Palace of Justice and it will considerably make the Tribunal's tasks easier if it can convince itself about such an experiment. We have a number of experts who can be in charge of that experiment. There is an American medical center at Heidelberg where a number of experts are located. The defendants Ruff and Romberg are available for

*Extract from mimeographed transcript, U.S. vs. Karl Brandt, *et al.*, Case 1, pages 6761 and 6762.

this experiment and are ready to subject themselves to it. I have received a number of telegraphic offers from a dozen former collaborators of Dr. Ruff that they would be glad to make themselves available here as experimental subjects. Among them is this witness Mrs. Guaita who, earlier in her capacity as film director, had participated in these experiments. I should like to consider this my application for having such an experiment performed here, and then, Gentlemen of the Tribunal, you will convince yourselves that, in case these experiments are planned and executed in a scientific manner, they are harmless and non-dangerous and not painful to an extent that any one of us here in the courtroom could subject ourselves to any such experiments.

JUDGE SEBRING: Counsel, is the experiment you propose the one you say that Dr. Ruff performed? That one, or one of those that Dr. Rascher performed? Which one do you propose to show here?

DR. SAUTER: Dr. Ruff's experiments, the experiments that Dr. Ruff performed. The experiments of Rascher do not concern us.

MR. HARDY (associate counsel for the prosecution): Your Honor, it is my understanding that the Tribunal has ruled on this once.

PRESIDING JUDGE BEALS: The Tribunal has ruled on this point, denying the application made for the defendant Ruff, and the Tribunal is of the same view. The application is denied.

O. Visiting the Scene of Alleged Criminal Conduct

I. INTRODUCTION

The indictment in the Hostage case charged that German troops under the command of the defendant Rendulic had engaged in the wanton destruction of property while evacuating Finnmark, Norway (see par. 9 (a) of the Indictment, vol. XI, this series, p. 770). Upon invitation of the Norwegian Government, the members of the Tribunal, counsel for the defendant Rendulic, and representatives of the prosecution visited the scene of this alleged criminal conduct during the course of the trial. The prosecution's application that this journey be undertaken, the agreement of defense counsel to the application, and the Tribunal's order on the application are reproduced in 2 below. In its judgment the Tribunal found that the defendant Rendulic was not guilty of the charges of criminal conduct here involved (see vol. XI, this series, pp. 1295-1297).

2. HOSTAGE CASE—JOURNEY TO NORWAY TO VIEW THE TERRITORY ALLEGEDLY DESTROYED WITHOUT MILITARY NECESSITY

a. Application by the Prosecution

Application Requesting the Tribunal to Travel to Finnmark, Norway¹

The prosecution hereby informs the Tribunal that it has received an invitation from the Attorney General of the Royal Norwegian Government to have the members of the Tribunal, a representative for the defendant Rendulic, and members of the prosecution fly to Finnmark, Norway, for the purpose of seeing first hand the geographical conditions of this province and if possible and time permits, the extent of the damages in connection with the forced evacuation of the Norwegian population by the 20th Mountain Army, then commanded by Lothar Rendulic, during the winter of 1944–1945.²

The date of departure, the duration, and the itinerary will be submitted separately and subject to the Tribunal agreeing to accept the invitation of the Norwegian Government.

Defense counsel for Rendulic, Dr. Stefan Fritsch, has been informed orally about this request and will indicate his decision to the Tribunal separately.

[Signed] TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes
CLARK DENNEY
THEODORE F. FENSTERMACHER
[Signed] WALTER H. RAPP

Nuernberg, Germany, 8 September 1947.

b. Agreement by Counsel for Defendant Rendulic to Accept the Invitation of the Norwegian Government

Nuernberg, 8 September 1947

To: Secretary General

Subject: Prosecution's Application Requesting the Tribunal to Travel to Finnmark, Norway, dated 8 September 1947, signed Taylor³

¹ U.S. vs. Wilhelm List, et al., Case 7, Official Record, volume 31, page 436.

² See paragraph 9 (a) of the indictment, volume XI, this series, page 770.

³ U.S. vs. Wilhelm List, et al., Case 7, Official Record, volume 31, page 434.

The undersigned defense counsel for the defendant Rendulic agrees voluntarily to accept the invitation from the Norwegian Government to travel to Finnmark, Norway, provided the Honorable members of the Tribunal will accept this invitation.

[Signed] STEFAN FRITSCH

c. Order of the Tribunal, 8 September 1947, Ordering the Trip of the Tribunal and Representative of the Prosecution and Defense to Finnmark.

[Stamp] Filed: 9 September 1947

ORDER¹

Upon application of the attorneys for the prosecution requesting the members of the Tribunal, in the presence of counsel for the prosecution and the defense, to view the territory in Norway alleged to have been destroyed by the German Wehrmacht without military necessity, as a part of the prosecution's case and the evidence offered in support thereof, and which application has been concurred in by the attorney for the defendant involved, said trip to be without expense to the Tribunal or the fund set up by the United States Government for the support thereof;

It is therefore ordered that the request of the attorneys for the prosecution be granted, that the territory be viewed by the Tribunal without expense to the Tribunal or the fund set up for the support of the Tribunal by the United States Government, that the prosecution's rest [the prosecution had rested its case on 28 August 1947] is ordered withdrawn for the purpose of including the viewing of said territory as a part of the prosecution's evidence and that the adjournment of the Tribunal to 12 September 1947 be extended to 15 September 1947 at 9:30 a.m. of said day.²

[Signed] CHARLES F. WENNERSTRUM
Presiding Judge

[Signed] EDWARD F. CARTER
Associate Judge

[Signed] GEORGE J. BURKE
Associate Judge

Dated this 8th day of September 1947.

¹ Ibid., volume 32, page 55.

² The Tribunal, in its judgment, found that Rendulic was not guilty of the charges here under investigation. See volume XI, this series, pages 1295-1297.

XIX. RULES AND PRACTICE CONCERNING APPLICATIONS, MOTIONS, AND ARGUMENTATION

A. Introduction

Neither the Charter of the IMT nor Ordinance No. 7, as originally issued, prescribed any procedure concerning the making or filing of motions or applications. Such procedural matters were left to the tribunals under the requirement that the tribunals "shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure" (cf. Art. 19 of the Charter of the IMT and Art. VII of Ordinance No. 7) and under the express authorization permitting the tribunals to draw up rules of procedure not inconsistent with the Charter or the Ordinance (cf. Art. 13 of the Charter and Art. V (f) of the Ordinance).

The Rules of Procedure adopted by the IMT on 29 October 1945 (reproduced in subsec. I D) dealt with applications for defense counsel, for witnesses, and for documents, and stated that "All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal." It also stated that "The Tribunal, acting through its President, will rule in court upon all questions arising during the trial, such as questions as to admissibility of evidence offered during the trial, recesses, and motions." There were no directives in the rules as to the form or manner in which "questions" were to be raised and no express provisions mentioning answers or objections by the opposing party. When, before the trial began, counsel for Gustav Krupp requested a postponement of the trial as to Krupp, he gave no special title or heading to his request, and merely began by stating: "As defending counsel to the accused*** I request that the proceedings be deferred***." The American prosecution's response to this request was titled "Answer of the United States Prosecution to the Motion," etc. The British response was without title or descriptive heading. The French responded by a "Memorandum" and a "Supplemental Memorandum" (see Trial of the Major War Criminals, *op cit.*, vol. I, pp. 124, 134, 139, 141, and 142). This nontechnical and varied manner of raising questions and joining issues continued throughout the trial.

The Rules of Procedure adopted by Military Tribunal I in the Medical case, the first case heard by a tribunal established under Ordinance No. 7, contained three main rules on applications and motions and objections thereto (sec. III). These rules were entitled: "Rule 10. Applications and Motions before Trial";

"Rule 11. Rulings during the Trial"; and "Rule 12. Production of evidence for a Defendant." These rules became a part of the codified rules of procedure of Tribunals I, II, and III in February 1947 (sec. IV B) and were incorporated in the first "Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 1 April 1947" (see sec. IV C and sec. V). On 2 December 1947, Rule 10 was revised by the Committee of Presiding Judges (sec. IV E), the main revisions eliminating the provision that the prosecution could make objections to defense applications for documents and witnesses and extending the time for filing objections to other types of motions or applications by both parties.

There were few directions in the rules of procedure as to the form or nature of motions, except for the requirement that defense applications for documents and witnesses state where the witness or document was thought to be, the general nature of the evidence sought to be adduced thereby, and the reason the evidence was deemed relevant. Forms were furnished defense counsel for making applications for documents and witnesses (subsec. B), but apart from such forms there were no technical requirements of uniformity and no rule that the action or relief sought had to be stated separately from the substantiation thereof. Many of the motions and answers took the form of memoranda of considerable length. It was the exception when a brief was filed separately in support of a motion or answer. Occasionally, a tribunal set a motion down for oral argument, as in the Ministries case where the Tribunal heard oral arguments of both prosecution and defense before granting a defense motion to dismiss count four of the indictment (see sec. VIII, vol. XIII, this series). Tribunal orders, apart from the captions, were likewise not of any uniform style or nature. Sometimes the orders merely stated that the motion or application was granted or denied; sometimes reasons for the ruling were stated in the text; and sometimes reasons for the ruling were set forth in a memorandum attached to and incorporated by reference in the order.

Apart from objections interposed during the offer of documents or the examination of witnesses, it was generally required that motions be submitted in writing, although there were some exceptions to this rule. Orders upon written motions were ordinarily made in writing, and orders made in writing, particularly the more important ones, were sometimes also read in full or summarized in open session.

Other sections of this volume contain a large number of various types of motions, applications, answers, and tribunal orders concerning a wide range of topics which are illustrative of "motion practice." Accordingly, no further materials are reproduced in

this section. Among the motions, applications, answers, and orders reproduced in four of the early sections of this volume, and which may be considered as illustrative, reference is made to the following: Motion of defense counsel concerning discrepancies between the English and German document books in the Ministries case, 9 February 1948 (sec. VII G 4 a); Motion to amend indictment in the Medical case and order thereon, 20, 21 November 1946 (sec. IX H 2); Order amending indictment in the Flick case, 10 September 1947 (sec. IX H 3); Order dismissing charges under count six as to the defendant Meissner in the Ministries case, 23 June 1948 (sec. IX H 6); Ruling dismissing two sections of count two in the Farben case and discussing the relation of this ruling to count five, 22 April 1948 (sec. IX I 4); Motion requesting separate trial for each defendant in the Krupp case, 9 December 1947 (sec. IX J 1); Motion that the Tribunal order the prosecution to supplement the indictment in the Medical case, 21 November 1946 (sec. IX K 1 a); Brief in opposition to motion for bill of particulars in the Medical case, 27 November 1947 (sec. IX K 1 b); Order denying 15 motions filed on behalf of defendant von Buelow in the Krupp case, 22 April 1948 (sec. IX K 4 c); Motion by defendant Bohle to change his plea in the Ministries case and related matters, 27 March 1948 (sec. X D 1); and order concerning the order of trial during the defense case in the Ministries trial, 29 March 1948 (sec. XII E 1).

Concerning general argument before the tribunal on the application of the law, the theory of the case, and the evidence, both the Charter of the IMT and Ordinance No. 7 made specific provisions concerning opening and closing statements, but no reference was made to written briefs. The provisions concerning opening and closing statements are contained in the articles concerning the order of trial (Art. 24 of the Charter and Art. XI of the Ordinance). The Charter directed that the prosecution "shall" make an opening statement and that after the close of the evidence first the defense and then the prosecution "shall address the court." No provision was made for opening statements by the defense, but in its order concerning the presentation of the defense case the IMT stated that "During the presentation of a defendant's case, defendant's counsel will*** make such brief comments on the evidence as are necessary to insure a proper understanding of it." (See sec. XIII J 3, par. 2 (a)). Just before and shortly after the defense case began, the IMT conducted discussions on several different days with defense counsel concerning their applications for documents and witnesses. In these discussions the proposed nature of the respective defense cases was outlined (see for example, Trial of the Major War Criminals,

op. cit., vol. VIII, pp. 161–238, 495–630; and vol. IX, pp. 1 and 2, 696–710). The IMT allowed one counsel to make a general closing statement concerning juridical aspects of the trial, in addition to the closing statements on behalf of each defendant and the arguments on behalf of the accused organization.

Article XI of Ordinance No. 7 stated that the prosecution and defense “may make an opening statement,” and in all cases both the prosecution and the defense did make opening statements. The provision, that “the defense” could make an opening statement (Art. XI (*d*)), was uniformly interpreted to mean that an opening statement could be made on behalf of each defendant. The defense openings were made consecutively at the beginning of the defense case in all the trials except the Ministries and High Command cases where the respective defense openings preceded the case in chief on behalf of the individual defendants. In the Ministries case the opening statement on behalf of the defendant Keppler was divided into two parts delivered several weeks apart. The prosecution ordinarily was allowed up to one day for its opening statement and in no case did the prosecution take longer than that amount of time. The opening statements on behalf of defendants in each case were longer than the opening statement of the prosecution except in the Milch and Flick cases.

Concerning closing statements, Article XI of Ordinance No. 7 as originally issued provided that first the defense and then the prosecution “shall address the court.” This was amended by Ordinance No. 11 to provide that, “The prosecution and the defense shall address the court in such order as the Tribunal may determine.” In a number of cases the tribunals authorized general closing statements on behalf of all defendants in addition to the closings on behalf of the individual defendants. The prosecution made its closing statement before the defense closings in all the trials except the Milch, Farben, and Einsatzgruppen cases. In five of the trials the prosecution made rebuttal closing statements (Justice, Flick, Hostage, Krupp, and Ministries cases) and in the Farben case the defense made a rebuttal closing statement. The prosecution ordinarily was allowed up to one day for its closing statement and in no case did the closing statement take longer than this amount of time. In each case the defense closings were longer than the prosecution closing (rebuttal included). On the average the defense closings were more than five times as long as the prosecution closings. The table appearing in subsection C indicates the transcript pages at which the respective opening and closing statements in each of the twelve cases may be found, and summary figures concerning the length of this argumentation. A substantial number of the opening and closing statements have

been reproduced in full or in part in the earlier volumes of this series devoted to the individual trials. Concerning the pages at which these may be found, reference is made to the "Contents" of the earlier volumes.

Both the Charter of the IMT and Ordinance No. 7 provided that after the closing statements "each defendant may make a statement to the Tribunal" (Art. 24 (*j*) of the Charter and Art. XI (*i*) of the Ordinance). A large number of the defendants elected to make these final statements and occasionally one defendant spoke on behalf of himself and others. These statements were not made under oath and were, of course, not subject to cross-examination. All the final statements made by defendants in the 12 cases held before tribunals established under Ordinance No. 7 have been reproduced in the earlier volumes of this series, as follows: Medical case, volume II, pages 138-170; Milch case, volume II, page 772; Justice case, volume III, pages 941-953; Pohl case, volume V, pages 931-957; Flick case, volume VI, pages 1185-1187; Farben case, volume VIII, Section XII; Hostage case, volume XI, pages 1228 and 1229; RuSHA case, volume V, pages 72-87; Einsatzgruppen case, volume IV, pages 384-410; Krupp case, volume IX, pages 1323-1326; Ministries case, volume XIV, pages 272-307; and High Command case, volume XI, pages 458-461.

There was no provision concerning the filing of briefs in Ordinance No. 7 or in the Uniform Rules of Procedure. However, numerous briefs were filed in most of the cases, frequently upon the express request of the tribunal. These briefs can be classified into three general types: special briefs on specific questions of law or in support of or in objection to motions; preliminary briefs on the individual responsibility of defendants (principally filed by the prosecution); and final briefs submitted after the close of the evidence and after the closing statements. Final briefs were submitted in all cases except the Milch, Justice, and Hostage cases.

**B. Forms for Defense Applications for Documents
and Witnesses**

I. FORM FOR DEFENSE APPLICATION FOR DOCUMENT

Military Tribunals

Nuernberg, Germany

United States of America

against

Defendant's Application for Document

TO: The Secretary General, Military Tribunals:

I, _____ attorney for _____,

(Name of Defendant)

hereby request that the Tribunal require the production of the following document to be used for the defense:

Identification of document:

Last known location of document and information that may aid in its location:

The document requested herein will be used to prove the following facts:

These facts are relevant to the defense for the following reasons:

(Date)

Signature of Defendant's Counsel

Decision of Tribunal

Presiding Judge

2. FORM FOR DEFENSE APPLICATION FOR WITNESS

Military Tribunals

Nuernberg, Germany

United States of America

against

Defendant's Application for Summons of Witness

TO: The Secretary General, Military Tribunals:

I, _____ attorney for _____,
(Name of Defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:

Occupation and last known location:

Other information that may aid in locating the person named:

The person above-named has knowledge of the following facts:

These facts are relevant to the defense for the following reasons:

(Date)

Signature of Defendant's Counsel

Decision of the Tribunal

Presiding Judge

C. Table Showing the Transcript Pages of the Opening and Closing Statements of the Prosecution and Defense in the 12 Nuernberg Trials Held Under the Authority of Control Council Law No. 10

Case No.	Popular name of case	Opening statements		Closing statements	
		Prosecution (Tr. pages)	Defense (Tr. pages)	Prosecution (Tr. pages)	Defense (Tr. pages)
1	Medical	12-74	2106-2284	10718-10796	10797-11309
2	Milch	9-24	494-509	2435-2488	2377-2435
3	Justice	34-137	4057-4221	9620-9798 (Rebuttal 10574-10586)	9799-10574
4	Pohl	1-88	1099-1251	7565-7637	7640-8009
5	Flick	34-149	3122-3149; 3916-3980	10344-10463 (Rebuttal 10952-10969)	10471-10951
6	Farben	39-192	4711-4944	15442-15534	14547-15441 (Rebuttal 15536-15599)
7	Hostage	10-123	2965-3143	9557-9718 (Rebuttal 10390-10413)	9719-10390
8	RuSHA	24-125	1230-1400	4781-4844	4845-5253
9	Einsatzgruppen	30-60	257-346; 359-364; 407-474	6577-6595	5670-6363
10	Krupp	18-113	4714-4847	12467-12511 (Rebuttal 13201-13215)	12519-13198
11	Ministries	17-151	266 transcript pages ¹	26902-27044 (Rebuttal 28009-28028)	27046-28007
12	High Command	20-152	284 transcript pages ²	9505-9620	9621-9977
Total pages		1152	2038	1237	6932

¹ The opening statements for the respective defendants were not delivered consecutively. They are recorded in the mimeographed transcript at the pages indicated:

Meissner	4461	Erdmannsdorf	12525	Kehrl	15522-15532
Schellenberg	5027-5032	Keppler (part 1)	12527-12535	Rasche	16995-17009
Puhl	5433-5443	Vessenmayer	13053-13061	Darré	18541-18548
Berger	5913-5915	Bohle	13461-13473	Keppler (part 2)	19251-19265
Weizsaecker	7218-7236	Dietrich	13616-13627	Lammers	19741-19762
Stengracht	9729-9737	Koerner	14076-14092	Krosigk	22678-22694
Woermann	10831-10848	Pleiger	14754-14769	Stuckart	24124-24146
Ritter	11554-11569				

² The opening statements for the respective defendants were not delivered consecutively. They are recorded in the mimeographed transcript at the pages indicated:

Leeb	1757-1814	Hollidt	4403-4419	Sperrle	6100-6118
Kuechler	2675-2696	Schniewind	4760-4779	Warlimont	6263-6274
Hoth	3019-3036	Roques	5007-5019	Reinecke	7153-7178
Reinhardt	3314-3330	Woehler	5604-5624	Lehmann	7889-7908
Salmuth	3878-3899				

XX. INABILITY OF DEFENDANTS TO STAND TRIAL, ABSENCES OF DEFENDANTS FROM THE PROCEEDINGS, FOR REASONS OF ILLNESS, AND RELATED MATTERS

A. Introduction

Article IV (*d*). of Ordinance No. 7 provided that every defendant was "entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the Tribunal defendant's interests will not thereby be impaired," or if a defendant was excluded from the proceedings as punishment for contumacy (subsec. B). No defendant was found in contempt of court and none excluded from the proceedings for any misconduct during the trial. The subject of temporary absences from the proceedings or for the purpose of preparation of the defense case, for personal or compassionate reasons, is treated in an earlier section (sec. XIII H). The present section is devoted to the question of inability to stand trial, absences for reasons of illness, and related matters.

In the IMT trial the physical and mental ability of three defendants to stand trial was brought into question in different ways. The defendants involved were Gustav Krupp von Bohlen und Halbach, Rudolf Hess, and Julius Streicher (Trial of the Major War Criminals, *op. cit.*, vol. I, pp. 124-167). Before the arraignment counsel for Gustav Krupp requested a postponement of the proceedings as to Krupp on the ground that Krupp was unable to stand trial because of physical and mental infirmities. After considering reports and various answers interposed by the chief prosecutors, the Tribunal granted the defense motion; ordered a postponement of the case as to Krupp; and directed that the charges in the indictment as to Krupp "be retained upon the docket of the Tribunal for trial hereafter, if the physical and mental condition of the defendant should permit" (*ibid.*, p. 143). Counsel for the defendant Hess applied for experts to examine and report upon whether Hess was mentally competent and capable of being tried, stating that counsel "has grave doubts as to the mental responsibility and the fitness for trial" of Hess. Counsel for defendant Streicher orally suggested at a preliminary hearing of the IMT that the Tribunal "consider whether a psychiatric examination of defendant Streicher would not be proper," noting however, that "my client does not desire an examination of this sort, and is of the opinion that he is mentally completely normal." After the Tribunal stated that a formal motion would have to be

filed, the Deputy Chief Prosecutor for the Soviet Union filed a written motion requesting "that defendant Streicher be submitted to a psychiatric examination before the beginning of the trial." In the case of both Hess and Streicher medical reports were filed by experts. Concerning these two cases the IMT declared in its judgment (*ibid.*, p. 172) :

"After argument, and consideration of full medical reports, and a statement from the defendant himself, the Tribunal decided on 1 December 1945 that no grounds existed for a postponement of the trial against the defendant Hess because of his mental condition. A similar decision was made in the case of defendant Streicher."

In four instances during the twelve trials before tribunals established pursuant to Ordinance No. 7, the case against one defendant was severed by tribunal order because of the defendant's inability to stand trial. The four defendants involved were Engert in the Justice case, Brueggemann in the Farben case, von Weichs in the Hostage case, and Rasch in the Einsatzgruppen case. Materials from the record concerning each of these cases, including in each instance the tribunal order directing the severance of the case, are reproduced in subsection C.

In the Justice case the defendants Rothaug and Engert were arraigned with the other defendants, but both were absent due to illness when the Tribunal next convened to hear the opening statement of the prosecution. After the Secretary General had read medical statements declaring that these two defendants would be prevented from attending trial for some weeks, their counsel requested permission for the defendants to be absent, and counsel for defendant Engert raised a question concerning the propriety of the severance of the case against Engert. The Tribunal stated that for the present the question of severance would be held in abeyance (subsec. C 1 a). After more than 1 month, the defendant Rothaug again began to attend the trial sessions, and on 11 days, between 11 and 26 August 1947, Rothaug testified and was cross-examined. The case as to Rothaug thereafter proceeded to judgment and sentence. Engert, after his arraignment, did not attend any of the sessions of the trial during the prosecution's case in chief. When the commissioners of the Tribunal discussed with defense counsel the order of the presentation of the defense case, counsel for Engert requested that the presentation of the case for Engert be delayed to the end of the entire defense case pending further inquiry on the question of Engert's ability to stand trial. The commission, not being empowered to rule for the Tribunal, deferred the matter (subsec. C 1 b). When the Tribunal next convened, it suggested that the prosecution and defense submit

proposed medical and psychiatric experts, both American and German, to examine Engert's condition (subsec. C 1 c). The prosecution and counsel for defendant Engert thereafter stipulated to four experts, the prosecution proposing two officers of the Medical Corps of the U.S. Army, the defense counsel proposing two German civilian doctors. The stipulation stated that "if this committee of experts is not in agreement concerning its findings, the Tribunal shall appoint its own medical and psychiatric experts for the purpose of making a further examination" (subsec. C 1 d). The Tribunal immediately appointed the four persons proposed by the stipulation as medical experts to examine Engert and to submit their findings to the Tribunal (subsec. C 1 e). Thereafter Dr. Marx, counsel for defendant Engert, was found guilty of contempt of court because of attempting to influence the findings of the German experts, the complaint being initiated by one of the German experts (sec. XXI D), and a new defense counsel for Engert was appointed. In the medical report upon the examination of the defendant Engert, the two American medical officers answered negatively the question: "Is the defendant Engert physically able to come to court and be examined as a witness?" The two German doctors, however, both answered this question in the affirmative, and both also answered affirmatively the two further questions: "Would the present condition of defendant Engert be rendered worse by reason of attendance in court for examination?"; and "If the defendant Engert should attend court and be examined as a witness, is he mentally capable of understanding the nature of the charges against him and of giving a fair presentation of his defense with the aid of his counsel?" (U.S. vs. Josef Altstoetter, et al., Case 3, Official Record, vol. 35, pp. 1650-1655). Engert's condition failed to improve. Near the end of the defense case, the prosecution called one German civilian doctor and an American medical officer to testify before the Tribunal on Engert's physical and mental condition (*Tr. pp. 7396-7402*) and immediately thereafter moved for a mistrial as to Engert. Counsel for the defendant joined in the motion and the Tribunal declared a mistrial (subsec. C 1 f).

In the Farben trial the case as to defendant Brueggemann was severed after motions for severance were made by both defense and prosecution (subsec. C 2). Because of medical reports on the physical conditions of Brueggemann, the prosecution requested that the service of the indictment upon him be deferred. Before the indictment was served, however, Brueggemann's counsel moved for severance on 16 June 1947 (subsec. C 2 a). After the indictment was served upon Brueggemann, the prosecution moved that the case as to Brueggemann be postponed for an indefinite

time, but that the charges be retained upon the docket (subsec. C 2 b). The Tribunal thereafter ordered the severance of the charges for the purposes of trial from the charges against the other defendants and that the indictment against Brueggemann be retained on the docket for trial as a separate cause if the physical and mental condition of said defendant should later permit his trial (subsec. C 2 c).

In the Hostage case, the Tribunal severed the case as to defendant von Weichs after two medical commissioners had rendered reports (subsec. C 3). Shortly after the beginning of the trial, on 24 July 1947, counsel for von Weichs requested a medical examination of von Weichs by a "German-American Committee of Physicians," counsel stating that he considered it his duty "to have established that Field Marshal von Weichs is no longer able to stand trial" (subsec. C 3 a). The Tribunal appointed a commission of three, consisting of two American medical officers and a German civilian doctor. The two American medical officers reported that it would not be harmful for von Weichs to stand trial, whereas the German expert filed a report to the contrary (*U.S. vs. Wilhelm List, et al.*, Case 7, Official Record, vol. 30, pp. 340-342). The Tribunal thereupon ruled that "von Weichs be continued as a defendant and held for trial and appearance before this court at such times as his physical condition will permit" (subsec. C 3 b). Von Weichs attended the proceedings on a number of days thereafter, but for the most part he was unable to be present. After several months, counsel for von Weichs again requested that von Weichs be examined to determine whether he could defend himself (subsec. C 3 c). The Tribunal then appointed a commission of three American medical officers who reported that von Weichs' condition had worsened and that he could not appear in court "within the next 3 weeks" (*ibid.*, vol. 31, p. 683). The Tribunal, on 7 January 1948, declared a mistrial as to von Weichs and severed his case from that of the remaining defendants (subsec. C 3 d).

In the Einsatzgruppen case the Tribunal directed the severance of the case against defendant Rasch. The order (subsec. C 4) summarizes the history of the case from the time counsel for the defendant filed a motion for severance.

There were also cases where motions to discharge the defendant from trial or for severance of the case for alleged inability to stand trial were denied, as in the case of defendant Strauch in the Einsatzgruppen trial. The Tribunal, in its judgment, devoted an entire section to the "Physical and Mental Condition of Defendant" Strauch, which is reproduced in subsection D. In the High Command case, counsel for defendant von Leeb asked for a determina-

tion as to whether von Leeb was fit to stand trial but did not expressly request a severance. After a medical examination had been submitted, the Tribunal concluded that "said report does not disclose a health condition of said defendant such as to unfit him to stand trial for and to present his defense to the offenses charged" (subsec. E). In the Farben case, two different medical commissions investigated and reported upon the ability of defendant Schmitz to stand trial (subsec. F). The first commission was established by tribunal order after a defense motion requested a commission investigate this question but stated that the defendant did not want to avoid trial if possible. The second commission was established upon motion of the Tribunal itself. Both commissions filed reports summarizing Schmitz' condition and both the prosecution and the defense were notified. No motion was made for a severance of the case and no further court order was issued. Schmitz did not elect to take the stand in his own defense and the case as to him proceeded to judgment and sentence.

Apart from cases where the ability of a defendant to stand trial was brought directly into question, there were numerous instances where defendants were absent from the proceedings because of illness, hospitalization, or special medical treatment. The trials lasted 6 months or more on the average, and many defendants were old or infirm in varying degree. In all but two of the trials (the Milch and Flick cases) twelve or more defendants were indicted. If there had been an unbending requirement that proceedings could not be held in the absence of any defendant, the trials could not have proceeded without numerous delays and without the severance of the cases of more defendants. However, Article IV (*d*) of Ordinance No. 7 provided that a "defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired," and further that "The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent." In practice, defense counsel generally requested permission for a defendant to be absent when there were grounds for believing that the defendant would be incapacitated for some period of time, the applications often specifying measures which would be taken to protect the interests of the defendant in his absence. There were many specifications in the charges of the indictment and many issues in which particular defendants were not directly involved, and if illness arose at a time when the case was at a crucial stage for the defendant in question, adjustments were sometimes made in the order of trial. The defendants and their counsel had access, of course, to the transcript of the daily

proceedings in court and to all the documentary evidence whether or not they attended the sessions of the trial.

Excused absences sometimes ran to weeks and in a few cases to several months. The illustrative materials reproduced herein concern three cases only, and each of these cases concerns excused absences of considerable duration. In the Medical case, the Tribunal granted a request of the defendant Herta Oberheuser that she be excused from trial for the purpose of an operation during the defense case. The Tribunal order, together with the attached medical certificate and defense requests, is reproduced below in subsection G 1. After an absence of several weeks, defendant Oberheuser resumed attendance at the sessions of the trial and still later was examined and cross-examined before the Tribunal. The case against her proceeded to judgment and sentence. In the Ministries case defendant Meissner was ill at the time of arraignment and requested his counsel to plead for him. His counsel at that time requested that Meissner be excused "from being present at these proceedings," giving no time limits whatsoever, except to state that he would try to bring the defendant into court as soon as possible. Counsel stated that Meissner's main counsel or assistant defense counsel would keep Meissner informed of the proceedings during his absence (subsec. G 2). After taking the matter under advisement, the Tribunal granted permission for Meissner to be absent, and Meissner did not in fact appear in court until several months later when the defense case was under way. Meissner elected to take the witness stand to testify in his own behalf (*Tr. pp. 4463-4802*) and the case against him proceeded to judgment and acquittal. A similar, though even more protracted case of absence from the proceedings developed in the case of defendant Sperrle in the High Command trial. Early in the trial, defendant Sperrle himself petitioned the Tribunal to be excused from attending the court sessions, stating that he was currently being informed of the proceedings by the documents and by his counsel and that he wished to conserve his strength for testifying later on (subsec. G 3 a). The Tribunal granted this request (subsec. G 3 b). When the order of trial for the respective defense cases was under consideration, counsel for Sperrle requested that Sperrle be excused further from the sessions and that Sperrle's defense be scheduled at the end of the defense case as a whole (subsec. G 3 c). The Tribunal deferred the defense presentation until near the end of the trial (subsec. G 3 d).

Sperrle's counsel later informed the Tribunal that he desired to present Sperrle's defense in Sperrle's absence and that Sperrle would not take the witness stand (subsec. G 3 e). The case against Sperrle proceeded to judgment and acquittal.

B. Provisions of Article IV (d), Ordinance No. 7

In order to ensure fair trial for the defendants, the following procedure shall be followed:

* * * * *

(d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the Tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI (c).¹ The Tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.²

Comparable Provisions of the Charter of the International Military Tribunal are the following:

IV. FAIR TRIAL FOR DEFENDANTS

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

* * * * *

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

¹ This provision deals with the possible exclusion of any defendant or his counsel from some or all further proceedings, without prejudice to the determination of the charges, as punishment for contumacy. No defendant was disciplined under this provision. Concerning contempt by defense counsel, see section XXI D and E.

* All the provisions of Article IV on "fair trial" are reproduced in section XIII B.

C. Severance of the Case Against Four Defendants Because of Inability to Stand Trial

I. JUSTICE CASE—SEVERANCE OF THE CASES AGAINST DEFENDANT KARL ENGERT BECAUSE OF INABILITY TO STAND TRIAL

a. Extract from the Transcript of the Justice Case, 5 March 1947*

MR. SANDS (Secretary General): May it please this Honorable Tribunal, I have letters here from the prison physicians which explain the absence of the defendants, Karl Engert and Oswald Rothaug. If the Tribunal please, I will read these.

PRESIDING JUDGE MARSHALL: You may do so.

MR. SANDS: "Headquarters, Justice Prison, Nuernberg, Germany, APO 696-A, U. S. Army, 3 March 1947.

"Subject: Physical Condition of defendant Oswald Rothaug

"To: The Secretary General

"The defendant Rothaug was admitted to the Fuerth-Oberschule Hospital for treatment and observation on 22 February 1947.

"In February 1946 he suffered a perforation of the stomach as a result of a peptic ulcer, and since that time has had periodic exacerbations of his ulcer symptoms.

"Roentgenologic examination now shows a severe gastritis with scarring of the original ulcer. Adhesions have caused the stomach to become adherent to the abdominal wall.

"The defendant at present is underweight and has abdominal pain at frequent intervals. Therefore, because of his generally debilitated state, it is advisable that he be excused from standing trial for a period of one month."

Signed, "Charles J. Roska, Captain, Medical Corps, Prison Medical Officer."

PRESIDING JUDGE MARSHALL: You may make the same statement, or whatever statement you have, concerning the other absent defendant at this time.

MR. SANDS: Yes, Your Honor. I have a similar letter here with regard to Karl Engert.

"Headquarters, Justice Prison, Nuernberg, Germany, APO 696-A, U.S. Army, 3 March 1947.

"Subject: Physical Condition of defendant Karl Engert

"To: The Secretary General

"The defendant Engert was transferred from the Nuernberg

*Extract from mimeographed transcript, U.S. vs. Josef Altstoetter, et al., Case 3, pages 25-28.

Prison to the Fuerth-Oberschule Hospital on 15 February 1947, because of serious gall bladder disease.

"The medical diagnoses are: Cholelithiasis with cholecystitis; severe gastritis.

"At present he is a bed patient with fever and is deeply jaundiced.

"It is expected that his illness will necessitate his being in the hospital for at least 6 weeks.

"Because of the nature of his illness he cannot be expected to appear in court for at least 6 weeks."

Signed, "Charles J. Roska, Captain, Medical Corps, Prison Medical Officer."

PRESIDING JUDGE MARSHALL: Has counsel for defendant Rothaug any request to make at this time relative to his temporary absence?

DR. JOSEF KOESSL (counsel for defendant Rothaug): If it please the Tribunal, I ask that defendant Rothaug be allowed to obtain permission for absence for one month, as requested. During this phase of the proceedings I do not consider it necessary that the defendant be present here.

PRESIDING JUDGE MARSHALL: Has counsel for defendant Karl Engert a request to make at this time?

DR. HANNS MARX (counsel for defendant Engert): Mr. President, it is requested that defendant Engert be excused for a period of at least 6 weeks, because he is not in a position to attend the sessions of this trial. I myself visited defendant Engert in the hospital for internees in Fuerth, and I convinced myself as to what his condition is as far as can be judged. I have concluded that his health is in a very bad condition. I am not in a position to say whether, after a lapse of approximately 6 weeks, he will be able to appear here.

Therefore, this question presents itself: To consider whether the trial against Engert could be severed and whether the trial against Engert could be referred to another court. Will you permit me to make this suggestion? Because I am of the opinion that the defendant Engert will not be able to attend a session for a period longer than 6 weeks.

PRESIDING JUDGE MARSHALL: Permission will be given at this time for each of these defendants—both of them—to be temporarily absent during the trial, but the trial will be continued in their absence. The matter of severance is something that will have to be considered later, and no announcement will be made at this time.

Mr. Secretary General, note for the record the presence of the defendants who have answered affirmatively, and make a proper notation as to the absence of those who are absent.

b. Extract from the Transcript of the Hearing before the Commissioners of the Tribunal in the Justice Case, 5 June 1947¹

DR. MARX (counsel for defendant Engert) : May it please the Commission. I am reverting to the suggestion by the Commission concerning the order of the opening statements and of the defense in general; that is, the submission of evidence.²

In respect to defendant Engert, there exists a special case. Defendant Engert is still in the Municipal Hospital of Nuernberg, and medical opinion about him is extremely unfavorable. According to the expert opinion by the American doctor, he is a chronically sick man who has an inflammation of the gall bladder, a disease of the heart muscles, extremely grave arteriosclerosis, and gastritis. Furthermore, it is impossible for the defense counsel to maintain and to keep in contact with defendant Engert. He does not respond at all to questions by the defense counsel; he is not in a position to make statements; he shows altogether a lack of interest. And, I assume the Court is in possession of the medical opinion which was given on 1 May 1947. I cannot say whether a change has occurred; therefore, I would ask you to have defendant Engert examined by a doctor once again and have another medical opinion submitted on him.

Today, however, I would like to request that the Engert case should be removed from the order and, concerning the opening statement and the submission of evidence, should come at the end of the defense, so that in the interim there should be a possibility for arriving at a final decision as to whether Engert is able to stand his trial or whether as time goes on his condition of health may improve. His present state of health makes it impossible for the defense counsel to assume the responsibility, as Engert himself cannot make useful contributions to his own defense.

JUDGE BRAND, PRESIDING: Of course, this is also a matter in which we cannot rule. Possibly defense counsel may be willing to agree that defendant Engert's testimony may go in at the end; that is a matter for you to confer with, confer upon, with your associates.

¹ Ibid., pages 4051 and 4052.

² The commissioners had just been discussing the order of trial during the defense case (sec. XII C 2). Two of the members of the Tribunal and the alternate member had been sitting as commissioners to hear the cross-examination of prosecution affiants. See section XVII B.

As to the opening statement, is there any reason why you cannot make an opening statement in the regular order?

DR. MARX: Your Honor, it would be useful, I believe, if the opening statement, too, would come at the end so that the medical quarters too, possibly a psychiatrist could exercise some influence on Engert for, at the present time, he suffers from complete apathy. The defense is, of course, in a position to make an opening statement, but without the cooperation of the defendant.

c. Extract from the Transcript of the Justice Case,
23 June 1947¹

PRESIDING JUDGE BRAND: We take notice of the application made by counsel for defendant Engert, owing to his illness; and, it has been thought advisable that at this time a conference of physicians and psychiatrists should be held to examine defendant Engert and report their findings to the Tribunal. It has also been suggested that it would be suitable to have not only American, but German physicians, appointed to take part in such a conference.

It is the suggestion of the Tribunal that counsel for the prosecution and for the defense confer and suggest to the Tribunal suitable medical and psychiatric experts who will, if approved by the Tribunal, be appointed for the purpose of making this examination.

In the meantime and until further order of the Tribunal, defendant Engert will remain in exactly the position as to the trial in which he now finds himself. His counsel will continue to represent him before this Tribunal until further order.

d. Stipulation of the Prosecution and Counsel for Defendant Engert, 26 June 1947, Proposing Four Medical Experts to Examine the Defendant Engert

STIPULATION re appointment of medical and psychiatric experts for the examination of defendant KARL ENGERT²

WHEREAS, a motion has been made in behalf of the defendant, Karl Engert, for his severance from the present case and deferment of his defense until a later date on the grounds that, in addition to his unimproved physical condition, defendant Engert's faculties of recollection of past events and his understanding of "diverse questions of the trial" are impaired; and

¹ Extract from mimeographed transcript, U.S. vs. Josef Altstoetter, et al., Case 3, page 4055.

² U.S. vs. Josef Altstoetter, et al., Case 8, Official Record, volume 84, pages 1472 and 1473.

WHEREAS, the Tribunal has requested that the prosecution and the defense submit, for its approval, names of medical and psychiatric experts to be appointed for the purpose of examining the defendant Engert and making a report to the Tribunal concerning their findings;

THEREFORE, it is hereby stipulated and agreed by and between the undersigned for the prosecution, and the undersigned counsel for the defendant:

1. That the prosecution will submit the names of one medical and one psychiatric doctor, and that the defense counsel will submit the names of one medical and one psychiatric doctor to the Tribunal for approval;

2. That this committee of four experts will examine defendant Engert, consult the attending physicians concerning his condition, beginning on or about 27 June 1947, and make a report of their findings to the Tribunal on or about 3 July 1947;

3. That if this committee of experts is not in agreement concerning its findings, the Tribunal shall appoint its own medical and psychiatric experts for the purpose of making a further examination of defendant Engert and a further report to the Tribunal;

4. That the names of the experts which the prosecution wishes to use and which are submitted for the approval of the Tribunal, are Capt. Eugene B. Brody and Capt. George T. Carpenter;

5. That the names of the experts which the defense wishes to use and which are submitted for the approval of the Tribunal, are Mrs. Oberarzt Dr. Kretzer and Oberarzt Dr. Gerstaecker.

Dated: Nuernberg, 26 June 1947.

[Signed] CHARLES M. LAFOLLETTE
Deputy Chief of Counsel for
War Crimes

[Signed] DR. HANNS MARX
Counsel for defendant Engert

**e. Order of the Tribunal, 26 June 1947, Appointing Four
Medical Experts to Examine Defendant Engert**

*ORDER**

IT IS ORDERED that the above-named Capt. Eugene B. Brody, Capt. George T. Carpenter, Mrs. Oberarzt Dr. Kretzer, and Oberarzt Dr. Gerstaecker be and hereby are appointed as experts

*Ibid., page 1474.

for the purpose of examining defendant Karl Engert and submitting a report of their findings to this Tribunal.

[Signed] JAMES T. BRAND
Presiding Judge, Tribunal III

26 June 1947

f. Extract from the Transcript of the Justice Case, 20 August 1947, Concerning the Declaration of a Mistrial as to Defendant Engert¹

MR. LAFOLLETTE (deputy chief counsel for the prosecution): If the Court please. On the basis of the medical testimony and the records of this Tribunal, which show that defendant Karl Engert has been absent 91 of the 92 court days, and on further showing that his condition is now acute, the prosecution, in view of the provisions of Article IV, of Ordinance No. 7, paragraph (d) of Article IV, which states that "Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences," now moves the Court to declare a mistrial in this case against defendant Karl Engert, and that the Court should now make such orders that shall be deemed proper in the premises in preserving the *status quo* of that clause under the indictment.

PRESIDING JUDGE BRAND: What does the defendant, by his counsel Dr. Link, have to say on this motion?

DR. LINK (counsel for defendant Engert): The medical expert opinions by Dr. Stern and Captain Martin, which have just been stated here, are in absolute accordance with the picture which I, as a layman in medicine, have formed for months in my mind. I can only state again that I adhere to the motion for severance which was made by my predecessor on 7 June,² and can assure the Tribunal and inform it that already for sometime it was impossible to build up a somewhat appropriate defense together with Engert, in spite of the fact that I visited him daily at his sickbed. It seems to me to be not entirely irrelevant that now the German chief physician, Dr. Kretzer, one of the two physicians who filled out the well-known questionnaires, adheres to the point of view expressed by the physicians who were examined here today. An

¹ Extract from mimeographed transcript, U.S. vs. Josef Altstoetter, *et al.*, Case 3, pages 7402-7404.

² The Official Record contains no written motion of 7 June 1947, and neither the Tribunal nor the commission of the Tribunal was in session on that day. It is believed that defense counsel refers to the application, made by his predecessor, Dr. Marx, to the commissioners of the Tribunal on 5 June 1947 (subsec. C 1 b), which requested a further medical examination of defendant Engert.

expert opinion which she gave me a short time ago said that Engert was not able to stand being held in a prison nor to appear in court. The contradiction, which seems rather surprising to the defense in the way in which the questionnaires were answered at the time, is thus also removed. I also agree to the motion by the prosecution which asks for severance of the case of my client and may I again refer to the motion of 7 June.

Furthermore, may I add the thought that the transfer of defendant Engert to Garmisch would increase the handicap which has existed in fact already for sometime to build up a somewhat proper defense for defendant Engert. Thus I may say that with his transfer, every possibility is taken away from me to act on behalf of defendant Engert in any responsible manner. Furthermore, I believe that I may understand the motion made by the prosecutor to mean that Engert is no longer to be tried by the Court in this trial here.

PRESIDING JUDGE BRAND: The situation which is presented to the Tribunal is a most unfortunate one, and one which we very keenly regret. This Tribunal has at all times been desirous of performing its duty, and a part of that duty which was imposed upon us was to try defendant Engert. It now appears that it is impossible for us to perform that duty and at the same time to conform to our higher obligation which is to give to every man a fair trial. The evidence satisfies us now, although we have been slow to come to that conclusion, that defendant Engert is not in a condition whereby he could fairly be compelled to come to court, or could fairly defend himself if he came. The motion which is in the language of Anglo-American law is that a mistrial be declared. That means that the indictment will stand against defendant Engert, but that he can no longer be tried in this particular case with these other defendants. The motion is allowed.

MR. LAFOLLETTE: May the prosecution simply state that it agrees with the statement of the court as to the unfortunate character of this situation which has arisen. The prosecution has felt it could prove the defendant guilty; otherwise it would not have indicted him. But the prosecution also has an obligation not to ask that the case be continued and that the Court be put in a position of trying a man, thereby flying squarely in the face of an ordinance which provides for him to be present so as to make an adequate defense. Under these circumstances, the prosecution also feels that it must conform to a higher obligation and make this motion, and it has so done.

2. FARBEN CASE—SEVERANCE OF THE CASE AGAINST DEFENDANT MAX BRUEGGEMANN BECAUSE OF INABILITY TO STAND TRIAL

- a. Motion by Counsel for Defendant Brueggemann, 16 June 1947, Requesting Alternative Measures concerning the Trial of the Defendant and His Release from Custody*

Nuernberg, 16 June 1947

To: The Secretary General of Military Tribunals
Nuernberg, Palace of Justice

In the proceedings against Krauch, *et. al.*, Case 6, I kindly request in behalf of and as counsel for defendant Dr. Max Brueggemann:

1. The proceedings against Brueggemann be temporarily quashed, in any case separated from the trial against the other defendants, and not to proceed against Brueggemann;
2. Brueggemann be released from custody and permitted to return to his place of residence.

Justification

To motivate these requests, I refer to the expert opinion of Dr. Martin, leading prison physician, who has been treating defendant Brueggemann for a rather long time. According to information I received, Dr. Martin diagnosed a serious and life-endangering disease which set in after his [Brueggemann's] arrest and decided that as a result, Brueggemann would be unfit to attend the trial and sustain the effect of imprisonment. An improvement of his condition is not to be anticipated in the near future. Owing to the present uncertain condition and the continued detention, a worsening of his state of health and an increased imperilment of life is to be feared.

To 1—according to Ordinance No. 7, proceedings against a defendant unable to follow the trial are not admissible. Article IV (*d*) of the Ordinance lays down the *principle* that the defendant is entitled to be present at the trial. According to this provision, proceedings in the absence of defendant are only allowed if the defendant is *temporarily* absent and his interests will not thereby be impaired in the opinion of the tribunal, or if he had to be removed from the proceedings because of improper conduct before the Tribunal, or if, upon request, he was permitted to be absent. According to these provisions, proceedings against a defendant who is not in a position to attend or follow the trial, without him being to blame for it, cannot take place.

*U.S. vs. Carl Krauch, *et al.*, Case 6, Official Record, volume 47, pages 687-690.

The proceedings against a defendant unable to follow the trial, especially in a trial of such an importance and of possibly severe consequences of the decision for the person concerned, would contradict the principles which are recognized everywhere in the interest of a proper and just procedure. According to the rules of procedure of practically all the nations, proceedings in the absence of the defendant are only admitted if defendant flies from justice either through fleeing or hiding, not, however, against a defendant who is not able to follow the trial because of serious illness and without him being to blame for it. The proceedings against such a defendant would be in contradiction to justice and would not guarantee an objective and just verdict.

The correctness of this point of view is clear from the examination of the rights which were given the defendants through Ordinance No. 7. According to Article XI (*a*), the defendant is to state at the opening of the trial whether he pleads "guilty" or "not guilty," which statement is important for the proceedings as well as for the decision. According to Article XI (*i*), defendant may give statements of any kind before the Tribunal. He may be interrogated as a witness during the proceedings, also by the Tribunal, according to Article V (*b*). Furthermore, according to Article IV (*e*), he has the right to cross-examine prosecution witnesses.

The defendant, who is unable to take part in the proceedings, cannot make use of all these rights.

Finally, due consideration should be given to the fact that, owing to his serious illness, defendant Brueggemann is not in a position to prepare his defense sufficiently, or inform his counsel to a sufficient extent, so that also defense counsel would not, or not sufficiently, be able to look after the defendant's interests and rights in the trial. His condition does not enable him to objectively reexamine and establish the incriminated facts. From the medical point of view any discussion relative to this should be avoided, as it would worsen his state of health.

To support the reasons brought forward, I refer to the session of 14 November 1945 in the trial against Goering, *et al.*, before the International Military Tribunal.* In this session the question was discussed whether proceedings should be opened against defendant Krupp von Bohlen und Halbach, who was also unfit to follow the trial. The Tribunal rejected the request of the prosecution to proceed against him in absentia, although the Charter of this Tribunal—in part different from Ordinance No. 7—provided for proceedings in the absence of the defendant, on

*Trial of the Major War Criminals, *op. cit.*, volume II, pages 1-17.

condition that justice deem these proceedings necessary. The arguments brought forward by the prosecution and the defense, in the discussion of which the Tribunal took part, are laid down in the session transcript of 14 November 1945.

To 2—to justify the request for release from custody, I likewise refer to the expert opinion of Dr. Martin, treating prison physician. I kindly request you to consider whether Dr. Brueggemann, in case he should be released from custody, can return to his native place, i.e., Leverkusen, since only there he can be given the proper care which promises an improvement of his condition. There is no danger that Dr. Brueggemann would fly from the possible further proceedings, or would not observe or thwart the security measures which the Tribunal would order. I kindly call your attention to the fact that Dr. Brueggemann immediately and of his own free will complied with the prosecution's request to appear in Nuernberg to be heard as a witness here. Upon request, he will give the assurance, upon his word of honor, not to leave the place of residence he might be assigned to, and to comply with all demands and measures of the authorities.

[Signed] DR. KLEFISCH

b. Motion of the Prosecution, 24 June 1947, Requesting the Postponement of the Case against Defendant Brueggemann

MOTION OF THE UNITED STATES TO POSTPONE PROCEEDINGS AGAINST DEFENDANT BRUEGGEMANN*

The United States of America petitions this Tribunal for an order postponing the proceedings against defendant Max Brueggemann and in support thereof respectfully shows to this Tribunal:

1. The indictment herein was duly filed in the office of the Secretary General on 3 May 1947.

2. Prior to the filing of the indictment, a medical examination was made by the medical officers attached to the prison of the persons in custody who have since been named as defendants. A medical report was submitted thereon, and with respect to defendant Brueggemann, who is 66 years old, the report stated that he was suffering from advanced arteriosclerosis, and hypertension, extreme, and that excitement might result in his having apoplexy with paralysis or death resulting, or cardiac death. On the basis of this medical report, the prosecution recommended to the Secretary General that service of the indictment on defendant Max Brueggemann be withheld pending further examination.

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 47, pages 680-683.

3. The prison physician, Lt. Roy A. Martin, M.C., and the prison psychiatrist, Lt. A. C. Wohlrabe, M.C., have submitted, on 6 May 1947, a further medical report, a copy of which is attached hereto as Exhibit A.¹ The report states that the defendant gave a history of constant medical treatment for cardiovascular disease; that a physical examination revealed that his heart is markedly enlarged to the left and his blood pressure is 215/140; his peripheral arteries showed advanced arteriosclerotic changes; and a pitting edema of the ankles was present. The clinical diagnosis was: 1. Hypertensive cardiovascular disease, advanced, severe with myocardial failure. 2. Generalized arteriosclerosis, advanced. The medical report concluded with the following recommendations: "The prognosis in the above-listed conditions is extremely grave. The pathological changes evident are degenerative and no improvement can be expected. It is entirely possible that he could have apoplexy with paralysis or death or suffer a myocardial infarct leading to complete disability or death. These eventualities could easily be precipitated by any physical or emotional strain. This man's condition is extremely precarious. It is the opinion of the examining physicians that to subject him to the physical and mental strain involved in a trial would be a serious threat to his life."

4. On the basis of the foregoing report the prosecution had refrained from serving defendant Brueggemann with a copy of the indictment. Notwithstanding the fact that the indictment had not been served on this defendant, the prosecution was advised that he had appointed counsel to represent him and said counsel has conferred with the office of the Secretary General of this Tribunal and with members of the staff of the prosecution. It became apparent from such conferences that although defendant Brueggemann was not served with the indictment, he knew he had been named as defendant and he also knew the nature of the charges made. Under those circumstances the prosecution requested the prison physician to again examine him and advise whether his physical condition would permit the service of a copy of the indictment and whether he could stand trial.

5. Under date of 17 June 1947, the prison physician, Capt. Roy A. Martin, submitted a report, a copy of which is attached hereto as Exhibit B,² advising that he had reexamined defendant Brueggemann and that he was of the opinion that service of the indictment upon him would not cause any undue emotional strain or result in disability or death. The said report stated, however, that to subject the defendant to trial at this time would involve a

¹ Not reproduced herein.

² Not reproduced herein.

serious threat to his life, and that the physical and mental condition of the defendant as set forth in the report of 6 May 1947 remained unchanged.

6. On the basis of the foregoing report, the prosecution requested the Secretary General to serve defendant Brueggemann with a copy of the indictment, and on 18 June 1947 a copy of said indictment was duly served on said defendant.

7. Prior to the service of the copy of the indictment as aforesaid, Th. Klefisch, acting as counsel for defendant Brueggemann, addressed a letter to the Secretary General under the date of 16 June 1947 requesting that (1) the proceedings against Brueggemann be temporarily quashed or in any case separated from the trial against the other defendants and not to proceed against him; and (2) Brueggemann be released from custody and permitted to return to his place of residence.

8. Passing for the moment the question whether counsel for the defense may make any application prior to the actual service of a copy of the indictment on this defendant, the prosecution is of the opinion that considering the physical and mental condition of defendant Brueggemann as set forth in the medical reports above-referred to, it would not serve the interests of justice to try defendant Brueggemann at this time. It is recommended that he be hospitalized or released conditionally to his home under surveillance.

9. Wherefore, petitioner respectfully prays that an order be entered herein postponing for an indefinite time the proceedings against defendant Max Brueggemann, but directing that the charges in the indictment against him shall be retained upon the docket of the Military Tribunals for trial thereafter if the physical and mental condition of the defendant should permit.

Respectfully submitted,
[Signed] TELFORD TAYLOR
Brigadier General, U.S.A.
Chief of Counsel for War Crimes
Acting on Behalf of the United
States of America

Nuernberg, 24 June 1947.

c. Order of the Tribunal, 9 September 1947, Severing the Case against Defendant Brueggemann*

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
9 SEPTEMBER 1947

United States of America

vs.

CARL KRAUCH, *et al.*,

Defendants

} CASE 6

ORDER

ON CONSIDERATION of the application of counsel for the defendant, Max Brueggemann, dated 16 June 1947, together with accompanying and subsequent medical reports which establish that the said defendant is not at present able to stand trial without serious danger to his life; and on consideration of the statement made by the Chief of Counsel to the Tribunal in open court under date of 14 August 1947, concurring in the foregoing conclusion based on the medical reports, together with the motion of the United States to postpone proceedings against the defendant, Max Brueggemann, dated 24 June 1947,

IT IS ORDERED that the charges against the defendant, Max Brueggemann, be, and the same are, hereby severed, for the purposes of trial, from the charges against the other defendants now on trial before this Tribunal;

IT IS FURTHER ORDERED that the charges contained in the indictment against the defendant, Max Brueggemann, shall be retained upon the docket of the Military Tribunals, as a separate cause, for trial hereafter, if the physical and mental condition of the said defendant shall permit.

By Military Tribunal VI

[Signed] CURTIS G. SHAKE
Presiding Judge

Dated this 9th day of September 1947

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 47, page 674.

3. HOSTAGE CASE—SEVERANCE OF THE CASE AGAINST DEFENDANT MAXIMILIAN VON WEICHS

- a. Motion by Counsel for Defendant von Weichs, 24 July 1947, Requesting that a Committee of Physicians be Appointed to Examine von Weichs as to His Ability to Stand Trial*

Nuernberg, 24 July 1947

To: Military Tribunal V
c/o the Secretary General
Nuernberg

Re: Request for medical examination of Field Marshal von Weichs

For a long time past Field Marshal von Weichs has been suffering from a progressive arteriosclerosis and circulation disturbances. In addition to this there are aftereffects of a serious rupture of the lungs. The state of health of Field Marshal von Weichs, which for a while was still somewhat bearable, has noticeably worsened in an increasing way recently and has reached such a low point that it is no longer possible for me to take the responsibility for a conscientious and adequate defense of Field Marshal von Weichs upon me.

To a certain extent he is not able to understand what is going on during the proceeding before the Tribunal, and despite the fact that he visibly tries to fight against it with all his remaining energy, he repeatedly fell asleep during the session. On one of these occasions the president of the Tribunal apparently saw himself compelled for this reason to recess for a short time.

Under these circumstances, I regard it my duty to have established that Field Marshal von Weichs is no longer able to stand trial.

I therefore request a mixed German-American committee of physicians be appointed to examine Field Marshal von Weichs as to his ability to stand trial.

[Signed] DR. LATERNER
Attorney

*U.S. vs. Wilhelm List, *et al.*, Case 7, Official Record, volume 30, page 215.

b. Ruling of the Tribunal, 28 August 1947, concerning the Status of defendant von Weichs after the Report of the Medical Commission

MILITARY TRIBUNAL V
CASE 7

United States of America
 against
Wilhelm List, *et al.*,
 Defendants }

*Ruling of Tribunal in connection with application by counsel for defendant Weichs for the appointment of a medical commission **

Heretofore Dr. Hans Laternser has filed an application with the Tribunal for the appointment of a commission of doctors to examine the defendant von Weichs as to his physical condition. In this application it is stated that it was the opinion of the applicant, Dr. Hans Laternser, that the defendant von Weichs "is no longer able to stand trial." Pursuant to said application a commission was appointed which has reported to the Tribunal, and in which report two of the doctors state that the continuation of the defendant in this case "would not be harmful and injurious to his health and there is no more probability that he will have a fatal stroke than if he were home." A minority report was filed by Dr. Riffart, the German physician appointed by the Tribunal.

Upon the findings submitted to this Tribunal by the respective members of the medical commission it is the order of the Tribunal that the defendant von Weichs be continued as a defendant and held for trial and appearance before this court at such times as his physical condition will permit. This order and ruling is without prejudice to the rights of the defendant von Weichs or his counsel to present a similar application at any later date if the circumstances should seem to justify the submission of such an application.

Dated this 28th day of August 1947.

[Signed] CHARLES F. WENNERSTRUM
 Presiding Judge, Tribunal V
[Signed] EDWARD F. CARTER
 Associate Judge
[Signed] GEORGE J. BURKE
 Associate Judge

*Ibid., volume 30, page 339.

c. Motion by Counsel for Defendant von Weichs, 12 December 1947, for a Further Examination of the Ability of von Weichs to Defend Himself*

Nuernberg, 12 December 1947

To: Military Tribunal V, through the Secretary General
Nuernberg

Subject: Application for medical examination of Field Marshal
von Weichs

My client, Field Marshal von Weichs, has been under medical treatment in a hospital for the last few months. His state of health has increasingly worsened in the meantime. He has frequently suffered fits of asphyxiation; one particularly serious case caused a lung rupture, which is shown by an X-ray examination.

This fit, as they assured me, would have caused immediate death to the defendant if it should still have occurred in a prison cell without any immediate medical help available. The aftereffects of this serious fit are still noticeable to a considerable degree and have so seriously diminished his strength that my client is not able to offer the slightest cooperation in preparing his defense. It has also been the doctor's advice in the last few weeks that the trial should not be discussed with my client.

According to medical personnel a confinement to bed will, moreover, be necessary for Field Marshal von Weichs.

I therefore request defendant von Weichs' physical condition be examined to determine whether he is able to defend himself.

[Signed] DR. HANS LATERNER

d. Order of the Tribunal, 7 January 1948, Declaring a Mistrial as to von Weichs and Severing His Case from That of the Remaining Defendants

MILITARY TRIBUNAL V
CASE 7

United States of America
against
Wilhelm List, *et al.*,

Defendants

} *ORDER*²

On 12 December 1947, counsel for the defendant Maximilian

¹ *Ibid.*, volume 31, page 645.

² *Ibid.*, volume 32, pages 103 and 104.

von Weichs filed an application for the appointment of a medical commission to determine the physical condition of the said von Weichs for the purpose of ascertaining whether he might safely appear in court for the purpose of testifying in his own behalf and otherwise participating in the conduct of his defense. The medical commission consisting of Eugene B. Brody, Captain, Medical Corps, Roy A. Martin, Captain, Medical Corps, and Roger J. Reynolds, First Lieutenant, Medical Corps, was appointed by the Tribunal. The report of the commission was duly filed in which it is found that defendant von Weichs is physically incapacitated to such a degree that it will be impossible for him to appear in person during the pendency of his case before the Tribunal. The matter is now before the Tribunal for decision on the application of defendant von Weichs and the report of the medical commission.

The Tribunal finds that defendant von Weichs became ill on 6 October 1947 and, on motion of his counsel, he was permitted to absent himself from the trial for the purpose of securing medical attention and hospital care, all of which was in accordance with an understanding had in open court that such absence was to be without prejudice to either the prosecution or the defense. Said defendant's physical condition has progressively deteriorated and prevented his further participation in the trial. The Tribunal further finds that the report of the medical commission is true and that said defendant is wholly incapacitated from appearing personally in court during the pendency of the trial for the purpose of testifying and otherwise participating in the conduct of his defense.

The Tribunal further finds that the absence of defendant von Weichs from the trial is more than temporary within the meaning of Article IV, (d) of Ordinance No. 7 and that the interests of said defendant would be prejudicially impaired if the case was to continue against him during his absence.

It is therefore ordered that a mistrial be declared as to defendant Maximilian von Weichs, that the case as to him be severed from that of the remaining defendants, and that he be held for trial at some future time, if and when his physical condition permits.

[Signed] CHARLES F. WENNERSTRUM

[Signed] EDWARD F. CARTER

[Signed] GEORGE J. BURKE

Dated: 7 January 1948.

severed, for the purposes of trial, from the charges against the other defendants now on trial before this Tribunal;

IT IS FURTHER ORDERED that the charges contained in the indictment against the defendant Otto Rasch shall be retained upon the docket of the Military Tribunals, as a separate cause, for the trial hereafter, if the physical and mental condition of the said defendant shall permit.

[Signed] MICHAEL A. MUSMANN
Presiding Judge, Military
Tribunal II

Dated: 5 February 1948.

D. Einsatzgruppen Case—Discussion in the Judgment of the Physical and Mental Condition of Defendant Strauch

EXTRACT FROM THE JUDGMENT IN THE EINSATZGRUPPEN CASE¹

Physical and Mental Condition of Defendant

On the day of the arraignment, 15 September 1947, Eduard Strauch had an epileptic seizure which necessitated his being taken from the courtroom. He soon recovered from this seizure and apparently enjoyed normal health, although he remained in the prison hospital for observation and rest.

On 11 December 1947, a medical board made up of three physicians conducted an examination of the defendant and declared that it was their opinion that "the defendant's mental condition is such that he is aware of the charges brought against him in the indictment." It was their opinion, further, that "the defendant is, at most times, physically and mentally able to understand questions put to him and to reply thereto with the full use of his mental faculties."

There is every indication that, up until a short time prior to the time Eduard Strauch was scheduled to appear in Court, his mental behavior was normal. However, in the latter part of December 1947, it appears that he would give irrelevant answers to questions put to him by his attorney when he was consulted in the preparation of his case.

On 13 January 1948, he came into Court as a voluntary witness, but, once on the stand, proceeded to answer in a manner which, to the Tribunal, represented a conscious and deliberate intention

¹ U.S. vs. Otto Ohlendorf, et al., volume IV, this series, pages 566 and 567.

to avoid direct and intelligent responses to the question put to him.¹

On 17 January 1948, a medical board of two physicians examined him and concluded:

“That the defendant, Eduard Strauch, except for brief periods preceding, during, and succeeding epileptic seizures is capable of understanding the proceedings against him and of taking adequate part in the direction and presentation of his own defense.”

The defendant then again came into Court and, on 19 and 20 January, testified in an intelligent fashion, giving conclusive evidence of a thorough awareness of the proceedings.

Lieutenant William Bedwill, medical officer and trained psychiatrist, was present in Court and reported to the Tribunal as follows:

“It is my opinion that the defendant, Herr Eduard Strauch, during the periods when I have observed him, including the Court sessions on the afternoon of 19 January 1948 and the morning of 20 January 1948, has been mentally competent and so free from mental defect, derangement, or disease as to be able to participate adequately in his own defense.”

On 2 February 1948, Lieutenant Bedwill was asked on the witness stand—

“Lieutenant, do you think that, at any time when his answers were obviously irrelevant, the answers could be consonant with a conscious desire on the part of the defendant to appear to be, or make himself appear, mentally incompetent?”

And he answered—“I believe that they could be consonant with that desire.”

After cross-examination by defense counsel, the following question was put to the psychiatrist:

“Do we understand from your statement, Doctor, that if the witness was not simulating, that then he was suffering from a disease that medical science up to this time has not yet discovered or recorded, so far as your cognizance of medical science is concerned?”

And his answer was—“That is true.”²

Another observation on Strauch's mental competency is the fact that counsel for Sandberger in his final plea to the Tribunal quoted from Strauch's testimony in confirmation of an objection supposed to have been made by Sandberger to the Fuehrer Order.

¹ Defendant Strauch's complete testimony is recorded in the mimeographed transcript, Case 9, U.S. vs. Otto Ohlendorf, *et al.*, 13, 19, 20 January 1948, pages 4907-4953, 5240-5297.

² Lt. Bedwill's complete testimony is recorded in the mimeographed transcript, Case 9, U.S. vs. Otto Ohlendorf, *et al.*, 2 February 1948, pages 5571-5588.

It is to be noted further that, on 9 February 1948, Dr. Gick made the announcement in Court that his client Strauch had no objection to his wife's being called for examination and cross-examination which fact would indicate that, even after he had testified in Court, Strauch was still in full possession of his mental faculties.

From the complete history of the defendant's case the Tribunal concludes that any odd behavior demonstrated by the defendant in or out of Court was consciously adopted.

The Tribunal further finds from the medical evidence and its own observation of the defendant in Court that he was mentally competent to answer to the charges in the indictment.

E. High Command Case—Investigation of the Ability of Defendant von Leeb to Stand Trial and Related Order of the Tribunal

I. APPLICATION FOR MEDICAL EXAMINATION OF DEFENDANT VON LEEB TO DETERMINE WHETHER VON LEEB IS FIT TO STAND TRIAL, 4 DECEMBER 1947*

Nuernberg, 4 December 1947
Palace of Justice
Room 557

TO: The Secretary General

RE: *Case 12, Application for medical examination of Field Marshal Ritter von Leeb*

In my capacity of counsel for Field Marshal Ritter von Leeb I take the liberty of submitting the following facts:

Owing to his poor state of health and his old age Field Marshal von Leeb seems no longer in a position to endure the strains of a trial.

Field Marshal von Leeb is 72 years old; he suffers from high blood pressure fluctuating between 230 and 240 which results in a feeling of giddiness, pressure on the temples, tinnitus, fatigue, and increased weakening of the memory. Because of the high

*U.S. vs. Wilhelm von Leeb, et al., Case 12, Official Record, volume 26, page 267.

The defendant Wilhelm Ritter von Leeb was arraigned on 30 December 1947 (see volume X, this series, page 59) before the Tribunal acted upon this motion. On 9 January 1948, while the Tribunal was still in recess between the arraignment and the opening statement of the prosecution, the Tribunal issued a memorandum order which stated: "The Secretary General is directed to request the proper military authorities to cause a physical examination to be made of the defendant Wilhelm von Leeb and to report the findings to this Tribunal with special reference to the ability of said defendant to stand trial and present his defense therein." The medical report filed pursuant to this order and the subsequent "Findings and Order" of the Tribunal concerning von Leeb's ability to stand trial are reproduced immediately following.

blood pressure there is a serious danger that an apoplectic fit might occur.

To this should be added that Field Marshal von Leeb is suffering from renal calculi. During the period of his imprisonment up to the present day — as he told me — he passed 10 stones which was attended, in part, with rather serious damages to his health. An X-ray picture made at the university clinic in Marburg showed a shadow of about the size of a plum-stone in the right kidney pelvis.

Owing to the state of health of my client it is my duty to have it determined whether or not Field Marshal Ritter von Leeb is fit to stand trial.

I therefore request Field Marshal Ritter von Leeb be examined as to his fitness to stand trial.

[Signed] DR. HANS LATERNER
Attorney

2. REPORT OF A BOARD OF MEDICAL OFFICERS, 26 JANUARY 1948, CONCERNING THE PHYSICAL CONDITION OF DEFENDANT VON LEEB*

385TH STATION HOSPITAL
NUERNBERG MILITARY POST
APO 696 U.S. ARMY

26 January 1948

Pursuant to par. 8, Special Order No. 6, Headquarters 385th Station Hospital, APO 696, dated 6 January 1948, a board of officers met at the 385th Station Hospital on 19 January 1948, for the purpose of determining the physical condition of defendant Wilhelm von Leeb.

Members present:

Major Clifton M. Fischbach
1st Lt. Charles W. Massey
1st Lt. Roger J. Reynolds

Members absent:

None

According to the history the patient has passed renal calculi several times in the past. He is also subject to attacks of dizziness at the present time.

Physical examination of the patient was negative except for elevated blood pressure. Other cardiovascular studies were within the limits of normal.

An intravenous pyelogram revealed a staghorn calculus of the

*U.S. vs. Wilhelm von Leeb, et al., Case 12, Official Record, volume 26, page 321.

right with marked renal ptosis. However, all kidney function tests and blood chemistries were within normal limits.

An X-ray film of the chest revealed several areas of increased density at the apex of the right lung field which on stereoscopic examination of the chest were seen to lie within the lung. These lesions must be considered as a minimal reinfection tuberculosis until proven otherwise. It is the opinion of the undersigned medical officers that defendant von Leeb should be hospitalized for a period of from 1 to 2 months in order to establish the diagnosis of tuberculosis and to determine the activity of the process both for the best possible medical care of the defendant and the safety of those who must be associated with him.¹

[Signed] CLIFTON M. FISCHBACH
Major, MC
President

[Signed] ROGER J. REYNOLDS
1st Lt., MC
Member

[Signed] CHARLES W. MASSEY
1st Lt., MC
Recorder

Approved: [Signed] RICHARD W. PULLEN
Lt. Col., MC
Commanding

Headquarters, 385th Station Hospital
APO 696, U.S. Army

3. FINDINGS AND ORDER OF THE TRIBUNAL, 5 FEBRUARY 1948, STATING THAT MEDICAL EXAMINATION DID NOT INDICATE THAT VON LEEB WAS UNFIT TO STAND TRIAL, AND ORDERING THAT VON LEEB STAND TRIAL.²

UNITED STATES MILITARY TRIBUNAL V A
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY, 5 FEBRUARY 1948

United States of America

vs.

Wilhelm von Leeb, *et al.*,

Defendants }

CASE 12

¹ This report was made near the end of the recess (31 December 1947 and 4 February 1948) between the arraignment and the opening statement. After this report was filed, it was determined that defendant von Leeb did not require immediate hospitalization. Except for 2 days he attended all sessions of the trial.

² U.S. *vs.* Wilhelm von Leeb, *et al.*, Case 12, Official Record, volume 26, page 320.

FINDINGS AND ORDER

Pursuant to application by his counsel, Dr. Hans Laternser, for medical examination of defendant von Leeb to ascertain whether said defendant's health is such that he is fit to stand trial, the Tribunal on 9 January 1948 directed that such medical examination be made and the findings reported to the Tribunal. Compliance with said directive has been had. The said report does not disclose a health condition of said defendant such as to unfit him to stand trial for and to present his defense to the offenses charged.

It is therefore ordered by the Tribunal that said defendant von Leeb shall stand trial for the offenses charged against him in the indictment in this case.

Done this 5th day of February 1948.

By the Tribunal:

[Signed] JOHN C. YOUNG
Presiding Judge

F. Farben Case—Investigation of the Mental and Physical Condition of Defendant Schmitz in Connection with His Ability to Stand Trial

I. APPLICATION BY COUNSEL FOR DEFENDANT SCHMITZ, 5 AUGUST 1947, REQUESTING AN EXAMINATION OF THE ABILITY OF SCHMITZ TO STAND TRIAL*

Nuernberg, 5 August 1947

[Stamp] Filed: 8 August 1947

To: Military Tribunal for Case 6
c/o Secretary General, Nuernberg

In the trial against Krauch, *et al.*

In my capacity of counsel for defendant Dr. Hermann Schmitz, I request that my client's ability to stand trial be examined by a commission of physicians. To justify this request I state the following:

In the discussions which I and, in particular, my assistant Hanns Gierlichs held with my client during recent weeks in order to prepare the defense, we gained the following picture of my client's state of health:

We have reasonable doubts as to our client's ability to stand trial. He is suffering from serious gaps in his memory which

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 47, pages 617-619.

also comprise such matters to which he himself lent his direct cooperation. During the aforementioned discussions, such facts as were subject of the discussion were not called back to his memory until his attention was directly called to it by another person. These gaps in his memory lead him to the attempt to reconstruct the occurrences according to their possible course which, owing to his impaired memory, resulted in the situation that he was unable afterwards to clearly distinguish between the *theoretical* reconstruction of the possible course and the *positive* recollection of the *actual* course of events. During lengthy talks it was shown repeatedly that, in the very beginning, Schmitz followed the discussions very briskly and interestedly; that, however, he became very tired after the first 1½ or 2 hours so that we gained the impression that concentrating on the subject of the discussion and fully cooperating in the conversation is hardly possible for him. It happened that my client, at the conclusion of such a discussion, again broached a question which had already been dealt with in the beginning and that his attention had to be called to the fact that this point had already been finished.

These observations which we made — according to what we learned from Mr. Sprecher — seem to correspond, at least in part, with observations made by members of the prosecution when interrogating my client during the last months. According to my assistant's observations, the memory and the mental power of concentration of my client, as they are today, cannot be compared with his state of health towards the end of the war, even not with his condition as could be observed by Herr Gierlichs during their common stay in the Dustbin Camp in the summer of last year. On the contrary, his general condition has worsened noticeably, obviously owing to the psychical shocks and fatigue of having been imprisoned for over 2 years, and his advanced age. It should be pointed out in this connection that the impression of my client's state of health differs considerably, since there are days on which he makes the impression of being fresh and able to work, immediately followed by days on which he is practically not capable of concentrating or discussing a problem in a rather long conversation.

When considering this state of affairs, it seems very doubtful to me whether the client's state of health is such that looking properly after his interests during a trial of several months which requires the defendant's utmost concentration and cooperation would actually be possible. I therefore kindly request my client be examined as to his ability to stand trial by a commission of physicians which is to be appointed by the Tribunal.

I further request the commission be ordered, in case it should

negative my client's ability to stand trial at the present time, to make proposals in which manner the defendant's condition could be improved most speedily and his ability to stand trial restored, since my client himself wishes urgently to participate in the trial, wants to expound the I. G. Farben industries' general attitude regarding all relevant spheres, and to refute thereby all the charges, which he deems entirely unjustified. Dr. Schmitz does not want that his ability to stand trial be doubted. He, however, welcomes all measures taken in order to improve his health and, on his own initiative, he requested already in May of this year that such measures be taken.

[Signed] KRANZBUEHLER

2. ANSWER OF THE PROSECUTION, 11 AUGUST 1947, TO DEFENSE APPLICATION

ANSWER TO APPLICATION ON BEHALF OF THE DEFENDANT SCHMITZ*

To: The Secretary General, Military Tribunals (Room 281).

1. Answer is made to an application by Dr. Kranzbuehler, defense counsel for defendant Schmitz, dated 5 August 1947 (noted as filed with the Secretary General on 8 August 1947) requesting that a medical commission investigate the ability of defendant Schmitz to stand trial.

2. The prosecution has no objection to the appointment by the Tribunal of appropriate medical officers to investigate the condition of defendant Hermann Schmitz and to make recommendations to the Tribunal concerning the ability of defendant Schmitz to stand trial.

3. In paragraph 4, reference is made to observations made by representatives of the Office Chief of Counsel for War Crimes in interrogations before issuance of indictment. Since this matter has been raised, it is probably appropriate to point out as a matter of caution that some of the investigators were of the opinion that the behavior of defendant Schmitz was affected greatly by his fear of a trial of leaders of I. G. Farben and that changes in his ability to remember were frequently self-induced.

4. It should be pointed out that defendant Schmitz was the Chairman of the Vorstand (the executive or managing board of directors) of I. G. Farben between 1935 and 1945. Therefore, most of the acts for which he reasonably may be held responsible were performed in connection with one or more of the nineteen ordinary

**Ibid.*, pages 615 and 616.

members of the Vorstand who are codefendants. If there are occurrences concerning which the defendant's memory appears to wane, his codefendants who were also principles in these matters, should be able to assist him and his defense counsel adequately. Moreover, Dr. Hanns Gierlichs, assistant defense counsel to defendant Schmitz, was an attorney in I. G. Farben's Berlin NW 7 organization where defendant Schmitz had his central office. Dr. Gierlichs often worked upon questions, such as financial matters, with which defendant Schmitz was concerned. These matters are merely pointed out for the Tribunal's consideration in determining how well a defense may be made by defendant Schmitz under all the prevailing circumstances.

By: [Signed] D. A. SPRECHER
Chief, Farben Trial Team
For: TELFORD TAYLOR
Brig. Gen., U.S.A.
Chief of Counsel

Nuernberg, 11 August 1947.

3. ORDER OF THE TRIBUNAL, 25 AUGUST 1947, APPOINTING A MEDICAL COMMISSION TO EXAMINE AND REPORT UPON THE CONDITION OF DEFENDANT SCHMITZ *

United States of America

vs.

Carl Krauch, *et al.*,

}
Defendants }

CASE 6

MEMORANDUM

IT IS ORDERED that:

Captain Brody, MC

Captain Wohlrabe, MC

Captain Carpenter, MC

be and they are hereby designated as a commission to make an examination and submit a report as to the condition of the defendant Hermann Schmitz. Said commission is requested to report its findings as to (1) said defendant's mental condition, and (2) whether he is physically able to attend court without serious injury to his health.

[Signed] CURTIS G. SHAKE
Presiding Judge, Tribunal VI

Dated: 25 August 1947.

*Ibid., volume 55, page 79.

4. REPORT OF THE MEDICAL COMMISSION ON THE
CONDITION OF DEFENDANT SCHMITZ, 5 SEPTEMBER
1947*

385TH STATION HOSPITAL
NUERNBERG MILITARY POST
APO 696 U.S. ARMY

5 September 1947

Subject: Mental state and physical condition of Hermann Schmitz

To: Commanding officer, 385th Station Hospital, Nuernberg
Military Post, APO 696, U.S. Army

1. In compliance with the court order dated 25 August 1947, the defendant Hermann Schmitz has been hospitalized and studied by the appointed commission of medical officers.

2. The defendant exhibits mental changes characteristic of advancing age, and of a mild degree of cerebral arteriosclerosis. These are, chiefly, defective recent recall, difficulty in concentration, and a tendency toward confusion under stress, and mild emotional lability. The ability to comprehend is not definitely impaired, remote memory is relatively intact, and it is the opinion of the commission that the defendant is able to testify in court with the aid of counsel and written materials.

3. In regard to his physical condition it is the opinion of the commission that the defendant is quite able to attend court without serious injury to his health.

[Signed] EUGENE B. BRODY
Capt. MC

[Signed] ARTHUR C. WOHLRABE
Capt. MC

[Signed] GEORGE T. CARPENTER
Capt. MC

*Ibid., volume 47, page 714.

5. ORDER OF THE TRIBUNAL, 29 JANUARY 1948, MADE ON ITS OWN MOTION, APPOINTING A SECOND MEDICAL COMMISSION TO EXAMINE AND REPORT UPON THE CONDITION OF DEFENDANT SCHMITZ

UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY, 29 JANUARY 1948

United States of America

vs.

Carl Krauch, *et al.*,

}
} *Defendants* }

CASE 6

*ORDER **

The Tribunal on its own motion hereby designatés
Major James Galvin, O-52052, MC
Captain Joseph S. Jacob, O-1735879, MC
Captain Harry G. Colgan, O-1724920, MC
as a commission to examine the defendant Hermann Schmitz,
and to report the result of their examination to the Tribunal for
its information.

The Tribunal especially desires a complete report as to the mental condition of said defendant, with particular reference as to whether his state of mind is such that he can make a defense and, if he so desires, testify as a witness in his own behalf. In that connection, the Tribunal wishes to be advised as to the findings of the commission from a medical point of view, leaving it to the Tribunal to draw the ultimate inferences as to whether the defendant can make a defense and testify if he so desires.

In order to facilitate said examination, authority is hereby granted for the removal of said defendant, from the prison at Nuernberg, to the 317th Station Hospital at Wiesbaden. The Secretary General is requested to take the necessary steps for the removal of the defendant to said hospital subject to such security measures as the proper military authorities may deem to be necessary and proper under the circumstances. Said defendant is to be returned to the Nuernberg Prison upon the completion of said examination or the further order of the Tribunal.

[Signed] CURTIS G. SHAKE
Presiding

Dated this 29th day of January 1948.

**Ibid.*, volume 49, page 1312.

6. REPORT OF THE SECOND MEDICAL COMMISSION,
6 FEBRUARY 1948, CONCERNING "MENTAL STATUS
OF HERMANN SCHMITZ"¹

NEUROPSYCHIATRIC SERVICE
317TH (US) STATION HOSPITAL
UNITED STATES AIR FORCES IN EUROPE
WIESBADEN MILITARY POST
APO 633 U.S. ARMY

[Stamp] Filed: 12 February 1948
6 February 1948

Subject: Mental Status of Hermann Schmitz

To: United States Military Tribunal VI, Sitting in the
Palace of Justice, Nuernberg, Germany

1. In accordance with an order from the United States Military Tribunal VI in the case of the United States of America *vs.* Carl Krauch, *et al.*, the defendant Hermann Schmitz has been examined in this hospital.

2. Hermann Schmitz gives evidence of physical and mental changes consequent upon the normal degree of senility at his age. General physical condition, the degree of arteriosclerosis, and certain changes in the skin are physical signs of early senility. From the point of view of mental examination, Hermann Schmitz has impaired memory for recent events, is easily confused by having to respond rapidly to various stimuli, has some emotional lability manifested mostly in minor and transient depressions when he is unable to solve his problems, and is easily fatigued. The patient is not psychotic nor otherwise seriously ill. He has not had hallucinations or delusions. His intellectual apparatus is moderately well maintained.

3. It is felt that Hermann Schmitz is now able to recall past events, particularly those rather more remote, with good accuracy. His efficiency, however, can be improved if as little pressure as possible is put on him during questioning, if questions are put to him slowly, and he is given rather longer than would ordinarily be required to formulate his answers. Allowance should be made for emotional lability. This patient, may, from time to time, during his testimony, become depressed and weep. He will ordinarily quickly recover from these episodes and they need not be considered an indication for interrupting or terminating the questioning.²

¹ *Ibid.*, page 1379.

² Defendant Schmitz did not elect to testify in his own behalf. The case against him proceeded to judgment and sentence.

[Signed] JAMES GALVIN
 Major, MC
 Chief, NP Service

[Signed] JOSEPH S. JACOB
 Captain, MC
 NP Service

[Signed] HARRY J. COLGAN
 Captain, MC
 Asst. Chief NP Service

G. Absences of Defendants from the Proceedings for Reasons of Illness—Examples of Excused Absences of Different Duration in the Medical, Ministries, and High Command Cases

I. MEDICAL CASE—ORDER OF THE TRIBUNAL, 4 MARCH 1947, EXCUSING DEFENDANT HERTA OBERHEUSER FROM ATTENDANCE AT THE TRIAL FOR THE PURPOSE OF A MEDICAL OPERATION*

[Stamp] Filed: 4 March 1947

United States of America
vs.
 Karl Brandt, *et al.*,

}
Defendants }

ORDER

There having been filed in the office of the Secretary General, directed to Military Tribunal I, and dated 25 February 1947, a written certificate by Charles J. Roska, MC, USA, prisoner surgeon at Nuernberg, Germany, describing the physical condition of Herta Oberheuser, a defendant now on trial in the above-entitled cause;

And Captain Roska having stated in the certificate that the defendant Oberheuser is laboring under certain described serious physical disabilities and is in need of an operation to relieve her;

And Dr. Alfred Seidl, representing Herta Oberheuser before Military Tribunal I on trial of the above-entitled cause, having on 28 February 1947 filed in the office of the Secretary General for the attention of Military Tribunal I, a written statement in the German language signed by him personally, stating defendant Oberheuser's serious physical condition and requesting that

*U.S. *vs.* Karl Brandt, *et al.*, Case 1, Official Record, volume 34, pages 1204-1209.

defendant Oberheuser be immediately treated in the American Army Hospital at Nuernberg, and that defendant Oberheuser's evidence may be presented to the Tribunal after her release from the hospital, which may be expected in some 2 to 3 weeks;

And defendant Oberheuser herself having filed in the office of the Secretary General, 3 March 1947, a signed statement in the German language requesting that she be transferred to a hospital for an operation and stating her reasons for desiring that the operation be performed;

And the Tribunal having been furnished with the above-described documents, together with English translations of the documents written in the German language (the original documents being hereto attached, marked Exhibits A, B, and C respectively),* and the Tribunal finding from said medical certificates filed with the Tribunal concerning the physical condition of defendant Oberheuser, and from the documents herein above-referred to, that defendant Oberheuser is in a serious physical condition and in need of immediate medical and surgical attention, and that her physical condition has been and is now such that she cannot adequately present her defense to the Tribunal, and that if an operation is performed on her it is to be expected that she will be able to attend the trial prior to its close and present her defense;

And it appearing to the Tribunal and the Tribunal finding that the interests of defendant Herta Oberheuser will not be prejudiced, but, on the contrary, will be best served by granting her request and that of her counsel for immediate hospitalization of said defendant;

NOW, THEREFORE, IT IS ORDERED that defendant Herta Oberheuser be, and she is hereby, excused from attendance at the trial in the above-entitled cause until her physician reports that she is able again to be in attendance at the trial;

And that the surgeons in charge of her case shall proceed in the exercise of their judgment and discretion for the best physical interests of defendant Oberheuser.

Dated at Nuernberg, Germany
March 4, 1947.

[Signed] WALTER B. BEALS
Presiding Judge, Military Tribunal I

*Reproduced immediately below.

EXHIBIT A
HEADQUARTERS
JUSTICE PRISON
NUERNBERG, GERMANY
APO 696-A, U.S. ARMY

CJR/jmb
25 February 1947

Subject: Physical Condition of Defendant Oberheuser

To: Presiding Judge, Military Tribunal I

1. The defendant Oberheuser was examined today at the 385th Station Hospital by Captain Luhr, the hospital proctologist. This was a much more thorough examination than was possible in the prison, and showed, in addition to the previously diagnosed hemorrhoids, a small rectal polyp and a rectal ulcer.

2. The recommendations of Captain Luhr are that the rectal polyp and hemorrhoids be removed, but the operation is not to be considered an emergency and can be done at the discretion of the Military Tribunal. The duration of hospitalization is expected to be 10 to 14 days.

3. The defendant is anxious and desirous of finishing her case before hospitalization. However, if her case is not expected to come up before 3 weeks it might be better if she underwent the operation immediately.

4. At present she is being treated symptomatically and it may be necessary from time to time to excuse her from court early and perhaps even for a whole day or two at a time.

[Signed] CHARLES J. ROSKA
Capt., MC
Prison Medical Officer

EXHIBIT B

Dr. Alfred Seidl, Attorney
Counsel for Gebhardt, Oberheuser, Fischer.

Nuernberg, 28 February 1947

To: Military Tribunal I, Nuernberg

Re: Dr. Herta Oberheuser on account of war crimes

According to the prison physician's expert opinion and according to the statement of the specialist in the American hospital in Nuernberg, defendant Dr. Herta Oberheuser is suffering from hemorrhoids and from an abscess that can be only treated surgically. Considering the bad general condition and the great

suffering of the defendant, I request that it be approved that the defendant be treated in the American hospital in Nuernberg now and not only after the presentation of evidence of her case has come to an end. According to the specialist's expert opinion the surgical treatment in the hospital would merely take from 2 to 3 weeks. I therefore kindly request that it be permitted to interrogate the defendant after her release from the hospital and after the presentation of evidence of all other defendants is terminated.

There is no danger that another submittal of evidence material would thereby become necessary.

Defendant Oberheuser herself already expressed her desire yesterday in a letter to the Tribunal for immediate hospital treatment.

[Signed] DR. ALFRED SEIDL

EXHIBIT C

Nuernberg, 27 February 1947

Herta Oberheuser

I request to be transferred to a hospital for an operation.

Reason:

I feel sick since about 8 weeks and my condition has aggravated despite therapy. At my last examination, on February 25, I believed myself still being fit to carry on my defense. Soon after, however, my condition worsened in such a degree that I don't feel able to pursue my case. I can hardly walk nor sit for more than half an hour. So the general state of my health is so badly reduced and pains are continuing that I am not capable to attend to my defense properly.

It is not necessary that a German doctor witness the operation of an American doctor.

[Signed] HERTA OBERHEUSER

2. MINISTRIES CASE—DEFENDANT OTTO MEISSNER

EXTRACT FROM THE ARRAIGNMENT IN THE MINISTRIES CASE,
20 DECEMBER 1947*

DR. SAUTER (counsel for defendant Meissner): The defendant Dr. Meissner should be the next one to be called in the dock. He is in a rather special position. It was only last month that he was operated on his eyes and he is now in the hospital. I saw him

*U.S. vs. Ernst von Weizsaecker, et al., Case 11, volume XII, this series, pages 67-69.

yesterday and I asked him how he intended to plead today. He requested me and authorized me to declare here on his behalf that he received the indictment more than 30 days ago, that it was read to him, and that he wishes to plead here that he is not guilty. This is the statement I wish to make on behalf of Dr. Meissner, who is absent.

If the Tribunal please, I would appreciate it if in this connection I would be allowed to make a motion on behalf of Dr. Meissner connected with the further proceedings of his case. I stated before that defendant Dr. Meissner was recently operated on his eyes and in January or February he will have to undergo a second operation on his eyes, which will be the main operation, because otherwise there is danger of complete blindness. He, therefore, will not be in a position in the next few weeks to appear in Court here, and I, therefore, on behalf of Dr. Meissner, beg to make the motion that the Tribunal would kindly excuse Dr. Meissner from being present in these proceedings. I shall take care that Dr. Meissner will daily be informed, either through me or through one of my assistants, of the records of these proceedings and also of the documents submitted by the prosecution. They will be read to him. He will then either tell me or one of my assistants what his comments are regarding these documents. He will dictate these things to me; otherwise there is no practical possibility of taking care of his case. This is how we shall be certain that in some time to come when Dr. Meissner's health will permit, he will be able to appear in person before this Tribunal and testify on the witness stand. This is how we shall on the one hand not prevent these proceedings from taking their course, and on the other, the interests of defendant Dr. Meissner will be suitably safeguarded.

I believe that the prosecution, in view of these conditions, will be agreeable to this idea, and I should be grateful to the Tribunal if they would express their agreement to this suggestion. I shall also inform the Court as soon as Dr. Meissner will be in a position to appear before this Tribunal and I shall see to it that this will occur as soon as possible.

JUDGE POWERS: Does the prosecution have anything to say on this motion?

GENERAL TAYLOR: The prosecution, of course, has no objection to any course that the medical authorities recommend to the Tribunal as necessary. We think that in the defendant's own interests he should be present in the Court as much as is possible under the medical circumstances, but beyond that, we concur with Dr. Sauter's recommendation.

JUDGE POWERS: I understand that the introduction of evidence will not be taken up for several days in any event, and the Court

will take this matter under advisement and confer with counsel about their conclusions,¹ if that is agreeable.

DR. SAUTER: Thank you very much, Your Honor.

PRESIDING JUDGE CHRISTIANSON: I understand that the prosecution then wishes the Court to receive the plea of Dr. Meissner in his absence by his counsel?

GENERAL TAYLOR: Yes, Your Honor, with the further suggestion that when the defendant is able to appear in Court, the plea should be taken again so that it is entered in the record in his own person.

DR. SAUTER: Of course. Thank you very much, Your Honor.²

3. HIGH COMMAND CASE—DEFENDANT HUGO SPERRLE

a. Petition by Defendant Sperrle to the Tribunal, 27 February 1948, Requesting Permission to Be Excused from Attending Sessions for Reasons of Health³

Nuernberg, 27 February 1948

To: American Military Tribunal V, via Secretary General,
Nuernberg

Considering my present state of health I ask to kindly excuse me further on from being present in the courtroom. My counsel gives me the prosecution documents upon which I give my comments and I am currently informed by him on the course of the proceedings.

I intend giving my statements as to the prosecution's case and for my defense on the witness stand later on and would like to preserve my energy for this stage of the proceedings.

[Signed] HUGO SPERRLE

[Handwritten] Approved, and excuse from attendance accepted—1 March 1948.

[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V

¹ Just before the prosecution began its opening statement on 6 January 1948, the Tribunal again discussed defendant Meissner's continued absence with Dr. Sauter. Dr. Sauter said: "I have seen my client about this. I have explained to him the advantages and disadvantages of these proceedings. He himself is a legal expert and he has asked me to express his wish to the Tribunal that they should proceed against him in his absence. As soon as he is in a position to appear before this Court he will do so without hesitation, in order to be at the Court's disposal." The Tribunal thereupon responded: "Very well. He will be excused for the time being and we will proceed in his absence" (*Tr. p. 16*).

² When defendant Meissner appeared in Court later, the Tribunal did not ask him to plead to the indictment in person. Meissner testified as a witness in his own behalf and was examined and cross-examined on 4, 5, 6, 7 May 1948 (*Tr. pp. 4468-4802*). The case against him proceeded to judgment and acquittal.

³ U.S. *vs.* Wilhelm von Leeb, *et al.*, Case 12, Official Record, volume 27, page 516.

**b. Order of the Tribunal, 1 March 1948, Granting Sperrle's
Petition To Be Excused from Attending Court Sessions¹**

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY, AT A SESSION OF
MILITARY TRIBUNAL V, HELD 1 MARCH 1948,
IN CHAMBERS

United States of America

vs.

Wilhelm von Leeb, *et al.*,

Defendants }

CASE 12

ORDER

On considering the application of defendant Hugo Sperrle to be excused from being present in the courtroom to preserve his energy for his defense on the witness stand at a later period, and the defendant's statement that his counsel keeps him currently informed of the course of the proceedings,

IT IS ORDERED, as announced this date in open court, that said application be approved and excused from attendance accepted, until the further order of the Tribunal.

Done this 1st day of March 1948.

By the Tribunal:

[Signed] JOHN C. YOUNG
Presiding Judge

**c. Petition by Counsel for Sperrle, 8 April 1948, Requesting
That Sperrle's Defense Case Be Postponed to the End of
the Entire Defense Case and That Sperrle Be Excused Further
from Attending Court Sessions²**

Nuernberg, 8 April 1948

[Stamp] Filed: 8 April 1948

To: American Military Tribunal V A via Secretary General
Nuernberg

The health condition of defendant Hugo Sperrle has not improved so far that he will be able to attend the sessions of the Tribunal. Because of being sick with bronchitis he has been confined to bed lately and is still physically weak. He will need

¹ Ibid., page 515.

² Ibid., volume 28, page 907.

some more time for special rest and care. He therefore asks to defer for the time being his defense, in particular his interrogation on the witness stand and not to hear his case in the order provided for in the indictment.

I ask to permit that defendant Sperrle will be the last defendant to conduct his defense and to excuse him further on from attending the sessions.

The defense counsel of the other defendants have been informed that their case will presumably be heard before that of defendant Sperrle.

[Signed] GOLLNICK
Defense Counsel

**d. Order of the Tribunal, 14 May 1948, Deferring the
Presentation of the Defense Case for Sperrle ***

UNITED STATES MILITARY TRIBUNAL V
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY, 14 MAY 1948

United States of America

vs.

Wilhelm von Leeb, *et al.*,

CASE 12

Defendants

ORDER

The motion of defendant Hugo Sperrle by his attorney, filed 8 April 1948, has been received and considered by the Tribunal, and after consultation with the prosecution and counsel for defense,

IT IS ORDERED that presentation of defense of said defendant Sperrle shall be deferred until after the defense of defendant Woehler and before the defense of defendants Reinecke, Warlimont and Lehmann.

Done this 14th day of May 1948.

By the Tribunal:

[Signed] JOHN C. YOUNG
Presiding Judge

**Ibid.*, page 906.

e. Discussion of the Tribunal with Counsel for Sperrle, 17 June 1948, Concerning the Continuance of the Trial in the Absence of Sperrle¹

PRESIDING JUDGE YOUNG: Dr. Gollnick [counsel for defendant Sperrle], in the conference that we had with you a few days ago, with respect to the trial and Field Marshal Sperrle, you intimated at that time that you probably would not have him take the stand, and you have stated this morning that you do not expect, I think, to call him to the stand; but, in his absence it is your desire that the trial proceed and testimony be taken without his presence; is that correct?

DR. GOLLNICK: Yes.

PRESIDING JUDGE YOUNG: If you desire that, we would not require a report on his condition, but for the record, we should have it, unless you are willing and request that we go ahead with this trial.

DR. GOLLNICK: Your Honor, I am in agreement with the fact that the proceedings continue in his absence. At any rate, he cannot follow the proceeding well enough and, should it be necessary, of course, he could appear before the Tribunal, but he couldn't remain here very long, but I agree that the proceedings should be carried on in his absence.²

¹ Extract from mimeographed transcript, Case 12, U.S. vs. Wilhelm von Leeb, *et al.*, page 6119.

² Dr. Gollnick presented the case for defendant Sperrle without Sperrle being present at any time. In fact, Sperrle did not appear in court except on two different days during the entire trial. The case against Sperrle proceeded to judgment and acquittal. See volume XI, this series, pages 564 and 565.

XXI. CONTEMPT OF COURT AND REPRIMANDS

A. Introduction

The language of the Charter of the IMT and of Ordinance No. 7 is identical with respect to the provisions concerning contumacy (subsec. B). In the IMT trial no witness or counsel was declared to be in contempt of court. In the twelve Nuernberg trials which followed the IMT trial, there were three cases of contempt, the first by a prosecution witness and the other two by persons who were either defense counsel or acting as assistants on the defense staff.

The first contempt case occurred in the presence of the Tribunal in the Medical case when a prosecution witness, after being asked to proceed to the dock to determine whether he could identify the defendant Beiglboeck, attempted to assault this defendant. The transcript of the record of the proceedings at the time in question, the contempt order, and the subsequent order releasing the person in contempt upon parole are reproduced herein (subsec. C).

The next contempt case occurred out of the presence of the Tribunal in the Justice case. The Tribunal found that defense counsel Marx and Mrs. Huppertz, a German national who acted in association with Dr. Marx, had committed contempt by attempting to influence improperly a German physician charged by the Tribunal with making a report upon the medical and physical condition of defendant Engert. Various materials from the record dealing with this matter are reproduced herein, including the judgment and sentence of the Tribunal concerning the attempt (subsec. D). The case against defendant Engert was later severed because of his inability to stand trial (sec. XX C 1).

The last case of contempt involved a number of defense counsel in the Krupp case and involved contempt both in and out of the presence of the Tribunal. The incident arose at a morning session of the Tribunal in connection with a protest by defense counsel against a ruling of the Tribunal and the unannounced departure, as a group, of all defense counsel then present at the session. When the Tribunal convened for the afternoon session, no defense lawyers put in an appearance until the Tribunal directed the Marshal to summon defense counsel to the courtroom. By questions to counsel, the Tribunal ascertained that five defense counsel then present had participated in the group walk-out from the morning session. The Tribunal pronounced these five counsel in contempt and committed them to the custody of the Marshal until further orders of the Court (extracts from the transcript of the

proceedings concerning this matter are reproduced in subsec. E 1). The Tribunal thereafter held hearings on 2 successive days concerning this matter and then issued its ruling "on matters relating to contempt of court" (subsec. E 2).

In the Farben case the Tribunal reprimanded a defense assistant and several members of the prosecution staff for conduct committed during trial preparations after the trial was under way. The conduct involved, on the one hand, the handling of documentary materials by the defense assistant, Dr. Alt, in his dual capacity as a defense assistant who had been approved by the Tribunal and as an official in a former plant of the I. G. Farben concern; and on the other hand, the investigation which several representatives of the prosecution undertook to locate documentary materials removed from the files of this plant. The matter was first brought to the attention of the Tribunal upon a prosecution application for an order directing defense counsel "and any other persons acting for the defense," to produce all files "removed from any Farben files or archives under the jurisdiction of any of the Allied authorities at the request of or upon the initiative of the defense or any person acting on behalf of the defense." and for an accounting "of any such files or documents which cannot be produced because they have been destroyed." This application (subsec. F 1, together with one of the affidavits filed therewith) was followed by an answer of the defense (subsec. F 2, together with one of the affidavits filed therewith); a reply of the prosecution to the defense answer (subsec. F 3); and a further affidavit of Dr. Alt (subsec. F 4). Upon the basis of these materials, the Tribunal announced its ruling on the prosecution's application and made the reprimands in open court (subsec. F 5).

B. Provisions of Article VI (c), Ordinance No. 7

Article VI

The Tribunals shall

* * * * *

(c) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Comparable provisions of the Charter of the IMT are the following:

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

* * * * *
Article 18. The Tribunal shall

* * * * *
(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

C. Medical Case—Contempt by Prosecution Witness Hoellenrainer

I. PROCEEDINGS SHOWING THE CONTEMPT BEFORE THE TRIBUNAL¹

DIRECT EXAMINATION

* * * * *
MR. HARDY (associate counsel for the prosecution): And there [in the experimental block of Auschwitz Concentration Camp] you met a professor, or a doctor?

WITNESS HOELLENRAINER: Yes.

Q. Do you think you would be able to recognize that doctor if you saw him today?

A. Immediately, yes. Yes, I would immediately recognize him.

Q. Would you kindly stand up from your witness chair, take your earphones off, and proceed over to the defendants' dock, and see if you can recognize the professor that you met at Dachau?
(Witness leaves the stand)

MR. HARDY: Walk right over, please.

(Witness attempts assault on the defendant Beiglboeck.)

MR. HARDY: The prosecution apologizes for the conduct of the witness, Your Honors. Due to the manner of this examination, the prosecution will have no further questions, Your Honors.

PRESIDING JUDGE BEALS: The Marshal will keep the witness guarded before the Tribunal.

DR. STEINBAUER (counsel for defendant Beiglboeck): I have no questions to put to the witness.²

¹ Extract from mimeographed transcript, Case 1, U.S. vs. Karl Brandt, *et al.*, 27 June 1947, pages 10232 and 10233.

² Several days later, on 1 July 1947, the witness was recalled as a witness and further examined by both prosecution and defense. Extracts from his testimony are reproduced in volume I, this series, pages 466-468.

PRESIDING JUDGE BEALS: Will the Marshal bring the witness before the bar of this Court? Will an interpreter come up here who can translate to the witness?

Witness, you were summoned before this Tribunal as a witness to give evidence.

WITNESS HOELLENRAINER: Yes.

Q. This is a court of justice.

A. Yes.

Q. And by your conduct in attempting to assault the defendant Beiglboeck in the dock, you have committed a contempt of this Court.

A. Your Honors, please excuse my conduct. I am very excited.

Q. Ask the witness if he has anything else to say in extenuation of his conduct.

A. I am very excited and that man is a murderer. He ruined me for my entire life.

Q. Your statements afford no extenuation of your conduct. You have committed a contempt in the presence of the Court, and it is the judgment of this Tribunal that you be confined in the Nuernberg Prison for the period of 90 days as punishment for the contempt which you have exhibited before this Tribunal.

A. Would the Tribunal please forgive me. I am married and I have a little son. And this man is a murderer. He gave me salt water and he performed a liver puncture on me. Please do not confine me to prison.

Q. That is no extenuation. The contempt before this Court must be punished. People must understand that a court is not to be treated in that manner. Will the Marshal call a guard and remove the prisoner to serve the sentence which this Court has inflicted for contempt? It is understood that the defendant is not to be confined at labor. He is simply to be confined in the prison, having committed a contempt in open court by attempting to assault one of the defendants in the dock.*

MR. HARDY: At this time, Your Honor, the prosecution will request a brief recess, if Your Honors please.

PRESIDING JUDGE BEALS: Very well, the Tribunal will be in recess for a moment.

*The written contempt order of the Tribunal is reproduced immediately following.

2. CONTEMPT ORDER OF THE TRIBUNAL, 28 JUNE 1947

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY AT A SESSION OF MILITARY TRIBUNAL
I HELD 28 JUNE 1947, IN CHAMBERS

United States of America
vs.
Karl Brandt, *et al.*,
Defendants } Case 1

CONTEMPT ORDER*

Whereas, in a trial session of Military Tribunal I in the above-entitled case in the Palace of Justice, Nuernberg, Germany, 27 June 1947, one Karl Hoellenrainer was called as a witness on behalf of the prosecution for the purpose of testifying concerning sea-water experiments carried out upon him as an experimental subject;

And whereas, during the course of the direct examination of the witness Hoellenrainer by the prosecution, the witness was directed by counsel for the prosecution to leave the witness box and approach the defendants' dock for the purpose of inspecting the defendants sitting therein and pointing out, if he could do so, any defendant or defendants who had conducted such experiments upon him against his consent;

And whereas, the witness then approached the defendants' dock and suddenly and without warning sprang into the dock, committing assault upon the defendant Beiglboeck, and then and there attempted to beat and bruise defendant Beiglboeck with his fists;

And whereas, the conduct and acts on the part of the witness Hoellenrainer, committed by the witness in open court in the presence of the Tribunal conducting a regular session thereof, constituted a contempt of the Tribunal and its processes;

Thereupon, the witness Karl Hoellenrainer, after being placed under restraint, was called before the Tribunal and was asked if he could show any reason why he should not be adjudged in contempt of court because of his acts above set forth, and the witness having offered no sufficient excuse;

It was and is ordered by Military Tribunal I that the said Karl Hoellenrainer, because of his acts above set forth committed in open court, be and is hereby adjudged guilty of contempt of this Tribunal;

And thereupon, the witness Karl Hoellenrainer was asked by

*U.S. vs. Karl Brandt, *et al.*, Case 1, Official Record, volume 36, pages 153 and 154.

the Tribunal whether he could show any reason why the Tribunal should not proceed to punish him because of his act of contempt of the Tribunal, and the witness Hoellenrainer offering no sufficient excuse;

IT WAS AND IS ORDERED AND ADJUDGED that Karl Hoellenrainer, for and on account of his contumacious conduct in contempt of this Tribunal, be committed to and confined in the Nuernberg Military Prison under the control of United States military security for the period of 90 days from 27 June 1947, unless he be sooner released and discharged from custody by order of Military Tribunal I;¹

IT IS FURTHER ORDERED that the Secretary General of Military Tribunals shall deliver a copy of this order to the Marshal of Tribunals and another copy of this order to the Prison Security Officer, both copies to be certified by the Secretary General to be true copies of this order, and that order constitute authority for the officers named to retain Karl Hoellenrainer in custody for and during the term of the sentence imposed upon him by Military Tribunal I;¹

Dated at the Palace of Justice, Nuernberg, Germany, this 28th day of June 1947.

[Signed] WALTER B. BEALS,
Presiding Judge
Military Tribunal I

3. FURTHER ORDER OF THE TRIBUNAL, 21 JULY 1947

ORDER²

By order of Military Tribunal I dated 28 June 1947, Karl Hoellenrainer was by the Tribunal adjudged guilty of contempt of Military Tribunal I because of an assault committed by Karl Hoellenrainer in open court upon defendant Wilhelm Beiglboeck, one of the defendants in the above-entitled case, Karl Hoellenrainer being then testifying as a witness for the prosecution before the Tribunal;

The witness above-named having been, by the order above referred to, committed to the Nuernberg Military Prison for a period of 90 days from 27 June 1947, unless sooner released from custody by order of the Tribunal;

And the above-named Karl Hoellenrainer having, by written

¹ A further order of the Tribunal releasing Hoellenrainer from confinement on parole for the balance of the term of sentence was issued on 21 July 1947. This order is reproduced immediately below.

² U.S. vs. Karl Brandt, *et al.*, Case 1, Official Record, volume 35, pages 1621 and 1622.

petition filed with this Tribunal, requested that he be conditionally released from confinement, and his wife and father-in-law, Joseph Haushammer, having joined with Karl Hoellenrainer in his petition;*

And the Tribunal having read petition above referred to and having investigated the statements contained therein, and Karl Hoellenrainer having appeared before the Presiding Judge of Military Tribunal I and having tendered an oral apology for his conduct above referred to;

IT IS ORDERED that Karl Hoellenrainer be released from confinement on parole for the balance of the term for which he was committed and that he be paroled to his wife, Walburja Hoellenrainer, for the balance of the term for which he was committed for contempt; the parole hereby granted being conditioned upon the good conduct of Karl Hoellenrainer during the balance of the term for which he was committed. If the said Karl Hoellenrainer conducts himself during the balance of the term above-mentioned as a peaceable and law-abiding citizen, he will be considered as discharged from the order of this Tribunal at the end of the period for which he was sentenced; but if during that period Karl Hoellenrainer shall not so conduct himself, it is the order of this Tribunal that he may be arrested and again confined in the Nuernberg Military Prison to serve the remainder of the term above referred to.

A certified copy of this order will constitute the authority for the commandant of the Nuernberg Military Prison to release Karl Hoellenrainer from custody.

Dated at the Palace of Justice, Nuernberg, Germany, this 21st day of July 1947.

[Signed] WALTER B. BEALS
Presiding Judge
Military Tribunal I

I hereby certify that I translated the foregoing order into the German language, speaking to Karl Hoellenrainer, the person named in the foregoing order, in the presence of Walter B. Beals, Presiding Judge of Military Tribunal I, at Judge Beals' office in the Palace of Justice, Nuernberg, Germany, this 21st day of July 1947.

[Signed] A. HORLIK-HOCHWALD
OCCWC

[Stamp] Filed: 21 July 1947

* The petition by counsel for Hoellenrainer was joined by a petition filed by the Chief of Counsel, General Taylor, on 10 July 1948, which is not reproduced herein.

I hereby certify that the above order was delivered to the prison commandant for necessary action.

[Signed] LOUIS J. COMBS
Captain, A.C.

D. Justice Case—Contempt by Defense Counsel Marx and Mrs. Huppertz, a German National

I. PROCEEDINGS IN WHICH THE PROSECUTION BROUGHT THE CONDUCT INVOLVED TO THE ATTENTION OF THE TRIBUNAL*

THE MARSHAL: The Tribunal is again in session.

MR. LAFOLLETTE (deputy chief counsel for the prosecution): May it please the Court. I have an affidavit which I would like to read to the Court. I send three copies of the English to the bench, one to the German interpreter, and please deliver this to Dr. Marx. I should like to read the affidavit and then make a very short statement, if the Court will permit me.

"I, Dr. Wilhelm Gerstaecker, senior doctor, Nuernberg, Kirchenweg 50, declare herewith under oath:

"I was born on 10 December 1907 in Kempton, Schwaben. Since 1 April 1946 I have been working at the psychiatric clinic of the Nuernberg City Hospital. On the evening of 27 June 1947, I was informed by Dr. Kretzer of the Court decision of Military Tribunal III, by which the defendant Karl Engert was to be psychoanalyzed by me. I was informed by Dr. Kretzer at the same time, that according to the statements of the defense counsel for Engert, Dr. Hanns Marx, the Court would like to receive the report by 28 June 1947, the following day. Inasmuch as I had been named to the Court as psychiatric expert for the defense counsel, without having been asked before, I expressed to Dr. Kretzer my amazement about this. On the following day Dr. Marx appeared in my office, and told me that he had gained the impression that the Americans, with the help of medical experts, would like to drop the case Engert. I told him at that time, that the Court would have other possibilities to handle the case as they saw fit, and that I could only express the medical facts objectively. I considered the remarks of the defense counsel as an unusual attempt to influence my medical activity. I wrote an expert opinion and, on 30 June 1947, turned it over to the assistant doctor Stern, for transmittal

*Extract from mimeographed transcript, Case 3, U.S. vs. Josef Altstoetter, et al., 17 July 1947, pages 5414-5417.

to the competent offices. About a week later a questionnaire of the Court consisting of three questions was submitted to me by Dr. Kretzer to be answered by 'yes' or 'no'. The questionnaire consisted of two pages. On the first page the questions were formulated, while the second page was reserved for my signature as well as for the signature of an official of the Secretary General. I answered all questions with 'yes' and signed the document. A few days later, a secretary of Dr. Marx came carrying the second signed page of the questionnaire, as well as a new blank first page. She informed me that she was being sent by Dr. Marx to offer me the opportunity to fill out the questionnaire once more. She said in so many words that Dr. Marx had been cited before the Court and had been reproached in a severe manner, because the expert opinions of the German doctors did not correspond with that of the Americans, and that the Court, in substance, had queried whether or not it would be possible to change my expert opinion. Furthermore she told me that it would look rather peculiar if the German doctors were stricter than the Americans. She told me expressly that this was the opinion of Dr. Marx. In camouflaged expressions she attempted to intimidate me and to alter my opinion. I told her, however, that I would not change my expert opinion overnight, and furthermore, that I considered the separation of pages of a document, after it had been signed, an unheard-of behavior if not even an illegal act. She then was visibly at a loss for words, and tried to exculpate herself by blaming others for the act. I filled out the first page again the same way in the affirmative. I consider the whole behavior of Dr. Marx in this case shameless from a personal angle, and legally objectionable. I have the impression that Dr. Marx tried to obtain from me, through forced haste, an expert opinion of his choice, which would not have been in agreement with my objectivity as a doctor.

"These statements are true and were given without any duress. I have read them, signed them, and declared them under oath.

Nuernberg, 16 July 1947

[Signed] DR. WILHELM GERSTAECKER
Senior doctor at the City
Hospital, Nuernberg

Signed and sworn to:
Nuernberg, 16 July 1947

[Signed] HENRY EINSTEIN, OCCWC
U.S. Civilian B-316209
Research Analyst"

If Your Honors please, the position of the prosecution is that we ask no action upon the basis of this affidavit alone. We assume the Court will certainly wish to have the affiant present.

However, I consider the affidavit at least primary evidence of the fact that actions have been taken by Dr. Marx which I must bring to the attention of the Tribunal.

I further want to say, although I don't think it is necessary, that no member of the prosecution staff has ever seen any doctor, American or German, in connection with this matter, either before or after they were appointed. I now leave the matter to the consideration of the Tribunal.

PRESIDING JUDGE BRAND: The Tribunal does not care to hear from Dr. Marx at this time. The Tribunal will examine the affidavit more carefully, will determine whether or not it forms the basis for a citation for contempt of court and, if so, against whom. If it be considered a proper basis for further proceedings by the Tribunal, counsel Marx will be advised of that fact and will be given the opportunity, which this Tribunal extends to all persons, to present a fair defense such as he may have.

DR. MARX (counsel for defendant Engert): Excuse me, Your Honor—

PRESIDING JUDGE BRAND: I don't care to hear from you at this time, Sir. You may be seated.

DR. MARX: I only wanted to correct some absolute mistakes from the very beginning.

PRESIDING JUDGE BRAND: I will not hear you at this time. You may be seated. You will be given opportunity to defend or to make a statement at a later time.

2. ORDER OF THE TRIBUNAL DIRECTING THE PROSECUTION TO SUBMIT FOR CONSIDERATION AN ORDER CITING DR. MARX AND AN UNNAMED PERSON FOR CONTEMPT OF COURT*

THE MARSHAL: The Tribunal is again in session.

DR. WANDSCHNEIDER (counsel for defendant Rothenberger): May it please the Court, I would like to mention two translation errors. They may not be very important, but they might be misleading.

PRESIDING JUDGE BRAND: We will ask you to postpone it until the Tribunal passes upon another matter.

DR. WANDSCHNEIDER: Naturally.

PRESIDING JUDGE BRAND: The affidavit which has been submitted

*Ibid., pages 5439-5441.

and which was read at the opening of the afternoon session presents matters of very serious concern to the Tribunal and no doubt to all of counsel, including those mentioned in the affidavit. The affidavit is not in the form which would warrant the Tribunal in acting upon it at this time, and it is the desire of the Tribunal that the office of the prosecution make such investigation as may be necessary with such aids as they may have to ascertain the name of the secretary mentioned in the sworn statement and to prepare and submit to the Court for its examination and for such action as the Tribunal may deem proper an order citing the secretary whose name is not mentioned and also citing Dr. Hanns Marx to come before the Tribunal at a time to be determined by the Tribunal and to show cause in each case why they should not be held in contempt of court. You will prepare such a form and submit it for the consideration of the Tribunal.

In making this order, and in view of the fact that it may be that some of the defense counsel are not aware of the fair procedures which are always followed in these matters, the Tribunal will say further that we deemed it improper to require or even to permit an oral statement to be made on such short notice after the affidavit had been introduced, and that if the Court does issue a citation, that there will be given full opportunity for any persons cited to introduce such evidence as they may have in their own defense.

MR. LAFOLLETTE: If Your Honor please, the prosecution will conform to the Court's order. May I further say also from the standpoint of what is fair that the prosecution did not go out and seek this information. It came to us, and we thought we were obligated to present it; nor did we anticipate that the Court would act purely on the affidavit. We will comply with the Court's order.

3. PETITION OF MR. LAFOLLETTE, DEPUTY CHIEF COUNSEL OF THE PROSECUTION, FOR AN ORDER DIRECTING DR. MARX AND MRS. HUPPERTZ TO APPEAR AND SHOW CAUSE WHY THEY SHOULD NOT BE PUNISHED FOR CONTEMPT, 18 JULY 1947

PETITION FOR AN ORDER DIRECTING DR. HANNS MARX AND MRS. KARIN HUPPERTZ AND EACH OF THEM TO APPEAR AND SHOW CAUSE WHY THEY SHOULD NOT BE PUNISHED FOR CONTEMPT OF THIS TRIBUNAL*

The undersigned, Charles M. LaFollette, Deputy Chief of Coun-

* U.S. vs. Josef Altstoetter, et al., Case 3, Official Record, volume 35, pages 1685-1689.

sel, Office of Chief of Counsel for War Crimes, in charge of the prosecution of the above-entitled cause for and on behalf of the United States of America, petitions the Tribunal and says:

1. That on 26 June 1947, this Court approved a stipulation entered into by and between this petitioner, as such representative, and Dr. Hanns Marx, attorney of record, for the defendant Karl Engert, whereby this petitioner and said Dr. Hanns Marx agreed that this Court should appoint Capt. E. B. Brody and Capt. G. T. Carpenter designated by this petitioner, and Mrs. Dr. Kretzer and Dr. Gerstaecker designated by said Dr. Hanns Marx, all duly qualified physicians and psychiatrists, to examine and ascertain the physical and mental conditions of said defendant Engert and report their findings to this Court, a true copy of which stipulation is attached hereto, marked exhibit "A" and made a part hereof.¹

2. That on 26 June 1947, the Court did appoint the aforesaid physicians and ordered them to submit their findings to the Court as provided in said stipulation.

3. That thereafter said physicians did submit and file with the Court their said report, the exact date of which is unknown to this petitioner.

4. That thereafter the Court on 1 July 1947, in open court, directed the aforesaid physicians and psychiatrists to make a further report of their findings to the Court in the form and manner requested by the Court, all as shown by the transcript of the proceedings of the Court on 1 July 1947, and by the form of said requested report, a true copy of which is attached hereto, marked exhibit "B" and made a part hereof.²

5. That thereafter said physicians and psychiatrists, before 7 July 1947, made and filed a report of their findings with the Court and answered the questions set out in exhibit "B."

That, this petitioner is informed and verily believes that the aforesaid Dr. Hanns Marx has been guilty of contempt of this Court in this, that:

A. After this court has appointed the aforesaid Dr. Wilhelm Gerstaecker, Senior Doctor, Nuernberg, on 26 June 1947, and before said doctor had made his first report of the result of his examination of the defendant Engert pursuant to said appointment and order of this Court, the aforesaid Dr. Hanns Marx appeared in the office of the aforesaid Dr. Wilhelm Gerstaecker and said that "he (Dr. Marx) had gained the impression that the Americans, with the help of the medical experts, would like to drop the case Engert," and by other remarks and actions attempted to coerce or influence the said Dr. Wilhelm Gerstaecker to that

¹ Not reproduced herein.

² Not reproduced herein.

end. And further, that the aforesaid Dr. Marx sought thereby to induce the aforesaid Dr. Wilhelm Gerstaecker to report the latter's findings of the mental and physical condition of the defendant Engert in a manner calculated to warrant this Court declaring a mistrial of the case against said defendant, even if the findings of the aforesaid Dr. Wilhelm Gerstaecker were in truth and in fact such as would not induce this Court so to act.

B. That after this Court had ordered a second report and the said Dr. Wilhelm Gerstaecker had made his second report by answering each of the questions with "Yes," the aforesaid Dr. Marx induced or otherwise employed a certain Mrs. Karin Huppertz,¹ who is not an official secretary or assistant of the said Dr. Marx, nor is in any manner duly registered with this Court or with the Secretary General, to call upon the aforesaid Dr. Wilhelm Gerstaecker and then and there to represent to him that the said "Dr. Marx had been cited before the Court and reproached in a severe manner because the expert opinions of the German doctors did not correspond with that of the Americans." By such representations and other statements and actions the said Mrs. Karin Huppertz, acting as the agent of said Dr. Marx, attempted to induce and coerce the said Dr. Wilhelm Gerstaecker to change his answers to his second report to this Court and to deceive him by making him think and believe that such action was desired and requested by this Court;

That this petitioner is informed and verily believes that the aforesaid Mrs. Karin Huppertz has been guilty of contempt of this Court in this, that:

A. She, the said Mrs. Karin Huppertz, did knowingly and willfully do and perform the acts hereinbefore alleged in paragraph B above, all as shown by the affidavit of said Dr. Wilhelm Gerstaecker which is attached hereto marked Exhibit "C" and made a part hereof.² Your petitioner further states that he is reliably informed and verily believes that the "secretary of Dr. Marx" described in Exhibit "C" is the aforesaid Mrs. Karin Huppertz,

WHEREFORE, your petitioner prays that this Court make and issue its order, ordering and directing the aforesaid Dr. Hanns Marx, an attorney of record of this Court, and the aforesaid Mrs. Karin Huppertz, who resides at Muellnerstrasse 30, c/o Mederer, Nuernberg, and each of them, to appear in open court before this honorable Court and show cause why they and each

¹ In Mrs. Huppertz' answer to the prosecution's petition for an order citing her and Dr. Marx for contempt, Mrs. Huppertz stated that, "I have not regarded myself as a 'secretary' of Dr. Marx, but merely as an occasional assistant." She further stated that she had received no pay from any defense counsel (sec. XXI D 5).

² This affidavit was read in open court when the prosecution first brought the conduct in question to the attention of the Tribunal (sec. XXI D 1).

of them should not be punished for contempt of this Court, and that this Court shall make such orders as to the time and place of said hearing and the summoning and appearance of witnesses as it shall deem necessary and proper in the premises.¹

Dated: 18 July 1947

[Signed] CHARLES M. LAFOLLETTE
Deputy Chief of Counsel in charge
of the prosecution of the afore-
said cause.

Charles M. LaFollette, being first duly sworn on his oath, says that he prepared and signed the foregoing petition and that all of the facts therein alleged as facts are true, and that he is reliably informed and verily believes that all of the facts therein alleged on information and belief are true.

[Signed] CHARLES M. LAFOLLETTE

Subscribed and Sworn to by the
aforesaid Charles M. LaFollette
by me personally known, at
Nuernberg, this 18th day of July 1947.

[Handwritten] Peter Beauvais, U.S. Civ., AGO No. A-441190, Interrogator
Evidence Division, OCCWC.

**4. TRIBUNAL ORDER, 22 JULY 1947, DIRECTING DR.
MARX AND MRS. HUPPERTZ TO FILE SEPARATE
WRITTEN ANSWERS TO THE PETITIONS²**

**ORDER DIRECTED TO DR. HANNS MARX AND TO
MRS. KARIN HUPPERTZ AND EACH OF THEM TO
APPEAR TO SHOW CAUSE WHY THEY SHOULD NOT BE
PUNISHED FOR CONTEMPT**

Comes now, Charles M. LaFollette, Deputy Chief of Counsel, Office of Chief of Counsel for War Crimes, in charge of the prosecution of the above-entitled cause, for and on behalf of the United States of America, and presents to the Court his duly verified petition for an order of this Court directing Dr. Hanns Marx, an attorney of record of this Court and Mrs. Karin Huppertz, who presently resides at Muellnerstrasse 30, c/o Mederer, Nuernberg, and each of them, to appear and show cause why they should not be punished for contempt of this Court; and

¹ On 21 July 1947, Mr. Wooleyhan (associate counsel for the prosecution) filed a supplemental and amended petition, alleging that on 17 and 18 July 1947, Dr. Marx had requested two other German doctors to prepare intermediate medical reports because of defendant Engert's "worsened condition" and because the Americans "demand" it.

² U.S. vs. Josef Altstoetter, et al., Case 3, Official Record, volume 35, pages 1675 and 1676.

Comes also, Alfred Wooleyhan, attorney in the Office of Chief of Counsel for War Crimes, associate counsel in the prosecution of the above-entitled cause for and on behalf of the United States of America and presents to the Court his duly verified supplemented and amended petition for an order of this Court directing Dr. Hanns Marx to appear and show cause why he should not be punished for contempt of this Court; and

The Court having examined said duly verified petitions together with the exhibits which are respectively attached to and made a part of each of them and being in all things duly advised in the premises, finds:

That the said duly verified petitions are in proper form, and that based upon the allegations therein contained a citation should issue;

IT IS, THEREFORE, ORDERED AND ADJUDGED by the Tribunal that Dr. Hanns Marx, an attorney of record of this Court, and Mrs. Karin Huppertz, and each of them, shall file their separate written answers to the charges contained in the petition and supplemental and amended petition on file herein, and by said written answers shall show cause, if any they have, why they should not be punished for contempt of this Tribunal. Said answers shall be filed with the Secretary General on or before Friday, 25 July 1947, at 1200 noon; and it is further

ADJUDGED AND ORDERED by the Court that a copy of this order in the German language, and a copy of this order in the English language, and a copy of each of the aforesaid petitions in the German language and a copy in the English language, shall be served upon the aforesaid Dr. Hanns Marx and Mrs. Karin Huppertz and each of them, in open court, or by the Marshal of this Court, and that service thereof shall constitute good and sufficient notice of this order, now made and entered by this Court at Nuernberg on the 22d day of July 1947.

Military Tribunal III *en banc*
By: [Signed] JAMES T. BRAND,
Presiding Judge

5. ANSWER OF KARIN HUPPERTZ, 23 JULY 1947

Reply of Karin Huppertz*

Nuernberg, 23 July 1947

In compliance with the request of Tribunal III, I submit the following statement:

1. With reference to my personal data I wish to say: I have been a nurse for over 30 years (8 years of which were in the

**Ibid.*, pages 1746-1750.

United States of America, postgraduate of the Women's Hospital, New York City), and was called to Nuernberg as a witness in the Medical trial in the case against the defendant Professor Schroeder. The decision on whether I would be examined was delayed because the evidence (the material concerning the seawater) was dealt with very late. For reasons which I personally do not know, an actual interrogation never took place. Since Dr. Marx and other gentlemen who are the defense counsel in the Medical trial knew that I worked as a nurse in America for many years and know the English language (Senior Oxford examination), they called me in as a person versed in the matter in question and familiar with the language. However, I was no employee of a defense counsel, and have received no payment. Consequently I have not regarded myself as a "secretary" of Dr. Marx, but merely as an occasional assistant.

I emphasize this in order to show that I had no motive to act as a secretary of Dr. Marx. Moreover, I have not done so.

2. I know nothing whatsoever about the facts as presented in the statement of Dr. Stern. Nor do I know anything of a visit made by Dr. Marx to Dr. Gerstaecker nor what was discussed on this occasion.

3. To the further statements of Dr. Gerstaecker I would like to say at the very outset: I have said nothing—nor even insinuated anything that could be construed as a criticism or anything of a negative nature against the American court, to say nothing of insults.

I had a purely private discussion with Dr. Gerstaecker and was introduced to him as "Sister Karin Huppertz from Berlin" and it is incomprehensible how Dr. Gerstaecker could have arrived at such an erroneous opinion that I was the secretary of Dr. Marx.

I cannot recall exactly in that form the remark that "Dr. Marx was summoned to court." However I said that Dr. Marx was called in "to a gentleman of the court" and I in no way meant to say hereby that he had been called before the "Tribunal," especially since this happened around 7 o'clock in the evening. I adhered to German usage according to which every office in the Palace of Justice is simply called "court." We are here dealing with an erroneous interpretation on the part of Dr. Gerstaecker which may be explained by my incorrect phraseology. Dr. Marx, at any rate, did not say that he was called to the "Tribunal."

It is possible that I repeated to Dr. Gerstaecker the utterances of Dr. Marx who expressed indignation at the fact that the decision of the German physicians was, so to speak, flaunted in his face.

4. Of the entire matter I know only the following: On 9 July

Dr. Marx came, towards evening, from the office of an American gentleman and said more or less to himself in substance: "Now I have the impression that the German physicians are more royal than the king." They declared Engert well enough to be interrogated after the Americans have long been of the contrary opinion. He intended to express this view very clearly to the Court within the next few days and he placed more weight on the American opinion than on the German.

This statement of Dr. Marx impelled me to reply: "As defense counsel you cannot publicly take a stand against German physicians if you are defending German physicians in the Medical case."

Until this day I had no knowledge whatsoever of the case Engert. I did not even know the name and learned only now that the defendant's name is Engert and not Engerer.

I then said spontaneously to Dr. Marx that I had long since intended to pay the Sister Superior of the Municipal Hospital a visit and that I wanted to use this occasion to become acquainted with Frau Dr. Kretzer who was the only German female physician in question. I intended to ask her whether the condition of defendant Engert had not taken a turn for the worse since the time that the questionnaire had been filled out and that perhaps she would not be of a different opinion.

In the forenoon of the same day Dr. Marx had stated that, according to his observations, the state of health of the defendant, Engert, had taken a striking turn for the worse since his last visit. He also stated that he had informed Dr. Kretzer (Frau Dr. Kretzer) of this, and that she had agreed with this opinion.

Dr. Marx had evidently not listened to me carefully; he had been dictating to a clerk, and I do not know whether he had understood me at all. The name of Dr. Gerstaecker was in no way mentioned between Dr. Marx and myself. Furthermore, I did not know that a physician of this name had anything to do with giving an expert opinion concerning defendant Engert.

Dr. Marx had brought along the questionnaire from the office of the American gentleman, and had it copied by a clerk. I took this questionnaire. Only, at the hospital did I notice, that among the papers which I had hastily taken along, the second page of the original questionnaire with the signatures was among them, but that the first page with the answered questions was missing. I concluded that this first page of the original questionnaire must have been lost, and this was the reason which prompted me to ask Dr. Gerstaecker at the conclusion of the discussion to fill out the first page of the questionnaire which I had brought along in the same manner as before.

I called up the Sister Superior and found that she was not there in the evening, so I did not go to see her until the next forenoon. I introduced myself as "Sister Karin Huppertz." I told her about the affair and asked her to introduce me to Frau Dr. Kretzer and to speak to her, since she knew the situation in the house better than I did and was in a better position than I to give an opinion. I told the Sister Superior that I had accidentally come to Nuernberg, and that I now wished to be of service voluntarily wherever I could because of my linguistic ability and would also try to mediate in this particular matter, if possible. I am convinced that she understood me correctly, that I am not employed in any capacity with Dr. Marx, and that I only wished to help as a nurse on my own initiative out of purely humane considerations.

The chief female physician could not be found in any of the sections where we looked for her, so the supervisor suggested going to the other physician who had also given his signature. I did not know that this Dr. Gerstaecker was a psychiatrist. The supervisor introduced me as "Sister Karin Huppertz" and explained to him in a few words the nature of my visit in Nuernberg, just as I myself explained to her previously.

Therefore, I am completely at a loss to understand how Dr. Gerstaecker could have concluded that I was a secretary to Dr. Marx because I distinctly stressed the fact that I had been prompted to come for purely private, humane reasons.

Dr. Gerstaecker was immediately extraordinarily unfriendly, irritated, and blunt, took this to be an attack against him personally, felt slighted and insulted and declared that as far back as 10 days ago he had submitted an extensive opinion upon which answers to the questionnaire are based. He felt that Dr. Marx himself could have approached him. Dr. Gerstaecker's behavior towards me gave me the impression that he was antagonistic to Dr. Marx.

I told Dr. Gerstaecker that I did not know that he already had submitted an opinion from which it was evident that defendant Engert is well enough to permit interrogation and that I, of course, understand his having filled out the questionnaire in that form. Consequently, it is not correct to speak of "intimidating" and of "changing of opinion." With a person in the mood he was in and considering his negative attitude, an attempt along that line would also have been entirely futile. I at once pointed out to him emphatically that the entire matter was very unpleasant to me; that while it was no concern of mine, only intended to do good and now I, too, "got into hot water."

When he had calmed down somewhat I once more asked him to reinsert his "yes" in the questionnaire at the proper place.

I already mentioned that I had left the office in such a hurry that only in the morning I realized that the first page was new and that the original page was not there. I explained to the physician that I did not know whether the new office help had destroyed that original page or whether it is still to be found at the office. Thereupon he became extremely indignant, refused to believe in the lack of legal experience of the secretary, declared that that was a trick arranged with Dr. Marx who again wanted to catch him unawares, and other similar things, of which I in fullest sincerity tried to dissuade him. He did not want to see that the document as such had not been changed at all. Finally he did believe me and inserted again his "yes" at the proper place.

There was no reason for me "to try and shift the blame on others" because I did not make the copy, nor had I separated the sheets. Dr. Marx also did not know about it. Frau Wieber, the new secretary to Dr. Marx, who made the copy will be very glad to clear up the matter.

In summing up I should like to say the following:

Today I see that it was unwise for me to interfere in this matter at all as it was no concern of mine. At no time, however, did it enter my mind to influence a physician or to insult the Court. I have had no order of any kind from Dr. Marx; I am not a jurist but merely a nurse who lived in America many years and the entire subject of alleged difference between the German and the American physicians disturbed me personally and that is why I wanted to mediate.

I did not intend to do anything that is bad or not permitted and I also do not believe that I did any such thing.

Finally, I offer my apologies should the form of this statement not comply with the regulations of the Tribunal. I am entirely inexperienced in legal matters but I have stated everything as it was to the best of my recollection.

[Signed] KARIN HUPPERTZ
Nuernberg, Mueilnerstrasse 30/0

6. ANSWER OF DR. MARX, 24 JULY 1947*

Dr. Hanns Marx,
Counsel for defendant Engert Nuernberg, 24 July 1947

Concerning the request of the prosecution I make the following statement—I would like to start with a personal remark.

I have always been far from lacking in the proper respect, which I, in my capacity of defense counsel, owe to the Tribunal.

* Ibid., pages 1727-1735.

I sincerely regret, that, due to an unfortunate chain of circumstances, at the first glance perhaps, the contrary impression could result.

I have been acting as counsel for the defense at the IMT and at the American Military Tribunals for almost 2 years. Before the IMT I was defense counsel in the Streicher case, which for various reasons made particularly strong demands on the tact of the defense attorney.

I believe that I may say that I have always fulfilled these demands. Nor have I so far ever been reprimanded for my manner of handling a case. On the contrary, the IMT in open session expressly stated its confidence in me and requested me to continue Streicher's defense, when differences of opinion had arisen between me and my client regarding the way of conducting the defense.*

After almost 40 years' work as attorney and defense counsel, I would feel particularly sorry if I could be reproached of having in any way violated the respect due to the Tribunal.

Regarding the matter contained in the prosecution's request I have to make the following statement:

The prosecution mainly bases its arguments on senior physician Dr. Gerstaecker's affidavit, who had been named by counsel for defendant Engert as expert for the defendant's mental condition.

It appears necessary first of all to give a survey of the chronological sequence of events:

Having learned—I think this was several days before 26 June—that the Tribunal was considering requesting further expert's testimonies, I asked myself, who would be suitable as an expert for an estimate of defendant Engert's physical condition and for giving a psychiatric expert's opinion. As expert for the first question I was thinking of Frau Dr. Kretzer, who is the doctor actually treating defendant Engert, whereas I knew as yet no suitable person for the expert's testimony on the defendant's mental state. I had been chiefly thinking of the chief of the Clinic for Nervous Diseases of the Erlangen University and of the chief of the section for nervous diseases in the Nuernberg Municipal Hospital. On the occasion of a talk with Dr. Stern, who as ward physician also treats the defendant and whom I knew from my visits to Engert, I mentioned that I needed a psychiatric expert and that I was thinking of the chief physician of the section for nervous diseases in the hospital. Dr. Stern told me in reply, that

* Dr. Marx refers to the statement of the President of the IMT on 26 April 1946 in open court: "The Tribunal thinks, Dr. Marx, that the explanation and the statement which you have just made is in accordance with the traditions of the legal profession and they think therefore that the case ought to proceed and that you should proceed with the case." See *Trial of the Major War Criminals, op. cit.*, volume XII, page 307.

it is not necessary to apply to him, senior physician Dr. Gerstaecker, who works in this section, is a good acquaintance of his; this doctor regularly makes out the expert's opinions, he would speak to him and give all necessary information, I myself need not do anything further in the matter. I want to state that I heard Dr. Gerstaecker's name for the first time in this connection.

I relied on this promise by Dr. Stern and did not think it necessary to inform Dr. Gerstaecker and to ask him whether he was prepared to act as expert. Afterwards, on 26 June 1947, the Tribunal made the ruling appointing the doctors who meanwhile had been named by the prosecution and by the defense, as experts in the Engert case.

On 27 June, in the afternoon, Dr. Wartena wanted to see me and informed me that the expert's testimonies have to be presented already on the following Saturday, 2 p.m.

On the evening of the same day Dr. Stern tried several times to get me on the phone in my apartment on an urgent matter. He did not get a connection until 2230 hours, and then he let me know, that unfortunately he had forgotten, as he had promised me, to inform Dr. Gerstaecker that the defense wanted to have him as an expert. He had requested Frau Dr. Kretzer to do so, but she, too, had forgotten it. At the end of the conversation Dr. Stern urgently asked me to come to the hospital immediately on the next morning and to get the whole matter straight with Dr. Gerstaecker himself.

Therefore, I went to the Municipal Hospital on Saturday, 28 June, in the morning, where I met Dr. Stern in the ward where Engert lies, and he offered to take me at once to the hospital ward where Dr. Gerstaecker works. Dr. Gerstaecker was just doing his morning rounds. Dr. Stern went up to him and informed him that Engert's defense counsel had come and wanted to speak to him.

Dr. Gerstaecker then came up to me, did not even introduce himself and at once used such unusually violent and insulting language against me as I had never experienced in my almost 40 years of work as an attorney. He started with reproaches and remarks, such as: That had not happened to him before that he had not even been asked in advance whether he was prepared to act as expert in a case; he had received a notification, which is only a copy, bears no signature, and appoints him as expert without any formality. This letter was probably the Secretary General's letter of appointment, which he had meanwhile received; he held it in his hand and waved it without giving me a chance to read it and to explain to him where this letter came from. He inti-

mated that he considered the letter to originate from me; I tried to rectify his error, but was unsuccessful in this.

In the same and still increasing state of excitement, which he had manifested already at the beginning of the conversation, he went on to state that he had not been given access to any court documents, he is not used to such treatment, being a senior physician who had already written many expert's testimonies; moreover, the letter contained no accurate information as to what single points he should give an opinion about. Dr. Gerstaecker also complained, that the time accorded for the giving of the expert's testimony was too short, and wanted to make me responsible for that, too.

I now tried to explain to Dr. Gerstaecker, whose indignation and excitement was constantly increasing, how the circumstances were really connected. In particular, I set forth the following:

I had come to tell him that it was not my fault that he had not been notified in time of the fact that he was nominated as an expert. I personally had not known his name and Dr. Stern had drawn my attention to him. Dr. Stern had expressly stated to me that he would undertake to notify him. And in particular, the decision of the Tribunal by which he was appointed expert, had only been made on 26 June—that is 2 days ago. Then I asked Dr. Stern, who was present, to clear up the misunderstanding but he kept silent. This conduct of Dr. Stern I thought very strange, the more so as the night before he only had told me over the phone that he had neglected to notify Dr. Gerstaecker in time.

More and more I won the impression that Dr. Gerstaecker just did not want to be told anything by me and that he closed his ears to any reasoning.

Then I went on explaining to him that there would only remain two ways open to him, either he could declare that he would generally decline to give an expert testimony, as on account of the short time being at his disposal he could not assume the responsibility for it; or else he would have to beg to have the appointed time extended accordingly. As far as I remember, Dr. Gerstaecker declared that he would nevertheless furnish the expert testimony.

In order to pacify him a little, I explained to him that he need not consider this to be an extensive expert testimony, as was customary when a German court procedure was concerned; according to my idea the main importance was being attached to the part concerning Engert's physical condition anyway. Already two expert testimonies of an American court physician had been submitted, which, taking into consideration Engert's physical condition had denied that Engert would be able to stand a trial.

If it has been deposed in Dr. Gerstaecker's affidavit that I had

mentioned that I had received the impression "the Americans" aided by medical experts wanted to drop the Engert case, then I declare that I never made such a remark. According to my opinion this can only be the result of a misconception of Dr. Gerstaecker's.

I interpret this misunderstanding by my having mentioned the older expert testimonies by an American physician and submitted to the Tribunal, and that I had also mentioned my application, to have the Engert case put separately. From this Dr. Gerstaecker may have mistakingly deducted, that I had wanted to express, that "the Americans" wanted to eliminate Engert from the case.

That I did not presume to reproduce the views of the Tribunal as those of the adjudicating court, which follows from the fact that first, I knew the point of view of the prosecution to be opposed to my application, and further second, from the fact that the already submitted expert testimonies by the American prison doctor were not considered sufficient reason for a decision concerning my application but that importance was being attached to an additional expert testimony on a much broader basis.

As an old and experienced jurist I could hardly gain any other opinion from these known circumstances than that the Tribunal without any further ado did not grant my application for separation of the Engert case, I would have talked against my own inner conviction, and of that nobody will think me capable.

And besides, from the declaration Dr. Gerstaecker gave in his affidavit, it is evident that I did not at all talk of the adjudicating court or of the Tribunal.

Then Dr. Gerstaecker maintains to have answered to my above-mentioned remark, that the Tribunal would have other possibilities to conduct the case according to its own ideas. The meaning of this sentence is completely incomprehensible to me, and I cannot remember that Dr. Gerstaecker had mentioned anything like it, and I deem this impossible. Neither would I know which other possibilities the adjudicating court could have taken into consideration according to Dr. Gerstaecker's idea; the fact remains that for months the court has had an eye on the health condition of the defendant and that it also let the decision of my application depend on the *finally* ascertained state of Engert's health. Otherwise it would be impossible to understand that for this reason the health condition of Engert is being thoroughly examined and an expert testimony be made and that before giving a decision on the separation of the case the Tribunal still attaches importance to a re-examination of the submitted American expert testimony by quoting further expert testimonies.

As a synopsis I want to mention the following:

Nothing was further from my mind than to influence Dr. Gerstaecker's medical activity in favor of Engert.

The sole purpose of my coming was to give him a declaration how it came about, that he was not notified in time of the intention to nominate him as expert, and furthermore to make it clear to him how to understand the short time between his appointment by the Tribunal and the date his expert testimony had to be delivered. This intention of mine I could not put into effect as Dr. Gerstaecker made it impossible for me to do so by his exceedingly excited and abrupt manner with which he confronted me during the whole conference, and he made it impossible for himself to consider my declarations which I gave quietly. I was under the impression that he did not want to listen to my words or that he just closed his ears to them.

If, as the prosecution states, I had the intention of getting a specialist for a certificate favorable to my client, I would have turned to a trustworthy specialist doctor with whom I was already acquainted and with whom I, as defense counsel, could have discussed such a ticklish matter, and would not have mentioned the doctor of the city of Nuernberg whom I did not know at all. Moreover, the extremely hostile and unbridled behavior of this doctor would necessarily have dissuaded me from so doing from the very beginning; such an attempt would have been judged hopeless from the very start. I would also have had to expect that Dr. Gerstaecker, if only because of his basically hostile attitude towards me, would not only have rejected such an attempt most sharply, but would also have at once complained about my conduct.

It appears to me, however, to be of particular importance to point out that Dr. Gerstaecker did not, on the basis of my conduct on the occasion of that conversation on 30 June 1947, draw the conclusion and inference that I had been guilty of impermissible influencing of his certificate; because, otherwise, it would not be understandable why he had not taken steps against me, if only because of this behavior. The fact is, however, that it was only after he had talked to Frau Karin Huppertz that he decided upon this derogatory judgment of my conduct.

Since Dr. Gerstaecker did not take the trouble of investigating the facts connected with the case, it is understandable that with the appearance of Frau Karin Huppertz he gained the impression that, just as in the first case, it could be a surprise move staged by me. Unfortunately, I made the mistake of not breaking off the conversation with Dr. Gerstaecker at once, as soon as I had noticed his emotional behavior towards me. It was only the

consideration that the submittal of the certificate would possibly be delayed, and that I could then be held responsible for the delay, that made me undertake the attempt to continue the discussion in order to reach an understanding with the doctor after all. I still do not understand why Dr. Stern did not intervene to settle and explain matters even though he was acquainted with the facts connected with the case; and also, after all, knew especially that it was he who had named senior physician Dr. Gerstaecker to me as a psychiatrist, and had undertaken to inform him in time, but had unfortunately failed to do so. He would have been able to calm Dr. Gerstaecker and to explain his error to him as well as his mistaken idea of the part that I had played.

I may also point out that in Dr. Gerstaecker's affidavit, nothing is mentioned of the above conversation which I have described in full, and that, moreover, the preceding events are so described as though I had suddenly appeared at his office on 28 June and had at once spoken of my alleged impression that the Americans, with the assistance of medical experts, intended to drop the Engert case.

In this manner, naturally, a completely distorted picture of the background of the case is created, and the reader of the affidavit is deprived of the opportunity of obtaining an impression of the manner and tone of the entire conversation and the reciprocal psychological impressions aroused thereby, just as it is then impossible to judge how these psychological impressions can have effected the forming of the manner of expression.

It should have been expected of a doctor and psychiatrist especially, that in a case of such extraordinary importance which concerned my honor as an attorney, he would have taken the trouble of describing the entire conversation and not using as the nucleus of his charges, statements torn out of their context which he had perhaps completely misunderstood due to his excitement. It should also have been expected of a German doctor who indeed seems to be exceptionally suspicious, that on the basis of a conversation with a nurse whom he had not known up till then, without further examination, he would not have allowed himself to be led into characterizing my conduct as defense counsel as personally impudent, legally impugnable, and aimed at an illegal influence of his certificate.

It is obvious that I too became inwardly very upset as a result of the behavior that Dr. Gerstaecker had displayed toward me and in addition, there were the inner considerations as to how, on the one hand, I could quiet Dr. Gerstaecker who was becoming more and more excited, and on the other hand, how I could prevent the case from being harmed. In addition, my severe war injury is also to be considered; during the First World War, I suffered a

skull and brain injury due to a shot in the head. This injury was recognized as a severe battle injury involving 60 percent disability. To be sure, this has never yet put me in a position where I could not carry out my profession; in the case of inner excitement and especially in case of personal attacks which I feel to be unjustified, my psychological composure becomes affected.

By way of precaution I suggest that a specialist opinion be obtained from Professor Dr. Liebbrandt, Director of the University Nerve Clinic, Erlangen. The American Military Tribunals were already able to gain an impression of his authority upon the occasion of his interrogation as an expert for the prosecution during the Doctors trial.

[Signed] DR. HANNS MARX

7. TRIBUNAL ORDER DIRECTING A HEARING UPON THE ISSUES, 25 JULY 1947

Subject: PETITION FOR AN ORDER DIRECTING DR. HANNS MARX AND MRS. KARIN HUPPERTZ, AND EACH OF THEM, TO APPEAR AND SHOW CAUSE WHY THEY SHOULD NOT BE PUNISHED FOR CONTEMPT OF COURT.*

COMES NOW Dr. Hanns Marx and files with the Secretary General his written answer setting forth therein the reasons by which he asserts that he should not be punished for contempt of this Court; and

COMES also Mrs. Karin Huppertz and files with the Secretary General her written answer setting forth therein the reasons by which she asserts that she should not be punished for contempt of this Court; and

The Court having examined said answers and each of them, together with the petitions and each of them heretofore filed, and being in all things duly advised in the premises,

NOW FINDS that issues of fact as well as issues of law are presented by the respective answers of each of said defendants and that a hearing should be had and evidence produced upon the issues of fact so presented.

IT IS, THEREFORE, ORDERED AND ADJUDGED by the Court that said issues of fact shall come on to be heard in open court on Tuesday, 29 July 1947, at 0930 hours, that the respondents and each of them shall be present at, and shall attend said hearing in person and that this Court shall convene at 0930 hours on Tuesday, 29

*U.S. *vs.* Josef Altstoetter, *et al.*, Case 3, Official Record, volume 35, pages 1708 and 1709.

July 1947, solely for the purpose of conducting the aforesaid hearing;¹ and

IT IS FURTHER ORDERED that the names of all witnesses which all or any of the parties desire to have produced to testify at said hearing shall be delivered to the Secretary General on or before 1200 hours on Monday, 28 July 1947, and that the Secretary General and the Marshal of these Military Tribunals shall take all steps necessary to procure their attendance at said hearing and that the attendance and testimony of said witnesses shall be subject to the provisions of Rule 9 of the Rules of procedure of this Court;² and

IT IS FURTHER ORDERED by the Court that when this Court shall adjourn on Monday, 28 July 1947, it shall reconvene again for the purpose of further proceedings in the case of the United States of America against Josef Altstoetter and others, on Wednesday, the 30th day of July 1947 at 0930 hours.

Dated: 25 July 1947

[Signed] JAMES T. BRAND
Presiding Judge

8. JUDGMENT AND SENTENCE OF THE TRIBUNAL, 31 JULY 1947, CONCERNING THE CONTEMPT

EXTRACT FROM THE TRANSCRIPT IN THE JUSTICE CASE,
31 JULY 1947³

PRESIDING JUDGE BRAND: Before proceeding with the trial of the main case, it becomes the duty of the Tribunal to pass upon the issues which were presented by the citation addressed to respondents Dr. Marx and Frau Huppertz; and while the Tribunal will not attempt to give any extended expression of its conclusions as to the details, a few words may be appropriate to explain the procedure and our conclusions.

The proceedings are conducted in accordance with the provisions

¹ The hearing concerning the contempt allegations took place on 29 and 30 July 1947, and the proceedings are recorded in the official mimeographed transcript of the Justice case, pages 6055-6198. Both respondents were represented by German counsel, Dr. Marx by Dr. Hermann Orth who was otherwise counsel for defendant Altstoetter in the trial, and Mrs. Huppertz by Dr. Agnes Nath-Schreiber, an assistant defense counsel in the Flick case. Altogether the testimony of 11 witnesses was heard, including 6 for the petitioners and 5 for the respondents. Both respondents testified. The evidence was followed by oral argument. No part of the transcript of the hearing is reproduced herein. On 31 July 1947, the Tribunal explained briefly the nature of the contempt procedure and its conclusions, and then announced its judgment and sentence. The entire statement of the Tribunal on 31 July 1947 is reproduced in the subsection immediately following.

² See section III F, Rule 9.

³ Extract from mimeographed transcript, Case 3, U.S. vs. Josef Altstoetter, *et al.*, 31 July 1947, pages 6200-6206.

of Control Council Law No. 10, Article III, paragraph 2, which provides that the Tribunal and the rules and procedure thereof shall be determined and designated by each zone commander for the respective zones. Ordinance No. 7 of the Zone Commander of this zone provides that the Tribunal shall deal summarily with any contumacy, imposing appropriate judgment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

It has occurred to us that the phrase "contempt of court" may possibly not be fully understood. That phrase, as used in the citation, does not imply any physical expression of discourtesy to the individual members of the Tribunal. On the other hand, it is a phrase which is employed as referring to the improper interference with the due processes of the Court. Consequently, the Tribunal approaches this issue in an entirely impersonal way, and I may say that this is an unpleasant duty.

One word of explanation concerning what defense counsel are entirely justified in doing for their defendants, and for which deeds none of them could be called before this Tribunal or be reproached. The attorneys in this case are certainly always entitled to seek through orderly procedure, the aid of this Court, to secure testimony by expert witnesses concerning the health of their defendants. If this condition of health changes, they are entitled to seek additional supplemental investigations and to secure, by proper means, medical witnesses to aid in discovering the truth.

No act of this kind is charged as being improper in this case. The substance of the charge is that the respondents made false representations for the purpose of influencing the action of expert witnesses. These expert witnesses were named in a written stipulation between counsel for the prosecution and respondent Marx. The Court made an order appointing these experts but that order strictly followed the stipulation of the parties.

After a first report had been made in medical terms, the Tribunal required of the experts that they answer a questionnaire. Three questions were asked and blanks were left for the answers to be filled in.

In addition to the charge of an attempt to improperly influence witnesses appointed by the Court, the other basis of the charge is that the defendants participated in the mutilation of a public record after the same had been filed with the Secretary General and was in the legal custody of the Court. Counsel will recall that these interrogatories, these questionnaires, consisted of two sheets of paper on the first of which were the questions and blanks

for the answers, on the second page of which was some further writing and the place for the signature of the expert witness.

A separate questionnaire was returned by each of the two German doctors. After it was signed, the two sheets, having been previously stapled together, were delivered into the custody of the Secretary General and became official documents of this Tribunal. The charge is that these documents were thereafter secured by defendant Marx and were mutilated. The mutilation is entirely undenied. The responsibility for it only is challenged.

As to the charge with reference to the statements made by respondent Marx on 28 June 1947, we have the direct testimony of two German doctors, both of them experts, both of them unimpeached as to their credibility, which testimony is opposed only by the somewhat equivocal denials of respondent Engert. (Correction made at the afternoon session of the same day: "Marx" instead of "Engert.")

We find that the testimony of the two witnesses was in substance true and we find that respondent Marx and respondent Huppertz each knowingly participated in the utilization and mutilation of the report and in the attempt to influence the signers of the questionnaire to join in altering it.

One matter which has received our consideration relates to the testimony of both respondents as to the relationship between respondent Marx and respondent Huppertz. The testimony as it was produced by those two respondents was to the effect that respondent Huppertz was acting wholly as an independent agency without any real connection with respondent Marx at all, either in general or in this particular instance.

The testimony of both respondents on the issue of the relationship, whether that relationship was that of employer and secretary, or of principal and agent, or of lawyer and informal assistant, the testimony was equivocal and evasive. It was conclusively established in our mind that respondent Marx wrote to Berlin with reference to the coming to Nuernberg of Frau Huppertz, and on 3 June we have the evidence of a telegram sent in confirmation of a telephone conversation which requests clearance for Frau Karin Huppertz to be assistant counsel to Dr. Marx. There surely was some relationship between these two parties and it appears to have been a close one.

The purpose of the original mutilation of the document has not been satisfactorily explained by the respondents. We consider it highly improbable that the secretary or stenographer in the office separated them by accident. It will be recalled that there were two separate documents; one, by one German physician and the

other by the other. Both were separated, the first pages in each case being removed. The accident theory seems impossible.

The fact that the secretary or stenographer made copies only of the first sheet, indicates that someone was interested in the substitution of a new sheet. It is significant that the stenographer did not in fact copy even the first sheet. Had she been instructed merely to copy the first sheet, she surely would have copied the answers which appeared on the first sheet in which the doctor replied "ja" to the interrogatory. But she did not copy the answers and therefore did not accurately copy the first sheet. She omitted the only really important portion of the sheet which she did copy. She must have received instructions from some source to do so. The intent was clearly to prepare a blank, unfilled in sheet number 1, and that sheet in its blank form was attached to the sheet which contained the signature previously made by the physician. Again the attempt to mutilate the documents is clear, because if the sheet had been separated unintentionally then surely in reassembling them and again stapling them together they would have stapled the original first sheet to the original signature. But they stapled another sheet which they must have known was not the original, because it was blank. Whoever saw the original first sheet knew that it was filled in with the answers "ja." The fact that the blank sheet was stapled on the signed second sheet indicates an attempt that a change should be secured in the answers, which preceded the original signatures. We found it unnecessary to go further in our discussion of the matter. After these informal comments, the Court will now read the judgment of the Tribunal:

Now, at this time, the above-entitled matter coming on for hearing upon the order directed to Dr. Hanns Marx and to Mrs. Karin Huppertz, and each of them, to appear and show cause why they should not be punished for contempt, and the said respondents and each of them having filed their written answers to the charges on file herein, and the cause having been heard in open court upon the testimony submitted by the prosecution and by the several defendants and their witnesses, and the Court being advised;

NOW, THEREFORE, it is the judgment of the Tribunal that the respondent, Dr. Hanns Marx, is guilty of the offense of contempt of court as charged in the petition and supplemental petition on file herein;

IT IS THEREFORE, ORDERED and ADJUDGED that respondent Marx be imprisoned for a period of thirty (30) days in such place of confinement as shall be designated by the Marshal of this Court;

IT IS FURTHER ORDERED and ADJUDGED that the said Dr. Hanns Marx be and he is barred from further participation in the cause

now pending before this Tribunal, and that he be and is excluded from the courtroom during the trial thereof ;

IT IS FURTHER ORDERED that Dr. Heinrich Link be and he hereby is appointed chief counsel for defendant Engert, and the respondent Dr. Hanns Marx is directed to deliver to Dr. Link all official records and files in his possession as attorney for defendant Engert ;

IT IS FURTHER ORDERED that execution of the sentence of imprisonment be and it hereby is suspended until the present employment of respondent Marx as official counsel in the trial of any case now pending before any of the military tribunals now sitting at Nuernberg shall have terminated ; upon such termination the sentence of imprisonment shall forthwith be executed ;

IT IS FURTHER ADJUDGED and DECREED the respondent, Mrs. Karin Huppertz, is guilty of the offense of contempt of court as charged in the petition of the prosecution, and that she be imprisoned for a period of ten (10) days in such suitable place of confinement as shall be designated by the Marshal of this Court, having due regard to the sex of the respondent ;

IT IS FURTHER ORDERED that the sentence herein imposed be forthwith executed, subject, however, to the condition that upon request of respondent Huppertz, or of the prosecution, execution of the sentence may be postponed for a period not exceeding ten (10) days.

This ends the judgment of the Tribunal.

The provision with reference to the suspension of the sentence, in the case of Dr. Marx until completion of any official employment in some other Tribunal, is made solely because of the desire of the Tribunal that no action on its part should interfere with the rights of any defendant in any tribunal now sitting in Nuernberg.

Counsel may proceed with the main case.

E. Krupp Case—Contempt by Defense Counsel

I. EXTRACTS FROM THE TRANSCRIPT OF THE PROCEEDINGS OF 16 JANUARY 1948*

JUDGE DALY, PRESIDING: All right, you have made your statement on the record.

[The transcript of the proceedings immediately preceding this statement of Judge Daly is reproduced in section XVII F, since the matters under discussion concerned the taking of evidence on commission. Judge Daly refers here to the last of a number of statements made by Dr. Pohle, counsel for defendant von Buelow.]

Do you have something to report on the other matter, Mr. Ragland?

MR. RAGLAND (deputy chief counsel for the prosecution): I understand the witnesses have been released until this afternoon. However, we have Document Book 26. Twenty-four hours' notice has been given on that. We have a number of exhibits. Unfortunately, they are exhibits in the latter portion of the book rather than in the first part, but we think with a brief explanation as we go along we can put in the documents — somewhat out of order — but I think it's probably better so there won't be any additional delay.

JUDGE DALY, PRESIDING: As to the place the commission will sit this afternoon and tomorrow, it will be announced at the beginning of this afternoon's session, if not before the recess this morning.

DR. SCHILF (counsel for defendant Janssen): Your Honor, there is a further difficulty which I consider it proper to submit for discussion.

JUDGE DALY, PRESIDING: Is this on the question of the commission?

DR. SCHILF: Yes.

JUDGE DALY, PRESIDING: There will be no further discussion on that. We will proceed with the document book. Proceed with the document book, please.

DR. SCHILF: Your Honor —

JUDGE DALY, PRESIDING: Proceed with the document book —

DR. SCHILF: Your Honor, I protest that I am not permitted to go on —

JUDGE DALY, PRESIDING: Did you hear me say, counselor, that there will be no further discussion on the question of the commissioner's hearing?

*Extracts from mimeographed transcript, Case 10, U.S. vs. Alfred Krupp von Bohlen und Halbach, et al., pages 1818-1820, 1855-1859, 1864-1871.

DR. SCHILF: Yes, and I protest against this ruling and request that a decision of another court —

JUDGE DALY, PRESIDING: You will please take your seat or I will order you removed from the courtroom.

DR. SCHILF: I request that that be done [ich bitte darum].

JUDGE DALY, PRESIDING: All right, you may remove yourself, then. Proceed.

MR. MANDELLAUB (associate counsel for the prosecution): Your Honors! The prosecution is now starting with Document Book —

[At this point a number of defense counsel were standing in the courtroom, and Dr. Schilf again approached the podium to speak.]

JUDGE DALY, PRESIDING: You [referring to Dr. Schilf] will have nothing more to say, now.

[At this point all defense counsel in the courtroom left in a group. The prosecution continued with its offer of documents until the noon recess, when the Tribunal recessed until 1330 hours. When the Tribunal reconvened at 1330 hours, no defense counsel put in an appearance. After an announcement by Judge Wilkins that the commissioner would not sit until the next Monday, 19 January 1948, due to mechanical difficulties in the courtroom where the commissioner was to sit, the prosecution continued with its offer of documents until the first afternoon recess.]

(A recess was taken.)

THE MARSHAL: All persons in the courtroom will please find their seats.

The Tribunal is again in session.

PRESIDING JUDGE ANDERSON: Are you ready to proceed? Notify the defense counsel we are ready to proceed with this case, Mr. Marshal. They don't seem to be present.

MR. MANDELLAUB: May it please the Court, our last Exhibit was 786. That was NIK-13318.

PRESIDING JUDGE ANDERSON: Now, you had better wait until — Mr. Mandellaub, you had better wait until the defense counsel or representative of the defense counsel get here. They seem to have absented themselves from the courtroom. We have sent the Marshal out to notify them.

We notice that usually — there are only a few of them here. There are some twenty-odd, and sometimes there are only a few of them present, sometimes two or three. Now there don't seem to be any of them here. They perhaps folded their tents, apparently. We will wait a few moments and give them an opportunity to get in, and if they are not in, we will take the steps that are necessary.

PRESIDING JUDGE ANDERSON: The Marshal seems to be having some difficulty in locating the counsel for the defense. We will take a recess and give him a little more time.

The prisoners will remain in the dock until further orders of the Court.

[During the recess which followed the Marshal notified those defense counsel who were to be found in the defense rooms of the Palace of Justice to appear in court.]

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE ANDERSON: Before you start, Counselor, the Tribunal has some remarks of its own to make. We have noticed, from time to time that very frequently there were very few of the counsel for the defendants present during the trial of this case, and we have proceeded upon the assumption that the absence of the other members was occasioned by the necessity of attending to some part of their duties in connection with the representation of these defendants. On this morning, we noticed, or today, rather, we noticed that counsel have not been present in the courtroom. No defense counsel has been present in the courtroom since shortly before noon until we took the afternoon recess. It appears, very clearly appears, apparently by pre-arrangement that counsel deliberately left the bar of this Court and absented themselves from the trial of this case until they were ordered just now by the Court to put in their appearance.

Now, that conduct—it was observed by the Court, as I said—was pre-arranged, apparently, or evidently pursuant to some pre-arranged plan, because there was no consultation among the members of the Court. Now, we want to state this thing once and for all, the Tribunal has tried to accord counsel for the defense in this case the consideration that they, as members of a great profession, are entitled to, and as officers of this Court are entitled to, but it looks as if the counsel for the defense have mistaken the part, that consideration by the Tribunal. We want to notify you once and for all now that no counsel, defense counsel or the prosecution, is going to run this Tribunal.

Now, every member of the defense counsel who was here this morning and participated in absenting himself in this plan is in contempt of this Tribunal, and it is so adjudged, and none of you will be heard on any subject until you have purged yourselves of that contempt. It is the judgment of the Tribunal that by reason of the contempt, that the Marshal take each of you who was present this morning and participated in that plan, into custody until further order of the Court.

Judge Wilkins, have you anything to say?

JUDGE WILKINS: Yes, I want to call the roll of defense counsel now, because we have a fair idea of those of you who were present. I want to know from you whether you were present or absent.

Dr. Pohle, were you present this morning, and left the Tribunal?

DR. POHLE (counsel for defendant von Buelow) : Yes.

[At this point the roll was called and five defense counsel admitted walking out with the group. Several others stated that they had left before the group walk-out took place.]

JUDGE WILKINS: Now those of you who were not here this morning, and who did not leave with the group, we noticed that you have not been here this afternoon. I want to ask you, starting with you, the second one, Doctor, did you deliberately absent yourself from this Court this afternoon? Yes or no, if you did?

DR. BEHLING (counsel for defendant Loeser) : I was informed that the defense was trying to prepare an explanation, and I took part in the preparation of this explanation.

JUDGE WILKINS: The point is that you deliberately absented yourself, then, upon the advice of some of the other counsel?

DR. BEHLING: I absented myself in order to further the work of the Court in the preparation of the explanation of the defense, and in order to be informed in detail as to what happened this morning.

JUDGE WILKINS: Well, you deliberately, then, absented yourself from the courtroom? Just yes or no. For the purpose of preparing this statement, or anything else? Will you answer that?

DR. BEHLING: Mr. President, ever since Christmas I have not been in this Court at all because I was engaged with work in another case.

JUDGE WILKINS: Are you chief counsel for one of these defendants?

DR. BEHLING: Yes.

JUDGE WILKINS: Which one?

DR. BEHLING: For defendant Loeser.

JUDGE WILKINS: And who are your assistants?

DR. BEHLING: My assistant is Wendland.

JUDGE WILKINS: And he wasn't here today?

DR. BEHLING: I have already said that I am not informed about that.

JUDGE WILKINS: Well, you knew that he wasn't here this afternoon, didn't you?

DR. BEHLING: Wendland was given leave by me this afternoon because he had to go away from Nuernberg in order to accept an affidavit, and this request was made 4 days ago.

JUDGE WILKINS: Did you know that your client was here, then, without anybody representing him this afternoon?

DR. BEHLING: Yes.

JUDGE WILKINS: All right.

Now, Dr. Peschke, (counsel for defendant Houdremont) did

you deliberately absent yourself from this courtroom this afternoon?

DR. PESCHKE: Yes.

JUDGE WILKINS: And why?

DR. PESCHKE: In agreement with my colleagues.

JUDGE WILKINS: In agreement with your colleagues? And your assistant, the lady sitting across from you, also absented herself from this Court in line with that agreement?

DR. PESCHKE: Yes.

JUDGE WILKINS: Did you deliberately absent yourself from this Court this afternoon?

DR. REITZENSTEIN (associate counsel for defendant Mueller): I deliberately stayed away in order to work with my colleagues on the statement which is to be presented to the Court.

JUDGE WILKINS: And your name?

DR. REITZENSTEIN: Reitzenstein.

DR. SCHILF (counsel for defendant Janssen): I deliberately absented myself in order to shape a statement by the defense.

DR. VORWERK: I did not stay away deliberately. However, I appeared deliberately. I was working on the draft of this statement, and I appeared with the defense. I probably would not have appeared in the Court if this incident hadn't happened. I am working on this statement.

JUDGE WILKINS: Whom do you represent, Doctor?

DR. VORWERK: Defendant Pfirsch.

JUDGE WILKINS: Are you the chief counsel for Pfirsch?

DR. VORWERK: I am the chief counsel.

JUDGE WILKINS: Was your assistant here this afternoon?

DR. VORWERK: No, he was not present.

JUDGE WILKINS: Did he deliberately absent himself in accordance with this agreement?

DR. VORWERK: He is working on defense material, and he knows nothing of the whole incident.

JUDGE WILKINS: We have noticed, anyway, that you have not been here very much, if any, since the Christmas holidays.

Dr. Pohle, I assume that you deliberately absented yourself this afternoon also.

DR. POHLE (counsel for defendant von Buelow): Yes. In order to prepare the explanation by the defense.

JUDGE WILKINS: And you knew that your assistant was absent also, Doctor?

DR. POHLE: Yes.

JUDGE WILKINS: And that your client was not defended by anybody during that time?

DR. POHLE: Yes.

DR. GOLLNICK: I absented myself in order to prepare the explanation of the defense. My assistant is not here.

JUDGE WILKINS: And you knew, Dr. Gollnick, that your assistant was not present also?

DR. GOLLNICK: I knew that my assistant was not present.

JUDGE WILKINS: And whom do you represent?

DR. GOLLNICK: I represent Eberhardt.

JUDGE WILKINS: And you knew that he was here without any lawyer to represent him this afternoon?

DR. GOLLNICK: I knew that.

DR. WANDSCHNEIDER (counsel for defendant Korschan): I did not leave with the group this morning. However, I should like to be put on the same footing with my other colleagues who left this morning, and who left deliberately this morning. My assistant knew nothing of the matter.

DR. WOLF (associate counsel for the defendant Lehmann): I did not leave with the group this morning. However, I stayed from the session this afternoon, as did the other colleagues.

DR. WEISE (counsel for the defendant Lehmann): I did not leave with the group this morning, but I stayed with my colleagues this afternoon in order to prepare that explanation. We listened to the film, and then worked on that explanation.

DR. MASCHKE (associate counsel for defendant von Buelow): I was not present this morning, and I did not appear at the afternoon session because I, also, participated in the explanation of the defense.

DR. HENNIG (associate counsel for defendant Ihn): I was not present this morning, and I took part in the preparations of the explanation of the defense.

JUDGE DALY, PRESIDING: Well, do you mean by that that you deliberately stayed away?

DR. HENNIG: I probably wouldn't have appeared at the session anyway, because of something I had to do.

JUDGE DALY, PRESIDING: Well, then, you didn't absent yourself deliberately?

DR. HENNIG: I want you to put me on the same footing as all my other colleagues. I helped in preparing this explanation.

JUDGE DALY, PRESIDING: All right.

DR. KUROWSKI-SCHMITZ (associate counsel for defendant Houdremont): The same goes for me as Dr. Hennig just now said.

JUDGE WILKINS: Did you deliberately absent yourself this afternoon?

DR. GEISSELER (associate counsel for defendant Ihn): I left the Court this morning for the reason which we should like to present to the Court. Dr. Pohle has prepared the explanation. I deliber-

ately stayed away from the proceedings this afternoon until we should have an opportunity to make our explanation.

PRESIDING JUDGE ANDERSON: Counselor, now let me ask you a question. I believe you were here this morning and left with the others?

DR. WECKER (associate counsel for defendant Krupp): Yes.

PRESIDING JUDGE ANDERSON: Those of you who were here deliberately got up while the trial was in progress, left the courtroom without conferring with each other at all about the matter, didn't you?

DR. WECKER: Yes, that was a spontaneous move.

PRESIDING JUDGE ANDERSON: Had that been agreed upon?

DR. WECKER: No, I just said it was a spontaneous action.

PRESIDING JUDGE ANDERSON: Well, you did that without giving the Court any notice of what your intention was in leaving?

DR. WECKER: Yes. We did not give any notice to the Court.

PRESIDING JUDGE ANDERSON: You did that with the knowledge and intention of leaving the defendants here without any representation at all?

DR. WECKER: No, not with the intention. With the knowledge, but not with the intention. Our intention was different.

PRESIDING JUDGE ANDERSON: Well, you knew that the defendants were left here without any counsel representing them at all?

DR. WECKER: Naturally.

PRESIDING JUDGE ANDERSON: You didn't ask the Court for permission to leave. You didn't ask the Tribunal for permission to leave, did you?

DR. WECKER: No, Your Honor.

PRESIDING JUDGE ANDERSON: You didn't, no one else did, did they?

DR. WECKER: I don't think so.

PRESIDING JUDGE ANDERSON: You didn't ask the Court for time within which to prepare for any explanation or any statement, did you?

DR. WECKER: No.

PRESIDING JUDGE ANDERSON: And no one else did?

DR. WECKER: No.

PRESIDING JUDGE ANDERSON: It is true, isn't it, that every member of the defense counsel who was present here this morning deliberately got up and left the courtroom without notifying the Court, without the permission of the Court, without notifying the Court as to the reason for it, is that correct?

DR. WECKER: Yes, Your Honor.

PRESIDING JUDGE ANDERSON: And it is also true that by com-

mon agreement no member of the defense counsel appeared after the noon recess? Is that true?

DR. WECKER: Yes, Your Honor.

PRESIDING JUDGE ANDERSON: And that was deliberately done, wasn't it?

DR. WECKER: Yes, Your Honor.

PRESIDING JUDGE ANDERSON: Without any notification to the Court, or the Tribunal, that you would not appear?

DR. WECKER: Yes.

PRESIDING JUDGE ANDERSON: And did you expect the trial to proceed?

DR. WECKER: I don't know what we expected.

PRESIDING JUDGE ANDERSON: Well, what did you expect when you got up, when all of you got up and left the room this morning — that the Court was going to stop the trial?

DR. WECKER: No, Your Honor.

PRESIDING JUDGE ANDERSON: Well, did you do that for the purpose of obstructing the course of the Tribunal?

DR. WECKER: In no event.

PRESIDING JUDGE ANDERSON: Well, why didn't you ask permission if you wanted to prepare a statement for the defense counsel? Why didn't you ask permission of the Tribunal to leave?

DR. WECKER: We felt that an injustice had been done to our honor. The honor of our revered fellow colleague had been slighted.

PRESIDING JUDGE ANDERSON: Well, you heard your revered fellow colleague deliberately refuse to obey the order of the judge who was presiding this morning, didn't you?

DR. WECKER: Yes, Your Honor.

PRESIDING JUDGE ANDERSON: All right. That's all.

Now, we don't care to hear anything from any of the defense counsel. Those of you who were present and deliberately left this Tribunal this morning, leaving these defendants here unrepresented by any counsel, without any notice to the Tribunal that you were going to leave, the reason why you were going to leave, without the permission of the Tribunal, each and every one of you is in contempt of this Tribunal, and you are going to be dealt with accordingly. And I say to you again, once and for all, that each and every one of you — and this goes for the defendants also — may as well make up their mind that they are not running this Tribunal. Now the sooner that you counsel that want to stay here — you were appointed by the Court, you are officers of the Court, and your action this morning was treating the Court with the greatest disrespect, something that we had no reason to

expect from you at all, and was premeditated, obviously premeditated, and by a concert of action, without any consultation among you at all here at the tables, and it was a deliberate disrespect accorded this Tribunal. We are not going to stand for it.

Now, Mr. Marshal, you take these men — if Judge Daly will assist me in calling the names — into custody, — I mean Judge Wilkins — and you hold them until further orders by the Court.

The Tribunal will stand adjourned—

All right. You call these names, please.

JUDGE WILKINS: Dr. Wecker; Dr. Reitzenstein; Dr. Schilf; Dr. Gollnick; Dr. Geisseler; Dr. Pohle.

DR. GEISSELER (associate counsel for defendant Ihn): Your Honor, may I say something?

JUDGE WILKINS: Take your place with the Marshal.

PRESIDING JUDGE ANDERSON: Those whose names have just been called, those who admitted that they were present this morning and left the courtroom without the permission of the Court, we find these —

DR. GEISSELER: Your Honor, I want to say something—

PRESIDING JUDGE ANDERSON: Just a moment. Mr. Marshal, hold those men until we get through with them. Bring them back to the courtroom.

Now, what was that you said?

THE INTERPRETER: He said, "Your Honor, I want to say something."

PRESIDING JUDGE ANDERSON: No, you are not going to say anything. You are in contempt of this Tribunal and you're not going to say anything until you've purged yourself. Hold him there, Mr. Marshal, until we get through with them.

Now, each and every one of you is adjudged in contempt of this Tribunal, as I said before.

Now, with respect to the balance of you who deliberately absented yourselves, who were not present this morning, and who did not leave this morning but who deliberately absented yourselves from the afternoon session of this Tribunal, we reserve our judgment until Monday morning.

And you are ordered to be here at 9:30 o'clock on Monday morning.

The Tribunal will recess until that time.

[The sessions of the Tribunal on Monday and Tuesday, 19 and 20 January 1948, were devoted to a further hearing concerning the contempt at which all concerned were accorded opportunity to be heard in person or by counsel. The record of these proceedings is recorded in the official mimeographed transcript of the Krupp case at pages 1872-2041. On the following day, 21 January 1948, the Tribunal read its ruling "on matters relating to con-

tempt of court committed on January 16, 1948" and thereafter the presentation of evidence continued. The ruling is reproduced in full in the section immediately following.]

2. RULING OF THE TRIBUNAL ON MATTERS RELATING TO THE CONTEMPT OF COURT

UNITED STATES MILITARY TRIBUNALS SITTING
IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY, AT A SESSION OF MILITARY TRIBUNAL III
HELD 21 JANUARY 1948

United States of America
vs.
Alfried Krupp von Bohlen und Halbach, *et al.*,
Defendants } *CASE 10*

Ruling of Tribunal III on matters relating to Contempt of Court
committed on January 16, 1948*

For the past several days we have been dealing with a very serious question. We have now come to dispose of the last phase of it. As we heretofore pointed out, the question concerns not only this Tribunal but all other Tribunals now sitting in Nuernberg. These Tribunals were established pursuant to an agreement between the United States of America and three other nations now occupying Germany under circumstances too well known to mention, and are engaged in the trial of defendants alleged to be guilty of serious charges including war crimes. The question essentially involves the ability of these Tribunals to function except at the whim and will of counsel for the defense; whether they shall abdicate their authority to control the proceedings and surrender it to counsel for the defense; or whether, to state it somewhat differently, counsel for the defense can stop or invalidate the proceedings of this or any other Tribunal by the simple expedient of walking out of the courtroom in a body without any notice whatever to the Tribunal, without advising it of the purpose for which the walk-out occurs, without permission of the Tribunal, and in open defiance of its authority and power to function, leaving the defendants on trial with no counsel to represent them.

When the circumstances which prevail are considered, the gravity of this matter must be obvious to any thinking person

*U.S. *vs.* Alfried Krupp von Bohlen und Halbach, *et al.*, Case 10, Official Record, volume 88, pages 1159-1169.

who has the least concern for the authority of the Tribunals and of the nations that are undertaking to function in this country.

On Friday 16 January 1948 a series of incidents occurred in connection with the sessions held on that day, which, in the considered opinion of the Tribunal, constituted contumacious conduct on the part of several of the counsel for defense in this case and it was accordingly so adjudged. Those whom the Tribunal found necessary to discipline were: Dr. Wecker, Dr. Reitzenstein, Dr. Schilf, Dr. Gollnick, Dr. Geisseler, and Dr. Pohle.

Upon this finding being made, the Marshal was directed to take said parties into custody and hold them pending further orders of the Tribunal.

On Monday, 19 January 1948 at 9:30 a.m. they were, at the order of the Tribunal, produced in open session. A hearing was held consuming 2 full days; wherein every person concerned was accorded a full opportunity to be heard in person or by counsel, or both.* The purpose of this hearing was to determine what further action, if any, was required in order to insure insofar as possible an orderly and lawful trial of this case.

Before announcing our findings, we deem it appropriate to recapitulate some of the events of 16 January insofar as they are pertinent here and refer to the authority by virtue of which we acted. In the morning session of that day the Tribunal announced that the commissioner theretofore appointed under the authority conferred by Military Ordinance No. 7, Article V, would sit that afternoon to hear the cross-examination by defense counsel of two affiants whose affidavits had been introduced in evidence by the prosecution. Counsel for the defense objected to the commission sitting concurrently with a session of the Tribunal. After a full discussion participated in by counsel for the defense, this objection was overruled.

It should be noted just here that each of the 12 defendants is represented by two lawyers, a chief counsel and an assistant counsel. In addition there is a general assistant to all the chief counsel in the case. As was customary, a number of these defense lawyers were, for legitimate reasons, absent from the courtroom on Friday morning when the incidents presently to be narrated took place.

Thus the procedural matter relating to the sitting of the commissioner has been definitely decided by the Tribunal and another matter was to be taken up, namely the presentation of documents by counsel for the prosecution. At or about this time, defense counsel Dr. Schilf began to address the Tribunal. Upon inquiry

*Tr. pages 1872-2041.

by the Tribunal, Dr. Schilf stated that he rose for the purpose of further discussing the question of the commissioner, which, as said, had been fully discussed and finally ruled upon.

When this occurred the presiding judge announced that there would be no further discussion on that and directed the attorney for the prosecution to proceed with the document book. In fact, at that time, counsel for the prosecution was standing at the podium preparing to begin his presentation; but Dr. Schilf persisted in an attempt to address the Tribunal. The presiding judge again directed the prosecutor to proceed with the document book.

Dr. Schilf did not even consider it necessary to wait until the presiding judge had finished his sentence, but in a defiant manner and cutting off the presiding judge and completely disregarding the ruling of the presiding judge to the effect that not Dr. Schilf but the prosecutor had the floor; protested against the fact that he was not permitted to go on. The presiding judge again admonished Dr. Schilf that there would be no further discussion on the question of the commissioner's hearing. Again disregarding the ruling of the presiding judge, Dr. Schilf continued to talk and again protested against the ruling.

The behavior of Dr. Schilf made it impossible for counsel for the prosecution, who was still standing at the podium, to proceed as he had been ordered by the Tribunal. The presiding judge warned Dr. Schilf to take his seat, otherwise he would order him removed from the courtroom. Dr. Schilf answered defiantly, "I request that that be done." In the German original this appears: "Ich bitte darum."

The presiding judge replied, "All right, you may remove yourself then," and speaking to counsel for the prosecution, he added: "Proceed." Counsel for the prosecution had hardly been able to say a few words when Dr. Schilf again interrupted him trying to speak and had again to be reminded by the presiding judge that he would have nothing more to say now. Even after having left the podium and having started to walk toward his seat, he neither took his seat nor did he move to the door, but started back to the podium and reached for the earphones. He was stopped by a gesture of the Marshal.

Dr. Schilf then left the courtroom. Immediately, all other defense lawyers who at that moment were present in the courtroom, and without any of them even asking the Tribunal for permission to leave, and without any of them making any statement to the Tribunal, demonstratively and in one group, marched out of the courtroom. This was about 11:45 a.m.

Being taken entirely by surprise and not appreciating at the moment the significance of this move or what it was intended to

be, the Tribunal allowed the proceedings to continue, momentarily expecting the return of counsel to the courtroom. Considerably more than a reasonable time elapsed before it was decided that some action must be taken to preserve the integrity of the proceedings. Accordingly, at a recess, we ordered the Marshal to institute a search for the defense counsel and notify them to forthwith appear in the courtroom. This notice was duly served and after a delay of some 20 to 30 minutes, they put in their appearance; whereupon, the members of the Tribunal resumed the bench and took the action already referred to.

About 2½ trial-hours, exclusive of the luncheon period, elapsed between the time defense counsel deserted the courtroom and their return following the action by the Marshal. During all this time the Tribunal received no word from them, or any of them. We did not know why they left the trial, where they were, what they were doing, or whether they or any of them intended to return to their duties ever.

The walk-out of the defense counsel made it impossible for the trial to proceed orderly and validly according to the normal course of procedure. What little was done during their absence must be done over again unless some way can be found to remedy the defect in the proceedings. Moreover, because of the disciplinary steps made necessary by this contumacious conduct, the Tribunal was unable to proceed further with the trial on that day and has not been able to proceed since.

As can be readily seen, all three members of this Tribunal necessarily had immediate, direct, and personal cognizance of all of the determinative acts, namely, the defiant behavior of Dr. Schilf, the walk-out demonstration, and the subsequent abstention from the trial by all of the counsel for the defense, which was ended through the action of the Tribunal in notifying its Marshal to direct the counsel to put in their appearance forthwith.

Just here distinction must be noticed between contumacy under the very eyes of a court or tribunal, and contumacious acts committed out of the presence of a court or tribunal. Only the latter require that a formal hearing be conducted in order to take disciplinary action. As to the former, that is contumacious conduct in the presence and under the very eyes of a court, this can be summarily dealt with on the strength of the immediate, direct, and personal knowledge of the court or tribunal.

From what has been said it is clear that the whole series of incidents revolved around the procedural question as to whether the cross-examination of the two witnesses was to be heard Friday afternoon before a commissioner. It was evident, indeed it was not denied, that the conduct of Dr. Schilf in this connection created

a state of confusion in the courtroom which was wholly incompatible with the orderly conduct of the trial. His attitude as reflected, not only by what he said and did, but by his tone of voice and manner and demeanor, had every appearance of being defiant, and his anger, or excitement if such it was, as he afterwards claimed it to have been, was apparent, not only to the Tribunal, but to everyone present in the courtroom.

The defense lawyers who, without asking permission or making any statement of their intention or attempting to do so, provocatively marched out of the courtroom also directly challenged the very authority and ability of the Tribunal to function. By such conduct they served notice upon the Tribunal that they considered it within their power to sabotage and paralyze the conduct of the trial if and when they felt misgivings about a particular ruling, and moreover that they reserved to themselves the right to determine when a particular ruling justifies a walk-out. By such conduct the counsel not only violated their duty to the Tribunal, but they violated their duty to the defendants in leaving them without benefit of counsel while the prosecution was proceeding with the presentation of evidence against them.

It should be pointed out just here that the counsel for the defense in this case occupy a somewhat unique status. They appear only by the express approval of the Tribunal under the regulations enacted by the Military Government of the United States of America for Germany; and moreover their compensation and expenses are not paid by their clients, but out of the public funds of this community.

Those of defense counsel who were not present in the courtroom when the walk-out occurred, but who later joined them and by common agreement remained away from the courtroom, knowing that no defense counsel were present in the courtroom, likewise violated their duty to the Tribunal and to the defendants.

Considered from any angle, the action of all counsel who participated can be regarded as nothing less than a strike against the authority of the Tribunal to function in this trial upon its own motion.

It should be noted that it was afterwards claimed that counsel's delay in returning to the courtroom was due to the fact that they were preparing a statement explaining the walk-out. They themselves introduced this statement in evidence upon the hearing held on Monday and Tuesday. It consists of slightly more than two typewritten pages. It points out the alleged reasons for the walk-out, which, reading from the English translation, are as follows:

"The defense counsel saw themselves forced to take this step for the following reasons: The presiding judge had denied a

defense counselor the right to make a regular motion and to justify it, a motion which the Tribunal had not yet ruled upon. The motion which Dr. Schilf intended to make had nothing to do with the ruling previously made by the Court regarding the employment of the commission. In addition to this, the defense counsel as a whole feel offended that Dr. Schilf was not permitted to go on and was denied the possibility to make this motion."

As to the first of these alleged reasons, we have already stated the material and determinative facts precisely as they appeared to the Tribunal at the time; which is also precisely as they now appear from the official record of the proceedings prepared by the official court reporters. As against the contention of defense counsel afterwards made, they speak for themselves.

In the statement prepared by counsel there was no intimation of regret for the disrespect shown the Tribunal and no explanation as to why no notice was given the Tribunal of the whereabouts and intentions of counsel following their departure from the courtroom.

From what has been said, it is apparent that the circumstances narrated, singly and together, propose a grave question as to who is to conduct this trial, whether the members of the Tribunal or counsel for the defense. To this question there can be but one answer.

We come now to a discussion of the authority by virtue of which the Tribunal acted in taking disciplinary measures against those named.

Article 18 of the Charter of the International Military Tribunal, annexed to the Four Power Agreement made in London on 8 August 1945 provides —

"The Tribunal*** shall deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges."

The London Agreement and the annexed London Charter have been adhered to after they were signed by the four major powers and by nineteen other nations. They have been formally upheld by the United Nations, which represents fifty-odd different countries.

The principles laid down in the London Charter, including the one just quoted, represent, therefore, the most authoritative expression of international law as pertaining to the trials of this character.

Control Council Law No. 10, which was duly enacted by the representatives of the four occupying powers, including the United States of America, makes the London Agreement and Charter an integral part of this law.

Ordinance No. 7 of the Office of the Military Government for Germany of the United States of America, which has laid down binding rules for the procedure in these trials, literally repeats in its Article VI (c) the provision contained in Article 18 (c) of the London Charter.

All these provisions are well known to the defense lawyers active here. Certainly, when confronted with a situation tantamount to surrendering its authority to counsel, the Tribunal therefore has the full power to take appropriate action to meet the challenge.

The authority of the Military Tribunals sitting here in Nuernberg to punish for contempt has been exercised in at least two other instances. These precedents were: first, the punishment of a witness in the so-called Medical case. There the act had been committed in open court and the witness was punished by imprisonment in a summary proceeding. The other precedent, in the so-called Justice case, involved the commission of grave irregularities by defense counsel and an assistant of his outside the presence of the Tribunal. The lawyer was sentenced to 30-days' imprisonment and disqualified to act as defense counsel in the trials being held here.

As already said, the afore-mentioned defense lawyers were produced Monday morning before the Tribunal. The Tribunal considered it essential to ascertain whether they persisted in their contempt, that is, continued in their contumacious attitude. After 2 full days of hearing in open court, the Tribunal finds as follows:

Dr. Wecker, Dr. Reitzenstein, Dr. Schilf, Dr. Gollnick, and Dr. Pohle have made declarations to the Tribunal in which they express that they realize that their behavior on 16 January was wrong and disrespectful to the Tribunal.

Dr. Ballas occupies a special position. He participated in the walk-out but left the courthouse before the Marshal notified counsel to put in their appearance. He was, therefore, not present on Friday afternoon when the disciplinary measures against the others were taken. On Monday, with commendable frankness, he voluntarily informed the Tribunal of the facts. He also has conceded his error and made suitable declarations to the Tribunal with respect thereto.

The case of Dr. Geisseler is different. Dr. Geisseler is an assistant to defense counselor, Dr. Kranzbuehler. On the day in question Dr. Kranzbuehler was absent from the courthouse and not involved in the events above-narrated. He had authorized Dr. Geisseler to act in his stead as counsel for defendant Krupp during his absence. Dr. Geisseler was one of the defense counsel who participated in the exodus from the courtroom and in the

protracted absence afterwards. Therefore, it only remains to be decided whether his present attitude is such that he can be allowed to continue in this case. This must be denied for the following reasons:

Dr. Geisseler still insists that he can see nothing wrong in the behavior he showed on 16 January. He still feels strongly that his honor was injured by the way the Tribunal dealt with the disorderly conduct of his codefense lawyer, Dr. Schilf. He would only admit that the failure to inform the Tribunal before 3:50 p.m. of 16 January of the reasons for the absence of the defense lawyers was not quite in order, but this he considers a mere fault of form, which he regards as very insignificant. His concept of honor, upon which he does not put much emphasis, is a wrong one, and in its ulterior implications, a dangerous one for any orderly, democratic society; for his concept of honor requires him in emergency cases, as he says, to disregard the generally accepted rules of conduct and to proceed on rules which he, himself makes as final arbiter. This time, because he considers that an emergency existed, he maintains that he was right in pursuing a course of conduct calculated to paralyze the Tribunal in the due performance of its functions.

It is to be noted that he not only claims the right to decide himself as to how far he may deviate from the generally accepted rules in an emergency, but also to rely entirely on his own discretion as to when an emergency exists. The Tribunal feels that the continued participation of a lawyer, who is animated by such views, would be potentially harmful to the fair continuation of this trial. The Tribunal, therefore, disqualifies Dr. Geisseler as a codefense lawyer or a defense lawyer for any of the defendants in this case and excludes him from all further proceedings in this case, but without prejudice to the determination of any of the charges against the defendants, as provided and authorized by Article VI of Ordinance No. 7 of the Military Government of the United States of America for Germany. The Tribunal also directs Dr. Geisseler to hand over, forthwith, to defense counsel Dr. Kranzbuehler, or to any other lawyer representing the defendant Krupp in this case, all and any files, papers, documents, pieces of evidence, etc., relating to defendant Krupp.

It may be noted that one of Dr. Geisseler's principal grievances is that he was not heard before being ordered into custody on 16 January. Since his contumacious conduct occurred under the eyes of the Tribunal and the Tribunal knows that it was wholly without justification, there was no need for any hearing. However, while it is not a determinative factor, it is interesting to note that upon the very full and extended hearing accorded him

on the 20th of January by this Tribunal he himself demonstrated how useless any hearing would have been on the preceding Friday. Upon that occasion, the only reasons he put forth demonstrated that he reserved to himself the right to determine whether a strike by defense counsel against the authority of the Tribunal was proper in a given instance and that he considered the walk-out in which he participated as having been fully justified.

There remains to be dealt with those members of defense counsel who were not, for legitimate reasons, present in court when the walk-out occurred but who, willfully, knowingly, and pursuant to a common plan, absented themselves from the proceedings, knowing that no defense counsel were present at the trial, and continued to so absent themselves until ordered to appear. The Tribunal finds that they were fully advised as to all the facts and circumstances connected with the walk-out and by common agreement with those who participated therein, and without excuse or justification, refused to return to the courtroom when the situation there demanded their presence or the presence of some defense counsel. We hold that this was a violation by those lawyers of their duty to the Tribunal and to their respective clients, but we think this contumacy was of a lesser degree than that of those who participated in the walk-out and that of Dr. Schilf, who created the turmoil in the first place. This for the reason that had the exodus not taken place, those defense counsel would not have absented themselves in the manner they did. The Tribunal, therefore, is satisfied to reprimand these members of the counsel for the defense for their conduct and to admonish them against a repetition of the violation of their professional duties.

It is well enough to say in reaching its conclusion that the Tribunal has not been unmindful of the fact that, for obvious reasons, the defendants have had a high stake in the outcome of this proceeding.

Now, the Tribunal herewith considers these unfortunate events as closed. It reiterates that it considers them as being fundamental and of the utmost gravity. The Tribunal hopes and expects that the trial will proceed in an orderly fashion in that all of the orders and rulings made by it will be respected by counsel on both sides of this case.

Finally, we think it proper to note for the record that this contempt proceeding has not been a criminal proceeding but that the measures taken were solely of a disciplinary nature.

[Signed] HU C. ANDERSON, Presiding Judge
[Signed] EDWARD J. DALY, Judge
[Signed] WILLIAM J. WILKINS, Judge

F. Farben Case—Reprimand of a Defense Assistant and of Four Members of the Prosecution Staff

I. APPLICATION BY THE PROSECUTION, 26 FEBRUARY 1948, FOR AN ORDER DIRECTING THE DEFENSE TO PRODUCE DOCUMENTS REMOVED FROM FILES UNDER ALLIED JURISDICTION AND TO ACCOUNT FOR ANY DOCUMENTS DESTROYED

APPLICATION FOR THE PRODUCTION OF DOCUMENTS *

1. It is requested that the Tribunal direct counsel for the defense, individually and severally, and any other persons acting for the defense with the approval of the Tribunal:

(a) To produce all Farben files or documents which have been removed from any Farben files or archives under the jurisdiction of any of the Allied authorities at the request of or upon the initiative of the defense or any person acting on behalf of the defense.

(b) To make an accounting in writing to the Tribunal of any such files or documents which cannot be produced because they have been destroyed.

2. The basis of the present motion is predicated upon the fact that persons, acting for and on behalf of certain defense counsel approved by the Tribunal, have engaged upon a systematic large-scale withdrawal of material evidence from places where both members of the prosecution and the defense normally would have access to such evidence, and under circumstances which have deprived the prosecution and the Tribunal of any knowledge or information concerning such evidence. This situation arises in part out of the fact that certain persons concurrently hold positions both in Farben plants under the jurisdiction of the Allies and in the defense at Nuernberg.

3. The following specific facts are offered for the consideration of the Tribunal: On Wednesday afternoon, 18 February 1948, the following members of the prosecution staff visited the Griesheim Document Center: Mr. E. E. Minskoff, Assistant to Deputy Chief of Counsel; Mr. Benvenuto von Halle, Chief Interrogator; Mr. Alfred Elbau and Mr. Paul Haeni, Research Analysts. Investigation of the document records at Griesheim indicated that almost all documents relating to Auschwitz, including personal files of

*U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 49, pages 1508-1511.

Auschwitz personalities, as well as general Auschwitz files, had been released by the American authorities to the French Control Office in charge of the I. G. Farben Ludwigshafen plant. In an interview with Major Hanson, the American officer in charge of the Griesheim Document Center, it was learned that the large shipments of documents (truckloads) from Griesheim to the Ludwigshafen plant were made at the request of Ludwigshafen on the understanding that those files consisted of such things as patents, financial matters necessary to the operation and production of I. G. Farben, Ludwigshafen. Major Hanson did not know that materials concerning only Auschwitz were included in the large volume of documents requested.

4. The prosecution team then asked that a list be prepared of all the documents shipped to the Ludwigshafen plant at the latter's request. The team then proceeded to Ludwigshafen on 20 February 1948. At the Ludwigshafen plant the French authorities were contacted and clearance from the French Command at Baden-Baden was obtained to make a further investigation at Ludwigshafen itself. As stated in the attached statement¹ of Col. Weiss and M. Echard, French officials in the French Administration of the Ludwigshafen plant, the further investigation at Ludwigshafen was conducted in the presence of the French authorities.

5. In the further investigation which ensued at Ludwigshafen, the following information was obtained:

(a) The French lists of documents received from Griesheim conformed with the American lists of documents sent from Griesheim to Ludwigshafen.

(b) The French authorities were of the opinion that these files were in their possession at Ludwigshafen.

(c) Actual physical search of the files revealed that in many cases involving Auschwitz matters, the envelopes had been emptied of their contents and the documents themselves had been removed.

(d) The German Farben officials in charge of the various departments admitted that many of these documents had been turned over to Dr. Alt² [a chemist, who had been approved as an assistant defense counsel] without receipt and without listing of the individual documents removed.

(e) They admitted further that large quantities of these documents which they could no longer account for were destroyed for the reasons:

¹ Not reproduced herein.

² Dr. Alt was not a lawyer. He had been an assistant of defendant Ambros at Farben's Ludwigshafen plant and was still employed there at the time of the incidents described here. A number of such assistants to defense counsel, who were not lawyers, were appointed as "assistant defense counsel."

(1) They had no space for these documents.

(2) They were of no use to the Ludwigshafen plant.

(f) With respect to documents already located in Ludwigshafen (in contradistinction to those obtained from Griesheim), it was admitted that these documents were surrendered from Ludwigshafen files to Dr. Alt for purposes of the defense without receipt and without retaining copies of the documents or lists of all the documents transferred.

(g) These documents included, among others, the weekly reports on Auschwitz.

(h) It was revealed that a large staff, including secretaries and legal assistants employed by and being paid by the French control in Ludwigshafen, were devoting a large part, and in some cases all, of their time working for the defense, both in Ludwigshafen and Nuernberg.

(i) To conceal these activities from the Allied authorities, Dr. Alt provided a code list of names to be used in transferring letters, documents, etc.

(j) Dr. Alt gave specific instructions that in the event American authorities should appear at Ludwigshafen, all documents of interest to the prosecution and defense were to be secreted and hidden from the view of the Americans.

(k) Upon the arrival of the prosecution team these instructions were carried out; documents were hidden in closets and a box was sent to the home of Dr. Alt in Ludwigshafen for safekeeping.

(l) Upon the discovery by the prosecution team of the attempted concealment, the French authorities notified the Security Police to search for the box of documents. After interrogations by the Security Police, the box was ultimately discovered in the home of Dr. Alt. The box was thereupon sealed and placed in the custody of the French Security Police.

6. On Wednesday, 25 February 1948, the prosecution, in accordance with the suggestion of the President of the Tribunal in a discussion in chambers with Dr. Hoffman [counsel for defendants Ambros and von der Heyde], offered to sit with representatives of the defense to make appropriate arrangements for the disclosure of Farben documents involved. Prosecution representatives have since been informed that the documents involved could not be obtained except by a formal motion to the Tribunal.

7. Attached hereto and made a part hereof are the affidavits of Anton Hoenig, Gertrud Reither, and Adam Klein concerning these

matters; and the official French report of the visit of the prosecution team at Ludwigshafen.¹

8. Accordingly the prosecution respectfully applies for the relief set forth in paragraph 1 of this application. With respect to the weekly reports on Auschwitz taken from the files of Dr. Santo in Ludwigshafen, it is requested that these reports be made available within 24 hours, since they are needed in connection with the preparation of the cross-examination of defendant Ambros and his witnesses.

By: [Signed] D. A. SPRECHER
Chief, Farben Trial Team
For: TELFORD TAYLOR
Brig. Gen. U.S.A.
Chief of Counsel

Nuernberg, 26 February 1948

AFFIDAVIT OF ANTON HOENIG, 22 FEBRUARY 1948²

I, Anton Hoenig, born on 25 September 1898 at Ludwigshafen, living in Ludwigshafen, 11 Siemensstrasse, after having been informed that I am liable to punishment for making false statements, herewith state under oath of my own free will and without duress the following:

1. My position in Ludwigshafen is that of a secretary to Dr. Alt. In this position, I am working partially for the firm "Badische Anilin- und Sodafabrik" (BASF) (I. G. Farben) which is controlled by the French authorities, and partially for the defense of Dr. Ambros in the I. G. Farben trial, Nuernberg.

2. Since approximately May-June 1947 a number of employees of BASF are working for Ludwigshafen as well as for the defense in Nuernberg. In the office in which I am working, Dr. Alt has lately been working almost exclusively for the I.G. trial in Nuernberg. He has a double-position: (a) as an assistant defense lawyer (Assistenz Verteidiger); (b) technical adviser in the BASF. I myself am working an average of 33 percent to 50 percent for the I.G. defense in Nuernberg and the rest of my time for BASF. At the beginning, i.e., middle 1947, I have worked much more for BASF, during the last 2 months I am working almost exclusively for the defense. My assistant, Miss Gertrud Reither, is doing approximately the same amount of work for the defense and for BASF as I myself.

I know that in addition to the three people mentioned above

¹ The affidavit of Hoenig is reproduced immediately following. The other three instruments appended to the prosecution's application are not reproduced herein. Dr. Alt made two affidavits responding, among other things, to statements made in the Hoenig affidavit. These two affidavits of Dr. Alt are reproduced later in this section.

² U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 49, pages 1512-1515.

Fritz G. Naumann, Josef Niemann, who are employees of BASF, are also doing a considerable amount of work for the defense in Nuernberg, mostly for Dr. Ambros. According to my opinion, Mr. Bumb is working for Dr. Wurster's defense in Nuernberg. The following people for the Ludwigshafen plant are working as secretaries in Nuernberg: Miss Erika Pluemecke, office of Dr. Alt; Miss Josephine Gierl, personnel department; Miss Wolanke, personnel department; Mrs. Doering, legal department. The greater part of the above-mentioned people are working full-time for the defense in Nuernberg (Miss Gierl and Miss Wolanke have been in Nuernberg for only a short time). I myself have twice gone to Nuernberg. I did not inform the personnel department and the French control authorities of BASF that I was away from Ludwigshafen and stayed in Nuernberg.

3. In the middle of 1947, Dr. Alt gave me a list which contained the following code-names:

Haefltling (convict)	Worker
Savelsberg	Harold
Faust	Posth
Eisfeld	Foerster
Braus	Sturm
Schneider (Goslar)	Muth
Chauffeur of Duerrfeld (Leuna)	Theo
Bahr v. Bahrenfels	von Fuchs
Duerrfeld ¹	Heribert
Ambros ¹	Bargemann
Alt ²	Josef
Heintzeler ³	Heinz
Santo	Laar
Heidebroeck	Kugel
Pohl SS ⁴	Haupt
Hoess ⁵	Ross
KL (Concentration Camp)	Heim
Lager IV (Camp IV)	Virnheim
Wittwer	Malz
Toni	Hubert
Palm	Kuep
Bilfinger	Foder
Klenck	Alex
Naumann	Moninger
Col. Weiss	Hendrick
Col. Fribourg	Muehlheim
Wurster ¹	Stutt

¹ Defendant in the I. G. Farben case.

² Dr. Alt, chemist and technical adviser at the Ludwigshafen plant, and defense assistant in the Farben trial.

³ Dr. Wolfgang Heintzeler, former Farben attorney and assistant defense counsel of defendant Wurster.

⁴ SS Lieutenant General Oswald Pohl, Chief of the SS Economic and Administrative Main Office, and defendant in the Pohl case (see volume V, this series).

⁵ Rudolf Hoess, Commandant of the Auschwitz concentration camp.

According to my information, the list was made up by Dr. Alt and served the purpose of passing reports and letters through the French and the American zones without giving the censorship of the two countries—France and America—the possibility of finding out what was being written about. I wish to add, however, that it served mostly in order not to help the prosecution in Nuernberg.

4. The office of Dr. Alt in Ludwigshafen was used in order to carry through the general defense of Dr. Ambros. Witnesses were called to I.G. Ludwigshafen, were interrogated there, and affidavits were made there. Letters were written to all four zones and to France, to America, and to Czechoslovakia in order to procure defense material for Mr. Ambros. Orders from the defense in Nuernberg were given to Dr. Alt who partially handed them on to the various departments in Ludwigshafen. The various departments in Ludwigshafen screened their documents or wrote theses that could be of help to the defense in Nuernberg. Documents were copied in our office and sent to Nuernberg. Parts of the document books were written in Ludwigshafen for the defense in Nuernberg.

By order of Dr. Alt, a thesis about Gendorf and one about Dyhernfurth which had been written in Ambros' personal handwriting was forwarded from Nuernberg. No copy remained in the Ludwigshafen plant. (It is possible that a copy of these theses is in the box which is in the apartment of Dr. Alt.) I destroyed the original of these theses by order of Dr. Alt.

I wrote lists of the documents which were sent to the defense in Nuernberg. Lately, these lists have not been available in the Ludwigshafen plant but were stored in a box in Dr. Alt's house.

Original documents of which no copies were made were also sent to Nuernberg, so that no copy is available in Ludwigshafen. Among other things, the documents concerned are weekly reports from Auschwitz which are at present in Nuernberg.

5. Quite sometime ago Dr. Alt gave me the order to put away, in case of an inspection by the prosecution in Nuernberg, all documents which could be of importance to the prosecution or the defense. When, on 20 February, I saw a car which obviously belonged to the Nuernberg trials standing in front of the Ludwigshafen plant, I ordered my assistant, Miss Reither, to hide all documents which seemed to me of importance. Miss Reither took the documents one floor higher and wanted to put them into the wardrobe of an employee, a Mr. Kern. Mr. Kern did not want to have the documents in his wardrobe, and thus they were hidden in a wall-cupboard. I then called up the apartment of Mr. Alt and gave orders to hide the box which had been stored in Dr. Alt's apartment and which, in my opinion, contained among other things

documents from Ludwigshafen, affidavits by voluntary witnesses for the defense, and the list of the documents sent from Ludwigshafen to Nuernberg. After having been interrogated for some time by Mr. Minskoff and Mr. von Halle, the representatives of the Nuernberg prosecution, I announced all of the places of hiding of the documents and all of these documents are today in the hands of the French administration.

6. Shortly before the end of the war, by order of Dr. Ambros and Dr. Alt, I burned in Kohlhof, near Heidelberg, documents which had been taken away from Ludwigshafen at the request of Ambros and Alt. I myself have never destroyed or mutilated any documents after the end of the war with the exception of the notes of Dr. Ambros which are mentioned in this affidavit.

7. According to my knowledge, the French I. G. Control Office was in no way informed of the work which the German employees did for the defense in I. G. Ludwigshafen. The French I. G. Control Office also did not know that documents were sent to Nuernberg without their having exact information or copies of these documents in their possession. The French I. G. Control Office also did not know that, initially, the intention existed of keeping the documents away from the prosecution. According to my knowledge it was hardly possible for the French authorities to discover the connection with the defense.

I have carefully read every one of the six pages of this affidavit and have signed it personally. I have made the necessary corrections in my own handwriting and have countersigned them with my initials and I herewith state under oath that in this affidavit I have said the pure truth according to the best of my knowledge and conscience.

[Signature] ANTON HOENIG

Sworn to and signed before me this 22d day of February 1948 at Ludwigshafen by Anton Hoenig, known to me to be the person making the above affidavit.

[Signature] BENVENUTO VON HALLE
U. S. Civilian D 432532
Office of Chief of Counsel for War Crimes

2. ANSWER OF THE DEFENSE, 28 FEBRUARY 1948, TO THE PROSECUTION'S APPLICATION

Nuernberg, 28 February 1948
[Stamp] Filed: 1 March 1948

ANSWER OF THE DEFENSE TO THE MOTION OF THE
PROSECUTION TO PROCURE DOCUMENTS,
DATED 26 FEBRUARY 1948 *

Ever since the beginning of the trial before the International Military Tribunal, the defense in every war crimes trial demanded to be granted access to the documentary material pertaining to the trial to the same extent as the prosecution. As we are going to show, this demand, although supported by the bench, so far was not complied with in this trial either.

At the very moment when it is generally realized and discussed publicly that in all trials the defense is, in this respect too, at a disadvantage compared with the prosecution, the prosecution in their motion of 26 February 1948 which they, tellingly enough, handed to the press for publication, attempt to defame the defense with the assertion that the defense withhold from the prosecution, and even destroy, documentary evidence.

We most vigorously protest against this defamation.

Furthermore, we protest strongly against the prosecution, as part of so-called investigations allegedly intended to establish such so-called offenses of defense counsel, by the use of intimidation, threats, and other illegal means, obtaining knowledge of plans, documents, and evidence (for example, affidavits) of the defense which up to the time of their presentation before the Court are protected by the professional secrecy of defense counsel which is recognized in all civilized countries.

The motion of the prosecution dated 26 February 1948 says in paragraph 3:

"In an interview with Major Hanson, the American officer in charge of the Griesheim Document Center, it was learned that the large shipments of documents (truckloads) from Griesheim to the Ludwigshafen plant were made at the request of Ludwigshafen on the understanding that those files consisted of such things as patents, financial matters necessary to the operation and production of I. G. Farben, Ludwigshafen. Major Hanson did not know that materials concerning only Auschwitz were included in the large volume of documents requested."

The prosecution purposely and intentionally omits to mention the time when these shipments went from Griesheim to Ludwigshafen, and the persons who arranged them. We were informed that this actually happened during the period from the end of 1945 to the middle of 1946, that is, at a time when there existed

*U.S. vs. Carl Krauch, *et al.*, Case 6, Official Record, volume 49, pages 1472-1477.

The answer of the prosecution of 3 March 1948 to this reply of defense and a supplemental affidavit of Dr. Alt, replying to prosecution answer are not reproduced herein.

neither indictment nor defense counsel. Furthermore, according to our information, and the lists kept in Griesheim and Ludwigshafen will show, there were among these documents only a relatively small number of documents concerning Auschwitz, if any. Therefore, these documents were returned in an entirely normal and lawful way from Griesheim to Ludwigshafen where they belonged, and without any initiative or knowledge on the part of defense counsel who did not even exist at the time.

Paragraphs 4 and 5(a) of the motion of the prosecution show that absolutely identical lists of the documents brought at that time to Ludwigshafen are available both at the Control Office Frankfurt/Main-Griesheim and at the French Administration. From these lists, the prosecution which has been frequenting the Control Office at Frankfurt/Main-Griesheim since 1945/46, could at any time ascertain what documents were sent to Ludwigshafen and could screen them there, or could take them into their possession, just like the defense. Furthermore, this shows that these shipments were made with the direct participation, if not at the instigation, of the Allied control authorities of the I. G. Farbenindustrie A. G.

The prosecution's own statement in their motion of 26 February 1948 (par. 5 (e)) does not leave the slightest suspicion that the defense, after Germany's collapse in spring of 1945, destroyed, or ordered the destruction of, any documents of I. G. Farbenindustrie. Therefore, there is no reason whatsoever why we should reply to the suspicions of the prosecution contained in paragraph 1a and b of the motion.

Therefore, the only remaining question is whether the defense has received documents from the Ludwigshafen plant since the indictment was served (paragraphs 5c, d, f, g) and whether these documents are to be made available also to the prosecution.

The answer to both questions is in the affirmative.

There cannot be any doubt that the defense is entitled to use the documents kept at the Ludwigshafen plant. The question of how this could be carried out in practice had to be solved by the defense together with the Ludwigshafen plant and its French Administration. The fact that the defense actually came into the possession of the documents, and the question whether this was admissible, are matters not under the jurisdiction of the prosecution or any other U. S. authority. The French Administration and the employees of the Ludwigshafen plant, and possibly defense counsel, between themselves can clear up these matters.

The defense certainly does not deny to the prosecution the right to gain, on their part, information from the documents from the Ludwigshafen files. For, defense counsel are, in contrast to the

prosecution, of the opinion that prosecution and defense have equal rights with regard to documentary evidence. In spite of this our basic attitude, we would be entitled to object, and even to prevent the prosecution from gaining information from these documents as long as they on their part do not allow us access to all their documents for examining them, which, so far, they did not do.

However, in order to set an example to the prosecution, we are going to return to the French Administration all documents taken from the Ludwigshafen plant and the prosecution may screen the documents there.

The weekly reports from Auschwitz (par. 8 of the motion), which are particularly urgently desired by the prosecution for the cross-examination of defendant Ambros, are immediately turned over by us to the Secretary General who may hand them over to the prosecution for examination only, since we are responsible to the French Administration for them.*

We should like to emphasize especially with regard to these documents that, by making them available to the prosecution, we are granting a favor to the prosecution to which they are not at all entitled because of their previous attitude. According to their statement, the prosecution wants to use these documents for preparing the cross-examination of Dr. Ambros. So far, the prosecution has not put its documents at the disposal of the defense in advance, neither those the prosecution wanted to introduce, or has introduced, during cross-examination (beginning approximately with Exhibit 1840), nor has the prosecution opened their offices in the Palace of Justice, where these special documents are kept, to make it possible for the defense to examine them.

In making available now to the prosecution the above-mentioned documents in the way stated, we expect that the entire material which so far was withheld from us will be handed over at once, and particularly the documents still to be presented during cross-examinations. If necessary, we herewith apply to the Tribunal for a decision instructing the prosecution to make available to the defense for inspection all documents which so far were held back.

The statement made in paragraph 5 j of the prosecution's motion of 26 February 1948, that "Dr. Alt gave specific instructions that in the event American authorities should appear at Ludwigshafen, all documents of interest to the prosecution and defense were to be secreted and hidden from the view of the Americans," is not true either. The attached affidavit of the

*After securing access to these documents, the prosecution introduced many extracts in evidence. During rebuttal alone more than 30 extracts were introduced in three exhibits: Document NI-15253, Prosecution Exhibit 2206; Document NI-15256, Prosecution Exhibit 2207; and Document NI-15254, Prosecution Exhibit 2208.

member of our defense, assistant defense counsel Dr. Wolfgang Alt of 28 February 1948, proves the opposite to be true.¹

By means of their actions in Ludwigshafen which the prosecution described in such detail in their motion they actually succeeded in gaining information on exclusive and most intimate defense documents. This is exactly what Dr. Alt wanted to prevent by his instructions, and the events show how justified these instructions were.

The attached affidavits of Anton Hoenig and Miss Gertrud Reither of 26 February 1948 show in detail that: ²

Among other things, the prosecution took notice of copies of affidavits of witnesses. These were in a folder which, according to Dr. Alt's instructions, was for the time being rightly kept secret from the prosecution. Only after the employees Hoenig and Reither during interrogation under oath by Messrs. von Halle and Minskoff had been threatened with arrest did they produce the folder which was not returned afterwards.

The affidavits of Dr. Helwert and Dr. Timm of 25 and 26 February 1948 show that the prosecution committed the following infringements of, and encroachments on, the basic rights of the defense:

(1) In spite of Dr. Timm's warning the prosecution, through Mr. Haeni, searched the private apartment of Dr. Alt, assistant defense counsel, and without calling in either the French or German police at that.

(2) The prosecution ordered Dr. Timm to name those plant employees who were searching for defense material for the trial, in order to interrogate them subsequently on their activities. The prosecution announced furthermore that they wanted to interrogate Dr. Alt, assistant defense counsel, and Mr. Gerhard Naumann, defense counsel (see pars. 8 and 9 of affidavit by Dr. Timm).²

These facts are causing grave concern to the defense. These actions taken by the prosecution were most detrimental to the defense and put their clients to a disadvantage. The defense must fear that in future they will not be able to conduct the defense in such a manner as is necessary under the basic rules of a "fair trial," if the above-mentioned action of the prosecution and the obvious lack of respect for the rights and privileges of the defense connected therewith is not stopped definitely and energetically.

For the Defense:

[Signed] DR. RUDOLF DIX

¹ This affidavit is reproduced below as a part of this answer. A further affidavit of Dr. Alt, dated 5 March 1948, and filed separately with the Tribunal after the prosecution had replied on 8 March 1948 to the defense answer, is reproduced later in this section.

² Not reproduced herein.

AFFIDAVIT OF DR. WOLFGANG ALT, 28 FEBRUARY 1948 *

I, Dr. Wolfgang Alt, resident in Ludwigshafen/Rhine Bunsenstrasse 4, having been warned that I will be liable to punishment if I make a false statement in lieu of oath, herewith declare in lieu of oath that my statements are true and were made in order to be submitted as evidence to Military Tribunal VI in the Palace of Justice, Nuernberg, Germany.

Since I have been working for the defense in Nuernberg I have endeavored to keep purely defense material—by which I mean everything except files or documents of the IG—separate from these files and documents. For this purpose I have usually kept this so-called purely defense material in my apartment, in a wooden packing case which could not be locked, and was placed underneath my table. Soon it appeared that in actual practice it was not possible to maintain this strict separation. Therefore, it also occurred that the so-called purely defense material was kept in the business offices of the Ludwigshafen plant. Of course, I expected that the prosecution would look into the files of the Ludwigshafen plant. I particularly expected this at the time when the documents of IG were submitted in the Ambros document books or submitted in Nuernberg for translation and mimeographing. The prosecution could assume from the documents or from the attached certificates about the location of the documents concerned that possibly, for instance, in the case of letters and correspondence, the documents of preceding or following dates might also be in Ludwigshafen.

Therefore, I instructed my employees, as I had done before, that in case the prosecution were to search for such documents in Ludwigshafen, the purely defense material must, in any case, be kept out of the hands or from the knowledge of the prosecution. I never gave any instructions that IG documents should be hidden, nor did I ever give any instructions that “all documents that might be of importance to either the prosecution or the defense should be gotten out of the way.”

Nuernberg, 28 February 1948.

[Signed] DR. WOLFGANG ALT

*U.S. vs. Carl Krauch, *et al.*, Case 6, Official Record, volume 49, pages 1486.

3. REPLY OF THE PROSECUTION TO THE ANSWER OF THE DEFENSE, 3 MARCH 1948

REPLY OF THE PROSECUTION TO THE ANSWER OF THE DEFENSE OF 28 FEBRUARY 1948 TO THE PROSECUTION MOTION OF 26 FEBRUARY 1948 *

1. In discussing the allegations and the countercharges contained in the reply of the defense of 28 February 1948, the prosecution will endeavor to limit itself to an objective analysis of the facts. It does not serve the ends of justice to try to becloud the issues by statements such as those made in the introductory paragraphs of the defense reply. (How completely unfounded the statement of the defense that the prosecution action was taken in view of certain publicity concerning the trials here is shown by (1) the fact that the investigation which gave rise to the motion started well before this publicity, and (2) by the further fact (as at least one member of the defense well knows) that the prosecution was anxious to settle this matter without any formal action. Once a formal motion is filed, it, of course, becomes public property.)

2. Before dealing with certain countercharges which really serve only to sidetrack the basic issues, it will be best at the outset to restate in unmistakable terms the basis of the prosecution motion and then to examine the facts in support thereof.

3. The basis of the prosecution motion is the following:

(a) Over a period of time since the collapse of Germany, and particularly during the years 1946 and 1947, shipments of documents were made from Griesheim to Ludwigshafen at the request of the Ludwigshafen plant under representations that these documents belonged to or were needed at Ludwigshafen.

(b) A number of these documents were destroyed and reduced to pulp on the alleged grounds that there was no room for such documents and that they were of no use to the Ludwigshafen plant.

(c) Documents have been removed over a period of time, and particularly since the filing of the indictment in May 1947, from the official archives in Ludwigshafen without receipt and have been delivered to Dr. Alt. Dr. Alt has forwarded some of these documents, without receipt, to the defense in Nuernberg, including the weekly reports on Auschwitz.

(d) These activities, many of which were conducted without the knowledge of the French authorities, resulted in the large-scale withdrawal of material evidence from places where both members

*Ibid., pages 1455-1466.

of the prosecution and defense would have access to such evidence, under circumstances which have deprived the prosecution and Tribunal of any knowledge of or accessibility to such evidence.

(e) The prosecution has not (and does not now) allege that the defense as a whole directed, approved, or even knew about these activities. It is clear, however, that Dr. Alt participated in some of these activities and had knowledge of others. It is also clear that certain other members of the defense knew where certain files on Auschwitz were, even though they may not have known the precise circumstances under which they were obtained. The prosecution has requested that anyone acting for the defense, with the approval of the Tribunal, produce any such Farben files or documents; and has requested that such person make an accounting for any such documents which cannot be produced because they have been destroyed. It should not be presumed from this (in an effort to evade the issue) that any misconduct is charged to any particular member of the defense merely because such person may have possession of or know about the existence of any document which the prosecution has requested should be produced or accounted for.

4. In support of the above allegations, the following facts, some of which have either been admitted or have not been denied, are established beyond a reasonable doubt in the judgment of the prosecution.

(a) Shipments of documents from Griesheim were made to the Ludwigshafen plant at the request of the Ludwigshafen plant. The actual list of documents shipped from Griesheim to Ludwigshafen are in the hands of both the French authorities at Ludwigshafen and the American authorities at Griesheim. It is a fact that one of the largest shipments, and particularly the one that contained a number of Auschwitz files, was made in May 1946. However, the records indicate that shipments of documents from Griesheim to Ludwigshafen were made on the following dates:

20 May 1946	21 May 1947
24 May 1946	12 Aug. 1947
27 July 1946	25 Sept. 1947
13 Feb. 1947	23 Dec. 1947
21 Mar. 1947	

During most of 1946, Dr. Alt worked as an assistant to Dr. Otto Ambros at the Ludwigshafen plant. During this same period, a number of the former Vorstand colleagues of Dr. Ambros were confined and being investigated in the American zone principally in and around Frankfurt. These investigations, among other things, involved the relation of Farben to Germany's armaments and to Auschwitz. Beginning in October 1946, OCCWC took

initial steps to have Dr. Ambros extradited to Nuernberg for trial. Since the filing of the indictment (May 1947), Dr. Alt has continued to work at the Ludwigshafen plant. Since September 1947, he has been approved as a defense assistant.

(b) The prosecution would have no reason to object to these shipments, provided they could have found the documents shipped to Ludwigshafen in the files at Ludwigshafen.

(c) When the prosecution team arrived at Ludwigshafen, it requested the French authorities for access to the files that were sent from Griesheim. The French authorities said that they would allow the prosecution team to see such documents; *that they could not be taken from the files*; but, that if necessary, photostats or microfilms could be made. The French authorities instructed the Germans who worked for them to make the files available for preliminary screening. The French authorities were obviously surprised when the Germans indicated that large quantities of the files had been destroyed and that others were sent to Nuernberg without receipt, or other record and without first obtaining photostats or microfilms. The French authorities mentioned a French regulation prohibiting the destruction of any documents of the plant.

(d) Actual physical search of the files revealed that in many cases, particularly involving Auschwitz material, the envelopes had been emptied of their contents and the documents themselves had been removed. In a statement taken before the control officials of the French Administration by Mr. Elbau of the prosecution staff, one Kurt Schaeffer tried to explain the circumstances which surrounded the disappearance of certain files which had been sent from Griesheim to Ludwigshafen in May 1946. This is attached as appendix I.* It will be noted that in connection with certain Auschwitz folders which had been either emptied or missing, the statement indicates that such material was probably made into pulp because "in the case of the former Eastern plants" the files were "totally without interest."

(e) The proof is clear *and it has not been denied* that a goodly number of documents were removed from the official archives in Ludwigshafen without receipt. Many of these were delivered to Dr. Alt who has been working in a dual capacity: *first*, as an official in the "Farben plant" at Ludwigshafen owing certain obligations and duties to the French authorities, and *second*, as an assistant defense counsel for the defense in Nuernberg. Dr. Alt has merged noncontemporaneous defense documents (such as affidavits, etc.), in which the prosecution has never had any

*Not reproduced herein.

interest and to which the prosecution admittedly has no right of access, with contemporaneous original documents. Dr. Alt has also ordered Ludwigshafen employees to conceal contemporaneous documents from Allied investigators and has provided Ludwigshafen employees working for the defense with a code system to conceal the nature of certain of his activities.

(f) In summary, documents (including Auschwitz documents) were sent from Griesheim to Ludwigshafen; many of these documents were destroyed; many original documents were delivered to Dr. Alt for the defense in Nuernberg without receipt and without any record.

5. The motion of the prosecution made no claim as to which defense counsel had knowledge of the detailed acts of assistant defense counsel Dr. Alt. Indeed, one of the objectives of the motion is to have an open accounting whereby each defense counsel, as an official of the Tribunal, can state whether or not he had any knowledge of the improper removal or the destruction of the documents. This is a question which can be answered fully only by defense counsel and it still has not been answered. As the Tribunal and the prosecution were informed informally by defense counsel after the filing of the prosecution's motion, the previously missing Auschwitz reports were, or had been, in the hands of several defense counsel. The prosecution feels that it is particularly incumbent upon Dr. Alt, as an officer of this Tribunal, to give an accounting for documents which have been removed from Farben plants or official archives under Allied control by him or by persons acting on his behalf where this has been done without appropriate receipt or record.

6. The claim that the method of handling documents in the French zone has been or can be worked out in a manner agreeable to the French authorities and defense counsel might be a valid assertion generally, except that:

(a) The French authorities did not know of all of the ramifications of the handling of documents by persons holding dual positions or acting under the supervision of Dr. Alt, who himself holds a dual position.

(b) None of the Allied authorities, including this Tribunal, can overlook completely a situation which permits the possible concealment or destruction of evidence.

7. Obviously the prosecution has no right to ask (and we do not now ask) for the production of or accounting for individual defense documents which have been withdrawn upon a proper accounting from official archives or which have been obtained by the ingenuity of the defense from other sources than the official archives. For example, where the originals remain in the official

archives, no accounting for or production of documents in the possession of the defense is requested. Moreover, where the originals have been removed upon receipt, so that any party can obtain those documents in a normal way upon the exercise of due diligence, again no accounting for or production of such documents is requested.

8. Among the more than 170 motions which the defense has filed with the Tribunal, there are dozens of examples where the defense has requested the prosecution to produce copies of documents or original documents which have been obtained according to the established regulations. Where the application has been for a specific document or a specific file of documents, the prosecution has produced these documents for the defense without ever saying to the defense "Go back to the Document Center and look for them yourself." In fact, in several cases the prosecution has brought documents here to Nuernberg at the express request of the defense so that they could be taken into conference between defense counsel and the defendants.

9. The defense makes certain allegations concerning the conduct of the prosecution team, which are without foundation and which the prosecution believes were made irresponsibly and improperly. The defense reply states: We also protest strongly that, as part of so-called investigations, that were to determine such so-called misdeeds of the defense, the prosecution obtained, by means of pressure, threats and *the employment of other illegal means*, knowledge of plans, documents, and evidence (for example, affidavits) of the defense which are protected up to the time of their presentation before the court through the professional secret of the defense which is recognized in all civilized countries. *The fact of the matter is that the prosecution at no time read or even touched any affidavit or other confidential evidence belonging to the defense but only concerned itself with contemporaneous Farben documents in existence before May 1945.* The investigation by members of the prosecution team was made under the supervision and with the assistance of the French authorities. A statement from these authorities was attached to the original motion of the prosecution.

10. The reply also states that the affidavits of Dr. Helwert and Dr. Timm of 25 and 26 February 1948 show the following transgressions and improper acts of the prosecution into the basic rights of the defense:

(1) In spite of Dr. Timm's warning the prosecution, through Mr. Haeni, searched the private apartment of Dr. Alt, assistant defense counsel, and they did this without assistance from the French or German police.

(2) The prosecution requested Dr. Timm to mention to them those plant members who seek defense material for the trial, in order to then interrogate them about their activities. The prosecution announced furthermore that they wanted to interrogate Dr. Alt, assistant defense counsel and Dr. Gerhard Naumann, defense counsel (see pars. 8 and 9 of Affidavit by Dr. Timm). With respect to the statement that Mr. Haeni of the prosecution searched the private apartment of Dr. Alt, several important facts are not mentioned. In the first place, Dr. Alt's apartment was searched by French officials (accompanied by German officials) of BASF, who had requested Mr. Haeni to accompany them. These French officials were looking for files which belonged to BASF and presumably had authority to make whatever search was necessary to find these files. Secondly, it may be mentioned that at the time no member of the prosecution team in Ludwigshafen realized that Dr. Alt was an assistant defense counsel in Nuernberg. Mr. Minskoff and his colleagues were informed at Ludwigshafen that Dr. Alt, who is a chemist and not a lawyer, was being paid by BASF, but that he was working for the defense (like many others employed at Ludwigshafen plant). It did not occur to Mr. Minskoff at the time that such an individual was accredited as an officer of this Tribunal, while having certain definite responsibilities and obligations to the French Administration at Ludwigshafen. With respect to the request that Dr. Alt be interrogated as well as Dr. Naumann, this again arose from the dual capacity in which these gentlemen were operating. They were both employees of Ludwigshafen and the prosecution requested them for interrogation not knowing they were officers of this Court.

11. The prosecution also takes a strong exception to other counter-charges contained in the reply of the defense relating to the general question of the access to documentary material on the part of both the prosecution and defense. The defense asserts that it has not been granted the same access to documents pertaining to the trial as the prosecution. It also makes the following statement concerning documents being used by the prosecution in connection with cross-examination: If we now make available to the prosecution the above-mentioned documents in the above-mentioned fashion we do this so that the entire material which so far has been denied to us will be handed over at once, thus especially the documents which are still to be presented during cross-examinations. If necessary, we request the court to instruct the prosecution by means of a decision to make available for inspection all documents which it has so far held back.

12. These allegations of the defense are based either upon a

complete misunderstanding or upon a complete misrepresentation of the situation relating to the documents. With respect to Farben documents the situation is briefly the following:

(a) Both the prosecution and the defense have equal access to the Document Centers under the jurisdiction of the authorities in the U. S. Zone of Occupation. There is a procedure which has been set up whereby if either side desires documents they can obtain them in one of two ways, neither of which, however, deprives the other side of the right of access to and knowledge of the existence of such documents. Thus in the Document Center at Griesheim when the prosecution wants to use a document it can either: (1) make a photostat of such document leaving the original in the files; or (2) in exceptional cases withdraw the original, provided the prosecution leaves a receipt showing exactly what documents have been removed. Where the prosecution follows the first method the original is left in the files where the defense has equal access to it. Where the second procedure is followed, the defense by checking the list of documents for which receipts have been given may request the prosecution to produce copies of such documents. It may be noted here that it has been the practice of the prosecution to deliver copies of specific documents or specific files of documents to the defense upon proper application irrespective of which step was followed in bringing documents to Nuernberg. In other words, even when we have left the original at the Document Center and the defense has requested copies of specific documents, we have not told the defense to "go to the Document Center," but as a matter of convenience and courtesy have delivered copies of such documents to the defense. Members of the defense can also testify to the fact that they have received copies of or been given access to specific documents on various occasions from various members of the prosecution without formal observance of the rules requiring them to make formal motion for such documents.

(b) With respect to Farben documents which are in the control of other governmental authorities such as the French, we agree that this is basically a matter for such authorities, but we do feel that it is not a matter which is totally of unconcern to the Tribunal. In this connection we are attaching a statement marked as appendix II* which outlines the procedure which the prosecution must follow in order to obtain documents from the French Administration of the BASF. We understand from the French authorities at Ludwigshafen that a similar procedure is supposed to be followed by persons who are not working for the French Administration such as the defense counsel in the case pending before

*Not reproduced herein.

this Tribunal. Although violations of such French regulations by the defense counsel are not *per se* matters within the jurisdiction of this Tribunal, it is submitted that this Tribunal, under its power to require the production of documents and other evidentiary material (Art. V (c) and (f) of Ordinance No. 7) can and should require the production of relevant contemporaneous documents in the control of an officer of this Court which have been improperly removed from official archives.

(c) With respect to the documents which the prosecution is using in cross-examination, the facts are as follows: An examination of the documents which have been used to date (beginning with Exh. 1840) will reveal that practically all such documents are photostats of documents, the originals of which have been left in the Document Center where by due diligence on the part of the defense they could read such documents or if necessary obtain copies for themselves. If there are a few cases where the original has been introduced into evidence rather than the photostat, the document is covered under prevailing practice by a receipt left at the Document Center. This is in contrast with the practice apparently followed by the defense in many cases, since an examination of many documents introduced in evidence by the defense reveals that the original itself has been introduced in evidence. The defense in their reply talk about the lack of due diligence on the part of the prosecution who it is alleged could have examined the documents that went from Griesheim to Ludwigshafen if they had gone to Ludwigshafen at an earlier date. It may be noted that the examination of many empty folders from which documents have been removed without receipt (many of which have been destroyed) would hardly reimburse the prosecution for its exercise of due diligence.

13. It is the considered judgment of the prosecution that in connection with the trial of this case every possible effort has been made by the prosecution to give the defense equal opportunities to obtain documentary evidence. The prosecution sincerely believes that the defense, with its large number (several dozen) of German-speaking defense counsel and assistants and with its apparently equally large number of assistants who are not formally attached to the Tribunal (many of whom have an intimate knowledge of and connection with the Farben files with which they are dealing), have a very much greater opportunity to discover relevant evidence and produce it before this Tribunal than does the prosecution. This would be true even assuming that everyone operated within the prescribed rules of procedure laid down by the Allied authorities. And when in addition to this the prosecution discovers that a situation exists such as it found at

Ludwigshafen, it is now more convinced than ever that the balance of the advantages lie with the defense.

14. The prosecution would welcome an appointment by this Tribunal of a special representative of the court who would study and report to the Tribunal on (a) the steps which have been taken by the prosecution to make evidence available to the defense; and (b) the steps which have been taken by the defense counsel as officers of this Court to see to it that no contemporaneous documents from official files have been concealed.¹

15. The prosecution reiterates each and every sentence of its motion of 26 February 1948 and requests that the Tribunal grant the relief sought in the motion. Accordingly, the prosecution repeats its request that the Tribunal direct counsel for the defense, individually and severally, and any other persons acting for the defense with the approval of the Tribunal:

(a) To produce all Farben files or documents which have been removed from any Farben files or archives under the jurisdiction of any of the Allied authorities at the request of or upon the initiative of the defense or any person acting on behalf of the defense ("removed from Farben files or archives under the jurisdiction of any of the Allied authorities" is intended to refer only to removal without compliance with prescribed and appropriate regulations applicable to both the prosecution and the defense);

(b) To make an accounting in writing to the Tribunal of any such files or documents which cannot be produced because they have been destroyed.

Nuernberg, 3 March 1948

By: [Signed] D. A. SPRECHER
Chief Farben Trial Team
For: TELFORD TAYLOR
Brig. Gen. U.S.A.
Chief of Counsel

4. SECOND AFFIDAVIT OF DR. WOLFGANG ALT²

AFFIDAVIT

I, the undersigned Dr. Ing. Wolfgang Alt, residing in Ludwigshafen, Bunsenstr. 4, have been cautioned that I render myself

¹ The Tribunal appointed no representative but made its ruling upon the basis of the prosecution's application, the defense answer thereto, the prosecution's reply, the affidavits and other materials attached to these instruments, and a supplemental affidavit of Dr. Alt which is reproduced immediately below.

² U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 49, pages 1442-1446. Dr. Alt's first affidavit is reproduced as a part of the defense answer in 2 above.

liable to punishment by making a false affidavit. I hereby declare on oath that my statement is true and was made to be submitted as evidence to the Military Tribunal at the Palace of Justice in Nuernberg, Germany.

I am informed about the prosecution's application for procurement of documents, dated 26 February 1948, as well as its rebuttal of 3 March 1948 to the reply of the defense.

I am able to state the following concerning the two written statements of the prosecution as a supplement to my affidavit dated 28 February 1948: I forwarded documents of the Ludwigshafen plant to the defense in Nuernberg and also transmitted them personally in some cases.

I did not consider this activity a "large-scale and systematic withdrawal of evidence."

I never intended to destroy any of these documents or to withhold them from third parties. I merely desired to assist the defense within the admissible limits. The prosecution is of the opinion that the right course would have been to leave all documents in Ludwigshafen and to have each document photostated. I considered the course I took correct. It was furthermore the only way of offering practical assistance to the defense.

Being a chemist, I could give explanations about the chemical part of the individual documents; however, I could not appreciate the full legal importance of these documents for the defense. Under these circumstances, I would have had to order many photostats, without anybody, except a chemist, finding anything interesting in them.

Not only would this have been useless, but due to the shortage of film, I would not even have been able to order so many photostats.

The only alternative would have been for each defense counsel interested in documents to have gone to Ludwigshafen, to examine on the spot.

Not only would we have encountered the same difficulties referred to above in procuring photostats for all the defense counsel, but such journeys would have complicated and protracted the trial considerably.

As I myself did not destroy or damage any of the documents, and have no doubt that the same applies to the defense, I subjectively persisted in the view that no fault could be found with my behavior.

I do not believe that my concurrent activities in Ludwigshafen and Nuernberg put the defense at an advantage, since the French Administration made the files available to each individual defense counsel, so that the truth could be ascertained. No basic dis-

advantage arose from conduct, as the documents which I forwarded were not destroyed, damaged or concealed even later, and the Tribunal as well as the prosecution can still study the documents concerned.

In this connection I must state that I had nothing whatever to do with the return of documents from the Document Center at Griesheim to Ludwigshafen.

In Ludwigshafen I have seen only very few documents originating from Griesheim. Documents from Griesheim, known to me as such by their description, I have neither taken nor sent to Nuernberg, nor have I removed any document from them, nor taken or sent to Nuernberg such documents.

I have detailed recollection of only three file folders [Leitz-Ordner] which were known to me as originating from Griesheim.

Two of these file folders referred to the complex Saargas-ethylene. These Ordner documents I received in the spring of 1947 for information in connection with a task I had been entrusted with as analytical chemist of the BASF.

I have returned these Ordner documents without having removed anything. As far as I remember the third file folder had the heading: "Buna-Osten" and the Griesheim mark. No documents were removed from this Ordner and none sent to Nuernberg either.

Whether any of the Griesheim documents have been destroyed I do not know.

Should this have happened, I declare neither to have caused such a destruction nor to have been in any way connected with it.

As for the origin of the weekly reports, I state that these weekly reports which have come to Nuernberg, do not originate from Griesheim.

They were personal data belonging to Bankdirektor Santo at Ludwigshafen who, after the closing of the Auschwitz works, kept them as his personal documents.

When I received these weekly reports they no longer presented an undivided and complete set.

I have sent the weekly reports to Nuernberg in the same condition in which I received them.

For me it goes without saying that no change whatever was made to them.

Further, the prosecution has taken exception to some instructions which I am supposed to have given or actually have given. To this I would say that some time ago I did actually suggest once that code names, such as are contained in the Hoenig affidavit, should be used. At the beginning of the proceedings I intended this to be a precautionary measure. In the course of the trial I

have realized that this precaution was unnecessary. As a chemist I had my own ideas of what legal proceedings would be like. However, I did not give any instructions to the effect that if American officials should appear in Ludwigshafen "all documents which might be of interest to the prosecution or to the defense" should be removed.

The instructions which I issued several months ago were simply for material consisting solely of defense papers, such as correspondence with the defense in Nuernberg, affidavits and copies, to be stored in a box, which could not be locked, in my private apartment.

Why this box was moved from my apartment to another room in the house before my apartment was searched, I do not know. I myself did not give any such instruction. The same applies to documents, which had been in my office, being moved to other rooms in the building.

If Herr Hoenig, as is apparent from his affidavit, has made a different statement, it can only mean that he misunderstood my instructions in this matter. Herr Hoenig obviously misunderstood me so thoroughly as to leave affidavits, for instance, in my office instead of putting them into the box. Meanwhile, the box, which the authorities had sealed after searching my apartment, has been opened, and the prosecution is now in possession of the few documents of those which were in the box which could be of any interest to it.

Among the documents which the prosecution seized out of my private box in my apartment is an extract from the Auschwitz weekly reports dealing with the air-raid precaution measures taken at the Auschwitz works, a plan of the buildings of the Auschwitz works, the detailed estimate of costs for an N4 salts plant at Ludwigshafen, and an unsigned copy of the draft of an agreement about this N4 salts plant. The agreement itself has already been submitted by the prosecution in its final form as Exhibit 608, [Doc. NI-7402] book 34.

Herr Hoenig, in his affidavit dated 22 February 1948, states that copies were made at Ludwigshafen of a handwritten statement by Otto Ambros dealing with Gendorf, and one dealing with Dyhernfurth. He said that the originals of these works were later destroyed on my orders. In this connection I wish to state that these treatises about Gendorf and Dyhernfurth were written by Otto Ambros from memory in Nuernberg Prison for his defense. I had copies of these made and it is possible that I told Herr Hoenig, after these copies were available, to throw away the handwritten originals which could only be read with difficulty and

which were superfluous. The said copies are in the possession of the Nuernberg defense, now as before.

[Signed] DR. WOLFGANG ALT

Nuernberg, 5 March 1948

5. TRIBUNAL ORDER, 8 MARCH 1948, DENYING THE PROSECUTION'S APPLICATION AND REPRIMANDING DR. ALT AND "THE MEMBERS OF THE PROSECUTION STAFF HERE INVOLVED"

UNITED STATES MILITARY TRIBUNAL VI SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
8 MARCH 1948

United States of America

vs.

Carl Krauch, *et al.*,

Defendants

CASE 6

ORDER *

Having considered the prosecution's application, dated 26 February 1948, for the production of documents, the defendants' answer thereto, the prosecution's reply, and the supplemental affidavit of Dr. Wolfgang Alt, presented on 6 March 1948, the Tribunal now announces its ruling on said application:

While the prosecution's application is very broad in its implications, the only specific charges contained therein, which are supported by any such showing of facts as merit the consideration of the Tribunal, relate exclusively to documentary material pertaining to Farben's Ludwigshafen plant in the French Occupation Zone. We find nothing in the record to indicate that there has been anything culpable or improper on the part of anyone in connection with the circumstances under which any documents were removed from Griesheim to Ludwigshafen or under which papers at Ludwigshafen were destroyed. It further appears that only a comparatively small number of documents are involved in this controversy and that these have since been deposited in the office of the Secretary General or returned to the files at Ludwigshafen, where they are accessible to all parties concerned.

It does affirmatively appear, however, that Dr. Wolfgang Alt has for some time been acting in a dual capacity, namely, as an assistant counsel for a defendant in this case and as a technical adviser to the present management of the Ludwigshafen plant.

*U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 49, pages 1440 and 1441.

If the obligations thereby voluntarily assumed by Dr. Alt were not, in fact, incompatible, they did, at least impose upon him the positive duty of circumspect conduct in respect to the handling of documentary material that thereby came under his control. His conduct in intermingling such documents with his personal papers and concealing the former, at the plant or elsewhere, justifies a reprimand.

Nor can we permit this incident to pass without taking notice of what we regard as hasty and ill-conceived action on the part of the members of the prosecution staff here involved. If, when they discovered the facts — subsequently set forth in their application, they had promptly come to this Tribunal for redress, instead of taking matters into their own hands by threatening potential witnesses with arrest and participating in an unwarranted violation of the privacy of the home of a member of the staff of defense counsel, they would have reflected greater credit upon themselves and the responsible positions they occupy.

If counsel for both sides will in the future carefully observe the rules pertaining to the production and handling of evidentiary documents and, at the same time, remember that as officers of the Court they share responsibility with the members of this Tribunal for the orderly administration of justice, such unfortunate incidents as this will not again occur.

There is nothing in the record reflecting upon the honor or professional integrity of counsel for the defendants, generally, and they need not answer further.

The application of the prosecution is now dismissed.

[Signed] CURTIS G. SHAKE
Presiding

Dated this 8th day of March 1948.

[Handwritten] The above order read in open court on 8 March 1948 by the Presiding Judge.

[Signed] MAURICE DE VINNA
Asst. Sec'y. Gen.
Tribunal VI

XXII. ALTERNATE MEMBERS OF THE TRIBUNALS

A. Introduction

Ordinance No. 7 required that each of the Tribunal's "consist of three or more members to be designated by the Military Governor." In no case did the Military Governor appoint more than three members to a tribunal, but in a number of cases he appointed an alternate member. The provisions of Ordinance No. 7 concerning alternate members of the Tribunals are contained in Article II (b). Article II (b) provided that "One alternate member may be designated to any tribunal if deemed advisable by the Military Governor." Alternate members were appointed to the Military Tribunals assigned to try the first six cases in which indictments were issued, as shown by the following table:

<i>Case No.</i>	<i>Popular name of case</i>	<i>Tribunal No.</i>	<i>Alternate member of the tribunal</i>
1	Medical _____	I	Judge Victor C. Swearingen
2	Milch _____	II	Judge John J. Speight
3	Justice _____	III	Judge Justin W. Harding
4	Pohl _____	II	Judge John J. Speight
5	Flick _____	IV	Judge Richard D. Dixon
6	Farben _____	VI	Judge Clarence F. Merrell

Article II (f) of Ordinance No. 7 provided that "In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial." In one trial only, did an alternate member take the place of a member. This was in the Justice case where Judge Harding became a member when Judge Marshall was relieved because of illness. This replacement occurred near the end of the prosecution's case in chief (sec. XVII B). The final general order relieving Judge Marshall and appointing Judge Harding is reproduced at page 8, volume III, this series.

In the Justice case Judge Harding was appointed a commissioner of the Tribunal before he became a member of the Tribunal. Judge Harding and two of the three members of the Tribunal sat as commissioners to hear the testimony of 13 prosecution affiants who had been called for cross-examination by the defense (sec. XVII B). This occurred after Judge Marshall became ill but before he retired from the case due to continuing illness.

In one case an alternate judge discussed his "contingent responsibility" as an alternate member of the Tribunal on two different occasions in open court. This was done by Judge Merrell, alternate member of the Tribunal in the Farben case. On both

occasions Judge Merrell expressed his agreement with Judge Hebert who had dissented from statements or a ruling of the other two tribunal members. The first instance may be found in the mimeographed transcript of the Farben case, 22 October 1947, pages 2569 and 2570, where Judge Merrell began his remarks by stating: "Just for the purpose of the record and having in mind my contingent responsibility in the case, I want to voice agreement with the judgment just expressed and the comments just stated by Judge Hebert." In the second instance Judge Merrell made a much fuller statement concerning his "contingent responsibility," a part of which was read in open court and all of which was made a part of the record in the case (subsec. C).

Where no alternate member was appointed, and where one of the members became incapacitated, Article II (f) of Ordinance No. 7 provided that "the trial shall be continued to conclusion by the remaining members." In the six cases where no alternate member was appointed to the tribunal, none of the tribunal members became incapacitated.

Three of the judges who were alternate members in the earlier trials became tribunal members in later trials. Judge Speight, alternate member of the Tribunal hearing in the Milch and Pohl cases, later sat as a member of the Tribunal which heard the Einsatzgruppen case. Judge Harding, first an alternate member and then a member of the Tribunal in the Justice case, later was a member of the Tribunal hearing the High Command case. Judge Dixon, alternate member of the Tribunal in the Flick case, was a member of the Tribunal which heard the Einsatzgruppen case.

B. Provisions of Article II (b), (e), and (f), Ordinance No. 7

Article II

* * * * *

(b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (c) of this Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

* * * * *

(e) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel.

(f) In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial. Members may be replaced for reasons of health or for other good reasons, except that no replacement of a member may take place, during a trial, other than by the alternate. If no alternate has been designated, the trial shall be continued to conclusion by the remaining members.

Comparable provisions of the Charter of the IMT are the following:

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

* * * * *

Article 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

C. Statement of Judge Merrell, Alternate Member of
the Tribunal in the Farben Case, 11 May 1948,
Concerning His "Contingent Responsibility" and
Related Matters¹

[Stamp] Filed: 12 May 1948

UNITED STATES MILITARY TRIBUNAL VI, SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
11 MAY 1948

United States of America

vs.

Carl Krauch, *et al.*,

Defendants

CASE 6

The attached six [transcript] pages were made a part of the record during the proceedings of Tribunal VI, on the morning of 11 May 1948, by reference by Alternate Judge Clarence F. Merrell, and after quoting several paragraphs from such statement,² it was filed with the Deputy Secretary General in Court VI as a part of the record of the proceedings in open court on 11 May 1948. Reference to such statement was made in connection with ruling just announced by the majority of the Tribunal and after Judge Paul M. Hebert had expressed his dissent and before Judge Curtis G. Shake had expressed agreement with the majority of the Tribunal as stated by Judge James Morris.

The attached six pages should be made a part of the record in Case 6 in accordance with the proceedings had in open court on this day as above-indicated.

[Signed] CLARENCE F. MERRELL
Alternate Judge

Dated this 11th day of May 1948.

Having in mind my contingent responsibility as an alternate member of this Tribunal, it has become incumbent upon me to state for the record my position on the question concerning the admissibility of affidavits as to which the Tribunal by a majority of its members has made a ruling.³

First a word as to what I mean by the phrase, "my contingent responsibility as an alternate member of this Tribunal." My

¹ U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Records, volume 55, pages 252-258.

² Case 6, (*Tr.* pp. 14253-14255.)

³ The Tribunal ruling, announced by Judge Morris, is reproduced in Section XVIII K 6d.

position is such that full responsibility for sharing in the decisions of the Tribunal would be imposed upon me only if one of the regular judges of the Tribunal should for some reason become indisposed and could no longer serve. It is a possibility — and it is my hope and prayer that it will not occur — that I may be called upon to assume the place of any one of the three regular members of the Tribunal. From that time, I should share direct responsibility for the final determination and judgment of this Tribunal.

In the event of such a contingency, and if a majority of the Tribunal as newly constituted should not agree with rulings made by the Tribunal as previously constituted concerning any question having an important bearing upon the determination of the final judgment, the Tribunal as then made up would find itself in this dilemma, the necessity of choosing between these two courses of procedure: (1) to accept the ruling already made and render final judgment on the record as thus made even though a majority of the Tribunal as constituted should not agree with the ruling already made, thus being responsible for a result which might have been different except for the ruling previously made; or (2) to reconsider the previous ruling and overrule it and proceed with the trial in the light of such new ruling, resulting in a final determination and judgment according to the views of the Tribunal newly constituted which would have full responsibility for the final result. In the light of that prospect, I cannot close my mind to the possible effects which the rulings of this Tribunal, made during the trial, may have on the final result.

The ruling of the Tribunal that affidavits of those defendants who do not take the stand as witnesses will not be considered as to other defendants is a corollary to the ruling of the Tribunal that affidavits of affiants will not be admitted upon a showing that such affiants are not available for cross-examination.¹

I agree with the opinion as expressed by Judge Hebert, on 2 December 1947, that the admissibility of affidavits should not depend upon the availability of the affiant as a witness for the purpose of cross-examination.² A thorough study of the provisions of the Charter, Control Council Law No. 10, and Ordinance No. 7, prescribing rules of procedure for these tribunals, and precedents established by other tribunals administering international law, convinces me that in keeping with the expressed intent of the law to avoid technical rules of evidence and to admit any evidence deemed to have probative value, affidavits should be received in evidence without regard to whether the affiant is available for cross-examination. Of course it must be recognized

¹ Reproduced in section XVIII K 6c.

² Reproduced in section XVIII L 2f.

that in the search for truth, cross-examination is an important help. However, even without cross-examination, the sworn statement given by one conscious of the possibility of penalty for a false statement has a certain weight beyond that of the ordinary voluntary statement given without the sanction of an oath. The lack of cross-examination goes to the weight of the evidence and not to its admissibility. As a statement given in the form contemplated by the Ordinance, the affidavit should be admitted so that it can be considered in the light of all the circumstances and given such weight as, in the sound judgment of the Tribunal, it is entitled to receive.

Experience during the progress of this trial has demonstrated that, to enable the parties to have a fair trial and to present evidence which they regard as important, it is necessary, under the novel and difficult conditions which have existed and continue to exist in Europe, to broaden the rules of evidence and to relax them in favor of admitting evidence which under the technical rules of evidence with which the members of the Tribunal are familiar would not be admitted. Accordingly, during the course of this trial, there has been a gradual relaxation of the rules of evidence as the case has progressed and experience has demonstrated that in fairness to the parties, especially to the defendants, such rules should be relaxed.

However, although in Schmitz Document Book 3 there is set out an affidavit by Goering, counsel for the defendant Schmitz, when he came to that document in the presentation of evidence, stated he would not offer it in view of the ruling of the Tribunal excluding affidavits of persons not available for cross-examination, inasmuch as affiant Goering was deceased. Thus defendant Schmitz was deprived of a bit of evidence which he evidently regarded as having probative value on his behalf.* The same can be said in regard to the affidavit of General Thomas offered and then withdrawn by counsel for defendant von Schnitzler because of this ruling of the Tribunal concerning affidavits of affiants now deceased.

The test as to admissibility of evidence laid down in the Charter and applied by the IMT is its "probative value." In Ordinance No. 7 creating these tribunals, it is expressly provided that the

* When counsel for defendant Schmitz came to the Goering affidavit in his Document Book 3, he stated that it would not be submitted because of the Tribunal ruling excluding affidavits of deceased affiants offered by the prosecution. Thereupon the prosecution stated: "We will not object to the admission in evidence on behalf of these defendants of the affidavits of the deceased persons. We think they are entitled to it. That is our position. We have argued that position, and we certainly don't think that these defendants are entitled to less than what we thought we should have the right to offer as prosecution material." Defense counsel, however, declined to offer the affidavit in evidence in view of the Tribunal's ruling, (*U.S. vs. Carl Krauch, et al.*, Case 6, 28 January 1948 *tr. pp. 5988-5989*).

Tribunals "shall admit any evidence which they deem to have probative value." If it has any probative value concerning any issues in the case, it should be received and given such weight as in the judgment of the Tribunal it deserves. Such a touchstone of admissibility affords a simple rule and assures all parties a fair, full, and impartial trial without imposing on either party the encumbering and disabling requirements of technical rules of evidence.

The fairness and the propriety of the test of probative value for the admissibility of evidence, including affidavits, instead of the ruling being applied by this Tribunal, has been demonstrated by experience in this case. There were 279 affidavits introduced and admitted in evidence on behalf of the prosecution; of those, 72 affiants were produced in open court for cross-examination before the Tribunal; cross-examination of 14 of such affiants was conducted before the commissioner appointed by the Tribunal; the cross-examination of 19 was waived by the defense. Thus all affiants whose affidavits were introduced by prosecution were cross-examined by defense unless waived.

On behalf of the defendants, a total of 2,363 affidavits have been introduced; of those affiants prosecution has requested that 72 be produced for cross-examination; to date 29 of them have been produced and have been cross-examined, and 6 more may be produced and cross-examined within the time allowed. Of the defense affidavits, approximately 865 were introduced after 14 April, approximately 400 during the last week of the trial, and 115 during the last two days. Cross-examination of 97 defense affiants has been expressly waived. Inasmuch as under the schedule for the production of evidence, time has been reached for the conclusion of all evidence, it is obvious that the prosecution is not afforded the privilege of cross-examining the balance of those affiants under the schedule being applied. The result is that while the defense have had the privilege of cross-examining all affiants unless they waived it, the prosecution will have been able to cross-examine only 35 and will not have the privilege of cross-examining the others even though they have made such request. That result was reached even though the provisions of Article XI of Ordinance No. 7, with reference to cross-examination, apply equally to evidence produced by defense and prosecution. The defense has had the privilege of cross-examination; the prosecution has had that privilege only to a limited degree. Under the ruling of this Tribunal, consistency would prompt the striking from the record of all defense affidavits of those affiants whose cross-examination has been requested and who have not been

available for such cross-examination within the time permitted by the Tribunal for the presentation of evidence.

My studies have convinced me that the ruling of this Court is contrary to the practice established and followed by various other courts and tribunals having the responsibility of trying persons charged with violation of international law. There have been, and are, many such tribunals, including: the International Military Tribunal which sat here in Nuernberg; the Far Eastern Tribunal sitting in Tokyo; British Military Courts; United States Military Commissions; Canadian and Australian War Crimes Courts; and the French Military Tribunals. More than one thousand trials have been conducted by those courts.

The rules of evidence followed by those tribunals establish a balance between their dual responsibility of protecting the fundamental right of the accused individual to a fair trial and of insuring that "no guilty person will escape punishment by exploiting technical rules." The tribunals recognize that "the circumstances in which war crimes trials are often held make it necessary to dispense with certain rules followed in ordinary criminal law." A controlling factor in that regard as to affidavits is the unavailability of witnesses at the time of trial but who have given affidavits. For that reason the practice has been generally established and followed of admitting affidavits even though the affiants are not available for cross-examination. Under such circumstances, however, it is pointed out that the tribunal takes into consideration the fact that the affiant has not been cross-examined in determining the weight to be given the statements in such affidavits.*

The ruling of the Tribunal as to affidavits of defendants who do not take the witness stand is in effect that the affidavit is to be regarded as admissible only as a declaration made by such defendant and not by virtue of the fact that it is an affidavit; under the ruling as made, the fact that it was given under oath does not give it such character as to entitle it to be considered as evidence although so provided by Ordinance No. 7.

The situation thus created comes into clear focus when the effect of the announced intention of defendants Schmitz, von Schnitzler, and Lautenschlaeger not to take the stand as witnesses is considered. There are in the record several affidavits given by those defendants. If they follow their announced intention and remain mute and silent throughout this trial and the ruling of the Tribunal as stated is followed, all those statements can be considered as to those respective defendants themselves but the

* Report of United Nations War Crimes Commission to the United Nations, November 1947, pages 330-342.

statements in all those affidavits concerning other defendants must be ignored by the Tribunal in determining the innocence or guilt of the other defendants. Thus by the free voluntary choice of those defendants a substantial amount of testimony by those peculiarly in a position to know the facts becomes unavailable to the Tribunal and is rendered a nullity whether it tends to exonerate or implicate their codefendants. That extreme result indicates the invalidity of the ruling as made.

The ruling, in my mind is a contradiction of the clear intent of the Charter, a nullification of the provisions of the Ordinance binding upon this Tribunal, and contrary to the procedure established and followed by other tribunals enforcing international law. It is my opinion that the affidavits should be considered as evidence as to any defendant to whom they refer directly or indirectly even though the defendant giving the affidavit is not cross-examined by or on behalf of the defendant thus referred to, and given such weight as under the circumstances, including lack of cross-examination, in the sound discretion of the Tribunal they deserve.

XXIII. COMMITTEE OF PRESIDING JUDGES

A. Introduction

The provisions of Ordinance No. 7 dealing with the Committee of Presiding Judges or the Supervisory Committee of Presiding Judges, as it was also called, are reproduced in subsection B. Article II (*d*) of Ordinance No. 7 provided that the Military Governor designate one of the members of each tribunal to serve as presiding judge, and Article XIII provided that "When at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee." After three tribunals had been established (Military Tribunals I, II, and III, assigned respectively to the trial of the Medical, Milch, and Justice cases), the Committee of Presiding Judges held its organization meeting on 17 February 1947. (The minutes of this meeting are reproduced in subsec. C.) The types of questions considered by the Committee of Presiding Judges are illustrated herein by the minutes of the conferences of 20 November 1947 and 11 August 1948 (subsec. D). The conference of 11 August 1948 was the last conference of the committee, since this was the last day on which there were three tribunals in session. Pertinent extracts from the minutes of a number of other conferences of the Committee of Presiding Judges and various orders of this committee are reproduced in other sections of this volume.

The membership of the Committee of Presiding Judges contained as many as seven presiding judges during one period (Nov. 1947–Feb. 1948) when seven different tribunals were assigned to the trial of cases.

Article V (*f*) of Ordinance No. 7 provided that the members of the tribunal or the committee of presiding judges, when constituted, should adopt and revise appropriate rules of procedure not inconsistent with the Ordinance. The activities of the Committee of Presiding Judges in connection with the development of uniform rules of procedure is shown by the materials included above in section IV, "Development of Uniform Rules of Procedure — Action by Individual Tribunals, Executive Sessions of Several Tribunals, and the Committee of Presiding Judges."

Article V (*g*), a subdivision added to Ordinance No. 7 by Ordinance No. 11, provided that the Committee of Presiding Judges, when established, "shall assign the cases brought by the Chief of Counsel for War Crimes to the various Military Tribunals for trial." The Committee's first action in performing this responsibility was the assignment of the Pohl case (Case 4) to Tribunal II for trial (this order is reproduced in subsec. E).

Article XIII of Ordinance No. 7 provided that the Secretary General, who headed the Central Secretariat of the Military Tribunals, "shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee." Materials concerning the functions of the Central Secretariat are reproduced in section VIII.

In July 1947 the Committee of Presiding Judges, composed of the presiding judges of the first five tribunals established in Nuernberg, ordered on its own motion the convening of a joint session of all tribunals then constituted to hear argument upon the question of whether conspiracy to commit war crimes and crimes against humanity was defined as a crime under Control Council Law No. 10 or any other law defining and controlling the jurisdiction of the tribunals. The order is reproduced in section XXIV C.

On 12 January 1948 the Committee of Presiding Judges, in an order signed by the presiding judges of seven tribunals, denied the first defense motion calling for a joint session of the tribunals. This order (sec. XXIV D 1 b) stated that "The right to demand a plenary session of the tribunals is not an absolute one but is addressed to the sound judicial discretion of the Supervisory Committee of Presiding Judges." The next section of this volume, "Joint Sessions of the Military Tribunals," contains various materials showing the action of the Committee of Presiding Judges in connection with joint sessions.

At the organization meeting of the Committee of Presiding Judges (subsec. C), the Committee chose a chairman and declared that "for the purpose of brevity and convenience, said office may be officially designated as 'Executive Presiding Judge'; and further that said Executive Presiding Judge be authorized to act on behalf of the tribunals and the several presiding judges thereof in all executive, ministerial and administrative matters, subject, however, to review, if requested, by the Committee of Presiding Judges of said Tribunals." As stated in the Interim Report of the Secretary General (sec. VIII E): "The duties of the Executive Presiding Judge, in addition to presiding at the conferences of the Committee of Presiding Judges, included making decisions and issuing orders on matters not having to do with a specific tribunal, as for instance on defense applications for counsel or for witnesses in a case not yet assigned to a tribunal" for trial. Sometimes a period of several months elapsed between the service of the indictment and the assignment of the case to a particular tribunal for trial. During this period, most, if not all, of the

principal defense counsel were approved and became active in the preparation of the defense. As illustrations of the functions of the Executive Presiding Judge before a case had been assigned to a particular tribunal for trial, three orders are reproduced in subsection F, the first dealing with a defense application for a witness, the second with a defense application for documents, and the third dealing with a defendant's request for counsel.

B. Provisions of Articles II (d), V (f) (g), and XIII, Ordinance No. 7 as Amended by Ordinance No. 11

Article II

* * * * *

(d) The Military Governor shall designate one of the members of the tribunal to serve as the presiding judge.

* * * * *

Article V

The tribunals shall have the power

* * * * *

(f) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunal or by the committee of presiding judges as provided in Article XIII.

(g) the presiding judges, and, when established, the supervisory committee of presiding judges provided in Article XIII shall assign the cases brought by the Chief of Counsel for War Crimes to the various Military Tribunals for trial.*

* * * * *

Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

*Subdivision (g) of Article V was appended by Article I of Ordinance No. 11, dated 17 February 1947 (sec. II D).

C. Organization Meeting of the Committee of Presiding Judges—Delegation of Authority to the "Executive Presiding Judge" to Act, Subject to Review, on Behalf of the Tribunals and the Presiding Judges Thereof "in All Executive, Ministerial and Administrative Matters"

**MINUTES OF EXECUTIVE MEETING OF THE PRESIDING JUDGES OF TRIBUNALS I, II AND III
PALACE OF JUSTICE, NUERNBERG, GERMANY
17 FEBRUARY 1947 ¹**

Present: Judges Walter B. Beals, Robert M. Toms, and Carrington T. Marshall.

Three Tribunals having been organized and being in session, under the provisions of Article XIII of Ordinance No. 7 the three Presiding Judges above-named met for the purpose of electing a chairman of the Committee of Presiding Judges.

On motion of Judge Beals, supported by Judge Marshall, Judge Robert M. Toms was designated as chairman of the Committee of Presiding Judges.²

It was further moved, supported and passed that, for the purpose of brevity and convenience, said office may be officially designated as "Executive Presiding Judge"; and further that said Executive Presiding Judge be authorized to act on behalf of the Tribunals and the several presiding judges thereof in all executive, ministerial and administrative matters, subject, however, to review, if requested, by the Committee of Presiding Judges of said Tribunals.

[Signed] WALTER B. BEALS
Presiding Judge, Tribunal I
[Signed] ROBERT M. TOMS
Presiding Judge, Tribunal II
[Signed] CARRINGTON T. MARSHALL
Presiding Judge, Tribunal III

¹ Official Record Tribunal Records, volume 5, page 130.

² Judge Curtis G. Shake, Presiding Judge of Tribunal VI (Farben case), succeeded Judge Toms as chairman of the Committee of Presiding Judges, on 12 November 1947. Judge William C. Christianson, Presiding Judge of Tribunal IV (Ministries case), succeeded Judge Shake as chairman of the Committee of Presiding Judges on 27 July 1948 (see Official Record, Tribunal Records, vol. 5, pp. 131 and 133).

D. Minutes of Two Conferences of the Committee of Presiding Judges, 20 November 1947 and 11 August 1948

I. CONFERENCE OF 20 NOVEMBER 1947*

OFFICE OF MILITARY GOVERNMENT (U.S.)
SECRETARIAT FOR MILITARY TRIBUNALS

No. 1

Palace of Justice
Nuernberg

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES

20 November 1947

1635 [hours]

Judge Curtis G. Shake, Executive Presiding

MEMBERS OF THE COMMITTEE PRESENT:

Judge Michael A. Musmanno, Tribunal II

Judge Frank N. Richman, Tribunal IV (sitting for Judge Sears)

Judge Charles F. Wennerstrum, Tribunal V

Colonel John E. Ray, Secretariat for Military Tribunals

MEMBERS OF THE COMMITTEE ABSENT:

Judge James T. Brand, Tribunal III

Judge Lee B. Wyatt, Tribunal I

Judge Hu C. Anderson, Tribunal IIIA

1. *Regular meetings of the Committee of Presiding Judges:*

It was agreed that meetings of the Presiding Judges will, under normal circumstances, be held on the first and third Tuesday of each month in the reception room of Court I at 1635 [hours]. The Secretary General will publish the necessary notices.

2. *Christmas Holidays:*

Upon the suggestion of General Taylor it was agreed that all courts will recess during the Christmas holidays. The Christmas holidays will begin the 24th of December 1947 and will end the 4th of January 1948, both dates inclusive.

3. *Saturday Sessions and Overtime:*

Dr. Russell discussed the great amount of overtime involved incident to the holding of Saturday court sessions. He advised the Committee that from now on until next June the staffs will have to be gradually reduced because of budget allowances.

It was agreed that all tribunals will refrain from holding Saturday sessions except in cases of an emergency which justifies the additional expense.

*Official Record, Tribunal Records, volume 5, pages 134 and 135.

4. *Publicity:*

Mr. Dean, head of the Public Information Service, stated that his office was anxious to publish all publicity desired by the various tribunals. He requested that 25 mimeographed copies of the judgment be supplied his office prior to the announcement of judgment and sentences by the Tribunal with the provision that the material therein be not released prior to its being read in court.

He explained the shortage of personnel and photographic equipment which prohibited the issuance by his office of souvenir photographs to any individual; however, he has arranged for the procurement of souvenir photographs through the local post exchange.

5. *Policies and Administrative Procedures in the Office of the Secretary General:*

[This item from the minutes is reproduced in full in section VIII D.]

6. The Committee engaged in a general discussion.
The Meeting Adjourned at 1740 [hours].

[Signed] JOHN E. RAY
Colonel, F.A.
Secretary General

Betty M. Low
Recorder

2. CONFERENCE OF 11 AUGUST 1948*

OFFICE OF MILITARY GOVERNMENT (U.S.)
SECRETARIAT FOR MILITARY TRIBUNALS

Office of Secretary General

No. 18

Palace of Justice
Nuernberg

CONFERENCE OF COMMITTEE OF PRESIDING JUDGES
11 August 1948 1220 [hours]

William C. Christianson, Executive Presiding Judge

MEMBERS OF THE COMMITTEE PRESENT:

Judge John C. Young, Tribunal V
Judge Robert M. Toms, Tribunal II

OTHERS PRESENT:

Howard H. Russell, Secretary General

The Committee of Presiding Judges convened at 1220 hours upon the call of Executive Presiding Judge William C. Christianson for the purpose of considering the application for a plenary

*Ibid., pages 163 and 164.

session made by Dr. Kranzbuehler in behalf of the following defendants:

Krupp v. Bohlen und Halbach, Alfried
von Buelow, Friedrich
Eberhardt, Karl
Houdremont, Eduard
Ihn, Max
Janssen, Friedrich
Korschan, Heinrich
Kupke, Hans
Lehmann, Heinrich
Loeser, Ewald
Mueller, Erich

The basis of which petition is that there is a conflict between the rulings contained in the judgment handed down by Military Tribunal III on 31 July 1948 in the case of United States of America *vs.* Alfried Krupp, *et al.*, and the judgment in Military Tribunal VI, United States of America *vs.* I. G. Farben, handed down on 30 July 1948.

Consideration having been given to various contentions and arguments made in the petition, the Committee unanimously decided that no conflict between the said judgments in fact exists, and it was accordingly ordered that the petition for a plenary session of all the Military Tribunals should be dismissed, and the presiding judge was authorized to direct such order of dismissal.* Meeting Adjourned at 1300 [hours].

[Signed] HOWARD H. RUSSELL
Secretary General
Military Tribunals

*The order is reproduced in section XXIV D 4.

E. Order of the Committee of Presiding Judges, 5
March 1947, Assigning the Pohl Case to Tribunal
II for Trial

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
HELD 5 MARCH 1947, IN CHAMBERS

United States of America
vs.
Oswald Pohl, *et al.*,
Defendants } *CASE 4*

*ORDER*¹

The Supervisory Committee of Presiding Judges of the United States Military Tribunals, provided for by Article XIII of Ordinance No. 7, and acting under the provisions of Article V (*g*) as amended 17 February 1947, hereby orders that Case 4, now pending before said Tribunals to wit, The United States of America *vs.* Oswald Pohl, *et al.*, be and it hereby is assigned to Tribunal II for trial.²

[Signed] ROBERT M. TOMS
Executive Presiding Judge

APPROVED:

[Signed] WALTER B. BEALS
Presiding Judge, Tribunal I
[Signed] CARRINGTON T. MARSHALL
Presiding Judge, Tribunal III

¹ U.S. *vs.* Oswald Pohl, *et al.*, Case 4, Official Record, volume 23, page 202.

² At this time Military Tribunal II was still engaged in the trial of the Milch case. Tribunal II, during the trial of the Milch and Pohl cases, was composed of the same three members and alternate member.

F. Three Orders of the Executive Presiding Judge on Defense Motions or Petitions after the Issuance of Indictment but before a Tribunal Was Assigned to the Trial of the Case

I. ORDER OF 18 FEBRUARY 1947, APPROVING APPLICATION FOR A WITNESS ON BEHALF OF HOHBERG, DEFENDANT IN THE POHL CASE

**Military Tribunals
Nuernberg, Germany**

**United States of America
against
Pohl and 17 others (Case 4)**

Defendant's Application for Summons of Witness¹

TO: The Secretary General, Military Tribunals:

I, Dr. Heim attorney for Hohberg ²
(Name of defendant)

hereby request that following person be summoned by the Tribunal to give evidence in the defendant's behalf:

Name of person desired as witness:

Frau Rosl Fauler, nee Hausboeck

Occupation and last known location:

Secretary; lives in a small village in the
vicinity of Balingen.

Other information that may aid in locating the person named:

Address is known in British Headquarters, as the
British have already located her.

The person above-named has knowledge of the following facts:

Fauler was for years the secretary of Hohberg
and then of Pohl.

She knows of all occurrences in the SS-WVHA.

These facts are relevant to the defense for the following reasons:

¹ U.S. vs. Oswald Pohl, et al., Case 4, Official Record, volume 28, page 62.

² Dr. Heim was approved defense counsel for Hohberg at a "joint executive session of Military Tribunals I and II" on 24 January 1947. The indictment in the Pohl case was served on 18 January 1947, but the case was not assigned to Tribunal II for trial until 5 March 1947 (see sec. E).

For clarification of the position of Dr. Hohberg
in relation to the WVHA.¹

11 February 1947

(Date)

[Signed] DR. W. HEIM

Signature of Defendant's Counsel

Decision of Tribunal

[Handwritten] Application granted.

18 February 1947

[Signed] ROBERT M. TOMS

Executive Presiding Judge

**2. ORDER OF 18 FEBRUARY 1947, APPROVING APPLI-
CATION FOR DOCUMENTS ON BEHALF OF HOHBERG,
DEFENDANT IN THE POHL CASE**

**Military Tribunals
Nuernberg, Germany**

United States of America
against
Pohl and 17 others (Case 4)

Defendant's Application for Document²

TO: The Secretary General, Military Tribunals:

I, Dr. Heim attorney for Hohberg

(Name of defendant)

hereby request that the Tribunal require the production of the
following document to be used for the defense:

Identification of document:

Economic Trustee Yearbooks, 1939, 1940, 1941

(Wirtschaftstreuhaenderjahrbuch 1939,1940, 1941)

Last known location of document and information that may
aid in its location:

Unknown. Editor: Otto Moenkmeier

The document requested herein will be used to prove the
following facts:

The documents contain the legal basis for the
auditing (Pflichtpruefung) of public enterprises.

¹ The witness here applied for—Frau Fauler—later executed two affidavits which were introduced on behalf of the defense, the first as Document Pohl 40, Pohl Defense Exhibit 32, and the second as Document Hohberg 24, Hohberg Defense Exhibit 24. Frau Fauler did not testify.

² U.S. vs. Oswald Pohl, et al., Case 4, Official Record, volume 23, page 83.

These facts are relevant to the defense for the following reasons:

Because defendant Dr. Hohberg as a free auditor (Wirtschaftspruefer) checked the concern which was under Pohl's direction and therefore is accused as an "Executive organ."

10 February 1947

(Date)

[Signed] DR. HEIM

Signature of Defendant's Counsel

Decision of Tribunal

Application granted

18 February 1947 [Signed] Robert M. Toms

Executive Presiding Judge

3. ORDER OF 10 APRIL 1947, APPROVING DR. DIX AS DEFENSE COUNSEL FOR FLICK, DEFENDANT IN THE FLICK CASE¹

**MILITARY TRIBUNALS
UNITED STATES OF AMERICA
against
FRIEDRICH FLICK, and others**

**Nuernberg, Germany
Case No. 5
Military Tribunal IV**

ORDER APPOINTING DEFENSE COUNSEL

Friedrich Flick, one of the above-named defendants, having requested this Tribunal that Dr. Rudolf Dix whose address is Berlin-Gruenewald, Berkaerstr. 30, be entered and approved on the records of Military Tribunals as his lawful attorney.

IT IS ORDERED that the said Dr. Rudolf Dix be, and he hereby is, approved as attorney for said Friedrich Flick to represent him with respect to the charges pending against him under the indictment filed herein.²

Dated: 10 April 1947

[Signed] ROBERT M. TOMS
Executive Presiding Judge

Form MT No. 1

¹ U.S. vs. Friedrich Flick, et al., Case 5, Official Record, volume 33, page 98.

² The first indictment filed in the Flick case was served on the defendants on 10 February 1947. This indictment was later withdrawn and a new indictment lodged and served on 18 March 1947. The Flick case was assigned to Tribunal IV for trial on 18 April 1947 by the Committee of Presiding Judges.

XXIV. JOINT SESSIONS OF THE MILITARY TRIBUNALS

A. Introduction

Ordinance No. 7, as originally enacted on 18 October 1946, contained no provision concerning any possible conflicting intermediate or final rulings which might be made by the different tribunals. However, two months before the first judgment was rendered (judgment of Tribunal II in the Milch case, 16 April 1947), Ordinance No. 7 was amended by Article II of Ordinance No. 11 to provide that a joint session of the Military Tribunals might be called "to hear argument upon and to review" interlocutory rulings or final rulings in the judgments where these rulings were conflicting or inconsistent "on a fundamental or important legal question either substantive or procedural." The decisions of joint session were to be "binding upon all the Military Tribunals" unless altered in a further joint session, and "In the case of the review of final rulings by joint session, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision." Since no joint session was called to review alleged inconsistent final rulings, none of the judgments were remanded for further action.

A joint session could be called "by any of the presiding judges" of the Military Tribunals "or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected" (see Art. V B (a) and (b) Ordinance No. 7 was amended by Article II of Ordinance No. 11).

The first and only joint session of tribunals at which arguments were heard was called by the Committee of Presiding Judges on its own motion on 7 July 1947 (subsec. C 1). In the Medical, Justice, and Pohl cases the defense had filed motions to strike the charges in each of those cases which alleged participation in a conspiracy to commit war crimes and crimes against humanity. The joint session was called because the Committee of Presiding Judges considered it "desirable that there be a uniform determination on the issue presented by such motions" and hence ordered arguments before a joint session of the five tribunals then established in Nuernberg. As Judge Beals pointed out just before the arguments on the question were heard, this joint session was not called under Article V-B of Ordinance No. 7, there being at that time no inconsistent rulings by any tribunals. The joint session was called, on the contrary, to prevent conflicting rulings. Since

these arguments concern a significant question and constitute the only arguments of counsel before a joint session, they are reproduced in full herein (subsec. C 2). The Tribunals sitting in joint session made no decision concerning the question argued, but within a few days after the joint session each of the three Tribunals with whom motions to strike had been filed entered separate orders, similar in substance, each of which declared that "neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of such conspiracy considered as a separate substantive offense." (The orders of Tribunals III in the Justice case and Tribunal II in the Pohl case are reproduced in section IX I.) Judge Blair dissented from the ruling of Tribunal III in the Justice case on conspiracy in the separate opinion which he filed when the final judgment in the Justice case was rendered (vol. III, this series, pp. 1195-1199).

The prosecution filed no motions requesting a joint session of the Tribunals. Numerous motions for joint sessions were filed by counsel for various defendants, all of which were denied by orders of the Committee of Presiding Judges, by orders of the judges of two Tribunals sitting in executive session, or by orders of individual Tribunals. These orders are all reproduced below, grouped within two sections (subsecs. D and E). The first group of orders (subsec. D) deals with those motions for a joint session in which the principal defense claim was the alleged existence of inconsistent rulings between the judgments in various cases. The second group (subsec. E) contains those orders directed to motions in which the defense principally sought consideration of matters other than alleged inconsistent rulings, or sought special action in the nature of an advisory opinion, or determinations of various kinds, such as Control Council Law No. 10 being declared invalid.

The first defense motion requesting a joint session was filed on 13 December 1947, and alleged inconsistent rulings between the Medical and Justice judgments. It was filed by counsel on behalf of Schlegelberger who had been convicted in the Justice case. This motion was not answered by the prosecution. The motion was denied on 12 January 1948 by the Committee of Presiding Judges, the order being signed by the presiding judges of the seven Tribunals then in session at Nuernberg. The defense motion and the order of the Committee of Presiding Judges are reproduced in section D 1. The order of the Committee of Presiding Judges stated, among other things, that "The right to demand a plenary session of the Tribunals is not an absolute one

but is addressed to the sound judicial discretion of the Supervisory Committee of Presiding Judges.”

Between 12 January 1948 and 11 August 1948, the Committee of Presiding Judges denied nine defense motions requesting joint sessions of the Tribunals (see subsec. D 1, b, 2, 3 c, and 4, and subsec. E 1, 2, 3, 4, and 5). The last meeting of the Committee of Presiding Judges was held on 11 August 1948, the day on which Tribunal II filed its supplemental judgment in the Pohl case (sec. XXVI) and the last day on which there were as many as three tribunals functioning in Nuernberg. Thereafter there no longer could be a Committee of Presiding Judges, since Article XIII of Ordinance No. 7 provided that “when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.”

After 11 August 1948, defense motions for joint sessions of the Tribunals were ruled upon either by joint sessions of two tribunals (see subsec. D 5 b, 6 b, and 7, also E 6 and 7) or by individual tribunals (see subsecs. D 8 a, c, and 9). From 12 August 1948 until 29 October 1948 there were only two tribunals functioning in Nuernberg, Tribunal IV in the Ministries case and Tribunal V in the High Command case. After Tribunal V adjourned *sine die* on 29 October 1948, only Tribunal IV remained in session.

After Tribunal V pronounced sentences in the High Command case, the defense in that case moved immediately for a joint session. After recessing until the next day, the Tribunal denied the defense motion and adjourned *sine die* (subsec. D 8 a). Counsel on behalf of defendants convicted in the High Command case thereafter filed a further motion for a joint session, notwithstanding the fact that only one tribunal was in session (subsec. D 8 b). Tribunal IV, the sole remaining tribunal, in denying this motion, stated that “The Tribunal is of the opinion that the provisions of said Ordinance No. 11 do not contemplate the convening of Military Tribunals at Nuernberg in joint session, unless there are at least two tribunals for such ‘joint’ session. Obviously, there cannot be a ‘joint’ session if there is only one tribunal. Moreover, it is reasonable to assume that it was never intended that a single tribunal should sit in a reviewing capacity, with respect to the actions of other tribunals of equal jurisdiction and of the same class.” However, the Tribunal stated further “that, in the event that there here existed no question as to the propriety of holding a so-called plenary session by a single tribunal, our examination of the petition on the merits leads us to the conclusion that there exists no such inconsistency or conflict with respect to Case 12 [the High Command case] and the judgments in prior cases as would justify the holding of such plenary session” (subsec. D 8 c).

When Tribunal IV, the last tribunal functioning in Nuernberg, was about to pronounce sentence, it took special notice of the fact that a joint session could not be called:

"The Tribunal takes note of the fact that there is at present only one military tribunal constituted in the American Zone of Occupation pursuant to Control Council Law No. 10 and Military Government Ordinance No. 7. Accordingly, the provisions of Article V-B of Ordinance No. 7, as amended by Ordinance No. 11, will not be applicable when this Tribunal renders judgment, inasmuch as Article V-B applies only in circumstances where more than one military tribunal is in existence. No motion for a joint session of tribunals will be accepted or considered."

This was stated in the Tribunal's order of 6 April 1949 (sec. XXVII B), in which the Tribunal announced that any defendant "whose interests are affected" could file a motion or memorandum to draw to the attention of the Court any errors that may be found in its judgment. After the Tribunal announced its judgment, defense counsel filed various motions alleging errors in the judgment (sec. XXVII). Counsel for 18 of the convicted defendants also filed a motion for a joint session (reproduced in part in subsec. D 9). The Deputy Military Governor directed that the motion for a joint session be referred to Tribunal IV for consideration in connection with the other defense motions. In ruling on the motions alleging error in the judgment, Tribunal IV refused to consider the motion for a joint session as such, but in various of its orders it stated expressly that it did consider the arguments in the joint motion directed against the convictions made by the Tribunal in its judgment. Each of the orders entered by the Tribunal after judgment is reproduced in section XVIII, volume XIV, this series.

B. Provisions of Article V-B, Ordinance No. 7, as Amended by Article II of Ordinance No. 11

Article II

Ordinance No. 7 is amended by adding thereto a new article following Article V to be designated Article V-B, reading as follows:

"(a) A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by

any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals.

“(b) A joint session of the Military Tribunals may be called in the same manner as provided in subsection (a) of this Article to hear argument upon and to review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural. Any motion with respect to such final ruling shall be filed within ten (10) days following the issuance of decision or judgment.

“(c) Decisions by joint sessions of the Military Tribunals, unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.

“(d) The presence of a majority of the members of each Military Tribunal then constituted is required to constitute a quorum.

“(e) The members the Military Tribunals shall, before any joint session begins, agree among themselves upon the selection from their number of a member to preside over the joint session.

“(f) Decisions shall be by majority vote of the members. If the votes of the members are equally divided, the vote of the member presiding over the session shall be decisive.”

C. Joint Session of Five Tribunals on the Question of Conspiracy to Commit War Crimes and Crimes Against Humanity

I. ORDER OF THE COMMITTEE OF PRESIDING JUDGES, 7 JULY 1947, CONVENING A JOINT SESSION OF TRIBUNALS I, II, III, IV, AND V

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
HELD 7 JULY 1947, IN CHAMBERS

ORDER*

Several verbal motions having been made by counsel for defendants in two or more of the cases now pending before these Tribunals to quash and strike the counts in the several indictments

* Official Record, Tribunal Records, volume 5, Joint Session, 9 July 1947, page 1.

alleging the formation of and participation in a conspiracy to commit war crimes and crimes against humanity, upon the ground that such offenses are not created by Control Council Law No. 10 or any other law or authority defining and controlling the jurisdiction of these Tribunals, and it being desirable that there be a uniform determination on the issue presented by such motions,

IT IS ORDERED that Military Tribunals I, II, III, IV, and V convene in joint session on Wednesday, 9 July 1947, at 9:30 a.m., in courtroom No. 1, there to hear arguments on the above motions; and

IT IS FURTHER ORDERED that two counsel be selected from the defense attorneys in all cases to argue said motions on behalf of the defendants; and

IT IS FURTHER ORDERED that the Office of Chief of Counsel, on behalf of the United States of America, and counsel for the defendants be allowed one hour each for the argument of said motions, counsel for the defense to open and close the argument.

[Signed] ROBERT M. TOMS¹
Executive Presiding Judge

APPROVED:

[Signed] WALTER B. BEALS
Presiding Judge, Tribunal I
[Signed] JAMES T. BRAND
Presiding Judge, Tribunal III
[Signed] CHARLES B. SEARS
Presiding Judge, Tribunal IV
[Signed] CHARLES F. WENNERSTRUM
Presiding Judge, Tribunal V

2. TRANSCRIPT OF THE ARGUMENT BEFORE THE JOINT SESSION, 9 JULY 1947

Military Tribunals I, II, III, IV, and V
Joint Session²

Official transcript of a Joint Session of Military Tribunals I, II, III, IV, and V, Sitting *En Banc* at Nuernberg, Germany on 9 July 1947, at 0930, Judge Beals, presiding

THE MARSHAL: The Judges of Military Tribunals I, II, III, IV, and V.

Military Tribunals I, II, III, IV, and V sitting *en banc* are now in session.

¹ Presiding Judge, Tribunal II, and chairman of the Committee of Presiding Judges.

² Official Record, Tribunal Records, volume 5, Joint Session of 9 July 1947, pages 2-49.

God save the United States of America and these Honorable Tribunals.

There will be order in the Court.

JUDGE BEALS, PRESIDING: This joint session of Military Tribunals I, II, III, IV, and V sitting *en banc* has been called to hear arguments on the part of the defendants now on trial before Tribunals I [Medical case, Case 1], II [Pohl case, Case 4], and III [Justice case, Case 3] in support of motions made by counsel of such defendants directed against the charges in the indictments proper, under which the defendants respectively are on trial, which charge the defendants with conspiracy to commit war crimes and crimes against humanity as separate substantive crimes, and also to hear arguments of the prosecution on the same subject matter.¹

This *en banc* session of the Tribunals above-named was not called primarily under Military Government Ordinance No. 7 as amended by Military Government Ordinance No. 11, the amendment bearing the date 17 February 1947, there being at this time no inconsistent rulings by any tribunals.

This session has been called to afford counsel for the prosecution and the defendants now on trial before the Tribunals above-referred to an opportunity to present to the judges of the Tribunals above-enumerated their arguments on the question above-referred to, and to afford the judges of all the tribunals an opportunity to hear the arguments of counsel on the question above-stated.

Counsel for each side is allowed 1 hour to present his arguments. The defense will open the argument and the counsel chosen to represent the defendants may divide his time, that 1 hour, between the opening and closing as he sees fit.

The Tribunals will now hear counsel for the defense.

DR. CARL HAENSEL (on behalf of the defense):² May I presently apologize. I am afraid during the night I contracted a

¹Count one in each of the three cases in question was called "The Common Design or Conspiracy" (see pp. 10 and 11, vol. I, for count one in the Medical case; pp. 201-204, vol. V, for count one in the Pohl case; and pp. 17-19, vol. III, for count one in the Justice case). Paragraph one of count one in each indictment alleged that "all of the defendants herein, acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, Article II." Further paragraphs of count one in each indictment set forth various specifications concerning the alleged conspiracy and the acts committed in connection therewith. The defense in each of these cases made motions for the dismissal of the conspiracy charge on the ground that Control Council Law No. 10 did not define conspiracy to commit war crimes and crimes against humanity as a crime.

²Dr. Haensel had a long and distinguished record as a defense counsel in Nuernberg. At this time he was counsel for defendant Joel in the Justice case and for defendant Georg Loerner in the Pohl case. Earlier he had been an associate defense counsel in the IMT case. Later he was counsel for defendant Greifelt in the RuSHA case and for defendant Steengracht von Moyland in the Ministries case.

swelling of my cheek. It doesn't impede my speech. It just looks ugly. However, there is an old writing in the Bible which says, "On the part of the body where you have sinned worst you are being punished." And there you are.

In Cases 1, 3—

JUDGE BEALS, PRESIDING: Counsel will you please, for the record, state your name as representing defense counsel in this argument.

DR. HAENSEL: Attorney Carl Haensel, speaking on behalf of the defense counsel.

A. THE ASPECTS OF THE TRIAL

In Cases 1, 3, and 4, all the defendants are charged with jointly planning the commission of war crimes and crimes against humanity.

In its opening statement in Case 3¹ on 5 March 1947, page 3 of the opening statement, the prosecution brought out that part of its evidence refers to events which had occurred before the outbreak of the war in 1939. It thus wishes to show, it said, that the defendants were conspirators in a plot to commit crimes which were carried out after the outbreak of the war. There it reads and I quote: "But none of these acts is being charged as an independent offense in this particular indictment."

A motion was made to declare the indictment "insufficient for legal reasons," insofar as it charges the defendants with the joint plan, with the conspiracy, for commission of war crimes and crimes against humanity, alone and as special points of the indictment, in addition to other charges based on Law No. 10 and international as well as German criminal law.

A plenary session of Military Tribunals I, II, III, IV, and V, was ordered, before the decision could be reached about the proposal in Case 3.

B. VIEWPOINT OF THE DEFENSE

I. *The Law to be Applied*

1. Control Council Law No. 10.

In Case 3, the prosecution declared (page 84 of the German records): "Law No. 10, Article II, paragraph 2 is part of the substantive law under which this indictment is brought."²

According to its preamble, Law No. 10 was decreed, "In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal

¹ U.S. vs. Josef Altstoetter, et al., case 3, volume III, this series, pages 31-107.

² Ibid., page 65.

basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.”¹

(a) The Origin of Control Council Law No. 10.

The Moscow Declaration of 30 October 1943 mentioned in the preamble of the Law, states this passage touching upon our question:

“Those German officers, men and members of the Nazi Party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. * * * Without prejudice of the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies.”²

At the Yalta Conference which took place on 11 February 1945, Messrs. Roosevelt, Churchill, and Stalin declared their “inflexible purpose to * * * bring all war criminals to just and swift punishment***.”

This resolution was confirmed by Stalin, Truman, and Attlee at the Potsdam Conference of 2 August 1945. On 7 June 1945, Judge Robert H. Jackson, appointed Chief of Counsel for the Prosecution of War Crimes, submitted to the Allied Governments a plan for the practical execution of the Yalta resolution, on the basis of which the London Declaration of 8 August 1945 was signed. The London Agreement with the “Charter of the International Military Tribunal” attached to it is the basic law, which, according to the preamble of Control Council Law No. 10 is to be brought into effect together with that law.

The London Agreement of 8 August 1945 declares that the Four Powers who had signed it, act “in the interest of all the United Nations.” It contains the invitation for joining the pact which was followed by 19 nations. It was, therefore, the intention of the four great victorious nations, to act for the community of the nations in its entirety, i.e., to take a “Universal International Law” as a basis.

One of the men who, before the announcement of the London Agreement, had negotiated there and had an influence on its formulation, is the Russian Professor A. N. Trainin, member of the Moscow Institute of Legal Science. In 1944, he wrote a book which was published under the title, “Hitlerite Responsibility

¹ Ibid., pages 60 and 61.

² United Nations Information Office, War and Peace Aims, January 30, 1943, page 116.

Under Criminal Law," at the Legal Publishing House NKU, U.S.S.R., Moscow, 1944. In his statements about the IMT and international law, in volume 41 of the American Journal of International Law, Quincy Wright, on page 41 ff., describes the influence which the Russian legal scholar, Trainin, has had on the terminology of the Charter. The wording of Article II, figure 2 in which a high political, civil or military position or one in financial, industrial, or economic life is mentioned as a particular form of participation, obviously goes back to Trainin, because in his book, too, he maintains the opinion that not only the members of the armed forces and of the government, but also the capitalists and industrialists are burdened with a special responsibility. Trainin, however, emphasizes expressly, "The main problem in the field of punishability is the problem of guilt. There is no criminal responsibility without guilt."

This sentence conforms with the reason for the IMT judgment in Article 9: "It is one of the most important principles that guilt, under penal law, must be personal guilt and that mass punishment is to be avoided." *

I do not want to examine in detail to what extent Trainin's thoughts are crystallized in Law 10. For the subject at hand it is merely important that in Trainin's works the Anglo-Saxon conspiracy is not to be found as an independent crime and that he did not incorporate it into the text of the Charter.

(b) The Text of the Conspiracy Provisions of Law No. 10.

War crimes, in the narrower sense of the word, and crimes against humanity, which alone are the subject of our discussion, since no charge was made of crimes against peace in the indictment (planning, preparation, initiation or waging of war of aggression), are defined in Article II under paragraph 1 (b) and (c). Even a superficial comparison of this regulation with Article 6 of the Charter shows that the text of Law No. 10 is based on that of the statute, but that its specifications were enlarged.

For our subject, whether conspiracy as common planning for the accomplishment of war crimes and crimes against humanity is punishable, the above-mentioned differences of the texts are of no importance, for which reason no comparison is necessary. Such a comparison of texts is tiring if brought forth in such a presentation; one rather makes them oneself, with the help of the

*The statement here in quotation marks is a free translation of Dr. Haensel, taken from a statement in the introductory section of the IMT judgment on accused organizations: "This discretion [to declare an organization criminal] is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided." (Trial of the Major War criminals, *op. cit.*, vol. I, p. 256.)

text in one's hands. It is, however, important for our problem that neither the Charter nor Law No. 10 in the paragraph 1 (b) and (c) mentioned, speak of common planning as a punishable separate crime, whereas both laws have in common that in their respective subdivision (a), dealing with the crimes against peace, participation in a common plan or conspiracy for the accomplishment of one of the listed crimes against the peace, is expressly declared punishable.

With regard to both laws, we can state that by especially emphasizing common planning or common conspiracy the wording of subdivision (a) on the one page, is clearly set off in the text from subdivisions (b) and (c).

Correspondingly, the IMT took the viewpoint not to follow the indictment, which included war crimes and crimes against humanity in the charge of conspiracy, but wanted to consider as conspiracy only the common plan for the preparation of wars of aggression.* In this, the IMT had to consider a regulation not included in Law 10 and which followed the above-mentioned subdivision (c) of the Charter. According to this regulation leaders, organizers, etc., who have taken part in the conception or accomplishment of common planning, should be responsible for all actions committed by any persons in the process of carrying out such a plan. The IMT is of the opinion that this regulation refers only to subdivision (a), punishable conspiracy for wars of aggression, and that it defines this conspiracy in detail. In the view of the IMT these words do not add any new special crime of conspiracy referring to war crimes or crimes against humanity to the crimes already listed.

(c) Forms of Complicity in Law 10.

Whereas in Article II the criminal facts are defined in paragraph 1, the forms of complicity, which are possible in these crimes, are stated in paragraph 2; in paragraph 3 possible punishments are fixed.

In paragraph 2, the following classes of persons are distinguished:

- (a) the principal culprit,
- (b) the accomplice, instigator, or abettor,
- (c) he who "took a consenting part," or
- (d) "was connected with plans or enterprises involving its commission."

Subdivisions (e) and (f) are of no interest in this connection.

Now the attempt has been made to use the above-quoted wording of subdivision (d) to reinterpret in a roundabout way con-

*Trial of the Major War Criminals, *op. cit.*, volume I, page 226.

spiracy as a special criminal action, into the facts of crimes, as defined in paragraph 1; but conspiracy had, quite obviously, deliberately been omitted there in subdivisions (b) and (c).

Against this the following reasons must be stated:

(a) The system of Law No. 10 makes it clear beyond doubt that the facts of crimes are exhaustively defined in paragraph 1, whereas in paragraph 2 only the forms of complicity in these crimes are defined.

(b) In Article II, paragraph 1 (a) the English text defines participation in a common plan or conspiracy with the words: "participation in a common plan or conspiracy." This, then, is the legal definition of conspiracy in the legislative work of the Charter and also of Law No. 10. But in the same paragraph 1 (a) we have a few lines before: "planning, preparation, initiation or waging a war." In paragraph 2 (d) no mention is made of "participation in a common plan," but a completely different terminology is used, when it is said: "was connected with plans or enterprises." Here, then, only planning as such is mentioned, and as a form of participation in the preceding subdivisions (a) to (c). Furthermore, it might appear to be of importance that the French translation of Article 6 of the Charter, has rendered "conspiracy" in paragraph 4 by "complot pour commettre l'un quelconque des crimes ***, " whereas Law No. 10, Article II, 2 (d) has been rendered by a "participe à des plans ou des entreprises."

(c) Notwithstanding, if the interpretation of the IMT must be prejudicial to the interpretation of Article II of Law No. 10—which in its wording, as far as it is essential for our question, closely follows the Charter—this interpretation may in any case serve as a model.

2. The Existing Law in Addition to Law No. 10, especially Ordinance No. 7.

In the Anglo-Saxon sphere of law, common law exists in addition to the statutory law. The question arises, and has not yet been investigated, whether Control Council Law No. 10, together with the Charter and the statements of the Allied statesmen, does *not* render conspiracy punishable regarding war crimes and crimes against humanity, but whether an American military tribunal might recognize this fact as a basis for a demand for punishment by virtue of American common law.

American common law is to be administered without hesitation also in Germany by American Military Tribunals as far as the defendants are members of the American occupation force. But for the defendants in these trials American common law does not apply.

(a) After the surrender of the German armed forces in May 1945, the four victor nations, to be quite clear: the four big victor nations, not only one, took over "the supreme authority with respect to Germany." (Department of State, *The Axis in Defeat*, page 63.)

According to explanations in the American Journal of International Law, volume 41, page 56, this declaration is distinct from the concept annexation, as defined in international law, in two points: First of all, the fact that several states took over authority in Germany, and furthermore, by the fact that an annexation of Germany was expressly rejected.

The Nuernberg judgment says in its chapter "The Law of the Charter," in the second paragraph:

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law." *

It is not possible simply to argue: The Nuernberg Military Tribunals are American Military Tribunals; war is still on; the American Army is in occupied territory; therefore, the American Military Tribunal has to administer American law, including common law. For us, however, in this place, special circumstances prevail because the tribunals, which administer the law, are special tribunals, the character of which I shall later discuss in detail under "C."

As I intend to introduce no more of the extraordinarily difficult questions of law, which will still have to be decided in the trials, I do not want to express an opinion whether we are still at war, or whether we are already living in a sort of peace, or in a warlike peace or a pacified war of a special kind. Thé Hamburg Professor of International Law, Dr. Rudolf Laun, has characterized the situation with the formula: "In Germany at the moment we have the law of war without warfare" (*Die Haager Landkriegsordnung*, Hamburg 1946, p. 59).

In the opinion of the American, Hans Kelsen (quoted in American Journal of International Law, volume 41, p. 50), the Supreme

*Trial of the Major War Criminals, *op. cit.*, volume I, page 218.

Authority in Germany was taken over by the victor nations, but "their exercise of powers * * * is permissible under international law, limited only by the rules of international law."

To make it easier to follow the further course of my arguments, I at once want to emphasize here that the only deduction I want to make from these quotations is that the former Occupying Powers are bound by the *rules of the Law of Nations* in the exercise of their power. I do not want to discuss here, what rules of international law these are. Nor do I want to go into the legal question for or against some of my colleagues, whether we still are in a state of war or whether there is no more war in Germany, which means, that there are no more belligerent powers, either, and that above all Germany is no more a belligerent power, or whether there is still war in the absence of a formal conclusion of peace. *To emphasize this expressly once more:* I do not enter into the question, whether a *debellatio* with all its consequences and with Germany's destruction as a subject of the Law of Nations has occurred, and what rights the Germans still possess at least in the form of "Coutumes de la guerre," which all human beings in the community of international law can never be deprived of.

The essential point for me is the fact that the occupation of Germany was carried out together by the four victorious powers, who according to the Berlin declaration* have confirmed again and again that Germany is to be neither annexed nor divided up but on the contrary to be maintained as an entity of which the political form is to be determined. Consequently, Germany is subject to the united occupation powers as represented in the Control Council, but not to the Russian, the English, the French, or the American law as such. The individual occupying power did not transfer the law of its own country attached to its banners into this country. It has rather become an occupied country for which all the four occupying powers together claim, within the bounds of international rules and regulations, the right of legislation in order to carry out the actual occupation. This right, however, must first be established by the occupation powers and must not—in case it is not completely established—be supplemented by the law of the land of one of the four occupation powers, neither by an amplifying interpretation of Law No. 10 nor by a one-sided change of this Control Council Law by order of one of the occupation powers, unless it be that the four victorious powers have jointly and explicitly delegated such a right to one in their group.

The preamble of Law No. 10 expressly states that a uniform legal basis must be created, which expresses clearly the intent of

*Anglo-Soviet-American Conference, Berlin 1945, Joint Report released 2 August 1945.

the law that each one of the four occupying powers, on their part, should not amend the common legal principles.

For the sake of completion I consider it my duty to discuss in this connection Ordinance No. 7, which I will discuss once again in subsection C. In the official gazette of the American Military Government this decree, published 18 October 1946, has been officially designated for the American zone as such, but not in the other occupation zones. According to its title the decree deals only with the "Organization Powers of certain Military Tribunals." It does not deal with material criminal law nor with modern criminal law. It does not deal with a fundamental change of Law No. 10 issued by the Control Council within the limits of its authority. In this decree it is stated that these *special* military tribunals "shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, *including conspiracies to commit any such crimes.*"

The mentioning of conspiracy in this text can be interpreted by the professional jurist, who *knows* international law, only in such a way that the courts are to have the authority for the charges cited in Law No. 10 *including*—not in addition to—the conspiracy charges. This, naturally, is the case only insofar as Law No. 10 defines crimes and a punishable conspiracy which it does in Article II, paragraph 1 (*a*), where it deals with the conspiracy for the preparation of aggressive wars. It is impossible, however, to perceive in this decree—valid only for the American Occupation Zone—a fundamental alteration of Law No. 10 and a change of its definition of punishable crimes. This would indeed lead to the introduction into the American zone of a war crime concept which is completely different from that in the other zones. The international relations between the four victorious powers would thereby be changed by the unilateral action of one of the four powers. The legal redress of the victorious powers among each other as provided in Article IV of Law No. 10 would be affected. A defendant handed over to the American occupation power by another power for punishment according to this article would not be punished according to Law No. 10, but according to an amendment which alters this law in a most essential point. Indirectly, by way of a seemingly insignificant procedural regulation, the material criminal law itself would be rendered more stringent. This means that an inner-American legal institution—by violating the principle *nullum crimen sine lege* to be discussed in the next chapter—would be made into an institution binding under international law, which is legally unjustifiable, because this procedural regulation lacks recognition by international law.

II. *Nullum crimen sine lege*

Let me offer reasons for my proposition that the Nuernberg Military Courts cannot refer to American common law as a base for their claim for punishment on account of conspiracy with regard to war crimes and crimes against humanity, not even based on Ordinance No. 7, I want to base my contention on several other aspects.

We have to admit, and we can do so without hesitation, that international norms have not been laid down with the exactness demanded by the continental jurist of his codified laws. But one thing we can and must demand of international law as well: a clear separation between what is desired and what has been established as law.

It must be said once that legal feeling does not exist at all. There is only a legal consciousness, a sense of law, and this sense of law is subject to human mental processes and must be separated sharply from instinctive feeling. The feeling by which a judge may be moved may be anger, contempt, love for humanity, feeling of responsibility, or the voice of his conscience. But with regard to the basis of this feeling he must hear, see, and decide with a clear, critical mind. I have given reasons for these propositions in detail in my book about "The Essence of Feelings" (published 1946). "Only by way of rational deliberations does one arrive at a correct application of a complex of norms, established as law by the intellect" (page 152). There I have also quoted Pascal: "Three degrees of latitude knock over the whole jurisprudence." (Pensées, par. 319).

More than three degrees of latitude lie between the continent and America.

I can refer to one of the recognized texts about conspiracy, to Francis B. Sayre's essay in the Harvard Law Review, volume 35, where on page 427, he says about conspiracy: "It is utterly unknown to the Roman Law; it is not found in modern Continental codes; few continental lawyers ever heard of it. It is a fortunate circumstance that it is not encrusted so deep in our jurisprudence by past decisions of our courts that we are unable to slough it off altogether."

The principle of *nullum crimen sine lege* is called in general a principle of justice* in the first place, by the judgment of the IMT. If one wants to apply this principle to the Nuernberg proceedings and if one wants to give it a living sense, then it cannot possibly be enough to state that somewhere in this world something was

*Trial of the Major War Criminals, *op. cit.*, volume I, page 219.

pronounced punishable, and therefore later an act could be punished according to that in a totally different part of the world.

I wish to point out here that in this place I only intend to refer to substantive law, not to questions of legal procedure, not the question of the competency of the Military Tribunals, and especially not to the question whether they are also competent to judge acts committed before the events took place that led to the occupation. Even if one answers all these questions in the affirmative—and I must ask that it should not be concluded from this that I do—one has not admitted that a military tribunal might be competent to judge any foreign national who comes into their venue according to the substantive penal law valid in his own country.

I do not wish to treat this group of questions in greater detail because it will have to be dealt with by several of my colleagues in connection with their own special cases. I here only state that the victorious powers have, based upon their rights as occupying powers, created legislation in which they have excluded unmistakably and undisputably the possibility to apply any national law valid in the one or the other of the victorious countries, which would violate the principle *nullum crimen sine lege*, referred to earlier. This principle has solemnly been confirmed for Germany by the Military Government Law No. 1, Article IV, par. 7 [Enactments prior to July 1945]. According to this, an accusation can only be brought if the act has expressly been declared punishable by a law valid at the time when the act was committed.

The American common law was not valid here before the beginning of the American occupation of Germany. Consequently, even a purely American military tribunal could not apply it retrospectively.

I personally quite understand the sound legal idea that conspiracy should be a punishable offense.

I should like to ask the High Tribunal to consider the critical comments of Francis B. Sayre, Professor of Law at the Harvard Law School, about criminal conspiracy. I shall take the liberty to submit excerpts from his work in the Harvard Law Review, volume 35, together with other literature, which I could only now procure from abroad. He berates conspiracy as a doctrine so vague in its outlines and uncertain in its fundamental nature.

Maybe it will happen, and I certainly hope so, that we are going to learn a lot from America, and that we get a lot of good from there, but up to now "conspiracy" has not yet been imported. There are still international customs barriers against such an importation, even an international ban on imports.

M. Donnedieu de Vabres, Judge at the International Military Tribunal, has given a lecture about the Nuernberg trials in March

of this year [1947] before the *Association des Études Internationales* and the *Études Criminologiques*. In this lecture he said about conspiracy: "The wide conception of the 'complot' or conspiracy is peculiar to British Law." He adds: "The danger of such incriminations is that the door is opened to arbitrariness. The accusation of conspiracy is indeed a weapon preferred by tyrants. When Hitler wanted to strike at his political opponents, he accused them of having conspired against him."

One will have to admit in agreement with the highly esteemed master of law, Professor Donnedieu de Vabres, that in these sentences no acknowledgment of "conspiracy" as an institution of international law is contained, but that these words from such a prominent man deny the effective validity of such a legal principle in international law.

III. *Conspiracy in Continental Law*

The prosecution has repeatedly referred to the Hague Land War Convention. The Hague Land War Convention of 1907 has been published in the German Reich Law Gazette. It was signed, apart from others, by the United States, France, Great Britain, and also Germany. Not only scholars of international law, but also decisive courts of justice have recently frequently discussed the question whether the Hague Convention is to be regarded as the fundamental law for occupied Germany. The Superior Court of Zurich in its decision of 1 December 1945 found (p. 89 of the *Schweizerische Juristenzeitung* 1946) that the Hague Convention is still valid today for the relations between occupied Germany and Switzerland. It states in its essential parts:

"The science of international law essentially distinguishes between two stages of conquest: The warlike occupation (*Occupation de Guerre, Occupatio Bellica Transitoria*) and the annexation (Strupp, *Outline of Positive International Law*, 5th ed., 1932, pages 135 and 297; von Waldkirch, *International Law*, 1926, p. 354 and 116; Sauser - Hall, *L. Occupation de Guerre et les Droits Privés*, in the *Swiss Almanac for International Law*, 1944, p. 60. According to Sauser-Hall, the primary stage of 'invasion' is included which is, however, subject to no other rules than the occupation, see page 60, note 1.) It is clear that during the occupation the treaties concluded by the occupied state still remain in force, but that, on the other hand, as a result of annexation, conquest of territory, the international treaties of the annexed state become void because one of the contracting parties has ceased to exist. * * *

"(a) When investigating the question whether we have an annexation, the requisites of such an annexation must first be

clarified. First of all it is necessary that the territory to be annexed be completely occupied and that any resistance of the opponent or his ally be completely extinct (Sauser-Hall, *ibid.*, p. 61/62; von Waldkirch, *ibid.*, p. 116; Strupp, *ibid.*, p. 135) this prerequisite has been fulfilled in regard to Germany, at least since Japan's capitulation.

"This however does not constitute an annexation in itself but only provides the prerequisites for it. As a result of statements in literature of international law, it cannot be doubted that this must be coupled with the will for annexation, which generally must find expression in an outright declaration of annexation. * * *

"The occupying powers have not expressed the will, so far, to retain the occupied territory, to rule it permanently with the exception of some border provinces * * *. They exhibit no inclination to transform the body of Germany into English, French, American or Russian territory. Their administrative policy points in an entirely different direction.

"(b) If no annexation exists, then the present state of affairs can only be one of warlike occupation, even if actually the act of debellation has already taken place. Therefore only the question still existing is whether, the international treaties with Germany have become void, because, unlike a normal warlike occupation, Germany has lost her government and thus her character as a state as a subject of international law."

It is correct that the Doenitz government surrendered unconditionally and was removed and placed in imprisonment. The occupying powers do not intend, however, to deprive Germany of its statehood because of this, but they merely wanted to remove her government. That was the main objective of the entire war. As far as possible, therefore, they have again accepted German governments and expressed by this that they do not consider German state authority as extinct.

Some of the scholars of international law, such as Professor Georges Sauser-Hall of Geneva, find that in Germany we have a sort of trusteeship occupation. This relation of trustee also finds expression in an English proclamation. I shall take the liberty to submit the detailed arguments of Dr. Sauser-Hall together with comments of Dr. Ernst Schneeberger, Washington. I should like to make the request here already that the High Tribunal accept the statements of several colleagues especially in this connection, which statements shall arrive at the latest during the next 2 weeks.

According to Article 43 of the Land War Convention, the legal powers of the occupation shall be executed with regard to the law of the land as far as there is no compelling obstacle.

Law No. 10 deals in one place with the domestic laws of the land. It says in Article II, paragraph 1 (c) at the end: "whether or not in violation of the domestic laws of the country where perpetrated." This half sentence follows the regulations concerning crimes against humanity. From the punctuation of the German text it is not quite clear whether the half sentence quoted refers only to the persecution for political, racial or religious reasons, since a semicolon is put in front of the word "persecution," or whether the emancipation from the law of the country is also to refer to the previously mentioned "crimes against humanity." Semicolons have their destiny, as we know from the history of the origin of punctuation of the charter used by the IMT.* But this problem is not to be discussed within our limited question since subdivision (c) does not contain conspiracy as an independent crime. We only have to decide, whether this emancipation from "the national law of the country" means a principal breach with the above-mentioned principle from subparagraph 43 of the Hague Convention. Such a principal breach and thus alteration of the existing international law cannot be seen in the above-quoted final regulation of subdivision (c). According to the meaning and, above all, considering the semicolon contained in the German text, it is only of importance for such regulations of national law, which render punishable acts which at the same time constitute persecutions on political, racial, or religious grounds, not liable to punishment or subject to an amnesty out of political, racial or religious prejudices. Such national laws covering political, racial, or religious persecutions should not be considered under subdivision (c), not, because—in the sense of the Hague Convention about land warfare—they are domestic laws, not because they are "domestic laws" of the occupied country, but rather because they are a wrong according to international law, which originated in the liberated country by reason of a legislation machinery which in the meantime has come to a standstill.

Paragraph 43 of the Hague Convention would enable the American Military Tribunals to base their verdict upon conspiracy as a punishable offense in the case of war crimes against humanity, if German law had known of this crime previous to the occupation.

It is one of the first rules of evidence all over the world that a fact which seems indisputable to all need not be proven. There will hardly be one among the high judges of the Court who had met so far a German jurist who would call conspiracy to commit war crimes and crimes against humanity a recognized crime in German penal law. But we also have tried an extension of the circle of those participating in a crime and responsibility for a

* See "Protocol Rectifying Discrepancy in the Text of Charter," page 17.

crime beyond participation in the narrower sense in our penal law. With us the conception of the "complot" and of the group [Komplottes und der Bande] has arisen as a scientific doctrine without general recognition or even general legal realization.

According to German legal theory the group is constituted by an agreement to commit a series of undefined offenses. The conception of the group consciously avoids an individualization of crimes. It is a crime in itself, even without the planned crime being executed later. It is an independent crime apart from the offense possibly being executed later by the group and resembles the Anglo-Saxon conspiracy like one egg resembles the other, as far as an American egg can resemble a continental one; like the egg of an ostrich resembles the egg of a lapwing. The ostrich lays his giant egg freely into the fields; the lapwing egg can only be hatched in a carefully guarded nest. The continental conception of a group can only exist if it is surrounded by a "nest" of positive rules and if it is clearly defined what is to be protected by the law (Rechtsgut) against the group. According to continental codes the war crimes and crimes against humanity listed in Article II, paragraph 1 (b) and (c) of Law No. 10, do not belong as much to these rights to be protected. A group can be punished only as far as the German penal code provides for punishment in the case of murder according to section 49 (b) if the crime of murder has been agreed upon with another person.

In order to be complete I should like to deal briefly with the question whether it could be reasoned that conspiracy to commit war crimes and crimes against humanity would be punishable, if one of the defendants has committed such a crime in an occupied country where this is a punishable offense. We are here dealing with international law and have to consider questions which become apparent for any jurist when the conceptions of territory principle, personality principle, and distance principle are mentioned.

It is easier to ask this question than to answer it, and it is easier to answer it than to prove the answer right. I dare to answer, in accordance with Sayre whom I have just quoted, that no continental law, that is, no law valid in any country occupied by Germany during the war, including the north coast of Africa, knows the conspiracy to commit war crimes and crimes against humanity as a punishable offense. I shall bring further proof in written submissions.

C. THE SPECIAL POSITION OF THE NUERNBERG MILITARY TRIBUNALS

I hitherto expounded on the assumption that the High Courts before which it is my privilege to speak are American Military Tribunals and not perhaps something else. I should not be so bold as to broach this subject were it not for Ordinance No. 7 of the American Military Government, designating the appointed Nuernberg Law Courts in their heading as "Certain Military Tribunals" and in Article II as certain tribunals to be known as "Military Tribunals."

These "Military Tribunals" of a special kind have been in session since proceedings were concluded in the IMT case. They are located in the same rooms and run along lines of similar rules and regulations, with the remarkable difference, however, that American citizens alone, and not members of other victorious nations as well, function as judges. These are, however, not American officers, but Article II of the above-mentioned regulation states expressly that, "all members and alternates shall be lawyers who have been admitted to practice, for at least 5 years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court." It follows from this appointment of qualified personnel for these courts that special knowledge of the highest questions of law and humanity was to be made a condition for the appointment of these judges, but not military rank.

The prosecution concluded its opening statement on 5 March 1947 in Case 3 as follows:

"The true significance of these proceedings, therefore, far transcends the mere question of the guilt or innocence of the defendants ***. These proceedings invoke the moral standards of the civilized world, and thereby impose an obligation on the nations of the world to measure up to standards applied here.

"Although this Tribunal is internationally constituted, it is an American court. The obligations which derive from these proceedings are, therefore, particularly binding on the United States." *

Without wishing to be accused by the gentlemen of the prosecution of foisting their words in their mouth, I should yet like to somewhat reverse the last but one sentence: I wish that I be permitted to say: Although this is an American court, it was composed on international lines. It was composed on international lines, that is, it was given international tasks. To all intents and

*U.S. vs. Josef Altstoetter, et al., Case 3, volume III, this series, page 107.

purposes these tasks should have been solved by a court composed of international members, as the IMT. We now experience it also in other cases, as in politics on a large as well as on a small scale, that powerful America, the United States of America, has to step in where the representatives of the Old World fail for whatever reason. Here in these high courts, the United States of America has undertaken to fulfill such obligations as are the duties of all mankind.

"The United States cannot evade the challenge of these responsibilities," were the words of the counsel of the prosecution; further, on page 109 of the German record of 5 March 1947, of Case 3: "We can fulfill only the smallest part of them at Nuernberg. But Nuernberg must be a symbol, not of revenge or of smug self-satisfaction, but of peace and good will among nations and peoples."*

These are noble and beautiful words, yet they indicate beyond a doubt that the law on which sentences shall be passed is international law, a law uniting all nations and placing all nations and their members under obligations, and not, for instance, Anglo-Saxon national law. These proceedings turn to the ethical conception of the civilized world and imposes on the peoples of the world the obligation to accept the norms recognized here as standards. These are the words of the prosecutor. These norms, however, can only be taken as a standard, if they can be proven either in accordance with international law or by virtue of the internal national legislation in the criminal law of all nations, above all those whose members will be affected by the sentence. As the authors and signatories of Law No. 10 and the London Charter classify conspiracy for aggressive warfare as definitely punishable, but omit to threaten with punishment in the case of conspiracy concerning war crimes and crimes against humanity, they hereby indicate their definite intention to punish conspiracy as an independent criminal offense only in the first case, namely as preparatory to aggressive warfare. This intention, as it is so clearly defined, can only be modified again by a common motion of that legislative body which proclaimed the legislative work of the Charter as well as of Law No. 10 and Law No. 1.

As a young law student, I was introduced to the fundamentals of international law by the old Professor Westerkamp in Marburg. Professor Westerkamp used to ask the candidates during examination: "What was the Battle of Koenigsgraetz?" In non-German historical science, the Battle of Koenigsgraetz is generally referred to as the Battle of Sadowa, which in 1866 decided the war between Prussia and Austria. At the time both states belonged

*Ibid.

to the Federation of German States, whose members had obligated themselves not to go to war with each other without previous appeal to the Federal Council. That learned man expected as an answer to his question: "The Battle of Koenigsgraetz was an impossibility according to international law." If the long since deceased professor were to appear once more in my dreams tonight—I assume you all know the dreams about the examinations which still frighten us now and then, after we have long since grown out of the stage of examinations—and if he were to ask me what constituted an absurdity according to international law, then I should answer: "The conviction of these defendants because of an independent conspiracy in connection with customs of warfare or of humanity."

It is true, I do have to admit that absurdities of international law endeavor, with particularly stubborn persistence, to become realities. I must also admit that possibilities of international law exhibit a similarly great weakness of realization. But despite the numerous skeptical statements that man does not grow more intelligent, I still believe that at least sometimes, if not always, some sudden progress is yet to be achieved and that humanity does learn something new. I would like once more to paraphrase a passage from the opening statement of the prosecution of 5 March 1947: Nuernberg is a symbol; that is, it is to become a symbol. At this time it is still a task, a demand, a hope of the whole world.

Shakespeare's Hamlet says: "The time is out of joint."

Hamlet—and that is a fact frequently overlooked—was a jurist. He studied law at Wittenberg. His mother requests his Wittenberg fellow-students Rosencrantz and Guildenstern to cheer him up; that attempt fails. Hamlet continues: "O cursed spite, that I was born to set it right!" Hamlet did not desire to assume the task of restoring the world that had broken to pieces. Like most of his colleagues he had too many misgivings. But we, the jurists of today, are not spared this task. We have to accept the heritage of Hamlet. The theologians, who up to the 18th century had the responsibility of maintaining world order, no longer command the loyalty of all humanity. Up to the 18th century the world was considered as God's creation, even for the scientists. Based on the principle of the legality of divine right of princes it was possible to restore the world for another century in 1815 at the Congress of Vienna. Since then, however, science rules; it bases its theses merely on the experiences of this world, no other ties beyond our world are left. This spirit of science together with Maja—the substance—has begotten that unruly giant of modern technique, an infant that knows no limit and that will burst the

mitted during the war. Likewise, in Case 4, much of the organization of the WVHA was established prior to the war, and this organization carried out the substantive crimes—murders and other atrocities—which are charged as having been committed during the war. No such problem is raised in Case 1.

I should like to approach the jurisdictional question which is being argued today by a few general observations about the concept of conspiracy. It is a venerable as well as an ancient concept in the jurisprudence of England and the United States, and finds its roots in English common law. The Anglo-Saxon concept of conspiracy has been developed and refined—and perhaps over-refined—in a multitude of judicial decisions stretching over several centuries. Legal concepts, analogous to that of conspiracy, are by no means unknown in continental law, but it is true that these concepts have not been as widely accepted or as fully developed in continental jurisprudence, and some continental lawyers tend to look upon the concept of conspiracy with some measure of suspicion and disapproval. The reasons for this are not far to seek, and these reasons, I think, will help to illuminate the rather divergent points of view which are being expressed in this courtroom today.

The classical definition of conspiracy at English common law is that it is a confederation to effect an unlawful object by lawful means, or to effect a lawful object by unlawful means. Within the scope of this definition, conspiracy is very little more than an elaboration of the law of attempts, in cases where the conspiracy was unsuccessful in attaining its object, or of the law of principals and accessories and accomplices, if the conspiracy succeeded in attaining an unlawful object. Within this sphere, the law of conspiracy is really just another manifestation of the very familiar problem in all legal systems of how closely or in what way an individual must be connected with a crime in order to attribute to him, in a judicial sense, guilt. To be sure, difficult questions often arise in this, as in all other fields of law. But the field itself is not more controversial than many others.

However, over the course of years there have occurred, both in English common law and in continental law, a number of efforts to apply the doctrine of conspiracy to acts which, if committed by a single person, would not have been indictable or, in a judicial sense, unlawful. It was argued in these cases that, although the object of the conspiracy might be lawful, and indeed the means themselves lawful if used by a single person, nonetheless the policy of the law forbade the reaching of the attempted object by means of a confederation. To be sure, in most such cases where the doctrine of conspiracy was held to apply, there was some element

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either of deception or of force, or threat of force, in the means used by the conspirators. However, it became apparent that such extensions of the law of conspiracy, unless confined within narrow bounds and within the bounds of well-established and well-known prior adjudications, tended to bring criminal law into a vague and dangerous field where no man, acting in concert with others, could be sure whether his actions might not subsequently be held to be criminal by virtue of the mere fact of confederation, even though the means used and the object itself would have been lawful had he pursued them by himself. It is this tendency in the law of conspiracy which, I am sure, has provoked fears and doubts both among continental jurists and among distinguished exponents of Anglo-Saxon common law, such as Wharton, which I have read, and the article by Sayre referred to by Dr. Haensel, which I have not read.

It is important to point out, therefore, that none of these questionable and perhaps dangerous developments of the law of conspiracy are in any way involved under the London Charter or under Law No. 10, or in any of the three cases before these tribunals in which this jurisdictional question is raised. Neither one, neither the London Charter nor these indictments, seeks to impose criminal liability for conspiring in pursuit of a lawful objective. On the contrary, the conspiracies involved in these cases are conspiracies to commit acts well-established as crimes at international law, under the specific language of the London Charter and Law No. 10 and, in most cases, under the penal law systems of all civilized countries. Therefore, the importance of the concept of conspiracy in the cases before these tribunals relates only to the necessary degree of the defendants' connection with acts which were, in fact, committed and which were clearly crimes, in order to establish the defendants' guilty participation in those crimes. Viewed in this light, I think it will be clear that many of the aspersions and doubts which counsel for the defense have cast upon the basic notion of conspiracy, and which indeed might have some point if we were seeking here to apply the doctrine of conspiracy to acts and objectives lawful in themselves, in fact have little weight since we seek here to apply the doctrine of conspiracy only in its more limited and classical meaning.

In dealing with the doctrine of conspiracy today, therefore, we are dealing only with the question of what degree of connection with an act, acknowledgedly criminal, a defendant must be shown to have had in order to attribute to him guilt. In this field Anglo-Saxon jurisprudence uses the terminology of principals and accessories, accomplices and confederates, conspiracies and attempts. In other judicial systems these words and other words are used.

There are some differences of importance between the various judicial systems, but the basic purpose of these concepts, such as accessories, accomplices, conspirators, etc., is common to all systems. That purpose is to insure that the man, who in the United States we would call the "trigger man," is not the only man who can be held judicially answerable, if other persons were substantially connected with the commission of the crime.

I think it would be useless and inappropriate today to labor the distinctions and subtleties which have been woven around the concepts of accessory and accomplice and conspirator, etc., in Anglo-Saxon law. In some cases these distinctions are very refined and surely there is much overlapping between the concept of conspiratorial guilt and the guilt of a confederation of principals and accessories. With all deference to the learned judges who have decided cases in this field, and to the text writers who have commented on those decisions, I do not think that these refinements and distinctions have often been very clear to these distinguished jurists themselves.

Today it is much more important, I think, to keep clearly in mind that we are applying international penal law, and that we should not approach these questions solely from the standpoint of any single judicial system. International law has, in recent decades, made substantial strides in the development of substantive international crimes, and this development has flowered into such attempts at partial codification as the Hague and Geneva Conventions, the London Charter, Law No. 10, and the more recent resolution of the United Nations with respect to the crime of genocide. But while these substantive crimes are now acknowledged and accepted as such in international law, we must recognize that international tribunals vested with jurisdiction to punish such crimes are relatively new. Consequently, in approaching the question of what degree of connection with these crimes must be established in order to attribute guilt to a defendant, we must not become enmeshed in the intricacies of the American or English law of principals and accessories, or of conspiracy, or indeed in the refinements or peculiar prejudices of any single judicial system. International law, with respect to these questions, must be derived and applied from a variety of sources and legal systems, including both civil and common law. And the notion of conspiracy, if sensibly and fairly confined, is, we submit, a useful body of doctrine to draw upon.

So much by way of general background to the observations which I will now direct more precisely to the narrow question for decision today. We are confronted by a question of the proper construction of Control Council Law No. 10, and the central and

critical question of construction has been sharply emphasized by defense counsel. Both in the London Charter and Law No. 10 the definition of crimes against peace expressly includes the clause "participation in a common plan or conspiracy for the accomplishment of crimes against peace." The parallel definitions of war crimes and crimes against humanity do not include this clause. Does it follow that a conspiracy to commit crimes against peace may be charged under Control Council Law No. 10, but that a conspiracy to commit war crimes and crimes against humanity may not? The prosecution respectfully submits that it does not follow and in support of this view we advert to the substantive content of the three types of crime in question.

Let us look first at the definitions of war crimes and crimes against humanity in the London Charter and in Law No. 10. They are all acts of violence or of plunder. They are all acts which contravene, in the language of the Hague Conventions, "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." * Most, if not all, of them, are unlawful under the internal penal laws of all civilized states. Indeed, the law of war crimes is, fundamentally, an attempt to define the circumstances under which a state of belligerent hostilities makes lawful acts which would otherwise be clearly unlawful. If, under the laws and customs of war, the protective cover of belligerency does not apply to these acts, they become murders or robberies or mayhems or other familiar crimes, commonly regarded as such under the laws of all nations. Crimes against humanity are also acts of this type, often committed under the color of so-called "law" or with executive or administrative tolerance of or encouragement by a dictatorial or oppressive government. Both in the case of war crimes and crimes against humanity, the acts themselves are murder, torture, enslavement, rape, plunder, destruction, devastation, etc.

Under both definitions, therefore, the acts with which we are dealing are well-recognized crimes which acquire an international aspect because of the circumstances under which they are committed. It is well-settled, and we think this is an important point, that a conspiracy to commit felonies of these types is an indictable offense at common law, and regardless of whether any statute expressly so provides. This has been settled in a multitude of English and American decisions over a number of years. It was, undoubtedly, for this reason that the draftsmen of the London

*Hague Convention No. IV, chapter 2, Preamble (18 October 1907).

Charter and Control Council Law No. 10 saw no need to include an express reference to conspiracy in the definition of war crimes and crimes against humanity, any more than they felt it necessary to make express reference to the liability of accessories and accomplices or to the law of attempts. All these things adhere to such crimes automatically.

Why then did the draftsmen of the London Charter make specific reference to "common plan or conspiracy" in the definition of crimes against peace? Clearly, we submit, this was done out of abundance of caution because of certain differences between the nature of crimes against peace on the one hand and war crimes and crimes against humanity on the other hand. To be sure, as the London Charter and Law No. 10 both recognize and as the International Military Tribunal has held, the acts of planning and waging aggressive wars had come to be regarded as criminal under international law some years prior to the outbreak of the Second World War. But the crime of planning and waging an aggressive war is, in many respects, peculiarly an international law crime, and particularly subject to international jurisdiction. The acts condemned as criminal in the definition of crimes against peace are not acts which are declared to be criminal under the internal penal law of most states. Furthermore, while war crimes and crimes against humanity can certainly be committed by a single individual, it is hard to think of any one man as committing the crime of waging an aggressive war as a solo venture. It is peculiarly a crime brought about by the confederation or conspiracy of a number of men acting pursuant to well-laid plans. It matures over a long period of time, and many steps are involved in its consummation. The interrelations between the confederates or conspirators are likely to be extremely complicated and far-flung. For all these reasons, and particularly because planning an aggressive war is not, like murder, a standard felony to which the orthodox paraphernalia of doctrine as to the liability of accomplices automatically applies, the draftsmen of the London Charter and Law No. 10 included an express reference to conspiracy in the definition of crimes against peace.

I think it is quite clear that it never occurred to the framers of the London Charter that, by including a reference to conspiracy with respect to crimes against peace, they would thereby raise the implication that conspiracy was excluded in the field of war crimes and crimes against humanity. If any such doubts do arise, undoubtedly they were set at rest by the paragraph which immediately follows these definitions in the London Charter and which states that:

"Leaders, organizers, instigators, and accomplices partici-

pating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in the execution of such plan.”

Certainly, too, it never occurred to those who drafted the indictment before the International Military Tribunal that the London Charter did not comprehend a conspiracy to commit war crimes and crimes against humanity. Indeed, the whole structure of the indictment in the international trial makes it clear that the chief prosecutors of the four nations laid great stress upon the concept of conspiracy as reaching out to include all the crimes charged in the indictment. The first paragraph under count one of the indictment before the International Military Tribunal makes this abundantly clear, and the same appears in many other places throughout. Mr. Justice Jackson, who was the signatory on behalf of the United States to both the London Charter and the indictment, stated in opening the case before the International Military Tribunal: *

“It is my purpose to open the case, particularly under count one of the indictment, and to deal with the common plan or conspiracy to achieve ends possible only by resort to crimes against peace, war crimes, and crimes against humanity.”

Furthermore, I am sure that it never occurred to the Allied Control Council when it adopted Law No. 10 in December 1945, during the proceedings before the International Military Tribunal, that by following the language of the London Charter they had excluded from the scope of Law No. 10 conspiracies to commit war crimes and crimes against humanity. And finally, so far as I am aware, such an idea never occurred to any of the defense counsel during the entire course of the international trial. No such contention was ever made on behalf of any of the defendants and as a result, there was never any argument upon, or thought given to, such a question during the international trial.

The International Military Tribunal, however, came to a different conclusion, and held that the London Charter “does not define as a separate crime any conspiracy except the one to commit acts of aggressive war.” As to this, the prosecution has two comments to make.

First, why did the International Military Tribunal reach this conclusion? I think the reason was an underlying hostility, particularly on the part of the continental members of the court, to the concept of conspiracy as such. Since the conclusion of the international trial, the distinguished French member of the Tri-

*Trial of the Major War Criminals, *op. cit.* volume II, page 104.

bunal, Professor Donnedieu de Vabres has set forth in a lecture certain of his views about the judgment of the International Military Tribunal, in the course of which he made certain significant comments upon the doctrine of conspiracy some of which are quoted by Dr. Haensel and some of which are repeated here now. Dr. Haensel stated:

“The wide conception of the ‘complot’ or conspiracy is peculiar to British law. The indictment includes in this term the entire Hitlerian enterprise leading to the seizure of power and aggressive war * * *.

“The danger of such incriminations is that the door is opened to arbitrariness. The accusation of conspiracy is indeed a weapon preferred by tyrants. When Hitler wanted to strike at his political opponents, he accused them of having conspired against him.”

I hardly think that any statement could illustrate better that distrust of the concept of conspiracy which I mentioned earlier. As I tried to explain at that point, this distrust has arisen chiefly out of efforts to stretch the law of conspiracy to cover acts, otherwise legal, which are said to become illegal by virtue of the mere fact of confederation. And, as I also pointed out, no such efforts to extend the doctrine of conspiracy are involved in the London Charter or Law No. 10 or the cases before these tribunals. A diametrically opposite comment on the judgment of the International Military Tribunal has recently been made by the distinguished American statesman and jurist, Mr. Henry L. Stimson, who has said, in a recent article on foreign affairs:*

“If there is a weakness in the Tribunal’s findings, I believe it lies in its very limited construction of the legal concept of conspiracy. That only 8 of the 22 defendants should have been found guilty on the count of conspiracy to commit the various crimes involved in the indictment seems to me surprising. I believe that the Tribunal would have been justified in a broader construction of the law of conspiracy * * *.”

In short, we submit that the International Military Tribunal excluded conspiracies to commit war crimes and crimes against humanity from the scope of the Charter because of a mistaken and misapplied suspicion of the whole concept of conspiracy on the part of some members of the International Military Tribunal, which lead the Tribunal to dispose of a contentious point of no great importance to the outcome of the proceedings, by taking the easy way out.

* Henry L. Stimson, “The Nuremberg Trial: Landmark in Law,” *Foreign Affairs*, volume 25 (Oct. 1946–July 1947), page 187.

Second, the prosecution respectfully submits that the decision of the International Military Tribunal was clearly wrong and overlooked the express language of the Charter. The Tribunal did, indeed, quote the final paragraph of Article 6 of the Charter, which states that:

“Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

But with reference to this paragraph, the IMT stated that:

“In the opinion of the Tribunal, these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in count one * * * and will consider only the common plan to prepare, initiate, and wage aggressive war.”*

This conclusion, we submit, is an entirely unwarranted interpretation of this paragraph of the Charter. True it is, that this language of the Charter is designed “to establish the responsibility of persons participating in a common plan.” But a common plan to do what? In the exact language of the Charter, a common plan to “commit any of the foregoing crimes.” We doubt that anything could be very much clearer. And while, to be sure, the decisions of the International Military Tribunal on points of law are entitled to the utmost consideration and deference, Ordinance No. 7, under which these Tribunals are constituted, does not make the decisions of the International Military Tribunal on points of law binding.

We submit, therefore, that the decision of the International Military Tribunal in this respect is wrong, and that these Tribunals should reach a contrary result under Control Council Law No. 10. To be sure, the paragraph which follows the definition of crimes in Law No. 10 is different from the paragraph which follows the definitions of crimes in the London Agreement. Article II, Paragraph 2 of Law No. 10, immediately following the definitions, reads as follows:

“Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization

* Trial of the Major War Criminals, *op. cit.*, volume I, page 226.

or group connected with the commission of any such crime or***.”

(f) is a clause which I shall not read because it relates to crimes against peace. This paragraph does not employ the word “conspiracy” or the phrase “common plan.” But its purpose is fundamentally the same as that of the paragraph similarly placed in the London Agreement, and is spelled out in much greater detail in Law No. 10. That purpose, abundantly reflected in all modern systems of criminal law, is to recognize the criminal liability of those who are substantially connected with the commission of a crime, even though the final criminal act is performed by someone else. As Mr. Justice Jackson stated in his opening address before the International Military Tribunal:

“Every day in the courts of countries associated in this prosecution, men are convicted for acts which they did not personally commit, but for which they are held responsible because of membership in illegal combinations or plans or conspiracies.”*

Indeed, the scope of paragraph 2 of Article II of Control Council Law No. 10 which I have just quoted is, we believe, broader than that of the doctrine of conspiracy, and in this connection, I refer particularly to clauses (c) through (f) of the paragraph. This is not the proper occasion to undertake an exhaustive analysis of the scope of the paragraph in question, but I think it is quite clear that it is more than broad enough to comprehend the criminal liabilities which are held to attach to those who enter into a criminal conspiracy.

Furthermore, the prosecution submits that the Charter and Law No. 10 both should be construed as comprehending conspiracies to commit war crimes and crimes against humanity, even if these paragraphs following the definitions of crimes, which we have been discussing, had been omitted from the Charter and Law No. 10. Surely it is not, and never has been, the law that the penal consequences deriving from the commission of international law crimes can be visited only upon the single individual who pulls the trigger or turns on the gas. I am sure that even counsel for the defense would not suggest such a preposterous conclusion, which would rob international penal law of all its meaning and substance. In applying international penal law, just as in applying domestic penal law, we must determine the substantial degree, or quality of participation in crimes upon the basis of which a fair judgment of guilt must be rendered. And in making these determinations under international law, it is surely not only

*Trial of the Major War Criminals, *op. cit.*, volume II, page 151.

appropriate but wise to draw upon such well-established bodies of legal doctrine in highly developed legal systems as will assist us in arriving at a result which commends itself to our sense of justice. The International Military Tribunal did not find that any considerations of general jurisprudence stood in the way of applying the doctrine of conspiracy in the case of crimes against peace, although indeed, it applied that doctrine so narrowly as to arouse criticism rather than approval from so distinguished and fair minded a jurist as Mr. Stimson; and I might point out that much of Dr. Haensel's argument has been directed against the concept of conspiracy in general and would apply equally to a conspiracy to commit crimes against peace.

As earlier precedents, earlier than that of the IMT, applied in the case of war crimes, the prosecution might mention the opinion of the reviewing authority rendered in March 1946 in *United States v. Weiss* and others, who were tried and convicted for atrocities at the Dachau concentration camp. This opinion contains a rather lengthy discussion of the application of the doctrine of conspiracy to—I quote—"war crimes committed by the concert, conspiracy, or common design of one or more individuals."—End of quotation.—The Dachau opinion quotes from the opinion of the British reviewing authorities in the earlier Belsen concentration camp case, in which the 45 accused were charged with being "together concerned as parties to the ill treatment of *** Allied nationals," and in which the British authorities reviewing the conviction stated:

"The accused were not charged with individual murders, though many such were proved ***. On the charges as framed, the case for the prosecution against an individual accused was established once the court was satisfied that he or she was a member of the staff of the camp, *** and that his or her acts were proved to be such as identified him or her with the system of ill treatment, assuming that the system was established, of which there was indeed no question."

In summary, the prosecution emphasizes that it is misleading to consider this question in terms of whether conspiracy constitutes a "separate" or substantive crime at international law. Conspiracy, to achieve an unlawful objective or to use unlawful means to attain an objective is not, properly speaking, a separate substantive crime at all, any more than being an accessory or an accomplice is a crime; it is an adjunct of the crime; and the question here is the test of the degree of connection with crime necessary to establish guilt. Only in these rare cases where English and American courts have attached criminal guilt to acts committed in confederation which would not have been illegal if

committed singly can conspiracy be properly spoken of as a "separate" crime at all. And with such cases, the prosecution emphasizes, we are not here concerned in the slightest degree.

It is important, also, to bear in mind that neither the London Charter nor Law No. 10 purports to be a complete, or even a nearly complete codification of international penal law. Surely no one would have attempted to do this in so narrow a compass. The definition of war crimes, for example, remits us for a fuller exposition to "the laws or customs of war," and if we look for those in the Hague Conventions, we find that here too the contracting parties recognize the incompleteness of the Hague Conventions as a codification of the laws of war, and in turn remit us to "the principles of the law of nations." Particularly in respect to the necessary degree of connection with a crime, the provisions of the London Charter and Law No. 10 are illustrative rather than exhaustive attempts at statutory definition. Neither of them, for example, makes mention of attempts, yet it surely was not the intention of either to eliminate attempts from international penal law. Let us suppose, for example, that an American or British or other Allied Jewish soldier is taken by the Germans as a prisoner of war, and that after his capture, when the fact that he is Jewish is discovered, a German soldier determines for this reason to shoot him, and loads his gun and makes ready for the execution, at which moment he is in turn captured by the advancing Allies and the execution is forestalled, the German soldier being caught in the act. Can one imagine that the German would not be court-martialed immediately, and rightly, for the attempted murder of an unarmed prisoner of war? Such examples could readily be multiplied and serve to emphasize that we do not find international penal law completely codified and ready to hand, as in a state criminal code.

Consequently, if Law No. 10 does not make express reference to conspiracy as an aid to determining guilt for war crimes that in itself is hardly governing. As we have pointed out the language of paragraph 2 of Article II of Law No. 10 is broader than the doctrine of conspiracy. Furthermore, if the doctrine of conspiracy should, as we contend, normally be drawn upon in determining guilt for crimes at international law, Law No. 10 imposes no barrier to such use. Paragraph 2 of Article III of Control Council Law No. 10 expressly states that:

"Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945."

Ordinance No. 7, which of course cannot and does not purport to create or define crimes, but which does prescribe the organization and powers of these Tribunals for the trial and punishment of offenses recognized as crimes in Law No. 10, expressly provides that the guilt for the commission of any such crimes attaches to conspirators.

In conclusion, the prosecution respectfully suggest that it would be useless, anomalous, and harmful if the doctrine of conspiracy is held to be applicable in the cases of crimes against peace but not in the case of war crimes and crimes against humanity. We are unable to find any sensible basis for such a distinction, and we believe that such a conclusion will tend to warp the logical and reasonable application of international penal law.

Before sitting down, I want to comment very briefly on the results which defense counsel seem to think would flow from a decision in their favor on the question being argued this morning. I suppose that the question this morning is being argued in general and without special reference to the disposition of the three cases in which the prosecution has charged a conspiracy in the first counts of the indictments therein. Presumably, should the Tribunals *en banc* decide* in accordance with the position taken by the defense counsel, Tribunals I, II, and III will thereafter determine individually what disposition should, in consequence, be made of count one in each of these three indictments. However, the prosecution thinks it appropriate to point out at this time that each of those counts, in addition to charging that the defendants were connected with the alleged crimes as conspirators, also contains charges in the exact language of paragraph 2 of Article II of Control Council Law No. 10. Therefore, we suggest, these counts would not become defective, even though the Tribunals *en banc* should determine that these charges cannot be made in the language of conspiracy. Nor do we think that any significant shortening of the proceedings in these cases is likely to result whichever way the Tribunals *en banc* decide the question being argued this morning because, as we have pointed out, the language of paragraph 2 of Article II of Control Law No. 10 is broader than the concept of conspiracy, and it will remain open to the prosecution to establish the connection of the defendants with the alleged crimes under that broader language of Control Council Law No. 10.

I venture to make only one other observation of general interest, but which may particularly concern counsel for the defense. I have noticed in several of their arguments, addressed to today's

*The tribunals *en banc* made no decision. See section XXIV A.

question, before Tribunals II and III and in Dr. Haensel's learned presentation today, that the suggestion is repeatedly made that any application in these trials of doctrine unfamiliar to German law will work grave injustice and will violate a number of learned Latin legal maxims such as *nulla poena sine lege*. I entirely agree, as goes without saying, that a man must not be punished for acts not unlawful at the time of their commission. But I have tried today to illuminate the proposition that, in the field of international penal law, many auxiliary principles and doctrines must be drawn from a variety of legal systems. These and other internationally constituted tribunals cannot work exclusively in the medium of German law, or American law, or even a combination of the two. That is not the genius of international law.

And may I be permitted to remark also that if the objections of defense counsel to an infusion of legal principles from non-German legal systems were to be taken at face value, certain consequences would flow therefrom which, I am sure, they would find most unwelcome. I will confine myself to two illustrations. Under German law, a defendant cannot testify under oath in his own behalf. It is because of an infusion of non-German legal principles that the defendants in these proceedings are entitled to take an oath and enter that box. Under German law, there is no requirement that the guilt of an accused be proved "beyond a reasonable doubt" in order to support a judgment of guilt. Hjalmar Schacht was acquitted by the International Military Tribunal because his knowledge of Hitler's plans for aggressive warfare was "not established beyond a reasonable doubt."¹ Erhard Milch was acquitted under count two of the indictment filed against him because Military Tribunal II believed that his guilt had not been established "beyond a reasonable doubt," and Tribunal II stated in its judgment acquitting Milch:

"Unless the court which hears the proof is convinced of guilt to the point of moral certainty, the presumption of innocence must continue to protect the accused. If the facts as drawn from the evidence are equally consistent with guilt and innocence, they must be resolved on the side of innocence. Under American law, neither life nor liberty is to be lightly taken away, and, unless at the conclusion of the proof there is an abiding conviction of guilt in the mind of the court which sits in judgment, the accused may not be damnified.

"Paying reverent attention to these sacred principles, it is the judgment of the Tribunal that the defendant is not guilty of the charges embraced in count two of the indictment."²

¹ Trial of the Major War Criminals, *op. cit.*, volume I, page 310.

² Volume II, this series, pages 778 and 779.

The two principles which I have used for illustration are not known to the German law. They are being applied in these proceedings because, in the view of the Four Powers who drew up the London Charter and Control Council Law No. 10, they are principles conducive to fairness and justice in the administration of international penal law. They both derive from the Anglo-Saxon common law. I do not believe that we will hear any defense counsel argue that their application in these proceedings works injustice because of their alien origin.

JUDGE BEALS, PRESIDING: Counsel for the defense has ten minutes remaining of his time.

DR. HAENSEL: We, on many points, agree with the prosecution. However, first of all, let me say that the prosecution, too, based themselves on the assumption that international penal law is applicable and that we are not bound to any internal laws of any particular state. Consequently, in this practical case, the question is whether conspiracy to conduct war, and again crimes against humanity, is part of this international law. I believe that of all the arguments stated by General Taylor, the one that is the most important, and the one which I will concern myself with now, is the question as to whether that conspiracy is necessary for the achievement of a just judgment. In other words, do we need the conspiracy in order to mete out punishment which otherwise would not be meted out for certain crimes?

I will admit that we, the continental jurists, have many differences and are much in the dark regarding the interpretation of this law of conspiracy, and we still remain in the dark to some extent. However, I must say that General Taylor is probably not altogether clear about continental law because it is a matter of course that we too know responsibility for perpetrations committed by others. We do not only punish those who shoot but also those who instigate the shooting, even if they are not physically involved at first sight. Participation, instigation, all such matters are, as a matter of course, punishable under continental law, too; and of course, no international penal law can be imagined without punishing those who in reality desired the perpetration and carried it into effect in some way.

The great difference, however, between that and conspiracy, as we see it, is that many may be caught in the conspiracy charge who did not themselves desire such a deed but who got involved not through their own volition and then are brought into the conspiracy.

The other objection against conspiracy is that the basic idea held by the authors, Bishop and Sayre, is the fundamental thought that something might not be punishable which is com-

mitted by an individual but might become punishable if it is brought about by collaboration between several. Let me give you an example: If a grown-up man seduces a grown-up woman, then that is not a punishable offense, although it is indecent. If several men do it, having agreed previously to do it, then it is conspiracy. That is where the trouble begins. I do admit that there is a correct principle attached to it, but it is a thought which is strange to us and makes us feel afraid. We feel like Professor Donnedieu de Vabres; we are afraid that it does not serve justice, but that too wide a field is opened to vague notions. This is the reason why we argue against conspiracy and that is why I say, it is not indispensable for a just judgment.

As to the question: Can something be recognized as right under international law that is so hotly disputed internationally as conspiracy? Therefore I want to say that what Professor Donnedieu de Vabres said, and what General Taylor said, speaks directly against conspiracy. It also speaks for my assumption, that conspiracy to commit war crimes and crimes against humanity were purposely not included in Law No. 10, for Law No. 10 was released during the time the IMT was still in session. Contradictions within the IMT, as those of Professor Donnedieu de Vabres, have obviously found expression herein. It has been decided knowingly and in agreement with the final judgment of the IMT, that there was a punishable conspiracy due to a special law for crimes against peace, but not for crimes against war and humanity.

This becomes abundantly clear if one considers the original history which General Taylor has mentioned again. And it is also clear that something which is so hotly disputed is not to be made a subject of international law, not even from the side of American jurists.

Once when I was a young student I went to Eton in England and I was taken to a hall, one wall of which had toppled over. This wall had a door which was made in the 13th century and had been made so low that every one going through that door had to bend down. Now, this wall had fallen down and the possibility existed to put a beautiful new door into the wall, but what did the English do? They put the same old door in once again and everybody had to bend, even afterwards. That is tradition as a pleasure.

If I trace conspiracy, if I look at something made in the 13th century, it is a historical door, but I can't imagine that anything that was right in the 13th century is right today. Perhaps it would be right to assume that something more timely, more modern, would be more applicable. And I also feel that the principle which we are now arguing about, the principle of guilt which

Trainin preaches, and which is included in the IMT judgment, is not properly dealt with by the conspiracy charge. That is our main objection. That is what we wanted to find expression for. Not by any means that any crime should be unpunished. They should be punished, yes, but let us punish them concretely. Let us punish them with greater safety, without that we have this uncertain spirit, "this wavering of the spirit," as our great thinker Hegel called it, but we have concrete conceptions, and that is what we are fighting for.

As far as the formal decision is concerned the following may be a way out: An application is lying before Tribunal III, and only Tribunal III is competent to decide on it. If a plenary session were to deal with it, then it wouldn't make a decision applicable to Case 3 but it would make a general decision that the judges of Tribunal III may know how the other judges feel when they in their turn decide about Case 3. I feel that every individual court ought to decide its own case individually, even if a general agreement has here been reached.

I believe that the arguments brought forward about the interpretation of Law No. 10 are actually supporting my thesis. General Taylor pointed out that there was, in fact, a considerable difference between crimes against peace and crimes against war and humanity, as far as conspiratorial conduct is concerned. The crime against peace is really not possible without extensive collaborative action. Therefore it was included in the law, but war crimes, crimes against the Hague Convention, and crimes against humanity might be committed by one person, or they might be committed by thousands. Then those should be punished who were the perpetrators, rather than to draw in an indefinite number of people who never demonstrated the *animus auctoris* and never incurred guilt themselves.

JUDGE BEALS, PRESIDING: The arguments of the prosecution and the defense having been concluded, this *en banc* session of the judges of the different tribunals, the purpose of which was announced at the opening of the session, is now adjourned.*

(The Tribunal adjourned at 1130 hours.)

* The Tribunals *en banc* made no ruling or statement on the questions raised by the defense motions or the arguments held before the joint session. Military Tribunals I, II and III, however, each made definite rulings within one week after the joint session. The separate orders, generally similar in substance, each stated that "neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crimes against humanity as a separate substantive crime. Therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense ***." The order of Tribunal III in the Justice case, dated 11 July 1947, and the order of Tribunal II in the Pohl case, dated 18 July 1947, are reproduced in section IX I, 2 and 3 respectively.

I. ALLEGED CONFLICTING RULINGS BETWEEN THE
D. Denial of Defense Motions for Joint Sessions to
Review Alleged Inconsistent Rulings in the Judg-
ments of the Tribunals
JUDGMENTS OF THE MEDICAL AND JUSTICE CASES

a. Motion, 13 December 1947, on behalf of Defendant
Schlegelberger, who was Convicted in the Justice Case

Nuernberg, 13 December 1947
Palace of Justice

[Stamp] Filed: 13 December 1947

To: Presiding Judge of Tribunal III,
or the Presiding Judges of all tribunals,
or to any other competent agency

Motion for a decision by plenary session of the Military
Tribunals according to Article II (b) of Ordinance 11.¹

In my capacity as defense counsel for the defendant Schlegel-
berger

I move,

that a ruling be made by plenary session to the effect that a
conviction for an offense is inadmissible, if in the indictment —
contrary to the usage observed in the indictment—a defendant
has not been charged with the special responsibility for this
crime.

I further move to

proceed in the case of Schlegelberger according to Article II
(c) of Ordinance 11 after this decision has been made.

For the reason:

The judgment of Tribunal III in the case against Altstoetter,
et al.,² deviates in a fundamental, at least in an important question
of procedure from that of the opinion of Tribunal I in the case
against Karl Brandt, *et al.*³

In its judgment, Tribunal I has passed no decision concerning
the participation in malaria experiments on human beings with
which the defendant Rose was charged.

In the reasoning of its judgment, Tribunal I points out that the
prosecution decided to present its case by charging all the
defendants with the commission of war crimes and crimes against
humanity in general, and at the same time by enumerating in the

¹ U.S. *vs.* Josef Altstoetter, *et al.*, Case 3, Official Record, volume 35, Additional Motions
Filed after End of Case, page 2.

² Volume III, this series, pages 954-1177.

³ Volume II, this series, pages 171-297.

subsections the special responsibilities of the individual defendants with respect to the counts of the indictment. Consequently, Tribunal I reached the following conclusion:¹

“We think it would be manifestly unfair to the defendant to find him guilty of an offense with which the indictment affirmatively indicated he was not charged.”

Tribunal III also based its findings in the Schlegelberger case on the Luftgas case. The verdict reads verbatim:²

“He [Schlegelberger] disapproved ‘of the revision of sentences’ by the police, yet he personally ordered the murder of the Jew Luftgas on the request of Hitler, and assured the Fuehrer that he would, himself, take action if the Fuehrer would inform him of other sentences which were disapproved.”

The Luftgas case belongs to that number of cases in which, during the period of Schlegelberger’s tenure of office, on Hitler’s special order, prisoners who had been sentenced to terms in prison or jail were handed over to the police. This number of cases had not been referred to in any of the details where Schlegelberger’s special responsibility has been stated. I would particularly like to point out that in the details of paragraphs 14 and 26 of the indictment Schlegelberger’s name is not mentioned.³ I must further point out that this matter must be distinguished from those cases in which, after Schlegelberger’s resignation, by virtue of an agreement between Thierack and Himmler, the so-called asocials were handed over to the police.

The decision of Tribunal III has, thus, in a fundamental question, departed from the decision made by Tribunal I in the Rose case. In my closing plea for the defendant Schlegelberger I have pointed out that a finding concerning the accusations against the defendant Schlegelberger with respect to the transfer to the police would be contrary to the opinion of Tribunal I.

The divergence in the decisions of Tribunals I and III are undoubtedly of the greatest importance for the conduct of the trials. The material of the prosecution in these cases is of such a size that the defense can only deal with it if it is limited to the charges actually made.⁴

For the defendant Dr. Franz Schlegelberger
[Signed] DR. EGON KUBUSCHOK
Defense Counsel

¹ See volume II, this series, pages 266 and 267.

See “Statement from the Judgment in the Medical case, 19 August 1947, Declining to Make an Adjudication of Guilt or Innocence under the Charges of Criminal Participation in ‘Malaria Experiments’ as to Defendant Rose because Rose Was not among the Defendants Particularly Charged with Responsibility for These Experiments,” section IX K 2.

² Volume III, this series, page 1085.

³ Ibid., pages 21 and 24.

⁴ The prosecution filed no answer to this motion.

b. Order of the Committee of Presiding Judges, 12 January 1948, Signed by the Presiding Judges of Seven Tribunals

UNITED STATES MILITARY TRIBUNALS SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY,
12 JANUARY 1948, IN CHAMBERS

United States of America

vs.

Josef Altstoetter, *et al.*,

CASE 3

Defendants

ORDER *

On 13 December 1947, counsel for Franz Schlegelberger, one of the defendants found guilty by the judgment of Tribunal III in the case of the United States versus Josef Altstoetter, *et al.*, (Case 3), filed a petition for a joint session of the Military Tribunals pursuant to Article V-B (b) of Ordinance No. 7, as amended by Article II of Ordinance No. 11, for the reconciliation of certain alleged conflicts and inconsistencies between said judgment and the final judgment of Tribunal I in the case of the United States versus Karl Brandt, *et al.*, (Case 1), upon a fundamental and important legal question. It is contended that Tribunal I acquitted the defendant Rose for the reason that he was not specifically charged, while Tribunal III found the defendant Schlegelberger guilty of a crime for which he was generally, but not specifically, charged.

The right to demand a plenary session of the Tribunals is not an absolute one but is addressed to the sound judicial discretion of the Supervisory Committee of Presiding Judges.

A careful examination of the judgments of Tribunals I and III, referred to above, discloses that there is no conflict or inconsistency between them on any fundamental or important legal question, as alleged in the petition herein. On the contrary, when said judgments are considered in the light of the indictments to which they relate, it affirmatively appears that they are entirely consistent.

The petition filed in behalf of the defendant Franz Schlegelberger is now denied.

[Signed] LEE B. WYATT
Presiding Judge, Tribunal I

[Signed] MICHAEL A. MUSMANNO
Presiding Judge, Tribunal II

*U.S. vs. Josef Altstoetter, *et al.*, Case 3, Official Record, volume 35, Additional Motions Filed after End of Case, page 1.

[Signed] HU C. ANDERSON
 Presiding Judge, Tribunal III

[Signed] CURTIS G. SHAKE
 Executive Presiding Judge

[Signed] WILLIAM C. CHRISTIANSON
 Presiding Judge, Tribunal IV

[Signed] CHARLES F. WENNERSTRUM
 Presiding Judge, Tribunal V

[Signed] JOHN C. YOUNG
 Presiding Judge, Tribunal V-A

2. ALLEGED CONFLICTING RULINGS BETWEEN THE JUDGMENTS OF THE FLICK AND HOSTAGE CASES

Order of the Committee of Presiding Judges, 3 March 1948,
 Signed by the Presiding Judges of Six Tribunals

UNITED STATES MILITARY TRIBUNAL, SITTING
 IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY,
 3 MARCH 1948, IN CHAMBERS

United States of America	}	CASE 7
<i>vs.</i>		
Wilhelm List, <i>et al.</i>		
	Defendants	
	ORDER ¹	

On 28 February 1948, counsel for General Ernst Dehner, one of the defendants found guilty by the judgment of Tribunal V in the case of United States *vs.* Wilhelm List, *et al.*,² Case 7, filed a petition for a joint session of the Military Tribunals, pursuant to Article II (b) of Ordinance No. 11, for the reconciliation of certain alleged conflicts and inconsistencies between said judgment and the final judgment of Tribunal IV in the case of United States *vs.* Friedrich Flick, *et al.*,³ Case 5, upon a fundamental and important legal question. It is asserted that Tribunal IV acquitted certain defendants under the defense of necessity, while Tribunal V found the defendant Dehner guilty, despite the fact that the defense of necessity applied as to him, and was by him asserted.⁴

¹ U.S. *vs.* Wilhelm List, *et al.*, Case 7, Official Record, volume 31, Additional Motion Filed After End of Case, page 1.

² See judgment volume XI, this series, pages 1230-1318.

³ See judgment volume VI, this series, pages 1187-1223.

⁴ The defense motion is not reproduced herein. It may be found in the Official Record of Case 7, volume 31, Additional Motion Filed after End of Case—Motion of defendant Dehner, pages 2-13. The prosecution filed no answer to this motion.

The right to a plenary session of the Tribunals is not an absolute right, but is addressed to the sound, judicial discretion of the Supervisory Committee of Presiding Judges.

A careful examination of the judgments of Tribunals IV and V, above referred to, reveals that the basic and controlling facts of each are materially different. In light of such differing factual situations, there is no inconsistency or conflict between these judgments, with respect to the holdings therein, and referred to in the petition here under consideration. On the contrary, such holdings are entirely consistent.

The petition filed in behalf of defendant Ernst Dehner is hereby denied.

[Signed] LEE B. WYATT
Presiding Judge, Tribunal I
[Signed] MICHAEL A. MUSMANNO
Presiding Judge, Tribunal II
[Signed] HU C. ANDERSON
Presiding Judge, Tribunal III
[Signed] CURTIS G. SHAKE
Executive Presiding Judge
[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV
[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V-A

3. ALLEGED CONFLICTING RULINGS BETWEEN THE JUDGMENTS OF THE HOSTAGE AND EINSATZGRUPPEN CASES

a. Motion 16 April 1948 on Behalf of Defendant Blobel, Who Was Convicted in the Einsatzgruppen Case *

Nuernberg, 16 April 1948

[Stamp] Filed: 16 April 1948

To: The Secretary General Military Tribunal
Nuernberg

As counsel for Paul Blobel in Case 9 (Ohlendorf, *et al.*), who was sentenced to death, I herewith request according to Article V (b) of Ordinance No. 7 of Military Government of 18 October 1946 along with Article II of Ordinance No. 11 of Military Government of 17 February 1947 to convene a plenary session of all the Military Tribunals sitting in the Palace of Justice, Germany, so as to discuss and re-examine the judgment of Military Tribunal II

* U.S. vs. Otto Ohlendorf, *et al.*, Case 9, Official Record, volume 21, Additional Motions After End of Case: Motion of defendant Blobel, page 5.

in Case 9¹ with regard to the statements on the culpability of the shooting of partisans, since the verdict on this point is in contradiction with the verdict of Military Tribunal V in Case 7.²

The decision in the judgment of Military Tribunal II in Case 9 largely affects the interests of my client, Blobel.

On pages 119 and 120 of the German text of the judgment in Case 9, Military Tribunal II stated that Article I of the Hague Regulations is not applicable to individual armed civilians shooting at soldiers in uniform; it said, however, that Article I of the Hague Regulations is applicable if these armed civilians are organized, by stating:

“If the partisans are organized and engaged in what international law regards as legitimate warfare for the defense of their own country, they are entitled to be protected as combatants.”³

The verdict in Case 9 further states that Article I of the Hague Regulations is also applicable to partisans if the partisans are engaged in a regular act of war against the enemy, but the judgment does not say that the conditions required in Article I of the Hague Regulations must be fulfilled. The judgment says:

“In reconquering enemy territory which the occupant has lost to the enemy, he is not carrying out a police performance but a regular act of war. The enemy combatants in this case are, of course, also carrying out a war performance. They must, on their part, obey the laws and customs of warfare, and if they do, and then are captured, they are entitled to the status and rights of prisoners of war.”⁴

This final recognition of Military Tribunal II in the question of the legitimacy or illegitimacy of the shooting of partisans is contradictory to the final judgment of Military Tribunal V in Case 7. Therein, Military Tribunal V states that an organization of partisans, even if it corresponds to a military organization, is not sufficient to claim Article I of the Hague Regulations as long as the other conditions, which are explicitly required therein, are not fulfilled, namely,

1. To be commanded by a person responsible for his subordinates,
2. To have fixed distinctive emblem recognizable at a distance,
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

¹ See judgment volume IV, this series, pages 411-587.

² See judgment volume XI, this series, pages 1230-1318.

³ Volume IV, this series, page 492.

⁴ Volume IV, this series, pages 492 and 493.

The judgment in Case 7 justifies its final finding as follows:

"The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian, and Serbian uniforms were used to the extent they could be obtained. The Soviet star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovic, and the Edes of General Zervas. It is evident also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being *francs-tireurs*."¹

Since this is a basic question of substantive law, the prerequisites for this motion are fulfilled.

[Signed] DR. HEIM

b. Answer of the Prosecution, 20 April 1948 ²

To: The Secretary General of the Military Tribunals

The prosecution respectfully submits the following information with regard to Dr. Heim's request of 16 April 1948 for a plenary session to consider a contradiction between the judgment of Military Tribunal II in Case 9 and the judgment of Military Tribunal V in Case 7.

In its judgment, Military Tribunal V stated that an organization of partisans could not claim the rights of prisoners of war under Article I of the Hague Regulations unless four conditions were fulfilled:

"1. To be commanded by a person responsible for his subordinates.

"2. To have a fixed distinctive emblem recognizable at a distance.

¹ Volume XI, this series, page 1244.

² U.S. vs. Otto Ohlendorf, et al., Case 9, Official Record, volume 21, Additional Motions After End of Case: Motion of defendant Blobel, page 3.

"3. To carry arms openly; and

"4. To conduct their operations in accordance with the laws and customs of war."¹

It is the contention of defense counsel, Dr. Heim, on behalf of the defendant Blobel, that Tribunal II reached a contradictory conclusion for "the judgment does not say that the conditions required in Article I of the Hague Regulation must be fulfilled."

This contention of Dr. Heim is not in accord with the facts. The judgment in Case 9 does say, and very specifically, "that the conditions required in Article I of the Hague Regulations must be fulfilled."

[Here the prosecution's answer quoted parts of the judgment in the Einsatzgruppen case which were incorporated in the order of the Tribunal (reproduced immediately following) along with a further quotation from the Einsatzgruppen judgment.]

It should be apparent, therefore, that the judgment in Case 9 is in complete accord with the judgment in Case 7 on the legal question of the requirements for legitimate belligerency.

It is difficult to see how the question of lawful belligerency would affect the case of defendant Blobel. Blobel was convicted because of the massacre of 33,771 Jews in 2 days (*Tr. p. 6809*), the execution of persons because he thought them "suspicious" (*Tr. p. 6810*), the execution of Jews and prisoners of war (*Tr. p. 6810*), and for having executed persons in a reprisal ratio of 116 to 1 (*Tr. p. 6811*).² Inasmuch as Blobel's interests would not be affected by any ruling on the question of the lawfulness of partisan warfare, he is not even privileged under Ordinance No. 11 to request a plenary session on that subject.

Respectfully submitted,

For the Chief of Counsel for War Crimes:

[Signed] BENJAMIN B. FERENCZ,
Executive Counsel

Nuernberg, Germany
20 April 1948

¹ Volume XI, this series, pages 1246.

² The findings concerning Blobel's guilt which are here referred to, are reproduced at pages 527-529, volume IV, this series.

c. Order of the Committee of Presiding Judges, 26 April 1948,
Signed by the Presiding Judges of Five Tribunals

UNITED STATES MILITARY TRIBUNALS, SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
26 APRIL 1948, IN CHAMBERS

*ORDER**

Dr. Willi Heim, counsel for Paul Blobel in Case 9, has filed a motion, calling for a plenary session of all Military Tribunals on the ground that there is a contradiction between the judgment of Military Tribunal II in Case 9 and the judgment in Case 7 of Military Tribunal V. A reading of the two judgments will quickly demonstrate that the alleged contradiction between the judgments does not exist.

Military Tribunal V stated:

“Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly, and (d) if they observe the laws and customs of war.”

Military Tribunal II stated:

“Article I of the Hague Regulations provides:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- ‘1. To be commanded by a person responsible for his subordinates;
- ‘2. To have a fixed distinctive emblem recognizable at a distance;
- ‘3. To carry arms openly; and
- ‘4. To conduct their operations in accordance with the laws and customs of war.’

“It is unnecessary to point out that, under these provisions, an armed civilian found in a treetop sniping at uniformed soldiers is not such a lawful combatant and can be punished even with the death penalty, if he is proved guilty of the offense.

“But this is far different from saying that resistance fighters in the war against an invading army, if they fully comply with the conditions just mentioned, can be put outside the law by the adversary. As the Hague Regulations state expressly, if they

*U.S. *vs. Otto Ohlendorf, et al.*, Case 9, Official Record, volume 21, Additional Motions after End of Case—Motion of defendant Blobel, pages 1 and 2.

fulfill the four conditions, 'the laws, rights and duties of war' apply to them in the same manner as they apply to regular armies.

"Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare for the defense of their own country, they are entitled to be protected as combatants.

* * * * *

"***They must, on their part, obey the laws and customs of warfare, and if they do, and then are captured, they are entitled to the status and rights of prisoners of war."

It will be noted also that Tribunal V in considering the issue of partisans and the particular facts in the case before it, said:

"It is evident also that a few partisan bands met the requirement of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements."

It is thus obvious that in considering this question the facts in each instance must be studied. In Case 7, had the partisans met the lawful requirements they would be entitled to protection under International Law. In Case 9, the Tribunal pointed out that certain defendants had an erroneous view of international law when they assumed that merely because someone was characterized a partisan he could be shot without trial.

The motion for a plenary session is denied.

- [Signed] CURTIS G. SHAKE
Executive Presiding Judge
- [Signed] MICHAEL A. MUSMANNO
Presiding Judge, Tribunal II
- [Signed] HU C. ANDERSON
Presiding Judge, Tribunal III
- [Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV
- [Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V

4. ALLEGED CONFLICTING RULINGS BETWEEN THE JUDGMENT IN THE KRUPP CASE AND THE JUDGMENTS IN THE MILCH AND FARBEN CASES

UNITED STATES MILITARY TRIBUNALS, SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
AT A SESSION HELD 11 AUGUST 1948, IN CHAMBERS

United States of America

vs.

Alfried Krupp von Bohlen und Halbach, *et al.*,
Defendants

} *CASE 10*

*ORDER*¹

On 10 August 1948, in behalf of defendants Alfried Krupp von Bohlen und Halbach, Max Ihn, Ewald Loeser, Eduard Houdremont, Erich Mueller, Friedrich Janssen, Karl Eberhardt, Heinrich Korsch, Friedrich von Buelow, Heinrich Lehmann, and Hans Kupke in Case 10, a petition was filed in the Office of the Secretary General² for a joint session of the Military Tribunals to answer the following questions:

"1. Are the Military Tribunals in Nuernberg American tribunals?

"2. Does it constitute illegal spoliation according to the Hague Rules for Land Warfare, if a member of an occupying power harms the economy of occupied territory as a whole without violating the rights of the owner?

"3. Is confiscation of property permissible if the judgment is unable to establish any connection between the punishable act and the acquisition of that property?"

it being contended in said petition that the judgment handed down by Military Tribunal III, Case 10 (Krupp)³, is in conflict with prior rulings in the judgments of Military Tribunal II, Case 2 (Mlch)⁴ and Military Tribunal VI, Case 6 (I. G. Farben).⁵

A careful consideration of the allegations of the petition does not show such a conflict or inconsistency between the rulings of said Tribunal III and those of Tribunals II and VI, with respect to the questions referred to in the said petition as to entitle the petitioners to a joint session of Military Tribunals as requested in the petitions.

¹ U.S. *vs.* Alfried Krupp von Bohlen und Halbach, *et al.*, Case 10, vol. 40, Additional Motion Filed after the End of the Case, page 1.

² This petition is not reproduced herein. The prosecution did not answer this petition.

³ Volume IX, this series, pages 1327-1452.

⁴ Volume II, this series, pages 773-878.

⁵ Volume III, this series, section XIII.

The petition is accordingly dismissed.

[Signed] WILLIAM C. CHRISTIANSON
Executive Presiding Judge

[Signed] ROBERT M. TOMS
Presiding Judge, Tribunal II

[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V

5. ALLEGED CONFLICTING RULINGS BETWEEN THE SUPPLEMENTAL JUDGMENT IN THE POHL CASE AND THE JUDGMENT IN THE FARBEN CASE

a. Motion, 27 August 1948, on Behalf of Defendant Bobermin, Who Was Convicted in the Pohl Case¹

Nuernberg, 27 August 1948
Dr. G./Zy

TO: Presiding Judge of the Military Tribunals
Nuernberg

As defense counsel for the defendant Dr. Bobermin in Case 4, I move:

1. that a plenary session of the Military Tribunals be convened in order to discuss and check the inconsistent and contradictory final results of Military Tribunal II [in its supplementary judgment in the Pohl case] of 11 August 1948² and Military Tribunal VI [in its judgment in the Farben case] of 29 July 1948³ with respect to fundamental and important questions of substantive law;

2. that the supplemental judgment of Military Tribunal II of 11 August 1948 concerning Dr. Bobermin be referred back in order that action be taken in accordance with the plenary decision.

Supporting reasons:

The supplemental judgment of Military Tribunal II of 11 August 1948, in the case against Pohl, *et al.*, (Case 4), differs from the decisions of the other Military Tribunals in fundamental and important questions of substantive law.

I

In its supplemental judgment of 11 August 1948 Military Tribunal II stated that Dr. Bobermin participated in a program of spoliation and plundering and that he approved the employment of workers from concentration camps in the Golleschau plant (p.

¹ U.S. vs. Oswald Pohl, *et al.*, Case 4, Official Record, volume 26, Additional Motions Filed after End of Case, pages 39-43.

² Volume V, this series, pages 1168-1251.

³ Volume VIII, this series, section XIII.

99 English).¹ With respect to spoliation and plundering it was merely found that Dr. Bobermin took over property which had *already been confiscated by the government* and that Dr. Bobermin acted under the *authority* of his government.

“He did, however, take over properties that were seized from innocent proprietors. Naturally he did not do this alone; *he did it under the authority of his government*, but his government was engaged in an obviously illegal enterprise.”²

(Supplemental judgment in Case 4, page 105 German.

Emphasis supplied)

Military Tribunal II did not make any further findings, in particular it was not proved, that Dr. Bobermin is responsible for the existence or the execution of this order of the German Government or that his participation in these measures exceeded the degree called for by these orders or was the result of his own initiative.

In this respect there is a contradiction between the supplemental judgment of Military Tribunal II of 11 August 1948 and the judgment of Military Tribunal VI of 29 July 1948 in the trial against Krauch, *et al.* (Case 6). Military Tribunal VI argued that an action carried out under the authority of the government was to be regarded as a case of legal necessity, *unless the one who claims the excuse of necessity was himself responsible for the existence or execution of such orders or decrees, or if his participation exceeded the degree called for by these requirements or was the result of his own initiative.*

“It follows that the defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.”³

(Judgment in Case 6, page 141 German.)

In consideration of the legal opinion adopted by Military Tribunal VI, therefore, Dr. Bobermin should have been acquitted of the charge of spoliation and plundering.

II

Furthermore, Military Tribunal II found the following in its reasons in support of the supplemental judgment concerning the charge of plundering raised against Dr. Bobermin:

“But the record does not show that ‘such steps were requisite

¹ Volume V, this series, page 1250.

² *Ibid.*, page 1249.

³ Volume VIII, this series, section XIII.

for the maintenance of public order and security in the occupied territory.'"¹

(Supplemental judgment in Case 4, page 106 German.)

It is thereby expressly stated by Military Tribunal II that the results of the evidence do not exclude the possibility *that the seizure effected by the government was necessary for the maintenance of public order and security in the occupied territory and therefore does not violate prevailing international law.*

The lack of proof has been adjudged *to the disadvantage of Dr. Bobermin.*

In this respect there is also a contradiction between the judgment of Military Tribunal II and the judgments of the other military tribunals, especially with the judgment of Military Tribunal VI. In the judgment of Military Tribunal VI of 29 July 1948 it was set forth that the difficulties of producing proof do not relieve the prosecution of its obligation to produce such proof.

"Difficulties of establishing such proof due to the destruction of records or other causes does not relieve the prosecution of its burden in this respect."²

(Judgment in Case 6, page 103 German.)

Regarding his conviction of participation in the slave-labor program, Military Tribunal II stated the following:

"Bobermin was the administrator of the plants in which these inmates worked and he obtained, in an official sense, the benefits of their work."³

(Supplemental judgment in Case 4, page 107 German.)

On the basis of these findings Dr. Bobermin was convicted of participation in the slave-labor program.

In this respect there is a contradiction with the statements of Military Tribunal VI in its judgment of 29 July 1948 in Case 6. Military Tribunal VI stated that a conviction of participation in the slave-labor program could only be justified if the defendant had procured or employed forced workers on *his own initiative*. I refer in particular to the following statements of Military Tribunal VI in the judgment of 29 July 1948 in Case 6:

"Despite this, however, it is evident that the defendants most closely connected with the Auschwitz construction project bear great responsibility with respect to the workers. *They applied to the Reich Labor Office for Labor. They received and accepted concentration camp workers, who were placed at the disposal of the construction contractors working for Farben.*"⁴

¹ Volume V, this series, page 1250.

² Volume VIII, this series, section XIII.

³ Volume V, this series, page 1250.

⁴ Volume VIII, this series, section XIII.

(*Judgment in Case 6, page 149 German. Emphasis supplied.*)

"The use of concentration camp labor and forced foreign workers at Auschwitz *with the initiative* displayed by the officials of Farben in the procurement and utilization of such labor is a crime against humanity and, to the extent that non-German nationals were involved, also a war crime, to which the slave-labor program of the Reich will not warrant the defense of necessity."¹

(*Ibid., page 152 German. Emphasis supplied.*)

"We are not convinced from the proof that any of these defendants exercised *initiative* in obtaining forced labor under such circumstances as would deprive them of the defense of necessity."¹

(*Ibid., page, 161 German. Emphasis supplied.*)

If the legal principles established by other military tribunals, especially those of Military Tribunal VI, are applied, Dr. Bobermin, therefore, should also be acquitted of the charge of having participated in the slave-labor program, because the proof advanced for this is not adequate in this respect, either.

Respectfully,

[Signed] DR. GAWLIK

b. Order of the Judges of Tribunals IV and V,
2 September 1948

UNITED STATES MILITARY TRIBUNALS, SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
2 SEPTEMBER 1948, IN CHAMBERS

United States of America

vs.

Oswald Pohl, *et al.*,

Defendants

} CASE 4

ORDER²

On 27 August 1948, Dr. Hans Gawlik, counsel for defendant Hans Bobermin in the above-entitled case, filed with the Secretary General a petition for a plenary session of the Military Tribunals "to discuss and check the inconsistent and contradictory final results of Military Tribunal II [in its supplemental judgment in the Pohl case] of 11 August 1948 and Military Tribunal VI [in

¹ *Ibid.*

² U.S. *vs. Oswald Pohl, et al.*, Case 4, Official Record, volume 26, Additional Motions Filed after End of Case, page 38.

its judgment in the Farben case] of 29 July 1948 with respect to fundamental and important questions of substantive law"; and in order "that the supplemental judgment of Military Tribunal II of 11 August 1948 concerning Dr. Bobermin be referred back in order that action be taken in accordance with the plenary session."

Such petition alleges that "The supplemental judgment of Military Tribunal II of 11 August 1948 in the case against Pohl, *et al.* (Case 4) differs from the decisions of the other Military Tribunals in fundamental and important questions of substantive law."

On 2 September 1948, the judges of the Military Tribunals now functioning in Nuernberg, namely Tribunals IV and V, convened for the purpose of considering and acting upon said petition for a plenary session of the Military Tribunals. Careful consideration having been given to the allegations of said petition, and to the judgments therein referred to, and it appearing to said judges that there is no such inconsistency or conflict between the rulings in said judgments, as to entitle defendant Bobermin to the convening of a plenary session of the Military Tribunals, in accordance with the provisions of Military Government Ordinance No. 11, it was decided that said petition should be denied.

Now, therefore, pursuant to the decision and authorization of the judges of Tribunals IV and V, IT IS ORDERED that said petition for plenary session of the Military Tribunals be, and the same is hereby, denied.

[Signed] WILLIAM C. CHRISTIANSON
Executive Presiding Judge

Dated this 2d day of September 1948.

**6. ALLEGED CONFLICTING RULINGS BETWEEN THE
SUPPLEMENTAL JUDGMENT IN THE POHL CASE AND
THE JUDGMENT IN THE HOSTAGE CASE**

**a. Motion, 27 August 1948, on Behalf of Defendant Volk,
Convicted in the Pohl Case***

Nuernberg, 27 August 1948
K1/Zy 1650 [hours]

[Stamp] Filed: 27 August 1948

To: Presiding Judge of the Military Tribunals
Nuernberg

Subject: Petition for decision by a plenary session of the military tribunals in accordance with Article II (b) of Ordinance No. 11

* *Ibid.*, pages 51-54.

As defense counsel for the defendant Dr. Volk in Case 4,
I move:

1. that a plenary session of the Military Tribunals be called in order to discuss and reexamine the inconsistent and contradictory final results by Military Tribunal II in the supplemental judgment [Pohl case] of 11 August 1948,¹ as well as of Military Tribunal V in the judgment of 19 February 1948 [Hostage case]² concerning basic and important question of substantive law;

2. that the supplemental judgment by Military Tribunal II of 11 August 1948 concerning Dr. Volk be remitted for the execution of measures in accordance with the decision taken by the plenary session.

Reasons:

The supplemental judgment by Military Tribunal II of 11 August 1948 in the case against Pohl and others (Case 4) deviates in basic and important questions of substantive law from the decision by Military Tribunal V, dated 19 February 1948, in the case against List and others (Case 7).

I

The following statement was made by Military Tribunal II in the supplemental judgment of 11 August 1948 with respect to the defendant Dr. Volk:

“The extent of his participation in the inhuman treatment accorded internees was a ‘consenting part’, as defined in Control Council Law No. 10.”³

To this extent this is contradictory to the judgments of the other military tribunals, especially to the judgment by Military Tribunal V in Case 7, dated 19 February 1948. Military Tribunal V has expressly found *that participation must be proven by some responsible act.*

“It must be shown by some responsible act that he was.”⁴

(Judgment in Case 7, page 78/79, German.)

Consequently, this consent alone was not sufficient.

Such an act of participation on the part of defendant Dr. Volk has not been ascertained by Military Tribunal II. On the contrary, it was argued by Military Tribunal II that it was not possible for Dr. Volk to commit such an act of participation if only for the reason that he had no authority over the concentration camp inmates.

¹ Volume V, this series, pages 1168-1251.

² Volume XI, this series, pages 1230-1318.

³ Volume V, this series, page 1229.

⁴ Volume XI, this series, page 1286.

"Defense counsel makes a point of the fact that 'Volk had no control over the internees'. It was not claimed by the prosecution, nor found by the judgment, that Volk directly *controlled* internees."¹

(Supplemental judgment in Case 4, page 83, German. Emphasis supplied.)

II

It was furthermore found by Military Tribunal II that the Chief of Staff was fully responsible with respect to criminal law if he violated the rules of war and the laws of humanity established in international law.

"If the Chief of Staff simply performs military duties, he commits no crime, but *if he himself violates the rules of war and the laws of humanity as established by international law, he is responsible.* Field Marshal Keitel, Chief of the High Command of the German Armed Forces was found guilty of war crimes and crimes against humanity and was convicted and executed even though he claimed that he had committed all his acts under the order of Hitler."²

(Supplemental judgment in Case 4, page 87, German. Emphasis supplied.)

To this extent this is contradictory to the judgment by Military Tribunal V in Case 7, dated 19 February 1948, which has decided that the deciding factor was that the defendant had acted on his own initiative.

"The order then was sent on its way through regular channels by von Geitner. No doubt exists that the order was that of the military commander and that *the defendant von Geitner lacked the authority to issue such an order on his own initiative.*"³

(Judgment in Case 7, page 81, German. Emphasis supplied.)

Military Tribunal V stated expressly in its verdict of 19 February 1948 that Foertsch had distributed an order issued by General Kuntze dated 19 March 1942 which was considered, in the verdict, to be a crime against international law (*page 77 German*). General Kuntze was sentenced for this order (*pages 67, 68 German*).

It has further been established that the Commando Order of 18 October 1942 was distributed by General Foertsch. Foertsch also distributed a Hitler order in 1943 to the effect that partisans were to be brought to the Reich to do forced labor in the mines. Despite all of this, Foertsch was acquitted for the reason that he had not acted on his *own initiative*.

¹ Volume V, this series, page 1229.

² *Ibid.*, page 1233.

³ Volume XI, this series, page 1288.

In regard to defendant von Geitner, who has also been acquitted, Military Tribunal V established that he initialed, signed, and then forwarded orders that violated international law.

"The latter was generally indicated by his initials or signature. The order then was sent on its way through regular channels by von Geitner."¹

(*Judgment in Case 7, page 81, German.*)

In spite of this, the defendant von Geitner was acquitted for the same reasons as was Foertsch as Chief of Staff.

Accordingly, Military Tribunal V has decided, in opposition to Military Tribunal II, that a Chief of Staff cannot be held responsible even if he violates the rules of warfare and the human rights established by international law, because he did not have the right, as Chief of Staff, to issue such orders on *his own initiative*.

The activities of Field Marshal Keitel cannot be compared with this because Keitel's position far surpassed that of the Chief of Staff and because he did act on *his own initiative*.

Therefore, by applying the legal principles laid down by the other Military Tribunals, especially those by Military Tribunal V in Case 7, Dr. Volk would have to be acquitted since the evidence does not prove beyond a reasonable doubt that he is guilty as charged.

Most respectfully,

[Signed] GERHARD KLINNERT

b. Order of the Judges of Tribunals IV and V, 2 September 1948

UNITED STATES MILITARY TRIBUNALS, SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
2 SEPTEMBER 1948, IN CHAMBERS

[Stamp] Filed: 3 September 1948

United States of America

vs.

Oswald Pohl, *et al.*,

Defendants }

CASE 4

ORDER²

On 27 August 1948, Gerhard Klinnert, counsel for defendant Leo Volk in the above-entitled case, filed a petition with the Secretary General for a plenary session of the Military Tribunals, "in order to discuss and reexamine the inconsistent and contradictory final results by Military Tribunal II in the supplemental judg-

¹ *Ibid.*

² U.S. *vs.* Oswald Pohl, *et al.*, Case 4, Official Record, volume 26, Additional Motions Filed after End of Case, page 50.

ment [Pohl] case of 11 August 1948, as well as of Military Tribunal V in the verdict [Hostage case] of 19 February 1948, concerning basic and important questions of substantive law;" and "that the supplemental judgment by Military Tribunal II of 11 August 1948 concerning Dr. Volk be remitted for the execution of measures in accordance with the decision taken by the plenary session."

On 2 September 1948, all the judges of the Military Tribunals now functioning in Nuernberg, namely Tribunals IV and V, convened for the purpose of considering and acting upon said petition for plenary session.

Such judges having given careful consideration to the allegations of the petition, and to the judgments therein referred to, and finding no such inconsistencies or conflict between the judgments of said Tribunal II and Tribunal V as entitles the petitioner to a plenary session of the Tribunals to consider such alleged inconsistencies, as provided in Military Government Ordinance No. 11, IT IS ORDERED that said petition for plenary session be, and the same is hereby, denied.

[Signed] WILLIAM C. CHRISTIANSON
Executive Presiding Judge

Dated this 2d day of September 1948.

7. ALLEGED CONFLICTING RULINGS BETWEEN THE SUPPLEMENTAL JUDGMENT IN THE POHL CASE AND THE JUDGMENTS IN THE JUSTICE, FARBEN, AND KRUPP CASES

Order of the Judges of Tribunals IV and V, 2 September 1948, Denying a Motion for a Joint Session Filed on Behalf of 14 Defendants in the Pohl Case

UNITED STATES MILITARY TRIBUNALS, SITTING
IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
2 SEPTEMBER 1948, IN CHAMBERS

United States of America

vs.

Oswald Pohl, *et al.*,

Defendants }

CASE 4

ORDEI*

On 27 August 1948, in behalf of defendants Hans Baier, Hans Bobermin, Franz Eirenschmalz, Heinz Karl Fanslau, August Frank, Max Kiefer, Georg Loerner, Hans Loerner, Oswald Pohl,

* *Ibid.*, page 14.

Hermann Pook, Karl Sommer, Leo Volk, Erwin Tschentscher, and Karl Mummenthey, a petition was filed with the Secretary General¹ for a plenary session of the military tribunals "to hear the legal explanations of the defense, to examine the decision of Military Tribunal II in Case 4, and to refer back, in accordance with the plenary decision, to the carrying-out of measures."²

On 2 September 1948, all the judges of the Military Tribunals now functioning at Nuernberg, namely Tribunals IV and V, convened for the purpose of considering and acting upon said petition for plenary session.

Military Government Ordinance No. 11 sets forth the conditions upon which a plenary session of Military Tribunals may be convened. After a careful consideration of all the allegations of said petition for plenary session, and of the judgments and rulings therein referred to, it is the opinion of said judges that there is revealed no such inconsistency or conflict between rulings or judgments of the Tribunals as would entitle petitioners to the convening of a plenary session of the Military Tribunals, and that, accordingly, said petition for plenary session should be denied.

Now, therefore, pursuant to the decision and authorization of said judges of Military Tribunals IV and V, IT IS ORDERED that said petition for plenary session of the Military Tribunals be, and the same is hereby, denied.

[Signed] WILLIAM C. CHRISTIANSON
Executive Presiding Judge

Dated this 2d day of September 1948.

¹ The prosecution did not answer this petition which is not reproduced herein. See U.S. vs. Oswald Pohl, *et al.*, Case 4, Official Record, volume 26, Additional Motions Filed After End of Case, pages 15-25.

² The petition alleged among other things, that (a) in reconvening and reconsidering its judgment in the Pohl case (sec. XXVI), Tribunal II had ruled inconsistently with the judgments in the Justice and Krupp cases, and (b) in its supplemental judgment had ruled inconsistently with the judgment in the Farben case on the personal responsibility of a member of the supervisory board.

8. ALLEGED CONFLICTING RULINGS BETWEEN THE JUDGMENT IN THE HIGH COMMAND CASE AND THE JUDGMENTS IN VARIOUS OTHER CASES

a. Defense Motion of 28 October 1948, Made Just after the Tribunal Had Pronounced Sentence in the High Command Case and the Tribunal's Ruling Thereon

EXTRACTS FROM THE TRANSCRIPT OF THE HIGH COMMAND CASE, 28 AND 29 OCTOBER 1948*

DR. LATERNER (counsel for defendant von Leeb and spokesman for defense counsel in the High Command case): Your Honors, on behalf of the entire defense, I should like to make a brief statement. The defense has ascertained that the judgment just pronounced is in contradiction to the decisions of other military tribunals in Nuernberg with respect to basic and important legal points. In accordance with Ordinance No. 11, the defense asks the Military Tribunals to make a decision on that point by calling a plenary session of all tribunals. The substantiation of this motion will be handed in later in view of the time period allowed in that ordinance.

This motion just read has been laid down in writing by me and I am now handing it over to the Secretary General.

PRESIDING JUDGE YOUNG: The motion may be filed. Before the Tribunal announces an adjournment or an order with respect to this motion, there is a request that has been made that a matter be included in the record.

[At this point Judge Young incorporated in the record a protest made on behalf of the French Ministry of War by the French delegation in Nuernberg concerning certain derogatory remarks against a French military leader which allegedly were contained in the closing brief for defendant Schniewind.]

In view of the motion that has been filed by the chief of defense counsel, the Tribunal will not at this time adjourn but will recess until 9:30 o'clock tomorrow morning at which time you may present the matter called to the Tribunal's attention. The Tribunal will now be in recess.

(The Tribunal recessed until the next day.)

PRESIDING JUDGE YOUNG: The motion filed last night before the close of the session has been translated and submitted to the Tribunal.

The Tribunal considered the judgments of other tribunals

*Extracts from mimeographed transcript, Case 12, U.S. vs. Wilhelm von Leeb, et al., pages 10814-10816.

heretofore rendered in arriving at the judgment in this case and is of the opinion there is no conflict with them and does not desire to hear argument on the motion. Accordingly, the motion for a plenary session filed on behalf of all of the defendants is overruled without prejudice to such further rights in the matter as defendants may have.

The Tribunal is now about to adjourn.

The Tribunal is adjourned without day.

DR. LATERNSEER: Your Honor, may I make a communication to the Court? May I make a statement to the Court?

PRESIDING JUDGE YOUNG: The Court has adjourned and I think it would not be proper to hear a statement to the Court. Adjourned.

THE MARSHAL: Military Tribunal V is adjourned without day.
(The Tribunal adjourned *sine die*.)

b. Extracts from a Defense Motion, 8 November 1948, on Behalf of 11 Defendants Convicted in the High Command Case *

PETITION FOR A PLENARY SESSION, CASE 12

Nuernberg, 8 November 1948

To: Plenary Session of the Military Tribunals

Nuernberg

[Stamp] Filed: 8 November 1948

c/o the Secretary General

Pursuant to Article II of Ordinance No. 11, promulgated in February 1947, the undersigned counsel for the defense in Case 12 request that a plenary session of all Military Tribunals at Nuernberg be called.

The plenary session is requested:

1. to ascertain that the judgment passed on 27 and 28 October 1948 in Case 12 in the below-mentioned 7 points, which concern fundamental and important legal questions, is not in agreement with and contradicts the judgments passed earlier by the Military Tribunals at Nuernberg (Article II b):

2. to refer back the judgment in Case 12 for a reconsideration of the contradictions ascertained and for the implementation of the measures decided on by the plenary session (Article II c).

It is requested that oral proceedings be held.

Reasons:

The defense has ascertained that the judgment in Case 12 is in the following fundamental and materially important questions not

*U.S. vs. Wilhelm von Leeb, et al., Case 12, Official Record, volume 28, Additional Motion Filed After End of Case, pages 3-32.

in agreement with and in contradiction to the judgments passed by the Military Tribunals at Nuernberg:

1. in the question of binding the tribunal by the judgment of the International Military Tribunal (Article X of Ordinance No. 7);
2. in the question of the legal significance of the "tu quoque" doctrine;
3. in the question of the state of emergency;
4. in the question of the legal adjudication of the position of a chief of staff;
5. in the question of the legal adjudication of the partisans;
6. in the question of the hostages;
7. in the question of the admissibility of affidavits by persons meanwhile deceased.

[In the balance of the text of this motion, the translation of which runs to 30 pages, numerous quotations were made from the judgment in the High Command case and from the judgments in the IMT, Flick, Farben, Krupp, and Hostage cases. The motion alleged various inconsistent findings or ruling between the High Command case and the judgments or rulings in other cases.]

[Signed by 11 counsel for the defense.]

c. Order and Memorandum of the Tribunal in the Ministries Case, 16 November 1948, on the Motion for a Joint Session Filed by the Defendants Convicted in the High Command Case

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY
16 NOVEMBER 1948, IN CHAMBERS

United States of America	}	CASE 12	
vs.			[Stamp] Filed: 17 November 1948
Wilhelm von Leeb, <i>et al.</i> , Defendants			

ORDER*

On 8 November 1948, a petition for a "plenary session of all Military Tribunals at Nuernberg" was filed by counsel for the following-named defendants in Case 12: Dr. Laternser, counsel for von Leeb; Dr. Behling, counsel for von Kuechler; Dr. Mueller-Torgow, counsel for Hoth; Dr. Frohwein, counsel for Reinhardt; Dr. Gollnick, counsel for von Salmuth; Dr. Fritsch, counsel for von

*Ibid., pages 1 and 2.

Hollidt; Dr. Tipp, counsel for von Roques; Dr. Surholt, counsel for Reinecke; Dr. Leverkuehn, counsel for Warlimont; Dr. Rauschenbach, counsel for Woehler; and Dr. von Keller, counsel for Lehmann.

Said petition asserts that the judgment in Case 12 is "not in agreement with and contradicts the judgments passed earlier by military tribunals at Nuernberg," and requests that the "Judgment in Case 12 be referred back for a reconsideration of the contradictions ascertained, and for the implementation of the measures decided on by the plenary session."

Said petition having come before Tribunal IV, the sole United States Military Tribunal now functioning at Nuernberg, at a session thereof in chambers, on 16 November 1948, with all judges of said Tribunal being present, and said petition having been considered by the Tribunal,

IT IS ORDERED that said petition for the calling of a joint session (referred to as plenary session in the petition) of the Military Tribunals at Nuernberg be, and the same is hereby, denied.

Memorandum hereto attached is made a part of this order. Dated this 16th day of November 1948.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV

[Signed] ROBERT F. MAGUIRE
Judge, Tribunal IV

[Signed] LEON W. POWERS
Judge, Tribunal IV

MEMORANDUM

Authorization for the calling of joint sessions of the Military Tribunals at Nuernberg is derived from Ordinance No. 11, dated 18 October 1946, which amended Ordinance No. 7 by adding thereto an article designated V-B. Subparagraph (a) thereof provides as follows: "A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes, or of counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals."

Subparagraph (b) provides that a joint session of military tribunals may be called in the same manner as provided in sub-

paragraph (a), for the purpose of hearing argument upon and to review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental and important legal question, either substantive or procedural. Obviously the petition here under consideration is intended to be pursuant to the foregoing Ordinance.

The Tribunal is of the opinion that the provisions of said Ordinance No. 11 do not contemplate the convening of Military Tribunals at Nuernberg in joint session, unless there are at least two tribunals for such "joint" session. Obviously, there cannot be a "joint" session if there is only one tribunal. Moreover, it is reasonable to assume that it was never intended that a single tribunal should sit in a reviewing capacity, with respect to the actions of other tribunals of equal jurisdiction and of the same class. The provision of the Ordinance would seem to make it clear that it was intended that the collective judgment and opinion of several tribunals should be brought to bear upon problems submitted to a joint session. That Military Tribunal IV is the only military tribunal now functioning at Nuernberg, doubtless was known to the petitioners when they filed this petition for a plenary session on 8 November 1948, inasmuch as all other tribunals, formerly engaged in the trial of actions at Nuernberg, had adjourned and ceased to function before the date of said petition and its filing.

The above considerations are sufficient to constrain the Tribunal to the conclusion that the petition for such joint session must be denied.

The Tribunal does not hesitate to state, however, that, in the event that there here existed no question as to the propriety of holding a so-called plenary session by a single tribunal, our examination of the petition on the merits leads us to the conclusion that there exists no such inconsistency or conflict with respect to Case 12 and the judgments in prior cases as would justify the holding of such plenary session.

It should be here noted again that the calling of a joint session of the military tribunals at Nuernberg is not a matter of right, but is a matter which, under the terms of the authorizing ordinance, is discretionary. The Ordinance, as will be noted, states that such joint session MAY be called under certain conditions.

16 November 1948.

9. ALLEGED CONFLICTING RULINGS BETWEEN THE JUDGMENT IN THE MINISTRIES CASE AND THE JUDGMENTS IN VARIOUS OTHER CASES

a. Introduction

When Military Tribunal IV in the Ministries case issued its orders of 6 and 14 April 1948 "permitting the filing of memoranda concerning alleged errors" of fact and law in its judgment (sec. XXVII B and C), it declared that the provisions of Article V-B concerning the calling of joint sessions were no longer applicable since only one tribunal was in existence and the Tribunal stated that "No motion for a joint session of tribunals will be accepted or considered." Notwithstanding, on 25 April 1949, counsel for 18 defendants convicted in the Ministries case addressed a motion for a joint session "To: The Presiding Judges of and to each of the United States Military Tribunals at Nuernberg, in care of the Secretary General of the United States Military Tribunals, Palace of Justice, Nuernberg." (This motion is reproduced in part in *b* below.) Upon inquiry by the Chief of the Defense Center, the Deputy Military Governor directed that the motion "should be referred to the Tribunal for its consideration in connection with its memorandum of 14 April 1949." (The memorandum of 14 April 1949 was attached to the Tribunal's order of 14 April 1949 providing for the filing of motions alleging errors in the Tribunal's judgment.) When Tribunal IV ruled upon the various individual defense motions filed after judgment, it stated in a number of the individual orders that it could not grant or give consideration to the motion for a plenary session, but that it had considered the arguments made in that motion against the convictions declared in the Tribunal's judgment. For example, in the order with respect to the motion of defendant Kehrl, the Tribunal stated:

"Reference is hereinbefore made to the petition for plenary session joined in by this defendant. The Tribunal again wishes to indicate that it could not grant request for such plenary session, or in fact give consideration thereto, but the arguments against the convictions of this Tribunal as contained in said request for plenary session have been considered in connection with the arguments advanced in support of this defendant's memorandum and motion of 10 May 1949, hereinbefore referred to."

All the orders of Tribunal IV upon the post-judgment motions and memoranda of the defense are reproduced in section XVIII, volume XIV, this series.

b. Extracts from the Defense Motion of 25 April 1949, Filed on Behalf of 18 of the Defendants Convicted by the Judgment in the Ministries Case*

[Stamp] Filed: 25 April 1949

To: The Presiding Judges of and to each
of the United States Military Tribunals at
Nuernberg

c/o The Secretary General of the U.S. Military Tribunals,
Palace of Justice, Nuernberg

*Motion for the Calling of a Plenary Session of the Military
Tribunals*

The undersigned defense counsel request on behalf of the defendants whom they represent, and pursuant to Article V-B (b) and (c) of Ordinance No. 7 of the Military Government for Germany, as set forth in Ordinance No. 11, to call a plenary session of the Military Tribunals in order to examine the judgment passed on 14 April 1949 by Military Tribunal IV in Case 11.

Reasons:

I

The judgment of Military Tribunal IV in Case 11 contains a series of findings applying to fundamental and important questions pertaining to substantive law and to procedure, namely findings which deviate from the judgments passed by other Military Tribunals, and which are inconsistent with and in contradiction to them. The deviations and contradictions are enumerated in section II.

In the case of such deviations and contradictions between the various judgments of Military Tribunals, and within the text of the judgments, Ordinance No. 7 of the United States Military Government for Germany makes it possible to call a plenary session of the Military Tribunals. This possibility is, in the viewpoint of the defense, a substitute although an inadequate one, for a reviewing body which, according to Ordinance No. 7 of the Military Government, does not yet exist for the judgments passed by Military Tribunals in Nuernberg.

Military Tribunal IV has now declared in its order of 14 April 1949 that no motions requesting the calling of a plenary session will be accepted and taken into consideration, as there are no more military tribunals which could form such a plenary session. The undersigned defense counsel, however, respectfully beg to

*U.S. vs. Ernst von Weizsaecker, et al., Case 11, Official Record, volume 82, Motion of 18 Defendants for Plenary Sessions, 25 April 1949, pages 12-33.

point out, that in their opinion the admissibility of a legal aid founded on law is not, in practice, dependent upon the fact whether or not the Tribunal, whose task it would be to review the decision appealed against, is in existence at the crucial time and is staffed with judges. It seems that Military Tribunal IV assumes that the admissibility of a legal aid depends on the existence of a tribunal for this purpose. The undersigned defense counsel are of the opposite opinion, namely, that once a legal aid is permitted by law, the tribunal competent to decide upon this must also be constituted. The Nuernberg Military Tribunals, after pronouncing their judgments, usually "adjourned sine die." It is possible that they were dissolved later on by special ordinance. But this too could not prevent their sitting anew in their original composition, as shown, for instance, by Military Tribunal II, which was in session again in Nuernberg in Case 4 (Pohl case) long after its adjournment and probable dissolution, and accepted new defense briefs and even passed a new judgment.

Neither does Ordinance No. 7 provide for the case when the plenary session can no longer be called, because the tribunals are no longer present in Nuernberg. Ordinance No. 7 explicitly does not mention the Military Tribunals which are *present*, but a "Plenary Session of the Military Tribunals." In practice, no difficulty in any individual case to bring about such a plenary session should prevent the only legal aid granted to the defendants by a military government ordinance.

According to Ordinance No. 7, the Military Governor has indeed the right to mitigate the sentences imposed by the Tribunal, to shorten or to transform them in some other way (Art. XVII). But this is an administrative (mercy) right, and no judicial authority. The Military Governor is not competent to decide legal questions, as shown by a letter dated 10 March 1949, written by the Acting Staff Secretary of the Office of the Staff Secretary to the undersigned defense counsel, attorney at law Stefan Fritsch.

Nor does the declaration of Military Tribunal IV contained in the decision of 14 April 1949,* a decision very welcome to the defense, to the effect that possible errors contained in the judgment would be corrected if defense counsel request it, form a substitute for the possibility of appealing to a plenary session of the Military Tribunals.

Lastly, the general purpose of the provisions of Article V-B(b) and (c) of Ordinance No. 7 requires that in this last case, just as in the previous ones, the possibility be given to secure as uniform a jurisprudence as possible by appealing to a plenary session.

*Reproduced in section XXVII C.

This is in the joint interest of the defendants and of the members of the various military tribunals which have been in session in Nuernberg.

II

Deviations and contradictions between the Judgment of Military Tribunal IV in Case 11 and the Judgments of other Military Tribunals.

[Under this heading, the motion contained detailed argument alleging inconsistencies in the findings concerning count one, aggressive war; count five, war crimes and crimes against humanity, atrocities and offenses committed against civilian populations; count six, war crimes and crimes against humanity, plunder, and spoliation; and the subjective criminal responsibility of the defendants.]

III

The deviations and contradictions, which we have mentioned under section II as examples of those existing between the judgment in Case 11 and the judgment of the IMT as well as the other judgments passed by Nuernberg Military Tribunals, do not include all of them. Therefore, the undersigned counsel for the defense reserve the right to mention further deviations and contradictions at the plenary session which should be convened in pursuance with Article V-B (b) and (c), of Ordinance No. 7 of the Military Government for Germany. We move that an oral hearing be ordered within the framework of the plenary session.

Nuernberg, 25 April 1949

[Signed by counsel for 18 defendants.]

E. Refusals to Call Joint Sessions upon Defense Motions Alleging Various Grounds and Seeking Various Remedies

I. ORDER OF THE COMMITTEE OF PRESIDING JUDGES, 12 JANUARY 1948, SIGNED BY THE PRESIDING JUDGES OF SEVEN TRIBUNALS, DENYING A DEFENSE MOTION FOR A JOINT SESSION TO ANSWER THREE QUESTIONS

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
AT A SESSION HELD 12 JANUARY 1948, IN CHAMBERS

United States of America

vs.

Alfried Krupp von Bohlen und Halbach, *et al.*,
Defendants

} *CASE 10*

*ORDER*¹

On 23 December 1947, Otto Kranzbuehler, counsel of record for Alfried Krupp von Bohlen und Halbach, one of the defendants in Case 10 pending before Tribunal III, filed in the office of the Secretary General a petition² in which he requested a joint session of the tribunals to answer the following questions:

"1. Is a military tribunal empowered to appoint a defense counsel for a defendant, if the latter has chosen another attorney as defense counsel and, according to his own statement, this attorney is willing to undertake the defense?

"2. Is a military tribunal empowered to appoint a defense counsel for a defendant if the latter explicitly states he does not want one?

"3. Is a military tribunal competent to designate a German attorney as defense counsel against his explicit will?"³

By virtue of Article II of Ordinance No. 11, joint sessions of the military tribunals are only authorized to review certain interlocutory or final rulings. The petition herein is, therefore, insufficient

¹ U.S. *vs.* Alfried Krupp von Bohlen und Halbach, *et al.*, Official Record, volume 36, page 423.

² *Ibid.*, pages 424-442. This motion, the prosecution answer thereto, and the defense reply to the prosecution answer are not reproduced herein.

³ The petition setting forth these questions was made after the Tribunal had refused an application by defendant Krupp to have one Earl J. Carroll substituted for Dr. Kranzbuehler as his defense counsel. Mr. Carroll, an American attorney, had been directed to leave Germany by the Military Governor before this application was made. After the Tribunal refused the application, the defendant Krupp, through Dr. Kranzbuehler, stated that he then desired to have no attorney. The Tribunal directed Dr. Kranzbuehler to continue as defense counsel (sec. XIII G 8). Thereafter this petition was filed seeking a joint session.

to invoke the jurisdiction of the Supervisory Committee of Presiding Judges.

The petition is accordingly dismissed.

[Signed] CURTIS G. SHAKE
Executive Presiding Judge
[Signed] LEE B. WYATT
Presiding Judge, Tribunal I
[Signed] MICHAEL A. MUSMANNO
Presiding Judge, Tribunal II
[Signed] HU C. ANDERSON
Presiding Judge, Tribunal III
[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV
[Signed] CHARLES F. WENNERSTRUM
Presiding Judge, Tribunal V
[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V-A

2. ORDER OF THE COMMITTEE OF PRESIDING JUDGES,
17 MARCH 1948, SIGNED BY THE PRESIDING JUDGES
OF FIVE TRIBUNALS, DENYING A DEFENSE MOTION
FOR A JOINT SESSION TO DECLARE CONTROL
COUNCIL LAW NO. 10 INVALID

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
17 MARCH 1948, IN CHAMBERS

United States of America
vs.
Carl Krauch, *et al.*,
Defendants } *CASE 6*
*ORDER*¹

On 11 March 1948, Rudolf Aschenauer, counsel for defendant Heinrich Gattineau in Case 6, before Tribunal VI, filed in the Office of the Secretary General for the attention of the Supervisory Committee of Presiding Judges, a petition² asking for a plenary session of the judges of all the Tribunals to declare Control Council Law No. 10 invalid.

¹ U.S. *vs.* Carl Krauch, *et al.*, Case 6, Official Record, volume 49, page 1543.

² *Ibid.*, pages 1544-1571. This petition and the prosecution answer thereto are not reproduced herein. The petition urged that Control Council Law No. 10 should be declared void on the ground that the Soviet Union, one of the cosignatories, had participated in a war of aggression by entering into the German-Russian Secret Treaty of 23 August 1939.

The jurisdiction of the Supervisory Committee of Presiding Judges to convene a plenary session is limited by Article V-B of Military Government Ordinance No. 7 as amended by Ordinance No. 11 to those instances in which interlocutory or final rulings of the tribunals are in conflict or are inconsistent.

It affirmatively appearing that there has been no determination with respect to the invalidity of said Control Council Law No. 10 by any tribunal, the said petition must be dismissed for want of jurisdiction.

IT IS SO ORDERED.

[Signed] CURTIS G. SHAKE
Executive Presiding Judge
[Signed] MICHAEL A. MUSMANNO
Presiding Judge, Tribunal II
[Signed] HU C. ANDERSON
Presiding Judge, Tribunal III
[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV
[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V

3. ORDER OF THE COMMITTEE OF PRESIDING JUDGES,
8 APRIL 1948, SIGNED BY THE PRESIDING JUDGES OF
FIVE MILITARY TRIBUNALS, DENYING A DEFENSE
MOTION FOR A JOINT SESSION TO DISCONTINUE
THE NUERNBERG TRIALS

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
8 APRIL 1948, IN CHAMBERS

ORDER ¹

On 22 March 1948, Rudolf Aschenauer, as counsel for defendant Otto Ohlendorf (Case 9, Tribunal II) and defendant Heinrich Gattineau (Case 6, Tribunal VI), filed with the Secretary General for the consideration of the Supervisory Committee of Presiding Judges a petition ² asking that all trials now pending before the United States Military Tribunals at Nuernberg be immediately discontinued. We are asked to convene the judges of the tribunals in a plenary session to pass upon said petition.

¹ U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 49, page 1694.

² Ibid., pages 1695-1698 and 1705. This petition and the prosecution answer thereto, are not reproduced herein.

The petition is based upon the contention that Control Council Law No. 10 is no longer in effect because and on account of the alleged withdrawal of the Union of Soviet Socialist Republics from the Allied Control Council for Germany.

We have repeatedly pointed out that the jurisdiction of this Committee to convene a plenary session of the judges is limited by Article V-B of Military Government Ordinance No. 7, as amended by Ordinance No. 11, to these instances where interlocutory or final rulings of the Tribunals are in conflict or are inconsistent. No such conflict or inconsistency is alleged in the petition.

The petition herein is, therefore, insufficient in substance to invoke the jurisdiction of the Committee. It is accordingly ORDERED that the said petition be dismissed.

[Signed] CURTIS G. SHAKE
Executive Presiding Judge

[Signed] MICHAEL A. MUSMANNO
Presiding Judge, Tribunal II

[Signed] HU C. ANDERSON
Presiding Judge, Tribunal III

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV

[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V

4. ORDER OF THE COMMITTEE OF PRESIDING JUDGES,
27 JULY 1948, SIGNED BY EXECUTIVE PRESIDING
JUDGE SHAKE, DENYING MOTIONS FOR A JOINT
SESSION TO CANCEL AN ORDER OF TRIBUNAL II IN
THE POHL CASE

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
27 JULY 1948

ORDER¹

Petitions have been filed with the Secretary General for a plenary session of the Tribunals asking for the cancellation of the order made by Tribunal II on 14 July 1948,² as follows, to wit:

¹ U.S. vs. Oswald Pohl, et al., Case 4, Official Record, volume 26, page 1338.

² Reproduced in section XXVI E. This order was made by Tribunal II after it reconvened upon order of the Military Governor for the purpose of permitting such reconsideration and revision of its judgment as might be appropriate. The order permitted the defense to file additional briefs and stated that after the Tribunal had considered these briefs, it would vacate, modify, or amend its judgment if it appeared proper. An entire section, later in this volume, is devoted to the reconvening of the Tribunal in the Pohl case and related developments (sec. XXVI).

1. The petition of Dr. Carl Haensel, counsel for defendant Georg Loerner, one of the defendants convicted by said Military Tribunal II in Case 4 on 3 November 1947, petition filed 22 July 1948,¹ and

2. A petition by Dr. Seidl and other members of the staff of counsel for the defendants convicted by Tribunal II in Case 4 on 3 November 1947, which said petition was filed in the office of the Secretary General on 23 July 1948.²

Upon consideration of said petitions, the Supervisory Committee of Presiding Judges finds that the basis thereof is the alleged lack of jurisdiction of Tribunal II to enter its order of 14 July 1948. It affirmatively appears that said petitions are not predicated upon the claim that the action of said Tribunal II in entering its said order on 14 July 1948 is in conflict or is not consistent with any prior interlocutory or final ruling of any of the Military Tribunals.

The only jurisdiction possessed by this Committee to convene a plenary session is found in Military Government Ordinance No. 11. Article II of said Ordinance provides that plenary sessions may be called to review interlocutory or final rulings which are in conflict or not consistent with prior rulings of these Tribunals.

Since the petitions described above do not properly invoke the jurisdiction of this Committee, IT IS ORDERED that said petitions be each dismissed.

[Signed] CURTIS G. SHAKE
Executive Presiding Judge

Dated this 27th day of July 1948.

5. MINUTES AND ORDER OF THE COMMITTEE OF
PRESIDING JUDGES, 5 AUGUST 1948, SIGNED BY THE
PRESIDING JUDGES OF THREE TRIBUNALS, DENYING
A DEFENSE MOTION FOR A JOINT SESSION TO
RESCIND AN ORDER OF THE TRIBUNAL IN THE
MINISTRIES CASE

UNITED STATES MILITARY TRIBUNAL
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY

Minutes and Order of a Meeting of the Committee of
Presiding Judges, held in the Office of the
Secretary General on 5 August 1948, at 12:15 p.m.

¹ The prosecution did not answer this petition which is not reproduced herein. See U.S. *vs.* Oswald Pohl, *et al.*, Case 4, Official Record, volume 26, pages 1349-1356.

² *Ibid.*, pages 1339-1343. The prosecution did not answer this petition which is not reproduced herein.

PRESENT: W. C. Christianson, Presiding Judge, Tribunal IV
Executive Presiding Judge
John C. Young, Presiding Judge, Tribunal V
Robert M. Toms, Presiding Judge, Tribunal II

ORDER DENYING PETITION FOR PLENARY SESSION¹

The Committee has before it the petition filed on 27 July 1948 of Dr. Alfred Seidl,² counsel for defendant Lammers (Case 11) praying that a plenary session of all Military Tribunals now sitting in Nuernberg be called for the purpose of rescinding a certain order entered in Case 11 on 26 July 1948.³

The only provision of Military Government Ordinance No. 7 authorizing the calling of a plenary session of the several tribunals is found in Article V-B, adopted 17 February 1947, which provides in substance that a plenary session may be called to review any interlocutory ruling or final judgment, either substantive or procedural, which is in conflict with or is inconsistent with a prior ruling of another military tribunal. No situation contemplated by this section of Ordinance No. 7 is alleged in the motion under consideration. The matters complained of in said motion rest exclusively within the jurisdiction of Tribunal IV.

The motion is accordingly denied.

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV
[Signed] JOHN C. YOUNG
Presiding Judge, Tribunal V
[Signed] ROBERT M. TOMS
Presiding Judge, Tribunal II

¹ U.S. *vs.* Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 77, pages 3413 and 3414.

² *Ibid.*, pages 3415-3419. The prosecution did not answer this petition.

³ The order referred to was actually signed by the presiding judge of Tribunal IV and filed on 23 July 1948. It provided among other things that "Until all defendants who so desire shall have testified before the Tribunal, the Tribunal will not itself hear testimony of other witnesses.*** Pending testifying in his own behalf each defendant shall proceed diligently to present his other testimony before the commission" (sec. XVII G 3).

6. ORDER OF TRIBUNALS IV AND V, 13 AUGUST 1948,
DENYING MOTION FOR A JOINT SESSION TO
DECLARE THAT THE TIME FOR FILING CLEMENCY
PETITIONS CONCERNING THE SENTENCES IN THE
FARBEN CASE BE EXTENDED UNTIL THE DISSENTING
OPINION WAS AVAILABLE

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE,
NUERNBERG, GERMANY
13 AUGUST 1948

*ORDER*¹

A motion was, on 12 August 1948, filed with the Secretary General on behalf of defendants ter Meer, Ambros, Bueteffisch, and Duerrfeld in case 6² praying that a joint session of Military Tribunals be convened to determine that the period of time allowed for the purpose of filing appeals and clemency pleas³ start only from the day on which the dissenting opinion of Judge Hebert relative to count three in Case 6 be made available to them.⁴

The Military Tribunals now sitting at Nuernberg, to wit, Tribunals IV and V, having this day convened for the purpose of considering said motion finds that said motion is not predicated upon the making of any alleged inconsistent or conflicting interlocutory or final rulings of any of the Military Tribunals.

The only authority to convene a joint session of the Military Tribunals for the consideration of rulings is contained in Military Government Ordinance No. 11 which provides that joint sessions may be called to review interlocutory or final rulings which are in conflict with or not consistent with prior rulings of these tribunals.

Since the motion does not contain the necessary grounds for

¹ U.S. vs. Carl Krauch, et al., Case 6, Official Record, volume 54, Motion of 4 defendants for Joint Session, page 1.

² Ibid., pages 2-4. The prosecution did not answer this petition which is not reproduced herein.

³ The provisions governing the filing of clemency petitions were set forth in Regulation No. 1 under Ordinance No. 7 (sec. XXV D).

⁴ At the time of the judgment in the Farben case (29, 30 July 1948), Judge Hebert announced his dissent from the findings that most of the defendants were not guilty under the charges of slave labor (count three), concluding his statement as follows: "I concur in the conviction of those defendants who have been found guilty under count three, but the responsibility for the utilization of slave labor and all incidental toleration of mistreatment of the workers should go much further and should, in my opinion, lead to the conclusion that all of the defendants in this case are guilty under count three, with the exception of defendants von der Heyde, Gattineau, and Kugler, who were not members of the Vorstand. I, therefore, dissent as to this aspect of count three and reserve the right to file a dissenting opinion with respect to that part of the judgment devoted to count three. I have signed the judgment with these reservations, and I hand a copy of this expression to the Secretary General for the record" (volume VIII, this series, sec. XIII).

convening a joint session of the Tribunals and no such grounds appearing to exist, IT IS ORDERED that said motion be, and the same is hereby, denied.

[Signed] WILLIAM C. CHRISTIANSON
Executive Presiding Judge

Dated this 13th day of August 1948.

7. ORDER OF TRIBUNALS IV AND V, 2 SEPTEMBER 1948,
DENYING A DEFENSE MOTION FOR A JOINT SESSION
TO DECIDE QUESTIONS CONCERNING THE TIME
FOR FILING CLEMENCY PETITIONS

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG,
GERMANY
2 SEPTEMBER 1948, IN CHAMBERS

United States of America

vs.

Oswald Pohl, *et al.*,

Defendants

} *CASE 4*

*ORDER*¹

On 26 August 1948, Dr. Ernst Schulte, counsel for defendant Hans Hohberg in the above-entitled case, filed a petition with the Secretary General,² requesting a plenary session of the Military Tribunals, to pass upon the question of whether the period of 15 days after judgment for submission of clemency petitions begins immediately after the judgment is delivered to a defense counsel in the German language, when it is not delivered in the English language until 5 days later.³ On 27 August 1948, said defense counsel filed a supplement to the foregoing petition of 26 August 1948, in which supplement it is requested that a ruling be made to the effect that the 15 day period for filing of clemency petitions shall start as of 27 August 1948.

On 2 September 1948, all the judges of the military tribunals now functioning in Nuernberg, to wit, Tribunals IV and V, convened for the purpose of considering said petition for a plenary session.

¹ U.S. *vs.* Oswald Pohl, *et al.*, Case 4, Official Record, volume 26, Additional Motions Filed After End of Case, page 1.

² *Ibid.*, pages 2-9. The prosecution did not answer this petition which is not reproduced herein.

³ The provisions governing the filing of clemency petitions were set forth in Regulation No. 1 under Government Ordinance No. 7 (sec. XXV D).

Inasmuch as authorization for the convening of a plenary session of the Military Tribunals, as found in Military Government Ordinance No. 11, provides that such plenary sessions may be called to review inconsistent or conflicting rulings of the Military Tribunals, and inasmuch as the petition here under consideration, and the supplement thereto, do not come within the provisions of said Ordinance No. 11 with respect to the calling of plenary sessions, such petition must be denied.

Therefore, pursuant to the decision and authorization of the judges of Tribunals IV and V, as aforesaid, IT IS ORDERED that said petition for plenary session be, and the same is hereby, denied.

[Signed] WILLIAM C. CHRISTIANSON
Executive Presiding Judge

Dated this 2d day of September 1948.

XXV. JUDGMENTS OF THE TRIBUNALS AND SENTENCES IMPOSED BY THE TRIBUNALS. REVIEW OF SENTENCES BY THE MILITARY GOVERNOR AND THE U.S. HIGH COMMISSIONER FOR GERMANY

A. Introduction

Articles XV, XVI, XVII, and XVIII of Ordinance No. 7 deal with the judgments to be declared by the tribunals, the punishment authorized for convicted defendants, the review of sentences by the Military Governor and his power to mitigate, reduce, or otherwise alter the sentences imposed by the tribunals, and related matters (subsec. B).

Of the 185 persons indicted in the 12 Nuernberg trials held under the authority of Control Council Law No. 10, four escaped judgment by suicide after indictment and before judgment, and four were severed due to incapacity to stand trial. Of the 177 tried, 142 were convicted and 35 acquitted. Article XV of Ordinance No. 7 required that "The judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based ***." The judgments in the 12 Nuernberg trials held under the authority of Control Council Law No. 10 run altogether to over 2,000 mimeographed pages. The length of the individual judgments varied greatly, the shortest judgment being that of the Milch case (37 mimeographed pages) where only one defendant was charged, and the longest being that of the Ministries case (727 mimeographed pages). Quite apart from stating the reasons for the conclusions of the tribunals as to the guilt or innocence of the defendants, these judgments are a major source of historical material. The judgments in each of these trials are reproduced in earlier volumes of this series as shown by the following table:

<i>Case No.</i>	<i>Popular name of case</i>	<i>Volume</i>	<i>Pages</i>
1	Medical	II	171-300
2	Milch	II	773-797
3	Justice	III	954-1177
4	Pohl (Supplemental judgment)	V	958-1063 1168-1253
5	Flick	VI	1187-1223
6	Farben	VIII	1081-1210
7	Hostage	XI	1230-1319
8	RuSHA	V	88-167
9	Einsatzgruppen	IV	411-589
10	Krupp	IX	1327-1452
11	Ministries (Orders and memoranda subsequent to judgment)	XIV	308-870 946-1002
12	High Command	XI	462-697

In addition to the judgments, there were ten separate concurring or dissenting, or concurring and dissenting opinions by individual judges. All of these are likewise reproduced in earlier volumes of this series. These include the concurring opinion of Judge Musmanno and the concurring opinion of Judge Phillips in the Milch case, volume II, pages 797-859, and 860-878 respectively; the concurring opinion of Judge Blair in the Justice case, volume III, pages 1178-1199; concurring opinion of Judge Musmanno in the Pohl case, volume V, pages 1064-1163; concurring opinion of Judge Hebert on the charges of aggressive war in the Farben case, volume VIII, pages 1211-1306; and dissenting opinion of Judge Hebert on the slave labor charges in the Farben case, volume VIII, pages 1307-1325; concurring and dissenting opinion of Judge O'Connell in the RuSHA case, volume V, pages 168 and 169; dissenting opinion of Presiding Judge Anderson on the extent of all but one of the sentences imposed by the Tribunal in the Krupp case, volume IX, pages 1453 and 1454; dissenting opinion of Judge Wilkins on the dismissal of certain of the charges of spoliation in the Krupp case, volume IX, pages 1455-1484; and the dissenting opinion of Judge Powers in the Ministries case, volume XIV, pages 871-942. In addition to the above, a number of opinions were filed in connection with the dismissal of certain counts or parts thereof during the course of some of the trials.

The tribunals were authorized to impose upon convicted defendants one or more of the following punishments: death, imprisonment for life or a term of years, with or without hard labor; fine and imprisonment with or without hard labor, in lieu thereof; forfeiture of property; restitution of property wrongfully acquired; deprivation of some or all civil rights (Art. XVI of Ordinance No. 7). The nature of the sentences initially imposed by the tribunals upon the 142 defendants can be summarized as

follows: 25 death sentences in three of the trials (Medical, Pohl, and Einsatzgruppen cases); 20 sentences of life imprisonment in eight of the trials (one or more life sentence in each trial except the Flick, Farben, Krupp, and Ministries cases); 97 sentences for a term of years or for the term of imprisonment prior to sentence (three or more in each case except the Milch case where the sole defendant was sentenced to life imprisonment); and one sentence providing for the forfeiture of all property (the sentence of Alfried Krupp von Bohlen und Halbach in the Krupp case which sentence also imposed imprisonment for a term of years). None of the sentences provided for imprisonment at hard labor, for a fine, or for deprivation of any civil right. Seven of the initial sentences in two of the trials were reduced by subsequent action of the tribunals which imposed the initial sentences. Four sentences were reduced by a supplemental judgment in the Pohl case (sec. XXVI): one from death to life imprisonment; one from life to 20 years' imprisonment; one from 25 to 20 years' imprisonment, and one from 20 to 15 years' imprisonment. Three sentences in the Ministries case were reduced from 7 to 5 years' imprisonment by orders directed to defense motions alleging errors of fact or law in the original judgment (sec. XXVII). A statistical table showing the number of defendants indicted, tried, acquitted, and convicted in each case, as well as the nature of the sentences imposed, is reproduced below (subsec. C). Concerning the sentences imposed on individual defendants, reference is made to the sentences at the conclusion of the respective judgments reproduced in the earlier volumes of this series.

Article XV of Ordinance No. 7 provided that "The judgments of the tribunals as to the guilt or the innocence of any defendant * * * shall be final and not subject to review," but under Article XVII (a) the Military Governor had the power to review the sentence and "to mitigate, reduce or otherwise alter the sentence imposed by the tribunal" (this latter provision is discussed later herein). Initially there was no provision in Ordinance No. 7 for any review of conflicting or inconsistent rulings in the judgments of the tribunals. This was changed, however, before any of the tribunals had pronounced a judgment by an amendment to Ordinance No. 7. This amendment (effected by Art. II of Ordinance No. 11 on 17 Feb. 1947) permitted joint sessions of Military Tribunals sitting concurrently to be called to "review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural." The amendment further provided that "In the case of the review of final rulings by joint sessions, the judgments reviewed may be con-

firmed or remanded for action consistent with the joint session." None of the presiding judges or individual tribunals called a joint session for the purpose of such review, as they were authorized to do upon their own motion or upon motion of either the prosecution or the defense.

Numerous defense motions for joint sessions of the Tribunals were denied by orders of the Committee of Presiding Judges, or, after there were no longer three tribunals in session, by orders of two tribunals sitting in executive session, or by orders of individual tribunals (these orders are all reproduced or dealt with in sec. XXIV D and E).

Trials under Control Council Law No. 10 in the French Zone of Occupation were subject to review by a superior tribunal. For example, in the Roechling case the Superior Military Government Court in the French zone made the following statement:

"It is further provided [in Control Council Law No. 10] that the Military Commander of each zone will designate the tribunal which is to try the offenses dealt with in the law, and that he will also determine the procedural law to be applied. On the basis of these provisions, the General Court and then the Superior Court became concerned with this case."

The indictment in the Roechling case, the original judgment of the General Court, and the judgment on appeal by the Superior Court are reproduced in appendix B, volume XIV, this series. The Roechling case was often referred to in Nuernberg during the later trials, and it has many noteworthy features for lawyers whose legal training has been directed principally to Anglo-American jurisprudence. In the judgment on appeal in that case, the Superior Court, among other things, convicted one defendant (Ernst Roechling) who had been acquitted of all charges by the General Court; increased the sentences which had been imposed upon two defendants (Hermann Roechling and von Gemmingen) by the General Court; and reversed the finding of the General Court that one defendant (Hermann Roechling) was guilty of crimes against peace.

In the Pohl and Ministries cases the Tribunals which had pronounced the original judgments reviewed their own judgments as to findings of guilt under procedures which were quite different as between the two cases. In the Pohl case the Tribunal was recalled upon order of the Military Governor, and after receiving further briefs, the Tribunal issued a supplemental judgment and a related supplemental order in which it reduced the sentences of four of the convicted defendants (sec. XXVI). In the Ministries case, the Tribunal provided at the time of judgment that the defendants

convicted could file motions alleging errors of fact and law in the judgment (sec. XXVII). In passing upon these motions, the Tribunal reversed its conviction under one count as to three defendants and reduced the sentence in each case from 7 to 5 years.

Whereas the judgments of the Tribunals as to the guilt or the innocence of any defendant were final and not subject to review, the sentences imposed were subject to review by the Military Governor who was authorized under Articles XV and XVII of Ordinance No. 7 to mitigate, reduce, or otherwise alter the sentences. Regulation No. 1 under Ordinance No. 7 (subsec. D) established a procedure for the filing of petitions for review of sentences, the forwarding of the records of the trials, the review of sentences, and related matters. Petitions for review by convicted defendants varied greatly in nature and length, the length generally increasing as time went on. Three examples of petitions for review in the Medical case are reproduced at pages 309-326, volume II, this series.

The sentences in each of the twelve trials, except those in the Ministries case, were initially reviewed by General Lucius D. Clay, as Military Governor of the United States Zone of Occupation. The post-judgment rulings of the Tribunal in the Ministries case (sec. XXVII) had not yet been made when the position of the United States High Commissioner for Germany was established by Executive Order No. 10062 of 6 June 1949 (subsec. E) and the Military Government of the United States Zone of Germany was terminated. After 6 June 1949 the United States High Commissioner for Germany had the responsibility for the execution of sentences and the disposition (including pardon, clemency, parole, or release) of war criminals convicted at Nuernberg under Control Council Law No. 10 (see Executive Order No. 10144 of 21 July 1950, reproduced in subsection F, which clarified the responsibility delegated by Executive Order 10062).

In the eleven cases reviewed by General Clay as Military Governor, all sentences were confirmed in eight of the trials (Medical, Milch, Justice, Flick, Hostage, RuSHA, Einsatzgruppen, and High Command cases). In three of these 11 cases (Pohl, Farben, and Krupp), all sentences were confirmed except for modifications of one sentence in each case. In the Pohl case the death sentence of Karl Sommer was reduced to life imprisonment (pp. 1254 and 1255, volume V, this series). In the Farben case the 2 years' sentence of Paul Haefliger was reduced to time spent in confinement. The Tribunal in the Farben case had relied upon a stipulation of counsel in determining the amount of time Haefliger had spent in confinement prior to trial. When an error in this stipulation was raised subsequent to judgment by defense counsel, the prosecution

joined in urging that the error be rectified (sec. XVI, volume VIII, this series). In the Krupp case the provisions of the sentence as to the forfeiture of Alfried Krupp's property were confirmed, except that the provisions for the disposition of this property were altered (pages 1485-1487, volume IX, this series). In the earlier volumes of this series a separate section on each of the trials, exclusive of the Ministries case, is devoted to the action of the Military Governor in reviewing the sentences.

Article XVIII of Ordinance No. 7, provided that "No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor." The seven death sentences in the Medical case were imposed on 20 August 1947 and confirmed by the Military Governor on 22 November 1947 (pages 327-329, volume II, this series). In the Pohl case the Tribunal, by supplemental judgment on 11 August 1948, confirmed the death sentences imposed on defendants Pohl, Eirenschmaltz, and Sommer by its original judgment. By separate orders the Military Governor confirmed the death sentence imposed on Pohl on 30 April 1949 and on Eirenschmaltz, on 11 May 1949. (The Military Governor reduced the death sentence of Sommer to life imprisonment. See pages 1254 and 1255, volume V, this series.) The 14 death sentences in the Einsatzgruppen case were imposed on 10 April 1948 and confirmed by separate orders of the Military Governor on two different days in March 1949 (pages 590 and 591, volume IV, this series). Each of the orders by which the Military Governor confirmed a death sentence directed that:

"Pending action on petitions filed by the defendant with authorities other than the Office of Military Government for Germany (U.S.), the execution of the death sentence be stayed until further order by me."

On 16 February 1948, the Supreme Court of the United States denied motions by defendants in the Medical case "for leave to file petitions for writs of habeas corpus and prohibition" (page 330, volume II, this series); on 14 May 1948, the Military Governor ordered that the executions of the seven death sentences in that case be put into effect; and on 2 June 1948, these executions were put into effect. The Supreme Court of the United States, on 2 May 1949, denied a number of applications by defendants in the Pohl and Einsatzgruppen cases (as well as by defendants in a number of the other Nuernberg trials), stating:

"Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied."

The full text of this order is reproduced at page 1256, volume V, this series.

In March 1950 the United States High Commissioner for Germany, Mr. John J. McCloy, established the Advisory Board on Clemency for War Criminals. This Clemency Board was composed of the Hon. David W. Peck, Presiding Justice, Appellate Division, First Department, New York Supreme Court, Chairman; Commissioner Frederick A. Moran, Chairman, New York Board of Parole; and Brigadier General Conrad E. Snow, Assistant Legal Adviser, Department of State. The Clemency Board made its report to Mr. McCloy on 28 August 1950. (The letter of transmittal and the introduction to this report are reproduced in subsec. G). Thereafter, on 31 January 1951, the High Commissioner made his final decisions on clemency, issuing a separate order with respect to the sentence of each war criminal affected by his review. Eight of these orders, which illustrate the various types of action taken upon review are reproduced in subsection H, as indicated in the following table:

<i>War Criminal</i>	<i>Case</i>	<i>Action upon review by High Commissioner</i>	<i>Page</i>
Oswald Pohl	Pohl	Death sentence confirmed and ordered executed	1166
Ernst Biberstein	Einsatzgruppen	Death sentence commuted to life imprisonment	1168
Franz Eirenschmaltz	Einsatzgruppen	Death sentence commuted to term of years (9)	1169
Franz Schlegelberger	Justice	Life sentence confirmed	1170
Erhard Milch	Milch	Life sentence commuted to term of years (15)	1171
Wilhelm Speidel	Hostage	Life sentence commuted to time served	1172
Alfried Krupp von Bohlen und Halbach	Krupp	Sentence of 12 years commuted to time served, and sentence of forfeiture of property vacated	1173
Otto Ambros	Farben	Sentence for term of years (8) commuted to time served	1175

On the same day that the orders containing the final decisions were made, 31 January 1951, the High Commissioner issued a short statement concerning the general nature of his review and a longer announcement summarizing his action with respect to each case. (The statement and the announcement are reproduced in subsec. I and J respectively.)

On 12 February 1951, less than 2 weeks after the final decisions of the High Commissioner, counsel for defendants Blobel, Braune,

Naumann, Ohlendorf, and Pohl (the only defendants whose death sentences were confirmed by the High Commissioner) filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia. These petitions were dismissed on 13 February 1951 by Judge Edward E. Tamm on the ground that the court "is without jurisdiction over the petitioner or the subject matter." (The order pertaining to defendant Pohl is reproduced in subsec. K.) Upon appeal to the United States Court of Appeals for the District of Columbia, the dismissals were affirmed on 19 February 1951. Petitions for writs of certiorari were thereafter filed on 28 March 1951, and these petitions were denied by the Supreme Court of the United States on 23 April 1951. (341 United States 916. The decision of the Supreme Court is reproduced in subsec. L.) A motion for rehearing before the United States Supreme Court was denied on 14 May 1951 (341 United States 933). Shortly thereafter, and on 23 May 1951, counsel for the same defendants filed motions for temporary restraining orders to enjoin the High Commissioner from carrying out the executions of the defendants, alleging illegal convictions of the defendants, and praying for declaratory judgment adjudicating, determining, and interpreting a number of international treaties and executive compacts. These petitions were denied by the United States District Court for the District of Columbia on 29 May 1951. (The memorandum of the court concerning the several orders signed by Judge Walter M. Bastian is reproduced in subsec. M.) This decision was affirmed by the United States Court of Appeals for the District of Columbia on 4 June 1951. Counsel for defendants then filed an application for stay of executions addressed to all and each of the justices of the Supreme Court of the United States. This application was denied on 6 June 1951. (The order of the Supreme Court is reproduced in subsec. N.)

On 7 June 1951, the defendants Blobel, Braune, Naumann, Ohlendorf, and Pohl were executed at Landsberg Prison.

B. Provisions of Articles XV-XVIII, Ordinance No. 7

Article XV

The judgments of the tribunals as to the guilt or innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Article XVII, *infra*.

Article XVI

The tribunal shall have the right to impose upon the defendant,

upon conviction, such punishment as shall be determined by the tribunal to be just, which may consist of one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10.

Article XVII

(a) Except as provided in (b) *infra*, the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.

(b) In cases tried before tribunals authorized by Article II (c), the sentence shall be reviewed jointly by the zone commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders.

Article XVIII

No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Article III, Section 5 of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes.

Comparable provisions of the Charter of the IMT are the following:

VI. JUDGMENT AND SENTENCE

Article 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27. The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and

sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

C. Statistical Table of the 12 Nuernberg Trials Held Under the Authority of Control Council Law No. 10¹

Case No.	Popular name of case	Number indicted	Number tried	Death sentences	Life sentences	Prison sentences ²	Number acquitted	Others
1	Medical	23	23	7	5	4	7	
2	Milch	1	1	—	1	—	—	
3	Justice	16	14	—	4	6	4	1 suicide 1 severed
4	Pohl ³	18	18	3	3	9	3	
5	Flick	6	6	—	—	3	3	
6	Farben	24	23	—	—	13	10	1 severed
7	Hostage	12	10	—	2	6	2	1 suicide 1 severed
8	RuSHA	14	14	—	1	12	1	
9	Einsatzgruppen	24	22	14	2	6	—	1 suicide 1 severed
10	Krupp	12	12	—	—	11	1	
11	Ministries	21	21	—	—	19	2	
12	High Command	14	13	—	2	9	2	1 suicide
	Total	185	177	24	20	98	35	8

¹ In the earlier IMT trial, held under the authority of the Charter of the International Military Tribunal, 24 persons were indicted. Of these one committed suicide before arraignment (Ley), one was severed from the case for reasons of incapacity to stand trial (Gustav Krupp) and three were acquitted. Of the 19 defendants convicted, 12 were sentenced to death, including Bormann who was tried in absentia, 3 to life imprisonment, and 4 to imprisonment for a term of years.

² Includes nine defendants convicted on one or more counts who were ordered released at the time of judgment, on the ground that their imprisonment prior to and during trial was sufficient punishment.

³ The figures on the sentences in the Pohl case are taken from the supplemental judgment of the Tribunal.

**D. Letter of the Office of Military Government
(U.S.), 11 April 1947, Transmitting Copy of
Regulation No. 1 under Military Government
Ordinance No. 7***

**OFFICE OF MILITARY GOVERNMENT FOR GERMANY
(U.S.) OFFICE OF THE MILITARY GOVERNOR APO 742**

AG 010.5 (LD)

11 April 1947

**Subject: Regulation No. 1 under Military Government Ordinance
No. 7, as Amended by Military Government Ordinance
No. 11**

**To: Directors, Regional Government Coordinating Office
Office of Military Government for Bavaria
Office of Military Government for Wuerttemberg-
Baden
Office of Military Government for Greater Hesse
Office of Military Government for Bremen
Office of Military Government for Berlin Sector*
Attn: Chief Legal Officers
The Secretary General for Military Tribunals**

***Subject to existing agreement with other occupying powers.**

1. Inclosed herewith is a copy, with a copy of the official German translation, of Regulation No. 1 under Military Government Ordinance No. 7 as amended by Military Government Ordinance No. 11 which has been approved by the Deputy Military Governor.

2. The Secretary General for Military Tribunals is requested to notify all defendants and their counsel in all trials before the Military Tribunals of this Regulation.

3. Copies of this regulation should be made available to the German Ministers of Justice so that they may arrange for its duplication and distribution to the German authorities.

BY DIRECTION OF THE MILITARY GOVERNOR:

**G. H. GARDE
Lieutenant Colonel, AGD
Adjutant General**

*** Official Record, Tribunal Records, volume 1, Tribunal I, pages 63-66.**

1 Incl:

Copy of Regulation No. 1
under Mil. Gov. Ordinance
No. 7, as Amended by Mil.
Gov. Ord. No. 11 and German
translation

Telephone Berlin 42456

DISTRIBUTION: "L"

REGULATION NO. 1 UNDER MILITARY GOVERNMENT
ORDINANCE NO. 7 AS AMENDED BY MILITARY
GOVERNMENT ORDINANCE NO. 11

1. *Purpose of this Regulation.* The purpose of this regulation is to establish a procedure to be followed in connection with the action to be taken by the Military Governor or his designee in confirming death sentences and in the exercise of his power under the provision of subdivision (a), Article XVII and Article XVIII of Military Government Ordinance No. 7. The regulation provides for the filing of petitions by defendants or defense counsel, forwarding of records by the Secretary General for Military Tribunals, review of cases, and related matters.

2. *Petition by Defendant or Counsel for Defendant.* In all cases in which a Military Tribunal shall have imposed a sentence, fine, or other punishment, the defendant or his counsel may file a petition directed to the Military Governor praying for mitigation, reduction, or alteration of such sentence, fine, or punishment. The petition shall be in writing, and an original petition and four copies thereof shall be filed with the Secretary General for Military Tribunals at the office of the Secretariat, Nuernberg. It need not be in any particular form and may consist merely of a letter addressed to the Military Governor by his title. It shall, at a minimum, set forth the title of the case, the names and addresses of the defendant and the defendant's counsel, a general statement of the nature of the offense charged, the date of the judgment, the sentence, fine or other punishment imposed, the grounds and reasons for the petition, and the mitigation, reduction, or alteration of sentence, fine or punishment prayed for. The petition shall be signed by the defendant, his counsel, or both.

3. *Time of Filing Petitions.*

a. The petition and copies shall be filed by the defendant or by his counsel:

(1) within fifteen (15) days of the imposition of sentence in

open court, provided no motion is made in the case pursuant to subdivision (b) of Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11;

(2) within ten (10) days of confirmation of judgment in a case reviewed by a joint session of the Military Tribunals pursuant to subdivisions (b) and (c) of Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11;

(3) within ten (10) days of final action by the Military Tribunal following the remand of any case reviewed by a joint session of the Military Tribunals pursuant to subdivisions (b) and (c) of Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11.

b. The day on which judgment is confirmed, or final action is taken following the remand, or sentence imposed, if no action is taken in accordance with subdivision (b) of Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11, shall not be counted in computing the time within which the petition shall be filed. If the final day for filing the petition falls on a day when the office of the Secretary General is closed to official business, the petition may be filed on the first day thereafter upon which such office is open for official business.

4. *Forwarding of the Petition to the Military Governor.* The original of any petition and three copies thereof filed pursuant to this regulation shall be forwarded by the Secretary General to the Military Governor with the record of the case, or, should the record have already been dispatched within 24 hours following receipt of the petition. One copy of the petition will be retained by the Secretary General. The Secretary General shall give to the person filing the petition a written receipt setting forth the hour, day, month, and year when the petition was filed. This information shall likewise be entered on the petition and copies thereof.

5. *Records.*

a. The record of each case to be forwarded to the Military Governor by the Secretary General, pursuant to Article XVII (a) of Military Government Ordinance No. 7, shall consist of the indictment, the plea or pleas of the defendant thereto, the English transcript of proceedings before the Tribunal, any motion made to, the proceedings before, and the decision of any joint session of the Military Tribunals pursuant to Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11, the opinion and judgment of the Tribunal, and the sentence, fine or punishment imposed by the Tribunal. All other parts of the trial record including the exhibits shall be

retained by the Secretary General, but any part thereof shall be forwarded upon request by the Military Governor or the Deputy Military Governor.

b. Unless otherwise ordered by the Military Governor or the Deputy Military Governor, the record of each case, other than those tried before Tribunals authorized by subdivision (c) of Article II of Military Government Ordinance No. 7 shall be forwarded to the Military Governor by the Secretary General not later than:

(1) Sixteen days after the imposition of sentence in open court, provided no motion is made pursuant to subdivision (b) of Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11;

(2) Eleven days after confirmation of judgment in a case reviewed by a joint session of the Military Tribunals pursuant to subdivisions (b) and (c) of Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11;

(3) Eleven days after final action by a Military Tribunal following the remand in a case reviewed by a joint session of the Military Tribunals pursuant to subdivisions (b) and (c) of Article V-B of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11.

c. If the final day for forwarding the record falls on a day when the office of the Secretary General is closed to official business the record shall be forwarded on the first day thereafter upon which such office is open for official business.

d. Before forwarding, each record shall be authenticated as to its correctness and shall be accompanied by a certificate signed by the Secretary General in the following form: "I hereby certify that the record attached to this certificate is a true record as required by subdivision (a) of paragraph 5 of Regulation No. 1 under Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11 of the trial of _____ (setting forth the name of the defendant or the defendants), and the final sentence, fine or punishment imposed by Military Tribunal No. _____ on the _____ day of _____ 194__."

6. *Review of Sentence and other Punishment.*

a. All death sentences imposed by a Military Tribunal shall be reviewed and final action taken by and in the name of the Military Governor unless in any particular case delegation of this power is made by him to the Deputy Military Governor.

b. All sentences and punishment, other than death, with respect

to which a petition shall be filed shall be reviewed and final action taken by and in the name of the Deputy Military Governor. In his discretion the Deputy Military Governor may review and take action in the absence of the filing of a petition in cases other than death cases.

This regulation shall become effective upon the 11th day of April 1947.

BY ORDER OF MILITARY GOVERNMENT

E. Order of the President of the United States, 6 June 1949, Executive Order 10062, Establishing the Position of United States High Commissioner for Germany

EXECUTIVE ORDER NO. 10062

**ESTABLISHING THE POSITION OF UNITED STATES
HIGH COMMISSIONER FOR GERMANY**

By virtue of the authority vested in me by the Constitution and the Statutes, including the Foreign Service Act of 1946 (60 Stat. 999) and as President of the United States and Commander in Chief of the Armed Forces of the United States, it is ordered as follows:

1. There is hereby established the position of United States High Commissioner for Germany, which position shall be that of Chief of Mission, Class 1, in accordance with the provisions of the said Foreign Service Act of 1946.

2. The United States High Commissioner for Germany, hereinafter referred to as the High Commissioner, shall be the supreme United States authority in Germany. The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the governmental functions of the United States in Germany (other than the command of troops), including representation of the United States on the Allied High Commission for Germany when established, and the exercise of appropriate functions of a Chief of Mission within the meaning of the Foreign Service Act of 1946.

3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take necessary measures for the maintenance of law and order and such other

action as is required to support the policy of the United States in Germany. If major differences arise over policy affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all the powers thereof including those vested in the United States Military Governor under all international agreements.

HARRY S. TRUMAN

THE WHITE HOUSE

June 6, 1949

F. Order of the President of the United States, 21 July 1950, Executive Order 10144, Defining the Responsibility of the United States High Commissioner for Germany in Connection with Sentences Imposed on War Criminals at Nuernberg, and Related Matters

EXECUTIVE ORDER NO. 10144

**AMENDMENT OF EXECUTIVE ORDER NO. 10062 OF
JUNE 6, 1949, ESTABLISHING THE POSITION OF
UNITED STATES HIGH COMMISSIONER FOR GERMANY**

By virtue of the authority vested in me by the Constitution and the Statutes, and as President of the United States and Commander in Chief of the Armed Forces of the United States, Executive Order No. 10062 of June 6, 1949, entitled "Establishing the Position of United States High Commissioner for Germany", is hereby amended as follows:

1. The following paragraphs are added to the said order at the end thereof:

"5. The High Commissioner, as representative of the United States, shall share the four-power responsibility for the custody, care, and execution of sentences and disposition (including

pardon, clemency, parole, or release) of war criminals confined in Germany as a result of conviction by the International Military Tribunal, Nuremberg, and shall be responsible for the custody, care, and execution of sentences and disposition (including pardon, clemency, parole, or release) of war criminals confined in Germany as a result of conviction by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10.

"6. The Commander in Chief, European Command, shall be responsible for the custody, care, and execution of sentences and disposition (including pardon, clemency, parole, or release) of war criminals confined in Germany under sentences adjudged by military tribunals established by United States Military Commanders in Germany and elsewhere, other than those referred to in paragraph 5 hereof. On the request of the High Commissioner, the Commander in Chief, European Command, shall take necessary measures for carrying into execution any sentences adjudged against war criminals as to whom the High Commissioner has responsibility and control, namely: war criminals convicted and sentenced by military tribunals established pursuant to Control Council Law No. 10."

2. The term "Commander of the United States Armed Forces in Germany", occurring in paragraph 3 of the said order, is changed to read "Commander in Chief, European Command".

This order shall be effective as of 6 June 1949.

HARRY S. TRUMAN

THE WHITE HOUSE

July 21, 1950

G. Advisory Board on Clemency for War Criminals —Transmittal of Report to the United States High Commissioner for Germany and Introduction to This Report, 28 August 1950

1. LETTER TRANSMITTING THE REPORT

ADVISORY BOARD ON CLEMENCY FOR WAR CRIMINALS

August 28, 1950

To: The United States High Commissioner for Germany

Pursuant to the directions of John J. McCloy, United States High Commissioner for Germany, the Advisory Board on Clemency for War Criminals was convened in Washington, D. C., in March 1950 as follows: David W. Peck, Presiding Justice, Appel-

late Division, First Department, New York Supreme Court, Chairman; Frederick A. Moran, Chairman, New York Board of Parole; and Conrad E. Snow, Assistant Legal Adviser, Department of State.

Commissioner Moran proceeded to Germany in April, returning to the United States with the judgments and the Board then commenced its study and consideration of the cases. The Board convened at 28 Prinzregenten Strasse, Munich, on July 11, 1950, and proceeded immediately to consider the petitions for clemency filed by or on behalf of the defendants who were convicted in Cases Numbers 1 to 12, inclusive, which were tried by Military Tribunals established in accordance with U.S. Military Government Ordinance No. 7, as amended. The Board has sat in Munich for 40 days, has read the judgments (over 3,000 pages) in the cases of 104 defendants now in confinement as a result of the above-mentioned trials, the appeals filed by counsel, the petitions for clemency and all supporting documents, and has heard 50 counsel representing 90 of the defendants. Commissioner Moran has personally conferred with the prisoners at Landsberg Prison. All considerations of the Board have been in accordance with the directions of the High Commissioner, as contained in Staff Announcement No. 117, dated July 18, 1950.

The Board submits herewith its findings and recommendations with regard to clemency, in accordance with paragraph 3 of the above-mentioned Staff Announcement.

Respectfully submitted,

DAVID W. PECK
FREDERICK A. MORAN
CONRAD E. SNOW

2. INTRODUCTION TO REPORT OF THE ADVISORY BOARD ON CLEMENCY FOR WAR CRIMINALS

REPORT OF THE ADVISORY BOARD ON CLEMENCY FOR WAR CRIMINALS TO THE UNITED STATES HIGH COMMISSIONER FOR GERMANY

The availability to the individual defendant of an appeal to executive clemency is a salutary part of the administration of justice. It is particularly appropriate that the cases of defendants convicted of war crimes be given an executive review because no appellate court review has been provided.

There were twelve trials before six United States Military Tribunals at Nuernberg, involving over one hundred defendants, these trials being known as the American Nuernberg trials.

Some of the defendants have asserted that standards of judgment varied between the several courts and that there were inequalities in sentences. There seems also to be a feeling upon the part of the defendants that the time of their trial, shortly after the war, was unfavorable and prejudicial. It is important, therefore, that all the cases be reviewed at one time by one body under conditions which guarantee objectivity.

While your Advisory Board has worked under a directive that it was not to review the judgments on the law or the facts, we have felt that the authority to review sentences required a differentiation between specific facts found and established in the evidence and conclusions that may have been drawn therefrom. We have considered ourselves bound by the former but not by the latter. We have closely examined the judgments, carefully considered the petition and supporting documents of each defendant, heard counsel in each case, and through one member of the Board interviewed each prisoner at Landsberg Prison.

The Nuernberg trials were more than the trials of individual defendants for individual crimes. They were group trials of men who, while participating separately, were engaged in a vast criminal enterprise against international law and humanity. We think that three things of equal importance should eventuate from these trials and be pointed up in this report.

(1) Recognition of laws of humanity which no people or state can flaunt and the certain knowledge that the individual engaged in their violation will be held accountable to society and punished.

(2) Education of the people of the world as to what took place under the Third Reich, that they may become ever alert to guard against the risks of repetition.

(3) Individual justice for the individual defendant. He must not be assimilated to the government, party, or program. His individual action and circumstances must be scrupulously observed to the end that he be held accountable only for his own misdeeds and not have visited upon him the misdeeds of others.

We duly appreciate that our province and concern is with the individual. We believe that our report and recommendations reflect an attention to all individual considerations in accordance with the standard set. We think it necessary as well as desirable at the outset, however, to outline the scope and showing of the trials, the manifold but unified criminal activities in which these defendants participated.

The 12 trials were separate proceedings, each concerning a segment of the Nazi program: the SS, the army, the concentration camps, the courts, the government, the industrial front. All were integrated in a massive design which despite its madness was

thoroughly worked out to incorporate every endeavor. The concept which underlay the design and aggressive action was the idea that the Germans were a master race destined to conquer, subjugate, and enslave the inferior races of the East, but that even the master race must be ruled by a dictator who would have complete control over their lives. It was not a new idea, this glorification of state and ordering of the lives of all individuals to serve the state, but it had never been conceived and carried out on such a large and ruthless scale as it was by Hitler and the Nazis.

The parts of the master plan all carried out in unison were:

(1) War, to conquer and bring within the Nazi domain the territories of the East.

(2) The elimination of all actual and potential opposition, by the extermination of political leaders and those who had any promise of becoming political leaders in opposition, or their collection and removal to concentration camps.

(3) The elimination of Jews, occasionally by deportation, but generally by outright slaughter. This organized business of murder was centered in SS groups which accompanied the army for the purpose of eliminating the Jews, gypsies, and all those even suspected of being partisans. No less than 2 million defenseless human beings were killed in this operation.

(4) The subjugation of the people of the Conquered Eastern Territory and suppression of all resistance by calculated terrorization. This was Hitler's direction to and the deliberate policy of the High Command (OKW), carried out by many of the commanding generals in the Southeast. Departing from military measures and in violation of laws of war, the Southeast army engaged in the murder of political leaders captured with troops, collected the civil population, and after destroying their villages held them as hostages to be shot together with prisoners of war in arbitrary reprisal ratios as high as 100 to 1 for the death of any German soldier or for any act of sabotage. Not infrequently this army was employed in rounding up Jews and other "undesirables" and turning them over to the accompanying SS for liquidation.

(5) Pillage of property and enslavement of the population of the invaded eastern territories to feed the machine of war. Local industry was preempted to fashion German arms, or machinery and material were removed to Germany for the purpose, and the local population was conscripted for local labor service or deported to Germany and placed in concentration camps near war plants, where they were set to work 12 hours a day until many thousands died from exhaustion, exposure, starvation, or brutal treatment.

(6) The resettlement program which had the dual purpose of

permanently ousting the non-Germans from their homes, eliminating their culture and even their existence, and settling Germans in their place. Included in this program was bringing back to the Reich from the eastern territories German nationals or ethnic Germans, regardless of whether they wished to come or not, kidnaping of non-German children with racial characteristics considered desirable and their removal to the Reich for strengthening the race, the deportation or reduction of non-Germans to a position of virtual slavery, and an elaborate program to end the propagation of the inferior races by means of sterilization, abortions, and the imposition of the death penalty for forbidden sexual intercourse. All this was done on a systematic basis of racial examinations which determined the disposition of all the people involved. This gigantic uprooting of people regardless of ties of home, family, or their wishes was carried out in a thoroughly businesslike way by agencies of the government set up for the purpose.

The medical experiments, which constituted one entire case, will be touched on here only as an illustration of the attitude and philosophy which dominated the whole program. They included a variety of experiments with diseases, inoculations, mutilating operations, and physical tests on human beings, all made on concentration camp inmates and involving a large number of deaths. While it is contended that the experiments were useful and conducted properly, despite the many deaths resulting, the noteworthy fact is that free subjects were not persuaded to make the sacrifice for country or humanity, which is the elementary legal requirement for experiments on human beings, but the imposition was made solely upon those helpless human beings for whom the Reich had no use or respect. The number that died by medical experimentations was not comparable to those who died by other means, but hundreds of concentration camp inmates, without their consent and in violation of every tenet of law and professional ethics, were subjected to torture and death by experiments, including their infection with mortal disease, the breaking and transplanting of bones, exposure to freezing, high altitudes, and other physical tests.

Of course, none of this could happen where law existed or was observed. Hence it was a necessary part of the program to eliminate law, and law was eliminated. There was an outright substitution of Nazi ideology for law. Judges were frankly instructed that in dealing with non-Germans they were not expected to apply or observe the statutes, but were to be guided by Nazi ideology. The judge was thus left loose and free from law to vent his will, and in a discriminatory manner based only on considerations of who the parties were, the antithesis of law, the

courts reached decisions and inflicted penalties and punishment, including death for the most trifling offenses if the defendant was a Pole or Jew.

While no law was above the judges in these cases, there were ministers and party leaders above them, and decisions were closely watched even by Hitler or Himmler to make sure that the courts did their part in the Nazi program. Their interference in court proceedings, particularly with dispositions and sentences, was common. If a decision was not satisfactory to the party or government, it was recalled and a dictated disposition made. Only puppets or party stooges could serve as judges in such circumstances. The administration of justice was thus corrupted and prostituted and harnessed to the Nazi will.

What manner of men were these SS leaders, commanding generals, judges, prosecuting attorneys, industrialists, and government ministers; what their psychological reactions were at the time and whether they enthusiastically or reluctantly bent themselves to their allotted tasks is not clear. While all now pretend to a distaste of their work, the hard fact remains obvious that with most of them willingness must have entered into their performance. No one man can make an entire nation goose-step to his will. Among the leaders down the line, even among the minor ones where the defendants now vie to place themselves, there had to be willing cooperation. If it had not largely existed among these defendants, Hitler and the small coterie at the top could never have come or remained in power.

The almost universal attitude and explanation of the defendants is that they were caught in the web, were unable to extricate themselves, and under coercion of superior orders, without any alternative but execution or suicide, were obliged to carry out their assignments. A few of the defendants had the courage and character by one means or another to remove themselves from those assignments. Nothing too serious happened to them, proving that for persons in the defendants' positions there was an escape for those who really had the character and desire to put humanity and decency above personal security at any price.

Some of the defendants have made the impression upon us of genuineness in their professions. Perhaps several traveled the road one describes as the "ridge between obedience and rebellion." Yet while none attempts to justify his actions as a humane matter, the main impression given, and one that is most disappointing, is that the majority of the defendants still seem to feel that what they did was right, in that they were doing it under orders. This exaltation of orders is even more disturbing as an attitude than as a defense.

The defense is both uniform and consistent. Every defendant in this case has raised it, as every defendant in the international trials raised it. It does not matter how high or how low the defendant was. There was always some superior, eventually up to Hitler, who gave the orders, and there is reflected here a complete acceptance of what was the basic evil in the Hitler regime, a dictatorship not only in fact but in philosophy, so that no one was expected to think or have any standards of official or personal performance except the thoughts and standards laid down by one man.

And now we have, 5 years after his end and the end of the war, all of these defendants chanting superior orders and contending that in the entire nation of 60 millions of people there was only one man, or a very small group of men, responsible for any and all of the things which happened, and that no one else was responsible for anything, and that so long as there was an order which trickled down from the top, everyone in the wash of it enjoyed an immunity bath. It may be as consoling a philosophy as it is a blind philosophy. But if it is to be negated and there is to be a world of law and justice, individuals in positions of some authority at least must be held answerable for their acts. However mitigating the circumstances may be, depending upon the position of a defendant and the actual coercion under which he may have acted, the defense of superior orders must be rejected as an absolution as it was rejected by the Tribunals on the trials.

Only by education of the people and the preservation of political power in them can repetition of what is shown here be avoided and the aspiration of the common man everywhere for peace and justice be realized. The other essential is the maintenance of law, and it is law which the Nuremberg trials observed and vindicated.

An elaborate legal attack was made upon the jurisdiction of the Tribunals at the trials upon the ground that the law being applied was *ex post facto* law and that the defendants had not known that they would be held accountable under such law when they were acting under German law. We are not permitted to reexamine this subject, but as we have undertaken to make a few general observations on the trials, it is appropriate to say that there was nothing *ex post facto* about the law applied in these cases. Rudimentary laws of humanity, including elementary laws of war such as those relating to the treatment of prisoners, reprisals, and hostages, were old and international law long before the Nazi war machine was set in motion, and were as much a part of German military and civil law as they were of international law. There was no German law that these defendants were observing

at the time they were violating all tenets of international law and natural law, unless they wish to assert as law the very lawlessness of Nazi ideology, which violated and suspended German law as well as international law. This legal defense comes down to nothing more than superior orders. It is the assertion again in legal jargon that officers of the army and officers of the state were entitled to do whatever a Fuehrer decree directed, regardless of the fact that it was contrary to all legal concepts everywhere and the dictates of humanity.

Where there is any room for question, we certainly would not hold a defendant criminally liable. But no law can be called upon to defend the murder of Jews or gypsies, the enslavement and accompanying cruel treatment of masses of people, and the wide program of racial examinations and valuations which determined who would be resettled and who would be enslaved or destroyed. Murder, pillage, and enslavement are against law everywhere and have been for at least the twentieth century.

The law existing, the concomitant, is that the violators be held accountable. What Nuremberg means is that the law remains at all times over all people, including the leaders of state and all who follow in their train, and that the individual will be held answerable to society.

What we have said is a necessary introduction to a consideration of the individual cases because, as we have observed, these individual defendants did not act in a vacuum or entirely on their own. It is quite as important in their behalf as it is against them to place them in the larger canvas and view them in perspective. We have said before, and we re-emphasize, that the individual is not to have visited upon him the sins of others. There is a guilt by association only to a limited degree. A man who joins and actively participates in a criminal organization, knowing that it is criminal, should be held responsible to some extent for the acts of the organization he enters and supports. A conviction of being a member of a criminal organization is not visiting upon him the crimes of that organization but is merely holding him accountable for his own association and action in entering into it and participating in it. Even in this respect and the limited punishment which we approve for it, and certainly in all other respects, each defendant is to be judged and punished solely upon the basis of his individual action.

To that end it is necessary to guard against the enormity of the program in which a defendant was engaged distorting our view of his position in it. We have found that in several cases the defendants occupied such subordinate positions, with little authority, although their titles may have sounded impressive, that in

reality they were little more than common members of a criminal organization. We believe that the adjustments in sentences which we have recommended are due and proper recognition of differences in authority and action among the defendants and place them in proper relation to each other and the programs in which they participated. We have not hesitated, where we thought it called for, to recommend sharp reductions in sentences.

Likewise, where after all allowances were made, the stark fact remained that a defendant held a position of leadership in a project of murder, we have not been moved by the argument that by remaining long under sentence of death, the defendant has suffered so much as to be entitled to consideration on that ground. Delays in executing the death sentences have been due to the defendants' efforts to have every possible review of their cases and to the time necessarily consumed in such reviews and extending to the defendants the fullest possible consideration of their cases. It always takes time in any civilized society to exhaust the salutary processes of the law for the individual's protection. Those defendants who will be spared execution by these processes will undoubtedly think the time so spent worthwhile, as obviously it is worthwhile in every case. It must follow, however, that in the cases remaining, where no consideration of clemency could possibly justify a change in sentence, there is no basis for making a change simply because the execution has been delayed in making doubly or triply sure that the judgment should be carried out.

A word should be said of Landsberg Prison. We have been reminded of the effect of prison confinement on a prisoner's health and morale. That factor has undoubtedly inclined us towards reducing sentences where any proper ground for reduction could be found, but it should be stated and understood that conditions at Landsberg Prison are ideal prison conditions. Commissioner Moran, who has a wide familiarity with prisons and is an authority on prison administration, has inspected the prison and talked with all the prisoners. There are no complaints whatever as to prison conditions or administration. On the contrary, the prisoners recognize and we are satisfied that the care, treatment, and attention given to the prisoners are all that could be asked and are in keeping with the highest standards of prison administration.

There have been urged upon us tenets of charity and generosity. Even in the case of one of the worst offenders we were asked to give an example of generosity to his family and to the people. Clemency, where any grounds can be found for exercising charitable instincts, may be an encouraging example, but a mistaken tenderness toward the perpetrators of mass murder would be a

mockery. It would undo what Nuremberg has accomplished, if in the end we were guided entirely by considerations of sympathy or generosity. Executive clemency does not exist to that end.

We have taken into consideration every mitigating circumstance urged upon us, including superior orders, and we have given that consideration effect in proportion to the position occupied by each defendant. In our recommendations we have made all possible allowances, and if we have erred, we have erred on the side of leniency. Justice requires the observance and enforcement of standards of law by punishment of those guilty of serious crimes in proportion to their guilt. We are not entitled to grant relief beyond that warranted by mitigating circumstances and fair consideration of individual situations. We believe that the sentences which remain are no more than fair and just in the interest of both society and the individual.

- Case 9, U.S. *vs.* Ohlendorf, the Einsatzgruppen case
- Case 4, U.S. *vs.* Pohl, the Pohl case
- Case 7, U.S. *vs.* List, the Hostage case
- Case 12, U.S. *vs.* von Leeb, the High Command case
- Case 1, U.S. *vs.* Brandt, the Medical case
- Case 2, U.S. *vs.* Milch, the Milch case
- Case 3, U.S. *vs.* Altstoetter, the Justice case
- Case 8, U.S. *vs.* Greifelt, the RuSHA case
- Case 11, U.S. *vs.* von Weizsaecker, the Ministries case
- Case 10, U.S. *vs.* Krupp, the Krupp case
- Case 6, U.S. *vs.* Krauch, the Farben case*

*The detailed recommendations of the report concerning the sentences in each of the cases listed have not been made public.

H. Eight Orders of the United States High Commissioner for Germany on Sentences of Convicted War Criminals, 31 January 1951

I. ORDER AS TO OSWALD POHL, WAR CRIMINAL CONVICTED IN THE POHL CASE

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of
The United States of America }
vs. } Military Tribunal II, Case No. 4
Oswald Pohl, *et al.* }

ORDER WITH RESPECT TO SENTENCE OF OSWALD POHL

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Oswald Pohl is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, on April 30, 1949, the United States Military Governor made and entered an order in the above-entitled matter the text of which is as follows:

"In the case of the United States of America against Oswald Pohl, *et al.*, tried by United States Military Tribunal II, Case 4, Nuernberg, Germany, the defendant Oswald Pohl, on 3 November 1947, was sentenced by the Tribunal to death by hanging. A petition to modify the sentence, filed on behalf of the defendant by his defense counsel, has been referred to me pursuant to the provisions of Military Government Ordinance No. 7. I have duly considered the petition and the record of the trial, and in accordance with Article XVII of said Ordinance, IT IS HEREBY ORDERED:

"a. that the sentence imposed by Military Tribunal II on Oswald Pohl be, and hereby is, in all respects confirmed;

"b. that pending action on petitions filed by the defendant with authorities other than the Office of Military Government

for Germany (U.S.), the execution of the death sentence be stayed until further order by me;

“c. that the defendant be confined until further order in War Criminal Prison No. 1, Landsberg, Bavaria, Germany”;

and

WHEREAS, the petitions referred to in paragraph marked “b” of said order hereinabove set forth have been considered and denied by competent authority, and

WHEREAS, all petitions for clemency or other relief received subsequent to April 30, 1949 have been considered and denied by competent authority,

IT IS ORDERED, that said paragraph marked “b” of said order of the Military Governor, dated 30 April 1949, hereinabove set forth, and made and entered in the above entitled matter, which provides that the sentence of death imposed on Oswald Pohl be stayed, be, and the same hereby is, revoked.*

[Signed] JOHN J. McCLOY
United States High Commissioner
for Germany

*On 31 January 1951, Mr. McCloy wrote the Commander in Chief, European Command, Heidelberg, Germany, APO 403, U.S. Army, as follows:

“Sir:

“In the case of the United States of America against Oswald Pohl, *et al.*, tried by United States Military Tribunal II, Case No. 4, Oswald Pohl, one of the defendants named therein, was sentenced to death. By order dated 30 April 1949 the United States Military Governor confirmed the sentence of death, stayed execution of the sentence pending action on petitions filed by Oswald Pohl with authorities other than Office of Military Government for Germany (US), and confined the defendant Pohl in War Criminal Prison No. 1 pending further order.

“Under the authority of Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, I have, by order dated January 31, 1951, revoked the stay of execution contained in the Military Governor's order of 30 April 1949. The order is enclosed.

“Pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 6 thereof, you are requested to take the necessary measures for carrying into execution the sentence of death by hanging imposed on Oswald Pohl, a war criminal convicted and sentenced by United States Military Tribunal II established pursuant to Control Council Law No. 10.

“Very truly yours,
[Signed] JOHN J. McCLOY
United States High Commissioner
for Germany.”

“Enclosure:

Order dated January 31, 1951.”

2. ORDER AS TO ERNST BIBERSTEIN, WAR CRIMINAL
CONVICTED IN THE EINSATZGRUPPEN CASE

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of
The United States of America }
vs. } MILITARY TRIBUNAL II
Otto Ohlendorf, *et al.*, } CASE NO. 9

*ORDER WITH RESPECT TO SENTENCE OF
ERNST BIBERSTEIN*

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Ernst Biberstein is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, an application for clemency on behalf of Ernst Biberstein has been duly considered,

IT IS ORDERED, that the sentence of death imposed on Ernst Biberstein be, and the same hereby is, commuted to life imprisonment and that such term of life imprisonment shall be deemed to have begun July 1, 1945.

[Signed]

JOHN J. McCLOY
United States High Commissioner
for Germany

3. ORDER AS TO FRANZ EIRENSCHMALZ, WAR CRIMINAL
CONVICTED IN THE EINSATZGRUPPEN CASE

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of
The United States of America }
vs. } Military Tribunal II
Oswald Pohl, *et al.* } Case No. 4

*ORDER WITH RESPECT TO SENTENCE OF
FRANZ EIRENSCHMALZ*

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Franz Eirenschmalz is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, an application for clemency on behalf of Franz Eirenschmalz has been duly considered,

IT IS ORDERED, that the sentence of death imposed on Franz Eirenschmalz be, and the same hereby is, commuted to imprisonment for a term of 9 years commencing May 8, 1945.

[Signed] JOHN J. MCCLOY,
United States High Commissioner
for Germany

4. ORDER AS TO FRANZ SCHLEGELBERGER, WAR
CRIMINAL CONVICTED IN THE JUSTICE CASE

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY,

Frankfurt, Germany

January 31, 1951

In the Case of The United States of America vs. Josef Altstoetter, <i>et al.</i>	} Military Tribunal III Case No. 3
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*ORDER WITH RESPECT TO SENTENCE OF
FRANZ SCHLEGELBERGER*

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Franz Schlegelberger is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, an application for clemency on behalf of Franz Schlegelberger has been duly considered,

IT IS ORDERED, that the sentence of life imprisonment imposed on Franz Schlegelberger be, and the same hereby is, unmodified and that such term of imprisonment shall be deemed to have begun May 8, 1945.

[Signed] JOHN J. McCLOY,
United States High Commissioner
for Germany

5. ORDER AS TO ERHARD MILCH, WAR CRIMINAL
CONVICTED IN THE MILCH CASE

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of
The United States of America }
vs. } Military Tribunal II
Erhard Milch } Case No. 2

*ORDER WITH RESPECT TO SENTENCE OF
ERHARD MILCH*

WHEREAS, pursuant to executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Erhard Milch is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, an application for clemency on behalf of Erhard Milch has been duly considered,

IT IS ORDERED, that the sentence of life imprisonment imposed on Erhard Milch be, and the same hereby is, commuted to imprisonment for a term of 15 years commencing May 8, 1945.

[Signed] JOHN J. MCCLOY,
United States High Commissioner
for Germany

6. ORDER AS TO WILHELM SPEIDEL, WAR CRIMINAL
CONVICTED IN THE HOSTAGE CASE

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of The United States of America <i>vs.</i> Wilhelm List, <i>et al.</i>	}	Military Tribunal V Case No. 7
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*ORDER WITH RESPECT TO SENTENCE OF
WILHELM SPEIDEL*

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Wilhelm Speidel is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, an application for clemency on behalf of Wilhelm Speidel has been duly considered,

IT IS ORDERED, that the sentence of 20 years' imprisonment imposed on Wilhelm Speidel be, and the same hereby is, commuted to time served.

[Signed] JOHN J. MCCLOY,
United States High Commissioner
for Germany

7. ORDERS AS TO ALFRIED KRUPP VON BOHLEN UND HALBACH, WAR CRIMINAL CONVICTED IN THE KRUPP CASE

a. Order Commuting Sentence for a Term of Years to Time Served

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of The United States of America <i>vs.</i> Alfried Felix Alwyn Krupp von Bohlen und Halbach, <i>et al.</i>	} Military Tribunal III Case No. 10
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*ORDER WITH RESPECT TO SENTENCE OF ALFRIED
FELIX ALWYN KRUPP VON BOHLEN UND HALBACH*

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Alfried Felix Alwyn Krupp von Bohlen und Halbach is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, an application for clemency on behalf of Alfried Felix Alwyn Krupp von Bohlen und Halbach has been duly considered,

IT IS ORDERED, that the sentence of 12 years' imprisonment imposed on Alfried Felix Alwyn Krupp von Bohlen und Halbach be, and the same hereby is, commuted to time served.

[Signed] JOHN J. MCCLOY,
United States High Commissioner
for Germany

b. Order Vacating Sentence of Forfeiture of Property

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of
The United States of America
vs.
Alfried Felix Alwyn Krupp
van Bohlen und Halbach, *et al.*

Military Tribunal III
Case No. 10

ORDER WITH RESPECT TO SENTENCE OF ALFRIED FELIX ALWYN KRUPP VON BOHLEN UND HALBACH

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Alfried Felix Alwyn Krupp von Bohlen und Halbach is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, on July 31, 1948, Military Tribunal III sentenced Alfried Felix Alwyn Krupp von Bohlen und Halbach and ordered forfeiture of all his property, both real and personal, directing delivery and disposal thereof in accordance with the provisions of Control Council Law No. 10, and

WHEREAS, on April 1, 1949, the United States Military Governor made and entered an order pertaining to the forfeiture in the above-entitled matter the text of which is as follows:

“All property owned by Alfried Felix Alwyn Krupp von Bohlen und Halbach on 31 July 1948 is ordered and declared to be subject to forfeiture and confiscation by the zone commander of the Area of Control in which the same was then located, without compensation, and without regard to any transfers thereof by him that have taken place or that may take place after that date,” and

WHEREAS, an application for clemency on behalf of Alfried Felix Alwyn Krupp von Bohlen und Halbach has been duly considered,

IT IS ORDERED, that the provisions of the sentence entered by Military Tribunal III and of said sentence as altered by the order

of the United States Military Governor of April 1, 1949, pertaining to the forfeiture, delivery, and disposal of all real and personal property of Alfried Felix Alwyn Krupp von Bohlen und Halbach be, and the same hereby are, revoked, vacated and set aside.

[Signed] JOHN J. McCLOY,
United States High Commissioner
for Germany

8. ORDER AS TO OTTO AMBROS, WAR CRIMINAL CONVICTED IN THE FARBEN CASE

OFFICE OF THE UNITED STATES HIGH COMMISSIONER
FOR GERMANY

Frankfurt, Germany

January 31, 1951

In the Case of	} Military Tribunal VI Case No. 6
The United States of America	
<i>vs.</i> Carl Krauch, <i>et al.</i>	

ORDER WITH RESPECT TO SENTENCE OF OTTO AMBROS

WHEREAS, pursuant to Executive Order 10062 as amended by Executive Order 10144 and in accordance with paragraph 5 thereof, the United States High Commissioner is responsible for the execution of sentences of War Criminals convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, Otto Ambros is a war criminal convicted by a military tribunal established by the United States Military Governor pursuant to Control Council Law No. 10, and

WHEREAS, an application for clemency on behalf of Otto Ambros has been duly considered,

IT IS ORDERED, that the sentence of 8 years' imprisonment imposed on Otto Ambros be, and the same hereby is, commuted to time served.

[Signed] JOHN J. McCLOY,
United States High Commissioner
for Germany

I. Statement of the High Commissioner for Germany, 31 January 1951, upon Announcing His Final Decisions Concerning Requests for Clemency for War Criminals Convicted at Nuernberg

Since my arrival in Germany I have received many letters and petitions asking clemency for war crimes prisoners convicted at Nuremberg and confined in Landsberg Prison.

It is a fundamental principle of American justice that accused persons shall be given every opportunity to maintain their innocence. If found guilty, it is recognized that they should be permitted to establish mitigating circumstances. In conformity with this latter principle I decided to appoint an impartial board to review these petitions, to examine each case, and to consider whether any basis existed for clemency.

Such a board was appointed in March 1950, and was composed of three well-qualified, distinguished, and impartial Americans who had not previously been identified in any way with the Nuremberg trials. Its members were: the Hon. David W. Peck, Presiding Justice, Appellate Division, First Department, New York Supreme Court, chairman; Commissioner Frederick A. Moran, Chairman, New York Board of Parole; and Brig. General Conrad E. Snow, Assistant Legal Adviser, Department of State. The Board commenced its deliberations in Washington and, in July of 1950, established itself in Munich, Germany, where it conducted proceedings during the course of the summer.

The Board submitted its recommendations to me at the end of the summer. In a statement which is being released at this time, the Board has described the general basis on which it proceeded. After reviewing the Nazi criminal programs which were the basis of the Nuremberg trials, this considered statement disposes of certain general arguments commonly made on behalf of a number of the defendants. These arguments include the following: (1) the excuse of "superior orders"; (2) claims that the offenders are being punished under *ex post facto* laws; (3) the allegation that the delay in carrying out the death sentences should itself be sufficient grounds for commuting them. I urge everyone to read the Board's statement. I call attention to the comments of the Board on conditions in Landsberg Prison.

With the assistance of the Board's recommendations, I have considered each individual request for clemency and in every case I have made the final decision.

Sentences have been reduced in a very large number of cases. They have been reduced wherever there appeared a legitimate

basis for clemency. Such reductions have been granted where the sentence was out of line with sentences for crimes of similar gravity in other cases; where the reduction appeared justified on the ground of the relatively subordinate authority and responsibility of the defendants; where new evidence, not available to the court, supported such clemency. Where I was convinced that a defendant on some occasion had the courage to resist criminal orders at personal risk, I took such facts into consideration. It is notable that several of the defendants did have the courage to resist or repudiate such orders without suffering any serious consequences. In certain cases my decision to grant clemency has been influenced by the acute illness of the prisoner or other special circumstances of similar nature.

Fifteen of the prisoners convicted at Nuremberg and now at Landsberg are under sentence of death. In these cases I have taken into account every factor which could justify clemency and have resolved every doubt in favor of the convicted man. Ten of the sentences will be commuted to imprisonment.

The remaining five sentences will be confirmed. In each of these cases the enormity of the crimes for which these men were directly responsible was such as to place clemency out of reason. Four of them were leaders of the *SS Einsatzgruppen* or extermination units which were engaged in the ruthless liquidation of all possible opponents of Nazism in the conquered territories. Their crime was the slaughter among others of Jews, gypsies, insane people, and communists who fell into their hands. In all, approximately 2,000,000 helpless human beings were exterminated in the program.

The other prisoner sentenced to death at Nuremberg whose sentence is not commuted is the former leader of the organization responsible for the administration of the concentration camps (WVHA). Hundreds of thousands of people died of starvation or abuse or were murdered in these camps. In addition to many other atrocities this man personally supervised the destruction of the Warsaw ghetto in which 56,000 Jews were murdered or deported.

Objection has been voiced to the execution of these death sentences as contrary to the provision of the Basic German Law of 1949, abolishing the death penalty in Germany. This provision, however worthy of respect, does not control this situation. It cannot affect my obligation to honor the judgments of courts constituted pursuant to international action before the adoption of the German Basic Law.

The crimes for which these judgments and sentences were imposed were committed mainly outside Germany and against

non-Germans. The flood of criminality engendered by the Hitler regime resulted in an international demand for justice. Courts were established to try individuals accused of a program of deliberate and calculated crime, of historic proportions, perpetrated not on a national but on an international scale. The crimes for which they were found guilty have no counterpart in the ordinary criminal law and the present German law concerning capital punishment cannot be accepted as the standard of punishment.

Some have suggested that the delay since the death sentences were imposed makes it inhumane or unjust to carry them out. These views fail to take account of the facts which induced the delay and the extent of it.

Actually the time which has elapsed since the sentences were imposed has been much shorter than is generally realized and has been taken up with reviews for the benefit of the condemned men. The defendants were originally sentenced in April and August of 1948. The law under which these cases were tried required that death sentences be reviewed and confirmed by the Military Governor. After this review General Clay * confirmed all death sentences except one which was commuted to life imprisonment. This process of reviews necessarily took considerable time.

*General Lucius D. Clay, U.S. Military Governor in Germany, 1947-49.

A further delay was caused by investigations of certain of the war crimes trials by committees of the Congress of the United States. These investigations were undertaken to make sure that the trials were fair in all respects and gave the defendants an adequate opportunity to present their defenses. While the investigations were in progress, a stay of execution was issued for all capital sentences imposed by Military Tribunals or Military Commissions in Germany. It is now no longer in effect.

In the meantime, however, all of the prisoners under death sentence had filed petitions for review of their sentences in the Courts of the United States. Appeals in certain of these cases were taken to the Supreme Court of the United States. The last of these petitions was dismissed in November 1950. I naturally would not permit any executions to take place as long as there was any possibility for legal review.

Finally, the work of the Clemency Board, followed by my own examination of petitions for clemency, has required more than eight months.

As I have said, all of these reviews—by the Military Governor, by the Committees of Congress, by the United States Courts, and by the Clemency Board—have been designed to make sure that

each defendant had the full benefit of a fair trial and of any possible legal appeals, and of any grounds for clemency which could be asserted on his behalf. The result of all these reviews has been that eleven of the original death sentences have been commuted, one by the Military Governor and ten on the basis of my own review. Had the death sentences been carried out when they were originally imposed, men whose sentences have since been commuted would have been executed.

There is one other matter in connection with the Nuremberg sentences upon which I wish to comment generally. It is the charge that sentences against certain former members of the German army malign the German military profession as a whole.

The sentences rendered at Nuremberg against members of the military profession were based on charges of excesses beyond anything which could possibly be justified on the grounds of military security. The individuals in question were convicted for directing or participating in savage measures of reprisal and oppression against civilian populations far exceeding the limits of international law or accepted military tradition. Whenever the heat of battle or true military considerations could persuasively be pleaded, a conscious effort has been made to moderate the sentences. In reaching my conclusions I have recognized, as did the courts and the Clemency Board, the bitter character of partisan warfare on certain of the fronts. But with every allowance for these considerations there still remain excesses which cannot be rationalized or excused. Where sentences were imposed upon former officers, they have, of course, been based on individual responsibility and participation. These sentences reflect upon the individuals concerned, not upon the honor of the German military profession.

I am satisfied that the dispositions now finally made in the individual cases are just to the individual and society. I have attempted to apply standards of executive clemency as they are understood in a democratic society. I have made every effort to decide each individual case objectively, dispassionately, and on its own merits. With the subordinate or less influential figures, I have endeavored to grant a greater measure of clemency than to those whose high positions placed on them a greater responsibility.

All of my decisions have been rooted in the firm belief in the basic principle of the rule of law which all must respect and to which all are answerable. With this principle, I have striven to temper justice with mercy.

J. Announcement of Decisions by the United States High Commissioner for Germany, 31 January 1951, Upon Review of the Sentences Imposed by Tribunals Established Pursuant to Ordinance No. 7

I am announcing herewith my decisions on the review which I have undertaken of the sentences rendered by the Military Tribunals established under United States Military Government Ordinance No. 7 for the trial of war criminals.

In large measure my decisions are based on the report of the Advisory Board for Clemency for War Criminals which was appointed to review these cases.

In all cases where the Board has recommended commutation of a death sentence I have accepted the recommendation. A very limited number of additional death sentences have been commuted, although the Board, in its report, found no ground for clemency. As regards sentences of imprisonment, in a few instances my own examination of the circumstances of individual cases has resulted in my reaching a result slightly different from that recommended by the Board as to the precise degree of modification warranted. In general, however, my decisions follow the substance of the Board's report.

I have adopted certain general recommendations made by the Board. One of these was the increase in the amount of time credited to prisoners against their sentences for good behavior from five to ten days a month. This is the amount generally allowed in prisons in the United States. Moreover, credit for good behavior is a standard and effective method of enforcing prison discipline.

On the recommendation of the Board I am also granting all prisoners credit against their terms of imprisonment for all forms of pre-trial confinement imposed by Allied governmental agencies subsequent to 8 May 1945. Such a credit has heretofore been allowed in a number of cases but in some it appeared that full credit had not been given.

My conclusions as to modification of specific sentences of prisoners at Landsberg under my jurisdiction and certain general comments which I have to make concerning these cases are as follows:

Case 1—Medical Case

Defendants were charged with performing medical experiments on concentration camp inmates, including high altitude tests, freezing, experiments with the use of typhus and malaria germs, artificially induced infections, salt water tests, etc.

The direct or indirect participation of professional practitioners in these crimes is a betrayal of the medical profession. The experiments were never the result of a free and voluntary proffer of their bodies by the unfortunate victims. They were imposed upon helpless human beings who had neither the opportunity nor the power to avoid the tests. Death or agony was the usual result of these experiments.

The worst offenders in this category of crimes have already been dealt with, but all of those presently imprisoned had a guilty part. Several of the men for whom clemency is asked were not only physicians, but also professional soldiers of very high rank.

If there had been any sense of obligation to either profession, they would not have played any consenting part in these outrages. Though difficult to find room for clemency, the Board has found, for reasons such as lack of primary responsibility, age, and limited participation, a certain basis for the modification of sentences.

Accordingly, after reviewing these recommendations, I have arrived at the following decisions :

Fritz Fischer	From life to 15 years
Karl Genzken	From life to 20 years
Siegfried Handloser	From life to 20 years
Gerhard Rose	From life to 15 years
Oskar Schroeder	From life to 15 years
Hermann Becker-Freyseng	From 20 years to 10 years
Wilhelm Beiglboeck	From 15 years to 10 years
Herta Oberheuser	From 20 years to 10 years
Helmut Poppendick	From 10 years to time served

Case 2—The Milch Case

Defendant was Erhard Milch, State Secretary in Hermann Goering's Air Ministry, who was convicted for advocating and exploiting slave labor

The sole defendant in this case is the former Field Marshal Milch. The conduct of this former officer in the field of military affairs is not subject to question. It is his almost violent advocacy of, and pressure for, slave labor and disregard for the life and health of such labor in the airplane factories which is the gravamen of this offense.

His petition for clemency urges instability of temperament due to nervous strain, aggravated by a head injury. The Board has recommended a reduction of sentence from life to fifteen years. This is a sharp reduction considering the high responsibility of this man, but I am prepared to follow it.

Case 3—The Justice Case

Defendants were leading judges, public prosecutors, and government officials who perverted law to suit the arbitrary requirements of Nazi racial ideology and presided at the "People's Courts" and "special" courts

The defendants in this case, as in the Medical case, cast discredit on the professions of which they were members. There are offenders in every calling, but it is peculiarly disheartening to find them among those who are called upon to uphold law and impartial administration of justice. These defendants were not only prepared, but in most cases eager to disregard judicial and legal principles in order to advance the most brutal racial and political principles. I have had difficulty in finding a justification for clemency in any of these cases. As in the Medical case, however, the Board for reasons such as limited responsibility has recommended certain reductions which I have followed with relatively minor modifications.

The results are as follows:

Herbert Klemm	From life to 20 years
Guenther Joel	From 10 years to time served
Rudolf Oeschey	From life to 20 years
Oswald Rothaug	From life to 20 years
Ernst Lautz	From 10 years to time served
Wilhelm von Ammon	From 10 years to time served
Franz Schlegelberger	From life to release on medical parole

Case 4—The SS and Concentration Camp Case

Defendants were administrators of the concentration camps or of economic enterprises of the SS conducted with slave labor. Some of the defendants were directly identified on a large scale with the genocidal program of the Third Reich

The case is concerned with the administration of the Concentration Camps as an adjunct of the SS. Two of the defendants were sentenced to death. One of them, Oswald Pohl, was found to have had personal responsibility for the administration of the camps. The liquidation of the Jews in the Auschwitz camp, the destruction of the Warsaw ghetto, and the pillage of the Jews in the East in the action known as "Action Reinhardt" were among the crimes chargeable to this organization. Not only was Pohl, according to the judgment, the head of this administration, but he personally directed and supervised the destruction of the Warsaw ghetto, and he personally selected prisoners for medical experiments. I naturally can find no basis for clemency, and the Board recommended no modification of the sentence.

On the other hand, in the case of Eirenschmalz, the only other defendant sentenced to death in this case, I have ordered a radical commutation of his sentence. This is due to the introduction of new evidence dissociating him from the offenses on which the original death sentence was chiefly based. Though he was a part of the whole criminal organization, his individual connection with exterminations has by reason of the new evidence become remote. If all the new evidence had been before the Court, the death sentence, in all probability, would not have been imposed.

Kiefer likewise benefits from the new evidence relating to Eirenschmalz. The Board has found reasons for recommending the reduction of other sentences in this case, and I have generally followed its recommendations.

My conclusions in these cases are as follows :

Oswald Pohl	Death. No modification
Franz Eirenschmalz	From death to 9 years
Karl Sommer	From life to 20 years
Karl Mummenthey	From life to 20 years
August Frank	From life to 15 years
Heinz Karl Fanslau	From 20 years to 15 years
Georg Loerner	From life to 15 years
Hans Loerner	From 10 years to time served
Hans Baier	From 10 years to time served
Hans Bobermin	From 15 years to time served
Hermann Pook	From 10 years to time served
Leo Volk	From 10 years to 8 years
Erwin Tschentscher	From 10 years to time served
Max Kiefer	From 20 years to time served
Hans Hohberg	From 10 years to time served

No mention is made of Case 5 (Flick) or Case 6 (Farben) as all of the defendants have been released or are now eligible for release.

Case 7—The Hostage Case

Defendants were generals assigned to southeastern Europe, charged with criminal disregard of the civilized rules of warfare in respect to the treatment of hostages and civilians.

In the so-called Hostage or Southeast Generals case, the Board has recommended no alleviation of the sentences of former officers Wilhelm List and Walter Kuntze, nor can I find any extenuation for the energy, as demonstrated by their own signed orders, with which they appear to have carried out the terrorization policy of their Command.

Their high rank set a certain tone to the brutalities practiced

in this area and their own orders can only be read as incitations to excess. There is, in short, more in these cases than the mere transmittal of a patently illegal order, bad as that might have been. In spite of an effort to give full weight to the harassing character of the local partisan and guerrilla warfare which these and other officers had to face in this campaign, the conclusion is inescapable that these highly responsible officers, as the Board found, passed far beyond the limits permitted by justifiable military considerations, both in their acts of omission and commission.

While the tribunal recognized that in extremity, and as a last resort, the shooting of hostages under certain restrictions was a concomitant of warfare of this type, the evidence established that many of the executions involved hundreds of gypsies and Jews and others who did not bear the slightest relation, either in location or causation, to any incidents against German troops. The taking and shooting of hostages were also in arbitrary and grossly excessive ratios to the offenses prompting the action.

The Board suggests that List and Kuntze, both elderly men, may have such physical infirmities as to raise the desirability of further medical examination to determine whether any medical parole is appropriate. In accordance with this suggestion and in accordance with a practice which has become standard in the administration of United States prisons in Germany, I have directed that medical examinations be made of them and that a report be rendered which would provide a basis for a determination of this matter.

The sentences of other officers charged with excessive reprisals have been reduced because they had lesser responsibility or, in some cases, showed evidence of humane considerations.

The decisions are as follows:

Wilhelm List	Life. No alteration
Walter Kuntze	Life. No alteration
Lothar Rendulic	From 20 years to 10 years
Wilhelm Speidel	From 20 years to time served
Helmuth Felmy	From 15 years to 10 years
Ernst von Leyser	From 10 years to time served
Hubert Lanz	From 12 years to time served
Ernst Dehner	From 7 years to time served

Case 8—The Race and Settlement Case [RuSHA]

Defendants were high officials in the Race and Settlement Office of the SS Elite Guard, RuSHA, the Repatriation office, VoMi, or the main staff office of the RKFBV. These organizations carried out systematic programs of genocide by kidnapping

alien children; performing abortions on non-German workers; sterilization; forced evacuation of enemy populations and forced Germanization of enemy nationals and a number of other excesses.

The individuals were all connected with former government ministries charged with carrying out the almost unbelievably brutal racial concepts of Hitler and Himmler.

Though guilt attends all of these defendants in some measure, the Board has based its recommendations on the relatively restricted nature of the relationship of these defendants to the crimes, their relatively subordinate roles, and certain other extenuating circumstances. I have followed those recommendations. The decisions are as follows:

Rudolf Creutz	From 15 years to 10 years
Werner Lorenz	From 20 years to 15 years
Heinz Brueckner	From 15 years to time served
Otto Hofmann	From 25 years to 15 years
Fritz Schwalm	From 10 years to time served
Herbert Huebner	From 10 years to time served

Case 9—Einsatzgruppen or Extermination Squads Case

Defendants were officers of the SS Elite Guard and in charge of the extermination squads which were responsible for the murder, as the International Tribunal found, of 2,000,000 people.

This case includes most of the death sentences which have heretofore been confirmed but which have not been executed. These men, or at least many of them, are typical of the most inhuman and degrading aspect of the whole Nazi spectacle. Their organizations were one of the chief instruments of the extermination policy of the Nazi regime.

The political and racial character of most of their victims, which included women and children, belies any pretense that the wholesale executions were military or bore any relation to military security. The murders which certain of these organizations committed were on such a large and vicious scale that the mind has difficulty in comprehending them. Certain of the crimes are of truly historic proportions. The evidence in these cases consists mainly in undisputed reports of the organizations, the statements of the leaders themselves, some of whom are among the defendants.

Whereas a careful examination of these cases and the Board's recommendations does afford grounds for clemency in certain individual situations, no rationalization or explanation whatever

can justify the existence of these organizations themselves, or the policy which motivated them. In some of these cases, no matter how one strains to find an area for the application of clemency, the responsibility of the defendants is so clear and direct and the nature of the offenses so shocking that clemency has no meaning as applied to them. In these individual cases no mitigating circumstances whatever have been found.

There are other defendants where, with difficulty, I have found a basis for commutation of the death sentence to one of confinement for the rest of their natural lives. Though deeply guilty it can be said of them that their offenses as proven by the record were on a less imposing scale.

In cases of still other individuals where the sentence of death has been heretofore confirmed, I feel injustice would be done if the sentences were carried out. This is due largely to the introduction of new and persuasive evidence which has recently been made available. The Haensch and Steimle judgments are examples. Though guilt still attaches to them the directness of their connection with the crimes is substantially lessened by this evidence. Had it not been for the lapse of time since the original sentence, this evidence would not have been considered. In such cases I have not only commuted the death sentence, but have substantially reduced the time of future confinement.

In ordering the reduction of sentences I have followed very closely the recommendations of the Clemency Board, and my action is based upon the prisoner's subordinate responsibility, or the relative remoteness of his connection with the murders, and in some cases, the refusal of the prisoner himself to continue in this brutal business. In no case have I permitted the execution to take place where the Board recommended clemency. In certain cases I have commuted the death sentence, though the Board itself recommended no clemency.

In order that it may be known why no clemency was granted in certain cases, I have appended to my decision in each such case a brief statement of the crimes for which the defendants were adjudged and sentenced and for which, after extended examination and review, no extenuation could be found.

The results in these cases are as follows:

Paul Blobel	Death. No modification
Ernst Biberstein	From death to life imprisonment
Walter Blume	From death to 25 years
Werner Braune	Death. No modification
Walter Haensch	From death to 15 years
Waldemar Klingelhoefer	From death to life imprisonment
Erich Naumann	Death. No modification
Otto Ohlendorf	Death. No modification
Adolf Ott	From death to life imprisonment
Martin Sandberger	From death to life imprisonment
Heinz Hermann Schubert	From death to 10 years
Willy Seibert	From death to 15 years
Eugen Steimle	From death to 20 years
Heinz Jost	From life to 10 years
Gustav Nosske	From life to 10 years
Waldemar von Radetzky	From 20 years to time served
Erwin Schulz	From 20 years to 15 years
Franz Six	From 20 years to 10 years
Lothar Fendler	From 10 years to 8 years
Felix Ruehl	From 10 years to time served

The case of defendant Strauch who was extradited to Belgium where he was sentenced to death for murders committed there was not reviewed.

Case 10—The Krupp Case

Defendants, who were among the highest executives in the Krupp industrial empire, were charged with collaboration with the Hitler government in the use of slave labor and in spoliation for the aggrandizement of the concern.

This case involves a charge of spoliation and plunder relating to certain property in France and Holland. There is also a slave labor count involving the illegal employment of civilians, concentration camp inmates, and prisoners of war in various Krupp plants.

On the first of these charges the defense is that the Krupp concern had no part in the confiscation of the property; that it was done entirely by German governmental authorities and the property was allocated to Krupp at prices set by the government and paid by Krupp.

On the second count the defense is that the slave labor was allocated by governmental authorities and the conditions under which the labor was confined and worked were directed entirely by the concentration camp commanders in the case of the civilians and by the army in the case of the war prisoners. Employment was illegal in the case of the civilians and contrary to the Hague Conventions in the case of the prisoners of war.

There is no doubt whatever that this labor was inhumanly treated, being constantly subjected to corporal punishment and other cruelties. There is likewise no doubt that the industrial concern and its management were not primarily responsible for this treatment. The judgment does indicate that several of the defendants were involved with certain of the illegalities but it is extremely difficult to allocate individual guilt among the respective defendants.

I have come to the conclusion that whatever guilt these defendants may have shared for having taken a consenting part in either offense, it was no greater in these cases than that involved in the Farben and Flick cases. I have accordingly reduced the sentences in Case No. 10 so that the terms served will conform approximately to the sentences in similar cases.

The decisions in this case are as follows:

Alfried Krupp von Bohlen und Halbach.....	From 12 years and confiscation of all property to time served and no confiscation
Friedrich von Buelow	From 12 years to time served
Erich Mueller	From 12 years to time served
Eduard Houdremont	From 10 years to time served
Friedrich Janssen	From 10 years to time served
Karl Eberhardt	From 9 years to time served
Max Ihn	From 9 years to time served
Heinrich Korschach	From 6 years to time served
Heinrich Lehmann	From 6 years to time served

One feature of this case is unique, namely, the confiscation decree attached to the term sentence against Alfried Krupp. This is the sole case of confiscation decreed against any defendant by the Nuremberg courts. Even those guilty of personal participation in the most heinous crimes have not suffered confiscation of their property and I am disposed to feel that confiscation in this single case constitutes discrimination against this defendant unjustified by any considerations attaching peculiarly to him. General confiscation of property is not a usual element in our judicial system and is generally repugnant to American concepts of justice, as Mr. Justice Jackson has said in opposing such sentences in connection with the jurisdiction granted to the International Military Tribunal.

I can find no personal guilt in defendant Krupp, based upon the charges in this case, sufficient to distinguish him above all others sentenced by the Nuremberg Courts. As one of the compelling motives of this review is to introduce a certain uniformity in the sentences I have determined to eliminate this feature from the defendant Krupp's sentence.

I would point out that by so doing I am making no judgments as to the ultimate title to the former Krupp property. The property of *Firma Fried. Krupp* will be subject to AHC Law Number 27, "Reorganization of the German Coal, Iron and Steel Industries," and is not affected by this decision.

Case 11—Ministries Case

Defendants were high-ranking officials who played an important part in the political and diplomatic preparation for initiation of aggressive wars, violation of international treaties, economic spoliation, diplomatic implementation of the genocidal program.

I have determined to follow the recommendations of the Board in all these cases. There is one case, however, which I feel deserves special comment. This is the case of Gottlob Berger, who was originally sentenced to 25 years' imprisonment.

Berger was a close official associate of Himmler; he was active in the *Heu-Aktion* program by which children were evacuated from the Eastern territories and sent to training camps for armament industries. He was prominent in the creation of and gave protection to the units presided over by the notorious Dirlewanger.

On the other hand, Berger appears to have been unjustly convicted of participation in the murder of the French General Mesny. At least there is substantial evidence to show that he protested the affair and did what he could to prevent it. Also, Berger, toward the end of the war, actively intervened to save the lives of Allied officers and men who under Hitler orders were held for liquidation or as hostages.

The judgment shows without contradiction that this prisoner is culpably responsible for much that was illegal and inhumane in the Nazi program and his close association with Himmler is a serious indictment in itself. However, I feel compelled to eliminate entirely from the consideration of the weight of his sentence any participation in the Mesny murder and to give perhaps somewhat greater weight than did the Court to certain humane manifestations toward prisoners which at least in one period of his career he displayed. For these reasons I have approved the recommendation of a reduction in sentence from 25 years to 10 years which the Board has made as a very liberal act of clemency. I have already commuted the sentence of the defendant Ernst von Weizsaecker to time served.

The conclusions of this case are therefore as follows :

Gottlob Berger	From 25 years to 10 years
Hans Heinrich Lammers	From 20 years to 10 years
Edmund Vessenmayer	From 20 years to 10 years
Hans Kehrl	From 15 years to time served
Paul Koerner	From 15 years to 10 years
Paul Pleiger	From 15 years to 9 years
Wilhelm Keppler	From 10 years to time served
Graf Lutz Schwerin von Krosigk.....	From 10 years to time served

Case 12—High Command Case

Defendants were charged with personal responsibility for ordering the killing and mistreatment of prisoners of war and fostering and participating in a program involving the deportation and abuse of civilians in occupied areas.

It is important to note that in these cases the defendants involved are men of very high military rank. They were tried and convicted not for excesses participated in by them or by units under their command on the battlefields and in hot blood, but for promulgating or participating directly or indirectly in the orders leading to the executions of or killing of civilians, political undesirables, Jews, gypsies, Allied flyers, those having "anti-German attitudes" and others having in large part no connection with the conduct of military operations. The testimony in these cases is mainly based on documents, the reports of the officers themselves, and those of their command of which they had knowledge.

The offenses also embrace responsibility for or a consenting part in the deportation of civilian populations, their enslavement, and the slaughter of commandos. The association of certain of these officers of the highest rank * with the liquidations conducted by the SIPO and the SD, was closer than is generally admitted, and their personal conduct in this connection places them beyond military justification.

*Reinecke, for example, was a lieutenant general, chief of the AWA and chief of the National Socialist Guidance Staff of OKW, and had charge of Prisoners-of-War Affairs.

With every disposition to grant consideration because officers are impelled to take measures calculated to protect their country and their command, there still remains, in these cases, an area of real guilt which, whatever his nationality, a professional soldier sensitive of his responsibilities cannot countenance.

Much has been said about the honor of the German soldier and of the German officer. The suggestion has been made that the condemnation of individual officers is a reflection on the German military profession as a whole. To condemn those who were not

faithful to their professional obligations is not to condemn the whole profession any more than to condemn the doctors and lawyers who participated in the medical experiments and in the administration of the people's courts under the Nazis is to condemn the medical and legal professions as a whole.

Where sentences have been substantially reduced it has been the result of more detached responsibility and other extenuating circumstances brought out mainly since the trials. Wherever evidence appears that any of these officers did resist or attempt to moderate in part certain of the excesses, due consideration was given such action either in the original sentence or by the present action.

The decisions in this case which closely follow the recommendations of the Board are as follows:

Hermann Reinecke	Life. No modification
Walter Warlimont	From life to 18 years
Georg von Kuechler	From 20 years to 12 years
Hans von Salmuth	From 20 years to 12 years
Hermann Hoth	15 years. No modification
Hans Georg Reinhardt	15 years. No modification

Kuechler is 70 years of age. Since the Court sentenced this defendant to a term less than life, I have reduced the sentence so as to give, with time served and time off for good behavior, a prospect of release from prison during his lifetime.

K. Order of the United States District Court for the District of Columbia Concerning Defendant Pohl, 13 February 1951

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

United States of America on the relation of Oswald Pohl	}	Habeas Corpus No. 3743
<i>Petitioner,</i>		
<i>vs.</i>		
Dean Acheson, Secretary of State, <i>et al.</i>	}	Habeas Corpus No. 3743
<i>Respondents</i>		

ORDER

This Court having issued a rule to show cause why a writ of habeas corpus should not be issued in the above-entitled case, and the respondents having made return thereto, and it appearing to the Court that it is without jurisdiction over the petitioner or the subject matter, it is by the Court this 13th day of February, 1951,

ORDERED that the rule to show cause heretofore issued be, and the same is hereby discharged and the petition for habeas corpus is hereby denied.

[Signed] EDWARD A. TAMM
Judge

L. Decision of the Supreme Court of the United States, 23 April 1951*

SUPREME COURT OF THE UNITED STATES

Oswald Pohl, *et al.*

vs.

Dean Acheson, Secretary of State, *et al.*

United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted. Mr. Justice Jackson took no part in the consideration or decision of this application. Warren E. Magee for petitioners. Solicitor General Perlman and Robert W. Ginnane for respondents.

M. Memorandum of Court of the United States District Court for the District of Columbia, 29 May 1951

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Pohl, *et al.*,

Plaintiffs

v.

Acheson, *et al.*,

Defendants

Civil Action No. 2140-51

Schallermair, *et al.*,

Plaintiffs

vs.

Marshall, *et al.*,

Defendants

Civil Action No. 2144-51

MEMORANDUM OF COURT

The above two cases were filed on May 23, 1951, and, on May 24, 1951, there were filed motions for temporary restraining orders.

*341 U.S. 916.

Briefly stated, the complaints, alleging illegal convictions in their trials for war crimes by United States Military Commissions in Germany, pray for declaratory judgment adjudicating, determining and interpreting the following international treaties and executive compacts of the United States:

- (a) The London Agreement and Charter of the International Military Tribunal of August 8, 1945;
- (b) Control Council Law No. 10, dated December 20, 1945;
- (c) Military Government Ordinance No. 7;
- (d) Executive Order No. 10144, dated July 21, 1950;
- (e) Charter of the United Nations;
- (f) Prisoner of War Convention of 1949;
- (g) The basic law, that is, the Constitution for the Federal Republic of Germany enacted in April of 1949;
- (h) The Occupation Statute enacted in April of 1949, as amended in March 1951;
- (i) The official communique of the United States, France and Great Britain issued March 6, 1951.

The complaints ask the Court to declare that the international treaties and executive compacts above-referred to abolish in Germany all death sentences by way of capital punishment, and further ask the Court to forbid the defendants from now executing death sentences upon plaintiffs, who in each case are under death sentence imposed by the military tribunals established under United States Military Government Ordinance No. 7, the sentences having been affirmed by the defendant, John J. McCloy, High Commissioner for Germany.

On the day of the filing of the complaints, at approximately four o'clock p.m., Eastern Daylight Time, Judge McLaughlin of this Court referred to me the motions for temporary restraining orders. The matters were presented, on behalf of the plaintiffs, by Mr. Warren E. Magee, a respected and honorable member of the bar of this Court, and the motions were opposed by Mr. Robert W. Ginnane, Special Assistant to the Attorney General, and by Mr. Ross O'Donoghue, of the Office of the United States Attorney for the District of Columbia.

The Court was advised by Mr. Magee that the death sentences were scheduled to be carried out in Germany at about six o'clock p.m., Eastern Daylight Time on the day of argument, also that the Department of Justice had advised Mr. Magee that the filing of these actions would not be considered grounds for stay of execution unless the Court granted restraining orders. Mr. Magee further advised the Court that although these plaintiffs had recently filed habeas corpus proceedings in this Court having to

do with their convictions and sentences, and although those proceedings had been finally dismissed, new matters never before presented to this Court, the United States Court of Appeals for the District of Columbia, or to the Supreme Court of the United States were being advanced. These new matters will be referred to hereafter. Mr. Magee stated very frankly that, in the petition for certiorari to the Supreme Court and in the motion for rehearing there, these new matters had been urged but that it might well be, because the matters referred to were not before the lower courts, due to the fact that they arose subsequent to the filing of the petitions for writs of habeas corpus and, therefore, not in the record, that the matters might not have been considered by the Supreme Court.

This Court listened to argument for approximately an hour and, it being obvious that a serious question had been presented and that the record was so large that it could not be properly considered (or, for that matter, even read) in the short time remaining before the executions, the Court determined to sign a temporary restraining order effective until 10:00 a.m., on Tuesday, May 29, 1951, and ordered the case set down for hearing, on the Government's motion to dismiss, at 10:00 a.m., on Monday, May 28, 1951.

It is perfectly obvious that had the suit been dismissed and the temporary restraining order denied without full consideration, and had the Court been in error, the deaths of the plaintiffs would have rendered it impossible to remedy the situation, whereas no harm could come from the delay which would enable the Court to further consider the matter. Accordingly, I directed that briefs be filed by twelve o'clock noon on Saturday, May 26, 1951, and, as above-stated, set the case for Monday, May 28, 1951. Briefs were filed as directed.

All the matters contained in items (a) to (g) inclusive of the international treaties and executive compacts referred to above were before this Court on the petitions for writs of habeas corpus which were dismissed by Judge Tamm of this Court. Those treaties and compacts were, of course, also before the United States Court of Appeals for the District of Columbia, which affirmed Judge Tamm's decision. They were contained also in the petition for certiorari which was denied by the Supreme Court. The original petitions for writs of habeas corpus were filed February 12, 1951 and dismissed February 13, 1951. The action of Judge Tamm was affirmed by the United States Court of Appeals on February 19, 1951. Thereupon, the petition for certiorari was filed on March 28, 1951, being No. 643, of the Octo-

ber Term of the Supreme Court. This petition was denied *April 23, 1951*, and motion to rehear denied *May 14, 1951*.

In the petitions for writs of habeas corpus no reference obviously, was made to the amendment to the Occupation Statute of April 1949, which amendment was made in March 1951, nor to the official communique of March 6, 1951.

The complaint in the *Pohl* case (C.A. No. 2140-51) alleges in paragraphs 22 and 23:

"22. Hostilities, that is, the state of war between the United States and Germany, came to an end on the enactment of the basic law for the Federal Republic of Germany; the enactment of the Occupation Statute, on to-wit, April 1949; and the amendment of the Occupation Statute in March of 1951. In March of 1951 the Occupation Statute, an Executive Agreement enacted by the United States, France and the United Kingdom, was amended and the Federal Republic of Germany was authorized to reestablish a German Foreign Office and to exchange diplomatic representatives with other nations, including the United States. In March of 1951 diplomatic representatives were in fact exchanged between the United States and Germany and between Germany and the Allies of the United States. This ended the technical state of war existing between the United States and Germany and the integration of the Federal Republic of Germany into the community of free and friendly nations occurred. This is established by the official Allied communique issued by the United States, France and the United Kingdom on March 6, 1951.

"23. The basic law for Germany, that is, the Constitution for the Federal Republic of Germany, which is now the law for all Germany as announced by the representatives of the United States, France and the United Kingdom, which basic law has been agreed to by the United States, France and the United Kingdom, provides that human life in all Germany shall be inviolate, and specifically by Article 102 provides for all of Germany 'the death sentence shall be abolished.' While the United States, France and the United Kingdom reserved certain powers, including control over the carrying out of sentences against persons charged before or sentenced by Courts or Tribunals of the Occupying Powers or Occupation Authorities, they did not reserve the right to carry out sentences of death in Germany. The enactment of the Constitution of the Federal Republic of Germany and its approval by the United States, France and the United Kingdom terminated the authority of all persons, including the defendants, to carry out death sentences by capital punishment in Germany."

Similar allegations are made in the *Schallermair* case (C.A. No. 2144-51).

The questions thus arise as to whether or not the amendment of the Occupation Statute and the official communique of the United States, France and Great Britain issued March 6, 1951, ended the state of war existing between the United States and Germany, and whether the integrating of the Federal Republic of Germany into the community of free and friendly nations in fact occurred and would have the result claimed by the plaintiffs. If the state of war between the United States and Germany has ended, and if the Federal Republic of Germany has been integrated into the community of free and friendly nations, a serious question exists as to whether or not the High Commissioner should or could proceed with the executions.

The decision of the Court of Appeals in the habeas corpus proceedings relied on two cases: *Johnson v. Eisentrager*, 339 U. S. 763, and *Flick v. Johnson*, 85 U. S. App. D.C. 70, 174 F. (2d) 983, cert. den. 338 U. S. 879.

The *Eisentrager* case was decided by the Supreme Court on June 5, 1950, and held that a *nonresident enemy alien* has no access to our courts in war-time; that *nonresident enemy aliens*, captured and imprisoned abroad, have no right to a writ of habeas corpus in a court of the United States; that the Constitution of the United States does not confer a right of personal security or an immunity from military trial and punishment upon a *nonresident enemy alien* engaged in the hostile services of a government at war with the United States; and that the petition in that case alleged no fact showing lack of jurisdiction in the military authorities to accuse, try and condemn those prisoners or that the military authorities acted in excess of their lawful powers.

It would seem to follow that if the state of war existing between the United States and Germany has ended, as claimed by the plaintiffs, the Court could entertain the complaints here under consideration.

Two questions are presented:

1. Has the state of war between the United States and Germany been terminated, as claimed by the plaintiffs? If it has not, the Court is bound by the *Eisentrager* case, *supra*.

2. If the state of war between the United States and Germany has been terminated, is the carrying out of the death sentence within the reservation of the control over the carrying out of sentence by the Occupying Powers against persons charged or sentenced by courts or tribunals before the termination of the state of war?

In the *Eisenrager* case, decided on June 5, 1950, the Supreme Court obviously regarded the state of war as still existing. There is a distinction between cessation of actual hostilities and the actual ending of a state of war. The latter may be determined by treaty, by legislation, or by Presidential proclamation. None of these has occurred. So, unless it be determined that the amendment of the Occupation Statute in March 1951 and the official allied communique of March 6, 1951, constitute such a proclamation, the state of war still exists.

It seems reasonable to suppose that, had the Supreme Court agreed with the plaintiffs' contention, it would have brushed aside the technical question as to non-inclusion of events subsequent to the filing of the petitions for writs of habeas corpus. On the other hand, it is true that the denial of certiorari is no expression of opinion on the merits, and it may be, as contended by the plaintiffs, that such denial of certiorari is not controlling on the issues which are presented here and which were not before this Court or before the Court of Appeals in the habeas corpus proceedings. However, in the face of denials by the Department of State that the amendment of the Occupation Statute in March 1951 and the official allied communique of March 6, 1951, constitute a proclamation of the termination of the state of war between the United States and Germany, and in the face of the language itself, this Court cannot conclude that the state of war between this country and Germany does not still exist. This being so, the Court is bound by the decision in the *Eisenrager* case and must dismiss the complaint, but on the conditions hereinafter set forth.

The plaintiffs advance earnest arguments as to why the executions should not take place. They urge the change in the political situation between this country and Germany; the necessity of a unified military front throughout the world to prevent aggression, in which front Western Germany is to have a part; the protests of the government of Western Germany against the carrying out of death sentences; the enactment of the Bonn constitution abolishing capital punishment; and other matters. The courts, however, are not the proper tribunals for consideration of these arguments, which are political and policy making and are proper subjects for executive action.

The Court has not passed on the technical question of the propriety of the present form of action.

Because of the serious and important questions which have been presented to the Court arising, as they do, after the February 19, 1951, decision of the United States Court of Appeals, I will, in the judgment dismissing the complaints, retain jurisdiction to continue the restraining order in effect for a period of one week, unless

sooner dissolved by the Court of Appeals, to enable this decision to be reviewed by that Court. This limitation of time will work no undue hardship on counsel on either side, who have already prepared their briefs and arguments.

This memorandum will be filed in each of the above-numbered cases.

May 29, 1951

[Signed] WALTER M. BASTIAN
Judge

N. Order of the Supreme Court of the United States,
6 June 1951

SUPREME COURT OF THE UNITED STATES

Oswald Pohl, Erich Naumann, Paul Blobel,
Werner Braune, Otto Ohlendorf,
Movants

vs.

Dean Acheson, Secretary of State, *et al.*
George Schallermaier, Hans th. Schmidt,
Movants

vs.

George C. Marshall, Secretary of Defense, *et al.*

} On application
for stay
of execution

ORDER

This matter came on for hearing on an application for stay of executions addressed to all and each of the Justices. The issues involved are those considered by the Court at the time of the denial of the petition for writ of certiorari by these movants in Pohl, *et al.*, *v.* Acheson, *et al.*, No. 643, October Term, 1950, April 23, 1951, and upon denial of the petition for rehearing in that case, May 14, 1951.

None of the qualified Justices consider that a stay should be granted and the application is denied.

The ground on which Mr. Justice Black denies is that the Court has previously denied certiorari over his dissent, and he feels bound by that action of the Court.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Dated this 6th day of June 1951.

XXVI. RECONVENING OF THE TRIBUNAL IN THE POHL CASE AFTER JUDGMENT AND PROCEDURE PRIOR TO THE ISSUANCE OF THE SUPPLEMENTAL JUDGMENT OF THE TRIBUNAL

A. Introduction

In two of the Nuernberg trials the tribunals took action after judgment by which the judgment and sentences were revised as to several of the defendants. The first case of this kind was the Pohl case (treated in this section) and the second was the Ministries case (treated in sec. XXVII). In the Pohl case the Tribunal, at its own request, was reconvened by the Military Governor more than 6 months after its original judgment "for the purpose of permitting such reconsideration of its judgment as may be appropriate." The Tribunal, after reconvening, considered further written defense briefs, which it allowed to be filed, as well as contentions set forth by the defendants in petitions for review of sentences which had previously been filed with the Military Governor. Thereafter the Tribunal issued a supplemental judgment and an order confirming or amending the original judgment and sentences of the Tribunal. This unusual procedure developed out of misunderstanding and confusion arising from a discussion between the Tribunal and counsel with respect to the final argumentation in the case.

On 15 August 1947, near the end of the presentation of the evidence in the trial, the Tribunal discussed the order of the closing statements in open court and then announced its decision that the closing statement of the prosecution would be followed by the closing statements for the 18 defendants. In conclusion Presiding Judge Toms stated:

"This Tribunal does not need both a closing argument and a brief from either prosecution or defense. You may say what you want in your closing argument. We will have a transcript of it, and we do not want a repetition of it in the way of a brief after that."

Thereafter, on 17, 18, 19, and 20 September 1947, the Tribunal heard the closing statements of the prosecution and the defense which comprise a total of 981 transcript pages. The prosecution's closing statement required a little more than one-half day to deliver, and comprises 73 transcript pages. The closing statements on behalf of the 18 defendants lasted for more than 3 days, and comprise 908 transcript pages. (Extracts from the closing statements for the prosecution and for the defendants Pohl and Scheide

are reproduced on pages 822-930, vol. V, this series.) On 22 September 1947, the Tribunal heard the final statements of the individual defendants (reproduced on pages 931-957, volume V, this series).

Thereafter the prosecution filed a number of written briefs in support of its argument which were directed to individual defendants. Defendants Pook and Klein filed reply briefs to the briefs against them. Counsel for all defendants, however, objected by various motions to the Tribunal's consideration of the prosecution's briefs in view of the Tribunal's statement of 15 August 1947, quoted above. In response to these motions the Tribunal on 13 October 1947 issued an opinion (reproduced in subsec. B) in which the Tribunal concluded: "In view of the Tribunal's previous statement above, it has determined to disregard the closing briefs of the prosecution and to consider only the closing arguments of the prosecution delivered in open court." The Tribunal pronounced its judgment on 3 November 1947, finding 15 of the 18 defendants guilty on one or more of the counts of the indictment. (The original judgment is reproduced in full on pages 958-1064, volume V, this series.) Four defendants were sentenced to death by hanging, three to life imprisonment, and eight to imprisonment for a term of years.

As stated in the supplemental judgment of the Tribunal (vol. V, this series, pages 1168, 1169, and 1193) :

"Subsequently, counsel for the convicted defendants filed petitions with the Military Governor of the United States Zone of Occupation asking revision of the sentences under Article XVII (a) of Ordinance No. 7. In these petitions various reasons were given for revision of the judgment, including claims that the proof had not been properly evaluated by the Tribunal, that various exhibits had been misinterpreted, that findings of fact were not supported by the evidence, and that there was injustice in the disparity of sentences. Two defendants stated that in preparing the judgment, the Tribunal had denied the defendants the right to answer prosecution's briefs filed against them. The Military Governor did not pass on the contentions of any of the defendants, but instead, at the request of the Tribunal, issued General Order No. 52, dated 7 June 1948, ordering it to reconvene on or about 12 July 1948, 'for the purpose of permitting such reconsideration and revision of its judgment as may be appropriate'.***

* * * * *

"On 13 October 1947 an order of the Tribunal was filed with the Secretary General to the effect that trial briefs filed by the

prosecution would be disregarded. However, through misunderstanding or confusion between what had been announced in open court and the true contents of the order of 13 October 1947, some members of the Tribunal considered excerpts from some of the briefs filed by the prosecution in the preparation of the judgment as to certain defendants only.

“When the question of the use of prosecution briefs was raised by defense counsel following the judgment, the Tribunal at once advised the Military Governor for the United States Zone of Occupation that the Tribunal should be reconvened to allow defense counsel every opportunity to reply to prosecution briefs and to submit additional briefs if they so desired.”

The general order directing the Tribunal to reconvene is reproduced in subsection C. The members of the Tribunal returned to Nuernberg from the United States and issued an order permitting the filing of defense briefs on 15 June 1948 (subsec. D). On 14 July 1948, the Tribunal issued a further “Order Permitting Defendants to File Additional Briefs” (subsec. E), which extended the time for the filing of additional defense briefs and which stated, among other things, that if it should appear to the Tribunal, after considering the briefs of the defense, “that the judgment heretofore entered as to any defendant is not then supported by the evidence and that his guilt had not then been proved beyond a reasonable doubt, or that the sentence imposed is unjust, the Tribunal will thereupon vacate, modify, or amend the judgment now entered in accordance with the facts and the law as so determined.”

By various means the defense thereafter sought to have this order of the Tribunal set aside and challenged the jurisdiction of the Tribunal to reconsider its judgment in the manner announced. On 20 July 1948, counsel for the defendant Georg Loerner filed a petition with the Executive Presiding Judge of the Military Tribunals requesting a joint session of the Military Tribunals on the question and requesting the cancellation of the Tribunal's order of 14 July 1948. This motion concluded by stating that “the only way out in my opinion is a retrial.” On 23 July 1948, counsel for 12 of the defendants filed a further motion for a joint session of the Tribunals, and on the same day defense counsel filed a motion with the Tribunal itself asking a hearing so that the defense could argue orally its legal objections and doubts concerning the Tribunal's order of 14 July 1948. (This last motion is reproduced in subsec. F.) The Committee of Presiding Judges considered the two petitions for a joint session on 27 July 1948 and denied these petitions. The order of the Committee

of Presiding Judges is reproduced in section XXIV E 4. On the next day the Tribunal in the Pohl case denied the defense motion for oral argument concerning the Tribunal's order of 14 July 1948 (subsec. G).

Most of defense counsel elected to file further written briefs. On 11 August 1948, the Tribunal filed a lengthy supplemental opinion in which it discussed a number of general defense claims as well as individual points raised on behalf of individual defendants in the petitions to the Military Governor and in the final defense briefs. On 11 August 1948 the Tribunal also issued its order confirming or amending the judgment and sentences as to the individual defendants. The supplemental judgment and the related order are reproduced in full at pages 1168-1253, volume V, this series. By its order of 11 August 1948, the Tribunal confirmed the sentences originally imposed upon 11 defendants and reduced the sentences initially imposed upon 4 defendants. The four sentences reduced were as follows: Georg Loerner, from death by hanging to life imprisonment; Max Kiefer, from life imprisonment to 20 years' imprisonment; Karl Fanslau, from 25 years' imprisonment to 20 years' imprisonment; and Hans Bobermin, from 20 years' imprisonment to 15 years' imprisonment.

Petitions for the review of sentences were thereafter filed once more by the defense with the Military Governor. The Military Governor confirmed the sentences as to 14 defendants and reduced the sentence of one defendant — Karl Sommer — from death by hanging to imprisonment for life (pages 1254 and 1255, volume V, this series).

B. Order of the Tribunal, 13 October 1947

UNITED STATES MILITARY TRIBUNALS SITTING IN
THE PALACE OF JUSTICE, NUERNBERG, GERMANY
AT A SESSION OF MILITARY TRIBUNAL II HELD
13 OCTOBER 1947, IN CHAMBERS

United States of America	} OPINION OF THE TRIBUNAL ON DEFENSE MOTIONS* CASE 4
vs.	
Oswald Pohl, <i>et al.</i> , Defendants	

After the conclusion of the final arguments in this case the prosecution filed a number of briefs in support of their argument directed toward the individual defendants. Counsel for all defend-

*U.S. vs. Oswald Pohl, *et al.*, Case 4, Official Record, volume 26, page 1167.

ants vigorously object to the consideration of these briefs by the Tribunal upon two grounds:

(1) That the Tribunal stated in open court as follows (*tr. p. 6253*):

“This Tribunal does not need both a closing argument and a brief from either prosecution or defense. You say what you want in your closing argument. We will have a transcript of it and we don’t want a repetition of it in the way of a brief after that.”

(2) That the Tribunal has recessed for the preparation of the judgment and the defense has had no opportunity to answer the prosecution briefs.

The Tribunal deems it inadvisable to make further delay necessary to permit the preparation and translation of replies by each defendant to the prosecution’s briefs. In view of the Tribunal’s previous statement above, it has determined to disregard the closing briefs of the prosecution and to consider only the closing arguments of the prosecution delivered in open court.

[Signed] ROBERT M. TOMS
Presiding Judge

C. Order of the Military Governor, 7 June 1948, Ordering the Reconvening of the Tribunal*

HEADQUARTERS — EUROPEAN COMMAND

7 June 1948

General Orders
No. 52

PURSUANT TO MILITARY GOVERNMENT ORDINANCE NO. 7

At the request of the judges constituting the Tribunal, Military Tribunal II as constituted by General Orders No. 85, Office of Military Government for Germany (U.S.) dated 16 December 1946, as amended by General Orders No. 5, same office, dated 21 January 1947, consisting of ROBERT M. TOMS, Presiding Judge; FITZROY D. PHILLIPS, Judge; MICHAEL A. MUSMANN, Judge; and JOHN J. SPEIGHT, Alternate Judge, is hereby ordered to reconvene at Nuernberg, Germany, on or about 12 July 1948 for the purpose of permitting such reconsideration and

**Ibid.*, page 1304.

revision of its judgment as may be appropriate in the case of United States of America *vs.* Pohl, *et al.* (Case 4).

BY COMMAND OF GENERAL CLAY:

C. R. HUEBNER
Lieutenant General, GSC
Chief of Staff

OFFICIAL:

[Signed] G. H. GARDE
Lieutenant Colonel, AGD
Assistant Adjutant General

D. Tribunal Order Permitting the Filing of Defense Briefs, 15 June 1948

UNITED STATES MILITARY TRIBUNALS
TRIBUNAL II
AT A SESSION OF SAID TRIBUNAL
ON THE 15TH DAY OF JUNE 1948

United States of America }
 vs. } *ORDER PERMITTING FILING*
Oswald Pohl, *et al.*, } *OF DEFENSE BRIEFS**
 Defendants } *CASE 4*

It appearing to the Tribunal that counsel for the defendants have requested leave to file further briefs in the above cause,

IT IS ORDERED that the Secretary General receive and file such briefs, including translations into English, up to and including Monday, the 12th day of July 1948, so that the Tribunal may consider such briefs and do any act within its jurisdiction which justice may require.

IT IS FURTHER ORDERED that no delay or extension of the time herein fixed be had for any reason whatsoever.

IT IS FURTHER ORDERED that the Marshal of the Tribunal serve a true copy of this order on the respective counsel for defendants in said cause within three days from the date hereof.

[Signed] ROBERT M. TOMS
Presiding Judge

**Ibid.*, page 1273.

E. Tribunal Order Permitting Defendants to File Additional Briefs, 14 July 1948

UNITED STATES MILITARY TRIBUNALS SITTING IN
THE PALACE OF JUSTICE, NUERNBERG, GERMANY
AT A SESSION OF MILITARY TRIBUNAL II
HELD 14 JULY 1948, IN CHAMBERS

United States of America } *ORDER PERMITTING*
 vs. } *DEFENDANTS*
Oswald Pohl, *et al.*, } *TO FILE ADDITIONAL BRIEFS*¹
 Defendants } *CASE 4*

On 7 June 1948, General Lucius D. Clay, Military Governor of the United States Zone of Occupation, issued General Order No. 52, ordering this Tribunal to convene at Nuernberg, Germany, on or about 12 July 1948 for the purpose of permitting such reconsideration and revision of its judgment as may be appropriate in the case of United States of America *vs.* Oswald Pohl, *et al.*, Case 4.

In pursuance of that order, Tribunal II has reconvened at the Palace of Justice in Nuernberg to carry out the mandate of the Military Governor.

The record in this case discloses that at the conclusion of the proofs, each defense counsel was allowed 1½ hours to present oral closing arguments with the exception of counsel for defendant Pohl, who was allowed three hours. The thoroughness with which the respective cases for the defendants were argued is shown by the number of typewritten pages of the several written arguments.²

¹ *Ibid.*, pages 1305-1309.

² The defense prepared and filed with the Tribunal written closing arguments which were not read in full when the closing statements were delivered in open court because of the time limitations placed upon final oral argument. Whereas the typewritten arguments totaled 909 pages, the transcript of the defense closing statements totaled only 370 transcript pages. See table in section XIX-C.

Oswald Pohl	152 pages
August Frank	79 pages
Georg Loerner	63 pages
Heinz Karl Fanslau	19 pages
Hans Loerner	18 pages
Erwin Tschentscher	56 pages
Max Kiefer	36 pages
Franz Eirenschmalz	50 pages
Karl Sommer	54 pages
Hermann Pook	22 pages
Hans Baier	41 pages
Hans Hohberg	63 pages
Leo Volk	55 pages
Karl Mummenthey	33 pages
Hans Bobermin	55 pages
Josef Vogt	39 pages
Rudolf Scheide	43 pages
Horst Klein	31 pages
<hr/>	
Total	909 pages

The transcript of the closing argument for the prosecution against all defendants comprises 73 pages.

The transcripts of these arguments were in the hands of the Tribunal at all times while considering its judgment and were given an attentive reading. These were considered in the nature of trial briefs.

The record also discloses (*tr. page 6253*) that on 15 August 1947 the Tribunal stated in open court:

“This Tribunal does not need both a closing argument and a brief from either prosecution or defense. You say what you want in your closing argument. We will have a transcript of it, and we do not want a repetition of it in the way of a brief after that.”

Subsequent to the rendition of the judgment on 3 November 1947, each of the defendants found guilty therein filed petition and appeal with the Military Governor of the United States Zone of Occupation. In such petitions and appeals two of said defendants claimed that as to them the Tribunal had made use of briefs filed by the prosecution, after the taking of proofs and oral arguments were concluded, in the preparation of its judgment. The remaining thirteen of the convicted defendants made no such claim. Two of the defendants, Pook and Klein, actually filed written briefs in reply to the prosecution briefs.

In conformity with the policy of the Tribunal to afford defense counsel every possible opportunity to present full and complete arguments in behalf of the defense, such counsel as wish to do so will now be permitted to prepare and submit briefs in reply to the

prosecution's briefs. If, after fully considering such defense briefs, it should appear to the Tribunal that the judgment heretofore entered as to any defendant is not then supported by the evidence and that his guilt has not then been proved beyond a reasonable doubt, or that the sentence imposed is unjust, the Tribunal will thereupon vacate, modify, or amend the judgment now entered in accordance with the facts and the law as so determined.

It is understood, of course, that as to the defendants Vogt, Scheide, and Klein, who were acquitted, this has no application. Having once been acquitted, they cannot be again put in jeopardy. It is further understood that this is not in any way a retrial of the case, but is merely a supplementary proceeding for the limited and specific purpose herein referred to. Defense counsel have heretofore received translations into German of the prosecution briefs. It is true also that the right to a review by the Military Governor of the original sentence and of any modified or amended sentence which may be hereafter entered remains intact and unimpaired. The Tribunal will receive and consider any briefs filed in conformity herewith, provided such briefs are in the hands of the Translation Division on or before Friday, 30 July 1948. The Tribunal will then await the translation into English of such briefs as soon thereafter as possible.

The Secretary General will direct the Marshal to immediately serve copies of this order on the respective defense counsel.

[Signed] ROBERT M. TOMS
Presiding Judge

[Signed] FITZROY D. PHILLIPS
Judge

[Signed] MICHAEL A. MUSMANN
Judge

F. Defense Motion, 23 July 1948, Requesting Oral Argument Concerning the Tribunal's Order of 14 July 1948

Nuernberg, 23 July 1948

To: Military Tribunal II,
Nuernberg

Subject: Reopening of Case 4 pursuant to the General Order of the Military Governor, dated 7 June 1948, and to the ruling of Military Tribunal II, dated 14 July 1948*

*U.S. vs. Oswald Pohl, et al., Case 4, Official Record, volume 26, pages 1367-1371.

The undersigned defense counsel request:

(a) to call a session in order to be able to set forth orally the legal objections and doubts relative to the implementation of the ruling of 14 July 1948;

(b) the implementation of the ruling of 14 July 1948 be suspended for the time being, and to decide on the implementation of this ruling on the basis of the result of the oral proceedings.

Substantiation:

14 July 1948 had been set by Military Tribunal II for the oral proceedings. This date has again been rescinded. Military Tribunal II thereupon issued the written order of 14 July 1948.

The undersigned defense counsel had assumed that, in the session which had been slated for 14 July 1948, the further proceedings contemplated by Military Tribunal II, in particular the legal foundations of these proceedings in Case 4 would be announced, and that the undersigned defense counsel would then have the possibility to voice their legal doubts and objections against the conduct of subsequent proceedings.

By cancelling the already set date for the session and fixing no other date, Military Tribunal II deprived the undersigned defense counsel of the possibility to comment in a session upon the legal foundations of the further proceedings which are to be conducted in Case 4.

The undersigned defense counsel, however, deem it their professional duty to state their doubts and objections which, for legal reasons, they have against the implementation of the order of 14 July 1948.

The undersigned defense counsel most respectfully call special attention to the fact that subsequent proceedings, as ordered with the ruling of 14 July 1948, are inadmissible according to the rules governing criminal procedure of the civilized nations known to them.

If the subsequent proceedings ordered with ruling of 14 July 1948 are to be considered a "return of the proceedings for correction" in the sense of the United States courts martial procedure — as set forth in detail by Winthrop in his work "Military Law and Precedents" (1920) page 454 — the undersigned defense council most respectfully point out that, even according to the rules governing the United States courts martial, the answering of the prosecution closing briefs could no longer be made good at the present stage of the trial. In this connection the undersigned defense counsel refer to the expositions by Winthrop in his work "Military Law and Precedents" (1920) page 455. There it says under the heading:

“Errors which cannot be corrected.

* * * So, defects or errors cannot here be corrected which from their nature can be remedied or prevented *only at the stage of the proceedings at which they occur, or at least at some time pending the trial* — as errors in the charges or specifications, or misrulings of the court upon objections to testimony.”

(Emphasis supplied.)

The answering of the prosecution closing briefs is a procedural act which could only be made as long as the proceedings were still pending and the verdict of Military Tribunal II had not been pronounced. Up to the pronouncement of the final judgment, there was the legal presumption of being not guilty for the defendants. The defendants no longer have this legal presumption of being not guilty. This is evident from the mere fact that after the final judgment was passed they have constantly been treated as convicts.

Moreover, the undersigned are of the opinion that the rules of procedure which are valid for the United States courts martial are not applicable to trials before the Nuernberg Military Tribunals; for, according to the judgment of Military Tribunal IV in the trial against Flick and others (Case 5), the Nuernberg Military Tribunals are International Courts, established by the International Control Council:

“The Tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a court martial. It is not a military commission. It is an international tribunal established by the International Control Council, the high legislative branch of the Four Allied Powers now controlling Germany, (Control Council Law No. 10 of 20 December 1945.)”

(Page 10716 of the German transcript.) (Emphasis supplied.)

In particular, the undersigned defense counsel are in doubt whether they violate the rights of their clients and their professional duty by making good a procedural act which, in their opinion and according to its nature, could only have taken place prior to the pronouncement of the judgment.

For this reason, the undersigned defense counsel request permission in an oral session to set forth their doubts and objections to the Tribunal. Defense counsel therefore request a date be set for the oral proceedings, since the questions of doubt can be clarified most promptly in this manner only. Clarification of these questions in writing would hardly be possible; if so, it would involve a considerable loss of time which defense counsel wish to avoid in order to expedite the proceedings. In particular, it would

probably not be possible to clarify the questions of doubt prior to the expiration of the period of time granted to answer the prosecution closing brief. The undersigned defense counsel explicitly state they agree that the oral proceedings will be limited to the discussion of legal questions relative to the admissibility of the subsequent proceedings ordered with ruling of 14 July 1948.

[Signed by 13 counsel for the defense.]

**G. Tribunal Order, 28 July 1948, Denying Defense
Petition for Oral Argument on the Tribunal's Order
of 14 July 1948**

UNITED STATES MILITARY TRIBUNALS SITTING IN THE
PALACE OF JUSTICE, NUERNBERG, GERMANY
AT A SESSION OF MILITARY TRIBUNAL II
HELD 28 JULY 1948

United States of America	} ORDER DENYING PETITION FOR ORAL ARGUMENT* CASE 4
vs.	
Oswald Pohl, et al., Defendants	

Counsel for 13 of the 15 defendants who were convicted in this case have filed a petition, dated 23 July 1948, requesting the Tribunal to convene in order that they may be able "to set forth orally the legal objections and doubts relative to the implementation to the ruling of 14 July 1948."

The Tribunal's order of 14 July 1948 is clear and unambiguous. It recites that Tribunal II has reconvened under General Order No. 52, issued pursuant to *Military Government Ordinance No. 7*, for the purpose of permitting such reconsideration and revision of its judgment as may be appropriate. This is a military order in obedience to which the Tribunal has reconvened for the clear and definite purposes specified in the order, which order the Tribunal had a sworn duty to obey. The authority and right of the Military Governor of the United States Zone of Occupation to issue this order is not subject to question or debate in this Tribunal. The manner in which that order is to be carried out is for the Tribunal to determine, and this it has done by its order of 14 July 1948. A portion of that order reads as follows:

"In conformity with the policy of the Tribunal to afford defense counsel every possible opportunity to present full and

*Ibid., pages 1364-1366.

complete arguments in behalf of the defense, such counsel as wish to do so will now be permitted to prepare and submit briefs in reply to the prosecution's briefs. If, after fully considering such defense briefs, it should appear to the Tribunal that the judgment heretofore entered as to any defendant is not then supported by the evidence and that his guilt has not then been proved beyond a reasonable doubt, or that the sentence imposed is unjust, the Tribunal will thereupon vacate, modify, or amend the judgment now entered in accordance with the facts and the law as so determined."

There is nothing compulsory in this order. It gives the opportunity to "*such counsel as wish to do so* to prepare and submit briefs in reply to the prosecution's briefs." Any defense counsel may, if he chooses, ignore this order and do nothing. On the other hand, such counsel as choose to submit briefs have that opportunity and the Court will carefully study such briefs. Each defense counsel will have to decide for himself whether he wishes to take advantage of the right granted by this order. If he believes that there is no authority in law for this order, he is at liberty to ignore it. If, on the other hand, he wishes a further opportunity to argue by way of brief the weight and probative value of the evidence, or any other matter arising out of the record in the case, this order gives him that opportunity.

The petition of 23 July 1948, above-referred to, will be denied.

[Signed] ROBERT M. TOMS
Presiding Judge

[Signed] FITZROY D. PHILLIPS
Judge

[Signed] MICHAEL A. MUSMANNO
Judge

XXVII. PROVISION BY THE TRIBUNAL IN THE MINISTRIES CASE ALLOWING DEFENSE MO- TIONS ALLEGING ERRORS OF FACT AND LAW IN THE TRIBUNAL'S JUDGMENT AND PRACTICE THEREUNDER

A. Introduction

Several days prior to the reading of the judgment in the Ministries case, the Tribunal issued an order permitting any defendant "whose interests are affected" to file a memorandum setting forth any errors of fact or law believed to exist in the Tribunal's judgment (subsec. B). This order granted the defendants 15 days from the rendition of judgment to file such motions. On 14 April 1949, the day on which the sentences were imposed, the Tribunal issued a similar order extending the time of filing these motions to 25 days from the rendition of judgment (subsec. C). These orders made no provision for the prosecution to answer whatever motions the defense might make. However, on 27 May 1949, Presiding Judge Christianson notified the Secretary General that the prosecution was to be allowed to answer defense motions and that the defendants thereafter were to be allowed to reply to the prosecution's answering briefs (subsec. D).

The judgment of the Tribunal, which convicted and imposed sentence upon 19 of the 21 defendants tried, is reproduced in section XV, volume XIV, this series. Between 2 May and 26 May 1949, each of the 19 convicted defendants filed motions which altogether amounted in length to more than 1,000 mimeographed pages. To these the prosecution filed one answering brief of 44 mimeographed pages on 16 June 1949. The defendant Bohle withdrew his motion on 23 June 1949. Other defendants filed reply briefs to the prosecution's answering brief.

The Tribunal, on 12 December 1949, issued 20 orders on the defense motions. One general order dismissed a defense motion to set aside the Tribunal's decision and judgment. A second general order (sec. VI M 3) discussed the Tribunal's practice in handling the individual motions alleging errors of fact and law in the judgment. There were also 18 separate orders, each incorporating a memorandum, which ruled on the individual defense motions. The Tribunal denied the motions of 15 of the defendants and granted the motions in part as to three defendants: Steengracht von Moyland, von Weizsaecker, and Woermann. With respect to these three defendants the Tribunal set aside its finding of guilty as to one of the counts under which each of these defend-

ants had been convicted and reduced the sentence in each case from 7 to 5 years' imprisonment. Presiding Judge Christianson dissented from these revisions of the judgment and sentences in a number of separate memorandum opinions. Judge Powers filed a separate memorandum opinion concerning various motions. Each of these motions, memoranda, and memorandum opinions are reproduced in full in section XVIII, volume XIV, this series.

B. Order of the Tribunal, 6 April 1949

MILITARY TRIBUNALS, TRIBUNAL IV, CASE 11

[Stamp] Filed: 7 April 1949

United States of America
against
Ernst von Weizsaecker, *et al.*,
Defendants }

*ORDER PERMITTING THE FILING OF MEMORANDA CONCERNING ALLEGED ERRORS**

The Tribunal takes note of the fact that there is at present only one military tribunal constituted in the American Zone of Occupation pursuant to Control Council Law No. 10 and Military Government Ordinance No. 7. Accordingly, the provisions of Article V-B of Ordinance No. 7, as amended by Ordinance No. 11, will not be applicable when this Tribunal renders judgment, inasmuch as Article V-B applies only in circumstances where more than one military tribunal is in existence. No motion for a joint session of tribunals will be accepted or considered.

The Tribunal also takes note of the fact that the record of this case is unusually long and presents a multiplicity of issues, legal and factual, and that an opportunity should be afforded, by some appropriate procedure, to draw the attention of the Court to any errors that may be found in its judgment.

IT IS THEREFORE, ORDERED BY THE TRIBUNAL:

“(1) That any defendant whose interests are affected, may, within fifteen (15) days following the rendition of the decision and judgment of the Tribunal, file with the Secretary General a memorandum calling to the attention of the Tribunal any matters of fact or law which it is believed are in error, together with citations to the record as to the facts, and

*U.S. vs. Ernst von Weizsaecker, *et al.*, Case 11, Official Record, volume 80, pages 5261 and 5262.

authorities as to the law which are relied upon in support thereof. The memorandum shall specifically refer to the place in the opinion and judgment where it is alleged there is error. Memorandum so filed will be brought to the attention of the Tribunal forthwith for such action as it may deem appropriate to correct such errors. All parties will be notified by the Secretary General of the action taken by the Tribunal with respect thereto. Nothing herein shall be construed to modify the requirement of Regulation Number 1, issued under Ordinance No. 7 as amended by Ordinance No. 11, that petitions for clemency to the Military Governor must be filed within fifteen (15) days of the imposition of sentence in open court. No motions to extend the time within which to file such memorandum or to extend the time for which to file petitions for clemency will be considered by the Tribunal."

Nuernberg, Germany
6 April 1949

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

C. Order and Memorandum of the Tribunal,
14 April 1949

MILITARY TRIBUNALS, TRIBUNAL IV, CASE 11

[Stamp] Filed: 14 April 1949

United States of America
 vs.
Ernst von Weizsaecker, *et al.* }

*ORDER PERMITTING THE FILING OF MEMORANDA
CONCERNING ALLEGED ERRORS**

The Tribunal takes note of the fact that there is at present only one military tribunal constituted in the American Zone of Occupation pursuant to Control Council Law No. 10 and Military Government Ordinance No. 7. Accordingly, the provisions of Article V-B of Ordinance No. 7, as amended by Ordinance No. 11, will not be applicable when this Tribunal renders judgment, inasmuch as Article V-B applies only in circumstances where more than one military tribunal is in existence. No motion for a joint session of tribunals will be accepted or considered.

**Ibid.*, pages 5300-5302.

The Tribunal also takes note of the fact that the record of this case is unusually long and presents a multiplicity of issues, legal and factual, and that an opportunity should be afforded, by some appropriate procedure, to draw the attention of the Court to any errors that may be found in its judgment.

IT IS, THEREFORE, ORDERED BY THE TRIBUNAL:

“(1) That any defendant whose interests are affected, may, within twenty-five (25) days following the rendition of the decision and judgment of the Tribunal, file with the Secretary General a memorandum calling to the attention of the Tribunal any matters of fact or law which it is believed are in error, together with citations to the record as to the facts, and authorities as to the law which are relied upon in support thereof. The memorandum shall specifically refer to the place in the opinion and judgment where it is alleged there is error. Memorandum so filed will be brought to the attention of the Tribunal forthwith for such action as it may deem appropriate to correct such errors. All parties will be notified by the Secretary General of the action taken by the Tribunal with respect thereto. Nothing herein shall be construed to modify the requirement of Regulation Number 1, issued under Ordinance No. 7 as amended by Ordinance No. 11, that petitions for clemency to the Military Governor must be filed within fifteen (15) days of the imposition of sentence in open court. No motions to extend the time within which to file such memorandum or to extend the time for which to file petitions for clemency will be considered by the Tribunal.”

Memorandum hereto attached is made a part of this order.

Nuernberg, Germany 14 April 1949

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge
Tribunal IV

MEMORANDUM

It is intended that the foregoing order shall supersede and take the place of that certain order made by the Tribunal on 6 April 1949 and filed with the Secretary General on 7 April 1949. The said order of 6 April 1949, provided that the defendants might file memoranda calling attention to claimed errors of fact or law in the judgment in Case 11 within fifteen (15) days following the rendition of decision and judgment of the Tribunal in said case. The above order is similar in tenor to the order of 6 April, except that the foregoing order gives the defendant twenty-five (25) days instead of fifteen (15) in which to file said memoranda with respect to claimed errors of fact or law.

D. Tribunal Directive to the Secretary General,
27 May 1949*

UNITED STATES MILITARY TRIBUNALS
APO 696-A, c/o POSTMASTER, NEW YORK

27 May 1949

William C. Christianson
Presiding Judge, Military Tribunal IV

Howard H. Russell
War Crimes Division, Department of the Army
Office of The Judge Advocate General, Washington, D. C.

In Re: Case 11, U.S. *vs.* Weizsaecker, *et al.*

Dear Mr. Russell:

It is the decision of the Tribunal that the prosecution is to be allowed to answer the motions made by defendants with respect to the judgment in Case 11, and the defense is to be furnished with German copies of such answers, and that the defendants are to be allowed to reply to such answering briefs. The prosecution shall be allowed a period of 10 days in which to file answers to said defense motions, exclusive of the day of service of an English translation of said defense motion or motions on the prosecution, and the defense shall have 5 days from the day of service of a German copy of such answer or answers upon them, in which to reply thereto, the day of service to be excluded in the computation of said 5-day period thus allowed.

Inasmuch as no specific provision has heretofore been made for the filing of answering and reply briefs in this matter, it is quite possible that some briefs may have been withheld from filing awaiting authorization therefor, in which event it is possible that the times fixed for answering or reply may have expired. In view of these possibilities, the prosecution is to have 5 days after the day of receipt of this authorization in Nuernberg, in which to file any answering brief or briefs not heretofore filed, even though more than 10 days may have elapsed since the filing and service of the defense motion or motions involved, and the defense shall have 5 days from the day of service upon its representative of answering brief or briefs (in the German language) or 5 days from the day of receipt of this authorization in Nuernberg (which-

*Ibid., volume 86, Prosecution Reply to Defense Memoranda re Errors in Judgments, page 2.

ever period is longer) in which to reply to such answering brief or briefs of the prosecution. In computation of the time allowed for answering or replying, the "day of service" and the day or date of "receipt of this authorization in Nuernberg" are to be excluded from the time allowed for answering or replying.

Respectfully yours,

[Signed] WILLIAM C. CHRISTIANSON
Presiding Judge, Tribunal IV.

APPENDIX A

Charter of the International Military Tribunal for the Far East*

I.

CONSTITUTION OF TRIBUNAL

Article 1. Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

Article 2. Members. The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

Article 3. Officers and Secretariat.

(a) *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

(b) *Secretariat.*

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide

Article 4. Convening and Quorum, Voting and Absence.

(a) *Convening and Quorum.* When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

(b) *Voting.* All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of necessary clerical services to the Tribunal and its Members, and perform such other duties as may be designated by the Tribunal.

*The Charter was approved by the Supreme Commander for the Allied Powers on Jan. 19, 1946; it was amended by order of the Supreme Commander, General Headquarters, APO 500, Apr. 26, 1946, General Orders No. 20. The amendments have been incorporated herewith. (Trial of Japanese War Criminals, Department of State, U.S. Government Printing Office, Washington, D.C., 1946, pages 39-44.)

those Members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

(c) *Absence.* If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

II.

JURISDICTION AND GENERAL PROVISIONS

Article 5. Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against Peace:* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *Conventional War Crimes:* Namely, violations of the laws or customs of war;

(c) *Crimes against Humanity:* Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 7. Rules of Procedure. The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.*

Article 8. Counsel.

(a) *Chief of Counsel.* The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal, and will render such legal assistance to the Supreme Commander as is appropriate.

(b) *Associate Counsel.* Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

III.

FAIR TRIAL FOR ACCUSED

Article 9. Procedure for Fair Trial. In order to insure fair trial for the accused the following procedure shall be followed:

(a) *Indictment.* The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

(b) *Language.* The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

(c) *Counsel for Accused.* Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

(d) *Evidence for Defense.* An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

*The Rules of Procedure of the International Military Tribunal for the Far East, adopted 25 April 1946, are reproduced in appendix B.

(e) *Production of Evidence for the Defense.* An accused 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. It shall also state the facts proposed 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 Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

Article 10. Applications and Motions before Trial. All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

IV.

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

Article 11. Powers. The Tribunal shall have the power

(a) To summon witnesses to the trial, to require them to attend and testify, and to question them,

(b) To interrogate each accused and to permit comment on his refusal to answer any question,

(c) To require the production of documents and other evidentiary material,

(d) To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths,

(e) To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

Article 12. Conduct of Trial. The Tribunal shall

(a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges,

(b) Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever,

(c) Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges,

(d) Determine the mental and physical capacity of any accused to proceed to trial.

Article 13. Evidence.

(a) *Admissibility.* The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

(b) *Relevance.* The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

(c) *Specific Evidence Admissible.* In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

(3) An affidavit, deposition or other signed statement.

(4) A diary, letter or other document, including sworn or unsworn statements which appear to the Tribunal to contain information relating to the charge.

(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

(d) *Judicial Notice.* The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.

(e) *Records, Exhibits and Documents.* The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

Article 14. Place of Trial. The first trial will be held at Tokyo and any subsequent trials will be held at such places as the Tribunal decides.

Article 15. Course of Trial Proceedings. The proceedings at the Trial will take the following course:

(a) The indictment will be read in court unless the reading is waived by all accused.

(b) The Tribunal will ask each accused whether he pleads "guilty" or "not guilty."

(c) The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

(d) The prosecution and defense may offer evidence and the admissibility of the same shall be determined by the Tribunal.

(e) The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

(f) Accused (by counsel only, if represented) may address the Tribunal.

(g) The prosecution may address the Tribunal.

(h) The Tribunal will deliver judgment and pronounce sentence.

V.

JUDGMENT AND SENTENCE

Article 16. Penalty. The Tribunal shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just.

Article 17. Judgment and Review. The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

By command of General MacArthur:

RICHARD J. MARSHALL

*Major General, General Staff Corps,
Chief of Staff.*

OFFICIAL:

B. M. FITCH

*Brigadier General, AGD,
Adjutant General.*

APPENDIX B

Rules of Procedure of the International Military Tribunal for the Far East, 25 April 1946

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

RULES OF PROCEDURE OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

The present rules of procedure of the International Military Tribunal for the Far East (hereinafter called the Tribunal) as established by the special proclamation of the 19th of January 1946 of the Supreme Commander for the Allied Powers and by the charter of the Tribunal of the same date and the amendments thereto are hereby promulgated by the Tribunal in accordance with the provisions of Article 7 of the Charter,* this 25th day of April 1946.

Rule 1. Notice to accused

a. Each individual accused in custody shall receive not less than 14 days before the Tribunal begins to take evidence a copy, translated into a language which he understands,

- (1) of the indictment
- (2) of the charter
- (3) of any other documents lodged with the indictment

b. Any individual accused not in custody shall be informed of the indictment against him and of his right to receive the documents specified in (*a*) above by notice in such form and manner as the Tribunal may prescribe.

c. Only one counsel shall be heard at the trial for any accused unless by special permission of the Tribunal.

Rule 2. Service of additional documents

a. If, before the Tribunal commences to take evidence, the Chief Prosecutor offers amendments or additions to the indictment, such amendments or additions, including any accompanying documents, shall be lodged with the Tribunal and copies of the same translated into a language which they each understand shall be furnished to the accused in custody as soon as practicable and notice given in accordance with Rule 1 (*b*) to those not in custody.

b. Upon application to the General Secretary, an accused shall be furnished with a copy translated into a language which he

*Reproduced in appendix A.

understands of all documents referred to in the indictment so far as they may be made available by the Chief Prosecutor, and shall be allowed to inspect copies of any such documents as are not so made available.

Rule 3. Order at the trial

In conformity with the provisions of Article 12 of the Charter, and the disciplinary powers therein set out, the Tribunal, acting through its President, shall provide for the maintenance of order at the trial. Any accused or any other person may be excluded from open session of the Tribunal for failure to observe and respect the directives or dignity of the Tribunal.

Rule 4. Witnesses

a. Prior to testifying before the Tribunal, each witness shall make such oath or declaration or affirmation as is customary in his own country.

b. Witnesses, while not giving evidence, shall not be present in court without the permission of the Tribunal. The President shall direct, as circumstances demand, that witnesses shall not confer among themselves before giving evidence.

Rule 5. Applications and motions before the taking of evidence by the Tribunal and rulings during the trial

a. Any motion, application or other request addressed to the Tribunal prior to the commencement of the taking of evidence by the Tribunal, shall be communicated by the General Secretary to the Chief Prosecutor or to the accused concerned, or his counsel, as the case may be, and, if no objection be made, the President may make the appropriate order on behalf of the Tribunal. If any objection be made, the President may call a special session of the Tribunal for the determination of the question raised.

b. The Tribunal, acting through the President, will rule upon all questions arising during the trial, including questions of admissibility of evidence, as to recesses and upon motions, and before so ruling the Tribunal may, when necessary, order the closing or clearing of the court and take any other steps which to the Tribunal seem just.

Rule 6. Records, exhibits, and documents

a. A record shall be maintained of all oral proceedings. Exhibits will be suitably identified and marked with consecutive numbers. So much of the record and of the proceedings may be translated into Japanese as the Tribunal considers desirable in the interest of justice and for the information of the public.

b. As far as practicable, a copy of every document intended to be adduced in evidence by the prosecution or the defense will be delivered to the accused concerned or his counsel or to the

prosecution, as the case may be, and also to the officer in charge of the Language Section of the Secretariat of the Tribunal, not less than 24 hours before such document is to be tendered in evidence. Every such copy shall have plainly marked thereon the part or parts upon which the prosecution or the defense, as the case may be, intends to rely, and every such copy shall be accompanied by a translation thereof into English or into Japanese, as the case may be, of the said part or parts. If the document is in a language other than English or Japanese, it shall be sufficient for the purpose of this provision if a translation into English or Japanese, as the case may be, of such document, or such part or parts, is delivered to the prosecution or the accused concerned or his counsel, and to such officer.

c. If, during the trial, counsel for the prosecution or any accused or his counsel receives or is apprised of any additional document which he intends to use at the trial, he will at once notify the opposing counsel concerned, or the accused concerned, as the case may be, and furnish him with a copy thereof as soon as practicable.

d. All exhibits and transcripts of proceedings, all documents lodged with or produced to the Tribunal, and all official acts and document may, with the consent of the Tribunal, be certified by the General Secretary to any government or to any other Tribunal or whenever it is appropriate that copies or representations as to such acts should be supplied upon a proper request.

e. In cases where original documents are submitted by the prosecution or the defense in evidence, and upon showing—

(1) that because of historical interest or for any other reason one of the signatories to the Instrument of Surrender of Japan or any other government which has received the consent of all the said signatories desires to withdraw from the records of the Tribunal and preserve any particular original documents, and

(2) that no substantial injustice will result, the Tribunal shall permit photostatic copies of the said original documents certified by the General Secretary, to be substituted for the originals in the records of the court, and shall deliver the said original documents to the applicants.

Rule 7. Seal

a. The Tribunal shall have a seal which shall be affixed to all summonses and certificates and to such other documents as the President from time to time directs.

b. The Seal shall be kept in the custody of the General Secretary and shall be in a form approved by the President.

Rule 8. Forms of oath and affirmation

a. The General Secretary and all personnel of the Secretariat of the Tribunal, and secretaries, stenographers, interpreters, and other such persons in attendance on the members of the Tribunal, shall sign and lodge with the Tribunal an affirmation in the following form or to the like effect:

"I (name and designation), will not disclose or discover any matter coming to my knowledge in the course of my employment in connection with the International Military Tribunal for the Far East, except to another person entitled to be informed of any such matter or to a member of such Tribunal."

b. Every official court reporter and interpreter shall, before commencing his duties, take an oath or make an affirmation according to the forms hereunder set out:

(1) Reporter's form of oath (other than Japanese):

"I swear that I will faithfully perform the duties of reporter to this Tribunal.

"So help me God!"

(2) Reporter's form of affirmation (other than Japanese):

"I affirm that I will faithfully perform the duties of reporter to this Tribunal."

(3) Interpreter's form of oath (other than Japanese):

"I swear that I will truly interpret in the case now in hearing.

"So help me God!"

(4) Interpreter's form of affirmation (other than Japanese):

"I affirm that I will truly interpret in the case now in hearing."

(5) Japanese reporters:

"I swear according to my conscience that I will faithfully perform the duties of reporter to this Tribunal."

(6) Japanese interpreters:

"I swear according to my conscience that I will truly interpret in the case now in hearing."

Rule 9. Effective date and powers of amendment and addition

Nothing herein contained shall be construed to prevent the Tribunal at any time, in the interest of a fair and expeditious trial, from departing from, amending or adding to these rules, either by general rules or special order for any particular case in such form and upon such notice as may appear just to the Tribunal.

I certify that this and the four preceding pages contain the Rules of Procedure made by the International Military Tribunal for the Far East.

WM. F. WEBB, President

APPENDIX C

Location and Description of the Records of the Nuernberg Trials¹

It is the purpose of this report to discuss briefly the location and nature of the official records of the thirteen (13) Nuernberg trials and of those documents which were accumulated in connection with the preparation and conduct of those trials. A large part of these records or copies of them is now deposited with the Departmental Records Branch (hereinafter referred to as the DRB) of The Adjutant General's Office, Department of the Army, located at the Federal Records Center, King and Union Streets, Alexandria, Virginia. Inquiries concerning the Nuernberg records may be directed to the DRB.

Official Records of the Trial before the International Military Tribunal

The official record of the trial before the International Military Tribunal (IMT) is in the custody of the International Court of Justice at The Hague, the Netherlands, in accordance with arrangements made with the United Nations. A duplicate set of the official record of the IMT has been deposited with the National Archives of the General Services Administration, Washington, D. C. With the permission of the IMT, the United States prosecution staff withdrew the original documents which had been introduced as United States exhibits, and substituted duplicate copies. The originals thus withdrawn, as well as photostats of the exhibits introduced by the British, French, and Russian prosecution staffs, are in the custody of the DRB. The DRB also has copies of the two IMT publications: (a) "Official Transcript of Testimony for the Defense of Organizations Taken Before a Commission Appointed by the International Military Tribunal," n.p., n.d., and (b) "Final Report on the Evidence of Witnesses for the Defense of Organizations alleged to be Criminal Heard Before a Commission Appointed by the [IM] Tribunal," Nuremberg, 15 August 1946.² The proceedings of the IMT trial and most of the original exhibits used in the trial have been reproduced in the official IMT publication, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Nuremberg, 1947-1949, 42 volumes. The

¹ This report was prepared by William H. Beidelman, Jr. and Philip P. Brower of the Departmental Records Branch, The Adjutant General's Office, Department of the Army.

² *Trial of the Major War Criminals, op. cit.*, volume XLII, pages 1-153.

IMT series *Nazi Conspiracy and Aggression* * comprise principally translations of documents for the most part introduced, but also some not introduced, by the United States and British prosecution staffs.

*Records of the Office United States Chief of Counsel
for the Prosecution of Axis Criminality*

The Office, United States Chief of Counsel for the Prosecution of Axis Criminality (hereinafter referred to as the OCCPAC), under Mr. Justice Jackson, in preparation for the IMT case, collected thousands of contemporary German documents and interrogated hundreds of German citizens who had information concerning the Nazi regime. The records of the OCCPAC, consisting largely of these documents and interrogations, whether used in the IMT case or not, are in the custody of the National Archives and the DRB. Records in the custody of the National Archives consist of the following series:

(a) A set of documents bearing the identifying symbols "C," "D," "EC," "ECH," "ECR," "L," "M," "PS," "R," and "TC":

"C" (Crimes) documents deal with the activities of the German High Command. The documents were collected by a joint British-American team.

"D" documents relate to German industry and slave labor camps. These documents were gathered by the British and used in the presentation of their case.

"EC" (Economic) documents pertain to the development of economic policies in the Third Reich and to the exploitation of the economy of German-occupied countries. These documents were secured from many document centers in Germany, principally the Berlin, Fechenheim, Wuerzburg, and the United States Third Army and Seventh Army Document Centers.

"ECH" (Economic, Heidelberg) documents concern economic conditions in the Third Reich and in German-occupied countries. The documents were procured from the Heidelberg Document Center.

"ECR" (Economic Reichskreditkassen) documents also have to do with economic conditions in the Third Reich and in German-occupied countries. The documents were secured from the several Document Centers.

"L" (London) documents relate to Nazi war plans, reports on the progress of the war, and Nazi concentration camps. The documents were either obtained from United States and British

*See *Nazi Conspiracy and Aggression*, (1946), eight volumes; *Supplements A and B*, (1947, 1948), and *Opinion and Judgment*, (1947), U.S. Government Printing Office, Washington, D. C.

services in London or processed in the London office of the OCCPAC.

"M" (symbol for the first name of the British assistant prosecutor, Melvin Jones) documents comprise articles from printed sources covering the Jewish question.

"PS" (Paris-Storey) documents deal with Hitler's rise to power, Nazi plans for aggression, and the organization of the Nazi government. Processing of this group of documents was started in Paris and later continued in Nuernberg under the direction of Colonel Robert G. Storey, Chief of the Documentation Division of the OCCPAC.

"R" (Rothschild) documents, dealing with the German administration of occupied countries, comprise the group screened by Lieutenant Walter Rothschild at the London Office of the Office of Strategic Services for use by the OCCPAC.

"TC" (Treaty Committee) documents pertain to treaties and conventions violated by the Nazi government. These documents were selected by a British Foreign Office committee which assisted the British prosecution staff.

(b) A set of Staff Evidence Analyses (SEA's) for each of the sub-series listed under (a) above, these analyses containing summary descriptions of documents.

(c) Interrogations of defendants and witnesses for both the prosecution and the defense.

(d) Summaries of these interrogations.

In addition to a set of nearly all the documents in the custody of the National Archives, the DRB has the following series:

(a) Reproductions of German documents relating to conditions in Greece. The documents were obtained from various offices of the Greek Government.

(b) Reproductions of German documents relating to conditions in Norway. The documents were obtained from various offices of the Norwegian Government.

(c) Records formerly held by the permanent delegations sent by Czechoslovakia, Great Britain, the Netherlands, and Poland to assist and cooperate in the preparations for the trial. The records consist of (a) studies and reports prepared by these delegations respecting Nazi activities in their countries, and (b) documents illustrating these activities.

(d) Collection of miscellaneous reference materials comprising interrogations of German prisoners of war, documents relating to the trial at Dachau of German concentration camp officials and guards, and studies and reports from United States, British, and other foreign sources on a wide range of subjects.

(e) Records of the Documentation Division of the OCCPAC

consisting of communications between document centers in Europe and the OCCPAC regarding the receipt and return of documents and reports on materials found at the centers.

Official Records of the 12 Nuernberg Trials

The official records of each of the 12 trials held before Military Tribunals set up by the United States Military Government for Germany (OMGUS) are in the custody of the DRB. These records were originally maintained by the Central Secretariat for the Military Tribunals. The records of each trial consist of the following nine items:

- Transcript.
- Minute Book.
- Official Court File.
- Order and Judgment Book.
- Clemency Petitions.
- Prosecution Exhibits.
- Defense Exhibits.
- Prosecution Document Books, Briefs, Opening and Closing Statements (one set in English, one set in German).
- Defense Document Books, Briefs, Opening and Closing Statements, and Final Pleas (one set in English, one set in German).

Copies of the official records (in English or German) are in the custody of those governments which had permanent delegations at the Nuernberg trials. Copies are also available in whole or in part at the Nuernberg Staat Archiv and at a number of leading German universities. In the United States the following institutions have complete or partial copies of the official records:

- Library of Congress.
- New York Public Library.
- United Nations at New York.
- United States Military Academy.
- Columbia University.
- Cornell University.
- Duke University.
- Georgetown University.
- Harvard University.
- Northwestern University.
- Princeton University.
- Stanford University (Hoover Library).
- Yale University.
- University of California.
- University of California, Los Angeles.

University of Chicago.
University of Michigan.
University of Nebraska.
University of North Dakota.
University of Texas.
University of Washington.
University of Wisconsin.

Records of the Central Secretariat

The Central Secretariat was established on 25 October 1946 to serve the United States Military Tribunals. The Secretariat provided personnel to function as clerks of the court at the Tribunals, located witnesses, obtained counsel for the defense and secured facilities for their use, procured court supplies, distributed documents, and served as custodian of the records created and assembled by the Tribunals. The Marshal's Office, the Legal Assistants to the tribunal judges, and the Chief, Court Archives were also part of the Secretariat.

The records of the Secretariat and its subordinate offices are in the custody of the DRB. The records of the Secretariat consist of the following series:

(a) Copies of documents constituting the basic authority for holding the war crimes trials (*i.e.*, the London Agreement, Control Council Law No. 10, OMGUS Ordinance No. 7, etc).

(b) Copies of orders of the European Command (EUCOM) and OMGUS establishing the Tribunals.

(c) Copies of Executive Orders of the President of the United States appointing judges for the Tribunals.

(d) Copies of OMGUS letters appointing judges to specific Tribunals.

(e) Tribunal orders having a significance apart from a specific case.

(f) Proceedings of joint sessions of the Military Tribunals covering legal and administrative procedures.

(g) Copies of appointment papers of Secretariat officials.

The records of the Office of the Chief, Court Archives comprise the following groups:

(a) Registry of prosecution and defense exhibits.

(b) Registry of prosecution and defense Document Books.

(c) Registry of incoming records.

(d) Copies of proceedings of joint sessions of the tribunals; copies of defendants' clemency petitions to the United States Military Governor, United States Supreme Court, Secretary of the Army, and the Judge Advocate General; and copies of review of

cases and decisions thereon by the United States Military Governor.

*Records of the Office United States Chief of Counsel
for War Crimes*

The records of the Office, United States Chief of Counsel for War Crimes (hereinafter referred to as the OCCWC) are in part in the custody of the DRB and in part held by the United States Army records depository at Kansas City, Missouri. The records in the possession of the DRB constitute the records of various subordinate offices of the OCCWC.

The records of the Document Control Branch of the Evidence Division of the OCCWC comprise the following series:

(a) Collection of German documents bearing the identifying symbols "NG," "NI," "NM," "NO," "NOKW," and "NP," comprising the originals or photostatic copies of records either introduced or not introduced as exhibits.

"NG" (Nuernberg, Government) documents deal principally with the activities of various Reich ministries.

"NI" (Nuernberg, Industrialists) documents concern German industry and finance, including the I. G. Farben and Krupp concerns.

"NM" (Nuernberg, Miscellaneous) documents concern various ministries of the Third Reich.

"NO" (Nuernberg, Organizations) documents pertain to the activities of organizations of the Nazi Party, such as the Schutzstaffel (SS), Gestapo, and Sicherheitsdienst (SD).

"NOKW" (Nuernberg, Oberkommando der Wehrmacht) documents relate to the High Command of the German Army, Navy, and Air Force.

"NP" (Nuernberg, Propaganda) documents deal with Nazi propaganda activities.

For each document in this collection there is a Staff Evidence Analysis.

(b) Collection of German documents bearing the symbols "BB" (Berlin Branch), "BBH" (Berlin Branch Heath), "BBT" (Berlin Branch Thayer), and "F," comprising photostats of records secured by an OCCWC team at the Berlin Document Center and dealing with agencies, economics, and related matters, in Germany and German-occupied territories. Also in this collection are "SS" ("Schutzstaffel") documents covering "SS" organization and activities. Some of the documents in this collection were introduced into evidence. For each document there is a Staff Evidence Analysis. Duplicates of these documents are in the "NI," "NO," and "NOKW" sub-series.

(c) Collection of German documents bearing the symbols "OCC" and "WB," some of which were introduced into evidence.

"OCC" (Office Chief of Counsel) documents, consisting of originals and photostats of documents collected from various sources, pertain to German governmental agencies, organizations, industrial concerns, and High Command, some of which documents were introduced into evidence.

"WB" documents, comprising photostats of documents obtained from the German Military Document Section of the DRB, cover activities of the German High Command. Duplicates of these documents are in the "NOKW" sub-series. Some of the documents were used as official exhibits.

(d) Collection of original and reproduced German documents, which were obtained from various sources, were not introduced into evidence, and are not duplicated in any other group of OCCWC records. The collection consists of the following sub-series:

- (1) Records of various Reich ministries.
- (2) Records of the Nazi Party (NSDAP).
- (3) Records of the "SS" and German concentration camps.
- (4) Records of the German High Command (OKW).
- (5) Records of German private industries, including the Farben, Flick, Hermann Goering, and Krupp concerns.
- (6) Records of some of the members of the German banks, the "Grossbanken," particularly the Dresdner Bank.
- (7) Dictaphone, tape, and other recordings of speeches of high ranking Nazi officials.
- (8) Papers of Dr. Theodore Morrell, personal physician of Adolf Hitler.

(e) Administrative records of the Document Control Branch comprising general correspondence, reports from document centers regarding materials found and dispatched, studies on special aspects of the Nazi regime, trial briefs, preliminary document books, document forms, and receipts for documents.

The records of the Interrogation Branch of the Evidence Division of the OCCWC consist of (a) interrogations of defendants and of prosecution and defense witnesses appearing before the Tribunals, and (b) summaries of the interrogations.

The records of the Public Information Office of the OCCWC comprise photographs taken during the course of the trials and show judges, prosecution staffs, defendants, defense lawyers, and other personnel.

The Publications Division of the OCCWC was established shortly before the close of the trials to obtain materials for a series of publications dealing with the trials. The records of the Branch consist of correspondence, lists of exhibits and documents used in the trials, and indexes to materials collected.

The records of the Reproduction Section of the Executive Office of the OCCWC comprise organizational charts for the Third Reich, the Nazi Party, the "SS," the Krupp concern, and other agencies.

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