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## NURNBERG TRIAL PROCEDURE AND THE RIGHTS OF THE ACCUSED

Benjamin B. Ferencz

The author, Executive Counsel, Office of Chief Counsel for War Crimes, is a member of the New York Bar. He was Chief Prosecutor in Case No. IX (*U. S. v. Ohlendorf, et al.*) which has been labeled "The Biggest Murder Case in History." The defendants were 22 SS prisoners charged with murdering more than a million people because of race, faith or political belief. Mr. Ferencz contributed *Rehabilitation of Army Offenders* to this JOURNAL, Vol. XXXIV, No. 4.—EDITOR.

"He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty he establishes a precedent that will reach himself."<sup>1</sup> Since the trial of major war criminals by the first International Military Tribunal was completed in October 1946, twelve other cases have been presented in Nurnberg against German nationals charged with the commission of crimes against peace, war crimes, and crimes against humanity. Judgments have been rendered in eight cases,<sup>2</sup> and the remaining four cases are in various stages of completion.<sup>3</sup> These subsequent proceedings against leading Nazi officials, Generals, industrialists, and SS officers, though conducted in the name of the United States have in fact been international trials.<sup>4</sup> The Military Tribunals enforcing established international law were constituted in the American zone in pursuance of legislation enacted by the four occupying powers<sup>5</sup> and similar tribunals were established in the other zones of occupation. That the crimes charged in these proceedings were punishable under preexisting laws has already been the subject of detailed examination and need not be here discussed. The landmarks in international law which have been erected in Nurnberg rest on a foundation of legal procedure which has satisfied the traditional safeguards of Continental and American law. The details of these rights and privileges, assuring a fair and impartial trial to each accused are but little known and worthy of consideration.

The fact that members of a defeated nation are tried in tribunals of the victor creates the need for closest scrutiny of the

<sup>1</sup> Tom Paine, quoted by Brooks, "The World of Washington Irving" 73.

<sup>2</sup> No. 1, Medical Case; No. 2, Milch Case; No. 3, Justice Case; No. 4, Pohl Case; No. 5, Flick Case; No. 7, Hostages Case; No. 8, Race and Settlement Office Case; and No. 9, *Einsatzgruppen* Case.

<sup>3</sup> No. 6, Farben Case; No. 10, Krupp Case; No. 11, Ministries Case; and No. 12, High Command Case.

<sup>4</sup> Judgment in *U. S. v. Alstotter, et al.*, transcript 10621.

<sup>5</sup> Control Council Law No. 10, 20 Dec. 1945.

proceedings but does not necessarily or by itself render the conduct of the trials corrupt. Such processes are as old as war itself and have been conducted by the United States since George Washington ordered Major Andre tried as a British spy.<sup>6</sup> Though the Nurnberg Tribunals, being international courts, are technically not bound by the laws of the United States, it is significant to note that the Supreme Court has recognized that the establishment of Military Tribunals to punish offenses against the Law of Nations is in full accord with Articles I and II of the United States Constitution. The Court pointed out that:

"An important incident to the conduct of war is the adoption of measures by the Military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort have violated the law of war."<sup>7</sup>

In a later case, the Supreme Court stated that:

"The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war."<sup>8</sup>

Following the many declarations made by the United Nations, which warned the Germans and held out hope and promise to the oppressed, it became the moral duty of the liberator not to forsake those pledges and to bring the criminals to trial.<sup>9</sup> This became one of the very purposes of the war. Yet it is only a figure of speech to say that "the Vanquished are tried by the Victors." The individual offenders placed on trial are no more "Vanquished" than an ordinary criminal apprehended by police representing law-abiding society. The conflict which engulfed most of the world left no real neutrals whose interests were completely unaffected. When the Germans were allowed to try their own war criminals at Leipzig following the First World War, the tragic comedy which resulted contained a lesson which could hardly be ignored.<sup>10</sup> The proceedings of Nurnberg, though conducted by the United States were always open to the German public. Correspondents and visitors from all parts of the world attended the trials without restriction or limitation. The writ-

<sup>6</sup> Proceedings of a Board of General Officers respecting Major John Andre, September 29, 1780, cited in Note 9 of *Ex Parte Quirin*, 63 Sup. Ct. Rep. 12. See also note 10 for subsequent cases.

<sup>7</sup> *Ex Parte Quirin*, 317 U.S. . ., 63 Sup. Ct. Reporter 11 (1942).

<sup>8</sup> *In re Yamashita*, 66 Sup. Ct. 340 (1946).

<sup>9</sup> See U.N. Review, Vol. III (1943) No. 1, p. 1, Moscow Declaration Oct. 1943, Crimea Conference Feb. 1945 cited in Title 23, MG Legislation, Change 1, 12 April 1946, Sec. 23-56.

<sup>10</sup> See Glueck, "War Criminals Their Prosecution and Punishment" Chap. 2—The Record of History.

ten daily transcripts in German and English have always been available to anyone who cared to read them. Where the complete record is readily available for the scrutiny or criticism of legal scholars the danger of tyranny is destroyed. The existence of American critics proves that there can be unbiased American judges. The judges were actually selected from prominent and respected members of some of the leading courts in the United States. Under such circumstances, the fact that the tribunals are composed of American jurists does not detract from the sincerity and fairness of the trials.

Military Government enacted legislation to ensure the rights of the defendants.<sup>11</sup> A committee of the Presiding Judges of the Tribunals adopted rules of procedure consistent with the laws of Military Government and these rules were revised from time to time if it appeared that any hardship or difficulty of procedure existed.<sup>12</sup>

Every defendant has had the right under the law to be represented by counsel of his own selection, providing such counsel was qualified to conduct cases before German courts or was specifically authorized by the Tribunal.<sup>13</sup> In practice this has meant that no German lawyer has ever been excluded if he was requested as counsel for a defendant. In fact most of the German counsel chosen are themselves subject to arrest or trial in German courts under German law for membership in the Nazi Party or the criminal SS.<sup>14</sup> If tried, many of them would be barred from legal practice but they have, through the intervention of the American authorities, even been given immunity from prosecution in their own courts in order to ensure that accused war criminals will have a free choice of counsel from those Germans whom they consider best suited to defend them. Only three defendants requested American counsel. Two of these requests were promptly approved.<sup>15</sup> The other, which was a request made late in the trial to have an American substituted for one of the German counsel who had previously been selected by

<sup>11</sup> MG Ord. No. 7, 18 Oct. 1946, MG Ord. No. 11, 17 Feb. 1947.

<sup>12</sup> Uniform Rules of Procedure of the Military Tribunals dated 2 Nov. 1946, amended 10 Feb. 1947, Revised 1 April 1947, 3 June 1947, 8 Jan. 1948.

<sup>13</sup> MG Ord. No. 7 Art IV (c); Uniform Rules of Procedure, Revised to 8 Jan. 1948, Rule 7 (a).

<sup>14</sup> Of 179 names checked against official German records it was found that 111 defense attorneys had been members of the Nazi Party and 10 members of the SS. All SS men are subject to immediate arrest by German authorities, Letter OMGUS "Arrest by German Police of members of Organizations Found Criminal by the International Military Tribunal," dated 9 July 1947. Nazi Party members are subject to denazification under German law. See MG Reg. 24-500, 5 Mar. 1946.

<sup>15</sup> Order of Military Tribunal No. IV, Case No. 11, dated 29 Dec. 1947.

Order of Military Tribunal No. III, Case No. 10, dated 26 Feb. 1948.

the defendant himself, was disapproved. The Tribunal expressed doubt of the sincerity of the application when pointing out that the American was not, in fact, available. It was the opinion of the Judges before whom he was to appear that the attorney had by his previous conduct defying orders of the Military Governor and by his violation of standing Military Government regulations disqualified himself.<sup>16</sup> The right of a Tribunal to protect itself from abuse by unscrupulous practitioners is inherent in every court and in exercising that right in the one case, the Nurnberg judges made it clear that they did not intend to bar the defendants from the ethical employment of reputable American counsel. This same tribunal later approved American counsel for another defendant.<sup>17</sup>

The solicitude shown the defendants is reflected in the privileges accorded their counsel. The highest number of prosecuting attorneys employed in Nurnberg for all trials was 75 as compared with the 191 German lawyers engaged for the defense. The United States Government provides a separate mess for the defense lawyers, where three adequate meals including American coffee are supplied. By command of the Military authorities all defense lawyers are given the largest German ration allowance, authorizing them 3900 calories daily which is more than the amount received by American soldiers and almost three times the amount available to the average German.<sup>18</sup> In addition, each one is gratuitously issued a very highly-priced carton of American cigarettes per week, which is a privilege afforded no employees of Military Government regardless of nationality or position. American air, rail, and motor transportation is authorized and American gasoline is given to those with private vehicles for their official use.<sup>19</sup> Their salaries of 3500 marks per defendant are paid by the local Government and may be as high as 7000 marks per month<sup>20</sup> as contrasted with the 200 marks received monthly by the average skilled worker. All needed office space for attorneys and clerical help is provided without charge. It may be fairly stated that the assistance given the Nurnberg defendants for the preparation and presentation of their defense has been greater than that available to the average impecunious defendant in America.

<sup>16</sup> Order of Military Tribunal No. III, Case No. 10, dated 19 Dec. 1947.

<sup>17</sup> Order of Military Tribunal No. III, Case No. 10, dated 26 Feb. 1948.

<sup>18</sup> See Cable Hq. EUCOM dated 19 June 1947.

<sup>19</sup> Privileges of Defense Counsel are established by letter, Hq. USFET, support of the U. S. Military Tribunals, dated 26 Feb. 1947.

<sup>20</sup> Uniform Rules of Procedure, Rule 26 revised to 8 Jan. 1948.

The law requires that the indictment state the charges plainly, concisely and with sufficient particulars to inform the defendants of the offenses charged.<sup>21</sup> At least 30 days must elapse between the service of the indictment and the beginning of the trial,<sup>22</sup> and this has generally been exceeded. The time thus allowed for the defendant to prepare his case is greater than that required by German or American criminal or military law, and every defendant has received with the indictment German copies of all pertinent laws, rules, and regulations.<sup>23</sup>

Every defendant has the right to be present throughout the trial,<sup>24</sup> which is conducted in German and English simultaneously by the use of interpreters and earphones. A sound recording of the verbal proceedings is made and used to check the accuracy of all translations and stenographic transcripts. These are promptly available to defense attorneys for use or correction.

Each defendant has the right through his counsel to present evidence in support of his defense,<sup>25</sup> and may testify for himself, which is a right denied by continental law. All personnel, facilities and supplies for translation, photostating and mimeographing are available on equal terms to Defense and Prosecution.

The Military Government Ordinance providing for the establishment of Military Tribunals specifically provides that the Tribunals shall not be bound by technical rules but shall admit any evidence which they deem to contain information of probative value relating to the charges.<sup>26</sup> Affidavits, interrogations, letters, diaries, and other statements may therefore be admitted. The opposing party is given the opportunity to question the authenticity or probative value of all such evidence.<sup>27</sup> Objection has been raised that this is broader than the rules applied in courts of the United States and therefore somehow deprives the defendants of a fair trial or the due process of law required in American courts by the Constitution's 5th Amendment. This question was brought before the Supreme Court of the United States when the Japanese General Yamashita was convicted by a military commission where similar rules of evidence prevailed. The Court held that Congress had authorized the establishment of such rules by the Military Commander and they were subject

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<sup>21</sup> MG Ordinance No. 7, Art. IV (a).

<sup>22</sup> Uniform Rules of Procedure revised to 8 Jan. 1948, Rule 4.

<sup>23</sup> See Uniform Rules of Procedure revised to 8 Jan. 1948, Rule 6 (a) (b).

<sup>24</sup> MG Ordinance No. 7 Art. IV (d).

<sup>25</sup> MG Ordinance No. 7 Art. IV (c).

<sup>26</sup> MG Ordinance No. 7 Art. VII.

<sup>27</sup> MG Ordinance No. 7 Art. VII.

only to review of the Military authorities.<sup>28</sup> No case has been held to be unfair even though such rules have prevailed before British<sup>29</sup> and American Military Commissions in the Pacific,<sup>30</sup> Mediterranean,<sup>31</sup> and European Theaters<sup>32</sup> and were in fact provided for in the Charter of the International Military Tribunal<sup>33</sup> which was accepted and ratified by 23 countries<sup>34</sup> and affirmed by the General Assembly of the United Nations.<sup>35</sup> Due process of law does not require any particular type of tribunal so long as the proceedings afford the accused an impartial hearing and adequate safeguards for the protection of his individual rights.<sup>36</sup> Exclusionary rules of evidence arose in ancient Anglo-American common law to prevent erroneous conclusions which might be drawn by a lay jury receiving insubstantial proof. Where the evidence is weighed only by judges skilled in the law, no such danger exists. The numerous exceptions to the American "hearsay rule" admit far more evidence than they exclude and no rule exists in German law to exclude hearsay proof. The captured official German documents which constitute the bulk of the prosecutions case have considerable probative value and to exclude such evidence which in many respects is more reliable than the report years later of a prejudiced or emotional eyewitness would be the height of folly. The weight given to particular pieces of evidence varies, of course, with the nature of the proof, and the failure to impose rigid technical rules on expert triers of fact and law in no way damages the substantial rights of the defense. By ruling of the Tribunals no document or exhibit may be offered against a defendant unless a German copy has been given to his counsel at least 24 hours in advance.<sup>37</sup> Usually the documents are furnished to the defense several days or even weeks in advance which is a privilege not accorded in German or American criminal or military courts. The accused may apply to the Tribunal for the procurement of documents on their behalf and these are brought to Nurnberg by the occupation authorities.<sup>38</sup>

<sup>28</sup> *In re Yamashita* supra.

<sup>29</sup> Law Reports of Trials of War Criminals, Vol. I, p. 85.

<sup>30</sup> "Regulations governing the Trial of Accused War Criminals" issued by General McArthur, U. S. Armed Forces Pacific Area, 24 Sept. 1945, Reg. 16, superseded by Regulation 5 d dated 5 Dec. 1945.

<sup>31</sup> USFET Circular No. 114 dated 23 Sept. 1945.

<sup>32</sup> USFET Order dated 25 August 1945.

<sup>33</sup> Article 19, Charter of the International Military Tribunal, 8 Aug. 1945.

<sup>34</sup> Trial of Major War Criminals, Vol. I, p. 9.

<sup>35</sup> Journal of U. N. No. 53 Sup. A/AP v/55, p. 485.

<sup>36</sup> *Crowell v. Bendon*, 285 U.S. 22, 52 S. Ct. 265, 76 L. Ed. 598; *Yamataya v. Fisher*, 189 U.S. 86, 23, S. Ct. 611, 47 L. Ed. 721.

<sup>37</sup> Uniform Rules of Procedure revised to 8 Jan. 1948, Rule 17.

<sup>38</sup> MG Ordinance No. 7, Art. IV (f); Uniform Rules of Procedure revised to 8 Jan. 1948, Rule 12.

Where affidavits are admitted the opposing side may call the witnesses for cross-examination<sup>39</sup> or if it is physically impossible for the witness to appear, cross-interrogatories or cross-affidavits may be submitted.<sup>40</sup> The use of affidavits by the Prosecution has in fact been negligible as compared to that of the Defense and their admissibility has been an advantage to the defendants.

Each defendant, through his counsel, may cross-examine any witness called by the Prosecution<sup>41</sup> and at his request the American authorities will transport to Nurnberg, feed, house and arrange payment for all witnesses for the defense.<sup>42</sup> The same facilities are shared by the Prosecution witnesses, and once a witness is brought to Nurnberg, he may be interrogated freely by the side at whose request he was produced, or by the opposing side with the requesting party having the right to be present.<sup>43</sup> There is absolutely no limitation on the defense concerning dealings with potential witnesses outside of Nurnberg and all friends and relatives of the accused are free to act on his behalf. The only potential witnesses held in confinement by the Prosecution are those who cannot be released because they are subject to automatic arrest by the German authorities or are themselves awaiting trial.<sup>44</sup> The methods employed in the interrogations have always been subject to scrutiny when the witness took the stand. There has never been a finding that force was ever employed by the Prosecution to obtain information from a witness or the accused.

Motions of either side are filed in both languages, with the adverse party having 72 hours in which to reply.<sup>45</sup> At the conclusion of the trial, every defendant is allowed to address the Tribunal,<sup>46</sup> which is a right denied by Anglo-American law.

Any defendant may call a joint session of the Military Tribunals to review any inconsistent ruling on legal questions which affect him, or any decision or judgment which is inconsistent with a prior ruling of another of the Military Tribunals.<sup>47</sup>

The full opportunity given the accused to present their

<sup>39</sup> MG Ordinance No. 7, Art. IV (e).

<sup>40</sup> See Uniform Rules of Procedure, revised to 8 Jan. 1948, Rule 21.

<sup>41</sup> MG Ordinance No. 7, Art. IV (e).

<sup>42</sup> MG Ordinance No. 7, Art. XIV (f); Uniform Rules of Procedure revised to 8 Jan. 1948, Rule 12.

<sup>43</sup> Uniform Rules of Procedure, revised to 8 Jan. 1948, Rule 23 as interpreted by Defense Administrator.

<sup>44</sup> Report on Detention of War Crimes Suspects from Chief of Counsel for War Crimes to the Military Governor, dated 19 Jan. 1948.

<sup>45</sup> Uniform Rules of Procedure, revised to 8 Jan. 1948, Rule 10.

<sup>46</sup> MG Ordinance No. 7, Art. XI (i).

<sup>47</sup> MG Ordinance No. 11, dated 17 Feb. 1947 amending MG Ordinance No. 7.



defense explains largely the duration of the trials. Invariably the defense takes much longer than the prosecution and in one case the defense lasted 72 days as compared with the prosecution's case of two days.<sup>48</sup>

The sentences actually imposed in the Nurnberg trials defeat the contention that they have been an instrument of vengeance. Germans, as well as Americans have condemned the leniency increasingly shown by the Courts in these trials of major offenders. Of the 108 persons sentenced in the first seven cases, 20 were acquitted,<sup>49</sup> 25 were sentenced to death,<sup>50</sup> and in one of the most recent cases 5 high-ranking SS officers, who were convicted of membership in a criminal organization with knowledge of its criminal activities, were promptly released.<sup>51</sup> The Tribunals have never exercised their power<sup>52</sup> to deprive defendants of civil rights or to impose a fine or forfeiture of property, although it is almost a certainty that any defendant convicted by a German court would have been subjected to some or all of these penalties in addition to confinement.

Upon the completion of every trial the record of the case is sent to the Military Governor for review. He has power to mitigate, reduce, or otherwise alter the sentence imposed, but he may not increase its severity.<sup>53</sup> No death sentence may be carried into execution unless and until confirmed in writing by the Military Governor.<sup>54</sup> The defendants have been given the privilege of sending petitions for review to the U. S. Supreme Court and other high governmental offices. The Court has twice refused to review the Nurnberg cases,<sup>55</sup> yet as of this writing<sup>56</sup> no death sentence has been carried out though most of them were pronounced over six months ago.

It should be apparent to every unbiased critic that the good name of the United States has been upheld in Nurnberg by administering justice according to law and that those accused of war crimes "have been given the kind of a trial which they, in the days of their pomp and power, never gave to any man."<sup>57</sup>

<sup>48</sup> Case No. IX, *Einsatzgruppen* Case.

<sup>49</sup> 7 in Case No. 1; 4 in Case No. 3; 3 in Case No. 4; 3 in Case No. 5; 2 in Case No. 7; 1 in Case No. 8.

<sup>50</sup> 7 in Case No. 1; 4 in Case No. 4; and 14 in Case No. 9.

<sup>51</sup> SS Colonels Mayer-Hetling, Schwarzenberger, Ebner, SS Lt. Col. Sollman, SS Major Tesch.

<sup>52</sup> Control Council Law No. 10 Art. II 3-(d)(e)(f).

<sup>53</sup> MG Ordinance No. 7 Art. XVII (a).

<sup>54</sup> MG Ordinance No. 7 Art. XVIII; MG Reg. No. 1 under MG Ord. No. 7, dated 11 April 1947.

<sup>55</sup> Certiorari was refused in the Case of *U. S. v. Milch* and *U. S. v. Brandt, et al.*

<sup>56</sup> April 23, 1948.

<sup>57</sup> Closing Statement of Mr. Justice Jackson, International Military Tribunal transcript p. 4333.