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978-0-521-45608-1 - The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History

Hilary Earl

Excerpt

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## Introduction

Just after midnight on the night of June 7, 1951, five men – Otto Ohlendorf, Paul Blobel, Werner Braune, Erich Naumann, and Oswald Pohl – were executed for crimes against humanity at Landsberg war crimes prison in Landsberg-am-Lech, Bavaria, southern Germany. The five executions took a little less than two hours and marked the conclusion of an international legal process begun by the Americans in the summer of 1945. In the 6 years since the end of the war, the Palace of Justice at Nuremberg had housed a number of high-profile war crimes trials; the most renowned was the International Military Tribunal (IMT) in which twenty-two major Nazi war criminals, including Hermann Göring and Albert Speer, were tried by the Allies in the first international court.<sup>1</sup> Albeit the most well-known, the IMT was but the first of thirteen so-called Nuremberg war crimes trials that covered an array of crimes not limited to either soldiers or the conduct of the war. Following the IMT, between 1946 and 1949, there were 12 additional Nuremberg trials or NMT, prosecuted by the Americans alone. The subject of this book is one of these trials, Case 9 against Otto Ohlendorf and the SS-*Einsatzgruppen* leaders, officially titled: “The United States of America v. Otto Ohlendorf et al.,” more commonly known as the *Einsatzgruppen* case.<sup>2</sup> The reference to “military” is confusing and somewhat of a misnomer

<sup>1</sup> Important works on the IMT include: Whitney Harris, *Tyranny on Trial: The Evidence at Nuremberg* (New York, 1954); Wilbourn E. Benton and Georg Grimm (eds.), *German Views of the War Crimes Trials* (Dallas, 1955); Joe Heydecker and Johannes Leeb, *Der Nürnberger Prozeß* (Cologne, 1958); Robert Kempner, *Das Dritte Reich im Kreuzverhör. Aus den unveröffentlichten Vernehmungsprotokollen des Anklägers Robert M.W. Kempner* (Munich, 1969); Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York, 1977); Robert Conot, *Justice at Nuremberg* (New York, 1983); Ann Tusa and John Tusa, *The Nuremberg Trial* (London, 1983); and Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston, 1992).

<sup>2</sup> The trial was referred to as the Ohlendorf case because Ohlendorf was the primary defendant. The trial transcript is available from the U.S. National Archives Records and Administration,

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as this trial and the eleven other NMT were conducted in civilian, not military courts. Confusion derives from the fact that the governing body in Germany between October 1946 and April 1949 was the United States military government (OMGUS), and, hence, they were responsible for overseeing the trials. Even though the tribunals were composed of civilian judges, the Americans preferred to call the tribunals “military” rather than “occupational.” The NMT should not be confused with the proceedings conducted by the United States Military, which were bona fide military trials, held in military courts, against military personnel.<sup>3</sup> The NMT were part of the American plan to punish members of the Nazi hierarchy and educate Germans about the criminal and inhumane behavior of their leadership, as well as to assist in the denazification and democratization of Germany. It was believed that if Germans witnessed liberal democratic justice in action – the underpinning of a functioning and healthy democracy – they would eschew their authoritarian tendencies and embrace democracy, its principles, and practice. Nuremberg, it could be argued, was the first example of transitional justice. The American trials were held after the major German war criminals had been tried before the IMT at Nuremberg and, hence, became known as the “Subsequent Nuremberg proceedings.”<sup>4</sup>

In the NMT, the Americans used legal precedents set during the IMT proceedings to try a variety of high- and mid-ranking Nazi civilian and military war criminals. Under these laws, the United States indicted 185 individuals in 12 cases. Four of the defendants committed suicide before they could be tried, and an additional four were judged too sick to stand trial. Thus, only 177 individuals were brought before the courts. Of these, thirty-five defendants were acquitted, twenty-four were sentenced to death, and twenty were sentenced to life in prison, whereas the majority, ninety-eight, were sentenced to prison terms ranging from eighteen months to twenty years. The average sentence for those convicted was 10 years.<sup>5</sup>

At war’s end, historians estimate that 8 million Germans were members of the Nazi party; needless to say, it was impossible to investigate all of these people, let alone prosecute them in individual trials. How then did the

Microfilm Publication M895, *The United States of America v. Otto Ohlendorf et al.*, 38 rolls (from here forward simply *Trial*, roll, page, or frame). An abridged version of the trial is published as *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4 (Washington, 1951; hereafter TWC). Also published by NARA is a comprehensive finding aid to the trial, referred to as “Special List No. 42,” John Mendelsohn (ed.), *Nuernberg. War Crimes Trial Records of Case 9: United States of America v. Otto Ohlendorf et al.* (Washington, 1978).

<sup>3</sup> See n. 129. For a complete history of the twelve Subsequent trials see the American Chief of Counsel, Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington, 1949).

<sup>4</sup> In addition to being called the Subsequent Nuremberg proceedings, these trials are also referred to as the Subsequent Nuremberg trials or simply the Subsequent trials or proceedings or the NMT. All of these variations are used throughout.

<sup>5</sup> Taylor, *Final Report*, 90–93.

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Americans decide which individuals to indict? Telford Taylor, the American lawyer in charge of organizing the NMT, decided that each trial should comprise individuals who represented a particular aspect of the Nazi system. In essence, he wanted to select representative samples from the worst-offending Nazi groups.<sup>6</sup> Within these broadly defined groups, defendants were selected for prosecution based on evidence American researchers had unearthed accidentally or in targeted investigations. The groups investigated and tried included: Nazi doctors who had conducted medical experiments on the inmates of death and concentration camps and who had participated in the murder of the mentally ill in the so-called euthanasia program (Case 1); Field Marshal Erhard Milch, who was involved in the slave labor program (Case 2); leading judicial figures from Nazi Germany (Case 3); those involved in the administration of the concentration camp system, such as *Waffen SS* General Oswald Pohl (Case 4); representatives of three of the major industrial combines – Flick, IG Farben, and Krupp – whose companies helped advance the war through the criminal utilization of slave labor (Cases 5, 6, and 10); representatives of the *Wehrmacht* involved in the murder of civilians (Case 7); representatives of the *Rasse- und Siedlungshauptamt* or Race and Resettlement Main Office (RuSHA) who had been involved in the deportation and murder of Jews from Poland and Western Europe (Case 8); the leaders of the *Einsatzgruppen* responsible for the mass murder of Soviet Jewry (Case 9); a catch-all trial of government officials involved in the design and implementation of the racial laws, aryanization of Jewish agriculture, and the confiscation of Jewish property (Case 11); and finally, officers of the German High Command who violated the military laws of war, especially with regard to the war on the eastern front (Case 12).<sup>7</sup> The charges were far from limited to wartime transgressions; in fact, most of the charges dealt with crimes that spanned the entire life of the regime. The Americans tried fewer than 200 individuals in these 12 trials, but, because of their scope, the Subsequent Nuremberg trials remain, as one historian has observed, “the single most concerted prosecution effort” against Nazi criminals in the postwar period.<sup>8</sup>

The Subsequent trials involve the prosecution of captured Nazi war criminals, who in the historiography of the Holocaust and the Third Reich are referred to as “perpetrators.” This book deals specifically with one group of

<sup>6</sup> Taylor, *ibid.*, 106–161 identified five groups for trial: doctors and lawyers; the SS and police; industrialists and financiers; leading military personnel; and government ministers.

<sup>7</sup> The transcripts of the 12 NMT are available on microfilm RG 238, from the National Archives of the United States. The proceedings of the trials are published in abridged form as *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, 15 volumes (Washington, 1951, hereafter TWC), sometimes referred to as “the green series.”

<sup>8</sup> Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany. The ‘Euthanasia’ and ‘Aktion Reinhard’ Trial Cases* (The Hague, 1996), 19.

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perpetrators, elite members of the SS known as the *Einsatzgruppen*. Translated, *Einsatzgruppen* literally means “special groups,” but, in the context of the Third Reich, it means “mobile security and killing units.” The *Einsatzgruppen* were special paramilitary task forces (not trained military men) of the SS and police, originally formed in 1938 to operate as the vanguard of a security-police presence in the annexed territories of Austria and Bohemia-Moravia. Further units were then created one year later for action in the Polish campaign, during which *Einsatzgruppen* personnel initiated the first large-scale killing operation of the war directed against Poland’s educated elite and leading social and political classes.<sup>9</sup> Although the focus of *Einsatzgruppen* activities changed over time to incorporate mass murder in ever greater measure, their security and intelligence-gathering functions remained constant throughout the period from 1938 to their deployment in the Soviet Union in 1941, when German policy makers expanded their activities to include the wholesale murder of Soviet Jews.<sup>10</sup> At the beginning of Operation Barbarossa, in June 1941, these motorized units of the SS were formed into four groups designated A, B, C, and D, and were officially assigned the task of providing security for German troops in areas behind the front line.<sup>11</sup> Neither the leadership cadre nor regular members of the mobile security units received much in the way of formal military training, highlighting the more political nature of their assignment. Whereas the *Einsatzgruppen* of the Security Police and Security Service operated under the tactical command of the German army in Russia, in reality they were mobile field offices of the *Reichssicherheitspolizei* or RSHA and, therefore, their leaders took their orders from Heydrich, the organization’s chief.<sup>12</sup> In practice, their principal

<sup>9</sup> For a discussion of the early activities of the *Einsatzgruppen* in Austria and Czechoslovakia, see Helmut Krausnick, *Hitlers Einsatzgruppen: Die Truppe des Weltanschauungskrieges, 1938-1942* (Frankfurt, 1993). For a discussion of the *Einsatzgruppen*’s activities in Poland, see Alexander Rossino, *Hitler Strikes Poland: Blitzkrieg, Ideology, and Atrocity* (Lawrence, 2003).

<sup>10</sup> The literature on the role of the *Einsatzgruppen* in the Final Solution is vast. Examples include: Raul Hilberg, *The Destruction of the European Jews*, 3 vols. (1961); Ralf Ogorreck, *Die Einsatzgruppen und die Genesis der Endlösung* (Berlin, 1996); Peter Longerich, *Politik der Vernichtung: Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung* (Munich, 1998); Peter Klein (ed.), *Die Einsatzgruppen in der besetzten Sowjetunion 1941/42. Die Tätigkeits- und Lageberichte des Chefs der Sicherheitspolizei und des SD* (Berlin, 1997); Helmut Krausnick and Hans-Heinrich Wilhelm, *Die Truppe des Weltanschauungskrieges: die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942* (1981); and Andrej Angrick, *Besatzungspolitik und Massenmord. Die Einsatzgruppe D in der südlichen Sowjetunion 1941-1943* (Hamburg, 2003).

<sup>11</sup> For a discussion of the cooperation between the Wehrmacht and the *Einsatzgruppen*, see Christian Streit, *Keine Kameraden. Die Wehrmacht und die sowjetischen Kriegsgefangenen 1941-1945* (Bonn, 1991).

<sup>12</sup> For instance, 10 defendants from the *Einsatzgruppen* trial came from the various agencies of the RSHA including: Ohlendorf, Jost, Sandberger, Seibert, Schulz, Six, Braune, Hausmann, Schubert, and Haensch.

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task was security, which in the context of Operation Barbarossa meant not only intelligence-gathering and protection from partisan attacks, but also the elimination of perceived political and racial enemies of the Reich, particularly Soviet Jews and communists, the mentally ill, the infirm, and Gypsies. To cover a larger geographic area, the *Einsatzgruppen* were divided into formations called *Sonderkommandos* and *Einsatzkommandos*. These sub-commands then frequently divided into smaller units called *Teilkommandos* and *Vorkommandos*. What did these groups do?

One month before they were deployed, the *Einsatzgruppen* were assembled at Pretzsch, a small German town on the Elbe River bordering Soviet territory where a training school for police was located. Here, the men were briefed about their assignments (what they were told is a matter of debate among historians of the Third Reich and Holocaust and will be dealt with later in the book) and given some rudimentary training.<sup>13</sup> The men were then allocated to one of the four mobile security units and each one of these was assigned to work with an army group. Each army group was responsible for conquering a particular geographic region of the western Soviet Union. *Einsatzgruppe* A, led by Franz Walter Stahlecker and, later, Heinz Jost, was assigned to Army Group North and operated in and around Lithuania, Latvia and Estonia. *Einsatzgruppe* B, led by Arthur Nebe and, later, Erich Naumann, was assigned to Army Group Centre and it operated in and around the area of Minsk. *Einsatzgruppe* C, led by Otto Rasch, was attached to Army Group South that operated in Ukraine. Finally, *Einsatzgruppe* D, led by Otto Ohlendorf, was assigned to the Eleventh Army that operated in and around the Crimea. The *Einsatzgruppen* joined the invasion of the Soviet Union on June 22, 1941, and almost immediately began to murder civilians.<sup>14</sup> For the first six to eight weeks of the campaign, the mobile units, with a few exceptions, limited their killing to communist functionaries, Jewish men, Gypsies, and, occasionally, the infirm. Beginning in August, however, their targeted killing escalated into a full-scale genocidal campaign against Soviet Jewry. Their role as killers of civilians, particularly Soviet Jews, has led many to refer to the *Einsatzgruppen* as “mobile killing units.”<sup>15</sup>

<sup>13</sup> The debate revolves around the issue of whether or not the *Einsatzgruppen* were briefed on their extra-military task and whom they would target and when. The issue is dealt with at length in Chapter 5.

<sup>14</sup> For first-hand accounts of the atrocities, see, Joshua Rubenstein and Ilya Altman (eds.), *The Unknown Black Book: The Holocaust in the German-Occupied Soviet Territories* (Bloomington, 2008).

<sup>15</sup> Nuremberg helped to create the impression that the sole task of the *Einsatzgruppen* was killing. Although it is true that one of the main functions of these groups was killing, killing was part of the larger intelligence and security work that was at the heart of the original *Einsatzgruppen* formations. For the purpose of this work the terms “mobile killing unit,” “mobile security unit,” and “mobile security and killing unit” will be used.

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After August 1941, when killing operations had expanded and civilians were being shot in large numbers, the *modus operandi* of all four *Einsatzgruppen* was remarkably consistent. Once the German army had cleared an area, one of the mobile killing units would immediately enter the sector, round up the Jews and other civilians targeted for murder, rob them of their belongings, and, finally, kill them in open-air shootings. Initially the murders were carried out in public, but because this endangered security, the murder sites were soon moved to more secluded areas, usually outside of towns. The victims would be led to a collection point from where they were then taken in groups of between ten and fifty (more in the case of the Babi Yar massacre) to a grave where they were told to strip off their clothing. One of three methods of execution was then employed. Some group leaders preferred to have the Jewish victims line up on the edge of the grave and have “specialists” shoot them in the back of the neck.<sup>16</sup> Ohlendorf disliked this method of execution and, instead, had his men shoot as a group from a distance, more like a military firing squad, which helped minimize individual responsibility. Still other commanders had victims lie face down at the bottom of the grave where the victims would be shot from above. Once the victims were dead, another group would be forced to lie on top of them. They, too, were then shot. Because many Jews escaped the initial roundups, especially if they received prior warning that the Germans were advancing, the mobile units would frequently return to an area more than once to ensure that they captured and killed all of a community’s Jews. Raul Hilberg estimates that of the 5 million Jews living in Soviet territory in June 1941, as many as 1.5 million either escaped from the advancing German forces or were evacuated further east.<sup>17</sup> Despite such evasions, the four units of the *Einsatzgruppen*, along with reinforcements, rounded up and murdered on average 100,000 people per month from July 1941 to July 1942.<sup>18</sup>

Although the massacre of Jews by shooting proved highly effective in terms of the large numbers killed, it had distinct disadvantages as a method of mass murder. For the perpetrators, such massacres caused considerable psychological stress, which could not always be overcome. Some of the men could only cope with their job by consuming large quantities of alcohol and others had nervous breakdowns. It was not that they had any great moral objection to what they were doing in theory, but, in practice, shooting women and children at close range took its toll on the shooters. Himmler was well aware of this situation. He had visited the site of a mass shooting

<sup>16</sup> These shooters were not specialists in the sense that they were trained to shoot civilians in the back of the neck. They were “specialists” in the sense that killing individuals was their singular job.

<sup>17</sup> Hilberg, *Destruction*, 291–295. Hilberg’s figure of 5 million includes nearly 1.5 million Jews residing in former Polish territory annexed by the Soviet Union in 1939.

<sup>18</sup> *Ibid.*, 317.



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in Minsk in the late summer of 1941 and had allegedly fainted when blood landed on his face during one execution. Shaken by the incident, he later was to have remarked that shooting was not the most “humane” and “rational” method of mass killing. Of course, he was not thinking of the victims, but rather the perpetrators. In Himmler’s view, an alternate method of mass murder was needed that could still liquidate large numbers of people quickly, but would also be psychologically easier on the men of the killing units.

One solution was the gas van. The use of poison gas had already been tested in the autumn of 1941 on Soviet prisoners of war in Sachsenhausen, and even earlier, in 1940, it had been used as part of the euthanasia program against the mentally ill in Germany. The first gas van was deployed in the Soviet Union in December 1941 and over the next 3 years the *Einsatzgruppen* used some 15.<sup>19</sup> Although many thousands of Jews were killed in this way, the gas vans were not popular with SS personnel because they proved just as unpleasant as shooting victims at close range; sometimes gassing required more effort and contact with the victims than shooting. Despite the ability of the gas vans to kill large numbers of people at once, they were not always as efficient as Himmler had hoped. Over time, the doors of the vans lost their seal allowing fresh air to mix with the noxious fumes. As a result, it often took more time for those inside to die.

It has been estimated that in their ideological campaign, the *Einsatzgruppen* were responsible for the murder – by shooting and gassing – of approximately 1 million Jews.<sup>20</sup> The four units of *Einsatzgruppen* consisted of approximately 3,000 men, mostly taken from the offices of the *SS-Sicherheitsdienst* or Security Service (SD), the *Sicherheitspolizei* or Security Police (Sipo), and the *Geheimstaatspolizei* or Secret State Police (Gestapo). Historians used to believe that the *Einsatzgruppen* alone were responsible for all 1 million murders. Research has shown, however, that they had help killing. Himmler sent thousands of reinforcements from the *Kriminalpolizei* or Criminal Police (Kripo), the *Ordnungspolizei* or Order Police (Orpo), the *Waffen-SS* (armed SS), and the *Wehrmacht* (military) to ensure his ideological soldiers could carry out their orders to the fullest. The activities of

<sup>19</sup> Longerich, *Politik der Vernichtung*, 441–448 and Shmuel Spektor, “Killings in the Gas Vans behind the Front,” in Eugen Kogon, Hermann Langbein and Adalbert Rückerl (eds.), *Nazi Mass Murder: A Documentary History of the Use of Poison Gas* (New Haven, 1993), 52–63.

<sup>20</sup> Whereas the *Einsatzgruppen* were at the center of the killing process, the situation in the east was far more complex than this. Research into the activities of the Orpo has shown that the *Einsatzgruppen* constituted a fraction of the German paramilitary organizations involved in the murder process in the east. Our enhanced understanding of the front-line perpetrators is the result of a number of factors, not the least of which was the opening of the archives in the former Soviet Union, which led to an upsurge in research on local auxiliary police units and their role in the Final Solution. Although narrowly focussed on one battalion, Christopher Browning’s seminal study *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York, 1992) also unwittingly contributed to this shift.

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the *Einsatzgruppen* and their helpers in Russia during the summer of 1941 represented a watershed in Nazi racial policy toward the Jews, a policy that, in 1942, proliferated into a European-wide program of murder. In the summer of 1947, the Americans decided to hold these men accountable for their acts and indicted twenty-four leaders of the *Einsatzgruppen* units for the murder of 1 million Soviet-Jewish civilians, a crime that the international community later identified as genocide, but which, in 1947, was still considered a crime against humanity.<sup>21</sup> The indictment against Otto Ohlendorf and the *Einsatzgruppen* leaders was based largely on the evidence gathered from their own Operational Situation Reports that thoroughly chronicled the part they played in the initial phase of the Final Solution.<sup>22</sup>

The *Einsatzgruppen* trial was the ninth of 12 trials held at the Palace of Justice, Nuremberg, Germany, beginning with the so-called Doctor's Trial in December 1946. In many respects, the NMT are a landmark in international law. Never before had an international criminal court combined the adversarial system of law in which decisions are reached by a judge who acts as an impartial arbitrator for the prosecution and defense, with the continental system of law where the judge plays a much more active role in the presentation and evaluation of evidence and in questioning witnesses.<sup>23</sup> In the adversarial system, facts emerge from the process of prosecution and defense whereas in the continental system, truth is established by an inquiry into the facts by the judge. Because international criminal law was in its infancy in 1945, the NMT also had jurisdiction to apply and interpret the newly written laws that governed the trials. The NMT derived its authority from international agreement, in particular from the *London Agreement* of August 8, 1945 (the law that formalized the IMT) and Allied Control Council Law No. 10 of December 20, 1945 (the law that allowed the Allies to hold trials independent of one another). Representatives of the United States, Britain, France, and the Soviet Union signed these laws. The Subsequent trials were also governed by zonal law, especially American Military Ordinance No. 7 of October 18, 1946, which laid out the rules under which the tribunals would function in the American zone.

In an attempt to ensure a fair process, the organizers of the NMT permitted full access to selected members of the German public and to the

<sup>21</sup> According to Taylor, *Anatomy*, 103, the term "genocide" was first used in August 1945 during the London negotiations to describe the "the extermination of racial and national groups."

<sup>22</sup> For a thorough discussion of the Operational Situational Reports, see Ronald Headland, *Messages of Murder: A Study of the Reports of the Einsatzgruppen of the Security Police and Security Service 1941-1943* (London and Toronto, 1992).

<sup>23</sup> Stephan Landsman, *The Adversary System: A Description and Defense* (Washington and London, 1984) and *Readings on Adversarial Justice: The American Approach to Adjudication* (St. Paul, 1988).



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international press. The trials themselves were bilingual, carried out simultaneously in German and English, and after they were completed, the transcripts were published in abridged form, but only in English. Defense attorneys fluent in both languages frequently corrected the official record when they detected mistakes in translation, but not all mistakes were caught. Each defendant also had the right to counsel of his own choosing. The Americans believed that Germans were best able to represent German defendants, not just linguistically, but culturally and politically too. Whereas defense attorneys outnumbered prosecution staff by more than two to one, the prosecution had an army of researchers not available to the Germans. The American Military Government paid the defense salary of 3,500 marks per month, provided them with three meals per day (with a caloric content calculated at 3,900, more than American soldiers received at the time), and supplied them with a much-coveted carton of cigarettes per week.<sup>24</sup> Defense counsel was given office space and furniture, and a “Defendant’s Information Center” was established where defense attorneys could procure documents and witnesses. This office acted ostensibly as the liaison between the defense, prosecution, and the tribunal. Under the uniform rules of procedure outlined in Control Council Law No. 10 (CCL10), each defendant had to be supplied with an indictment, in German, at least thirty days before trial began and all were given the right to be present at trial, testify in his own behalf, and to present evidence in support of his defense. With rules and procedures in place to ensure due process, one would assume Nuremberg was procedurally fair. As will be shown, however, criminal law was not always applied evenly nor as it would have been in the United States, and, in addition, structural issues had an impact on elements of the process.

On July 29, 1947, the American Office of Chief of Counsel for War Crimes (OCCWC), the legal organization that administered the NMT and headed by Brigadier General Telford Taylor, indicted twenty-four *Einsatzgruppen* leaders on 3 counts of criminality: crimes against humanity, war crimes, and membership in organizations declared criminal by the IMT.<sup>25</sup> Prior to their recruitment to the *Einsatzgruppen*, all twenty-four defendants had been members of the SS, SD, or Gestapo, organizations declared criminal in the judgment of the IMT. Twenty-four defendants were indicted, yet, only twenty-two were tried. One of the defendants, Emil Hausmann, an officer in *Einsatzkommando* 12, committed suicide in his prison cell immediately after receiving his indictment. Otto Rasch, considered one of the “most vicious killers in the dock,” was excluded from the case after the trial had begun

<sup>24</sup> Interim Report in Taylor, *Final Report*, 156 and 173–175 and Ferencz, “Nürnberg Trial Procedure and the Rights of the Accused,” *Journal of Criminal Law and Criminology* 39 (July–August, 1948), 146–147.

<sup>25</sup> The original indictment was filed July 3, but was amended.

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because of a severe and advanced case of Parkinson's disease that limited his ability to participate in his own defense.<sup>26</sup> Rasch died in prison nine months after the conclusion of the trial. Each defendant entered a plea of "not guilty," and many added the statement: "in the sense of the indictment," with no objection from the court.<sup>27</sup> Few denied participating in the murderous campaign in the Soviet Union; rather, their defense hinged on the argument that under the circumstances of total war and a state of emergency, they had acted legally, as soldiers, and merely had been following orders.

The defendants were arraigned between September 15 and 22, 1947, at the Palace of Justice before Military Tribunal II-A (later renamed Military Tribunal II). The tribunal consisted of three judges, two of whom were culled from American state courts because federal judges were prohibited from working at the NMT. Michael Angelo Musmanno was a reserve naval captain and judge from the Court of Common Pleas, Allegheny County, Pennsylvania, and was named presiding judge. John Joshua Speight, a member of the Alabama bar had no experience as a judge before coming to Nuremberg, and Richard Dillard Dixon, a judge from the Superior Court of North Carolina was the final member of Tribunal II. Each defendant was permitted to choose his own advocate and the vast majority of indictees opted for an additional defense attorney. All defendants testified on their own behalf. Under German criminal law, the right to testify before the court is determined by the judge, who decides if defendant testimony is reliable enough to be heard. At Nuremberg, the defendants were automatically granted the right to testify under oath and were permitted to address the court after closing statements were made, which they did, but not under oath.<sup>28</sup> Along with the defendants, the defense called only eighteen witnesses to the stand. This was unusual, but, given the time constraints, the tribunal ruled that the defense could submit any and all evidence (including hearsay evidence) that might exonerate the defendants.<sup>29</sup> The ruling led to the submission of 549 affidavits (mostly statements about the defendants' characters from school teachers, ministers, family, friends, and colleagues) on behalf of the defense and in lieu of direct testimony. The tribunal calculated that the submission of affidavits in lieu of direct testimony saved more than five months of court time; of course, it also meant that witnesses could not be cross-examined in open court, something that never would have been permitted in an American criminal proceeding where affiants must be available

<sup>26</sup> Press release, September 1947, 5-1-4-62, NMT, OCCWC Press releases, 1947, TTP.

<sup>27</sup> Only one defendant ever pled guilty, SS officer Ernst Wilhelm Bohle, who was tried in the Ministries case. Press release, March 28, 1948, 5-1-4-63, NMT, OCCWC Press releases, 1948, TTP.

<sup>28</sup> "Oral Testimony by Defendants," in *TWC*, vol. 15, 714-715.

<sup>29</sup> Because the rules of evidence were flexible and because the charges were so grave, Musmanno claimed he wanted to ensure the defendants had every opportunity to prove their innocence, see *Trial*, roll 4, 2841.