

The *I.G. Farben* Trial: Evidentiary Standards and Procedures and the Problem of Creating Legitimacy

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This Note examines the evidentiary standards and procedures created for and used in the I.G. Farben Trial, one of the twelve Subsequent Nuremberg Trials held in the U.S. Occupation Zone after World War II. Because the I.G. Farben Trial was not bound by “technical rules of evidence,” the three judges on the tribunal had broad discretion to develop evidentiary rules and standards. This Note argues that the I.G. Farben judges created evidentiary rules and procedures as they arose during the trial, with no preexisting philosophy. Faced with competing factors, they based their decisions on which factor—speed and efficiency, the defendant’s due process protections, the prosecution’s rights—they weighed more heavily in that instance, often choosing efficiency to finish the trial more quickly. This ad hoc creation of standards and procedures led to unorthodox practices and a lack of uniformity both within the trial and across the Subsequent Nuremberg Trials. This is the first article to examine closely the evidentiary standards and procedures in the I.G. Farben Trial. More generally, this is one of the only articles to look at standards and procedures at the Subsequent Nuremberg Trials in detail.

INTRODUCTION

In 1947, the United States, one of four occupying powers in Germany, indicted twenty-four high-ranking executives of the I.G. Farben company and charged them with helping the Nazi regime to wage aggressive war and commit war crimes and crimes against humanity. In his opening statement, Telford Taylor, Chief of Counsel for the Prosecution, described the defendants as:

men who stopped at nothing. They were the magicians who made the fantasies of “Mein Kampf” come true. They were the guardians of the military and state secrets of the Third Reich. They were the master builders of the Wehrmacht; they and very few others knew just how many airplane and truck tires and tank treads were being built from Farben buna rubber and just how large the stock pile of explosives was. They knew every detail of the intricate and

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enormous engine of airfare, and watched its growth with an architect's pride.¹

The U.S. prosecutors indicted these twenty-four men on five counts, including helping the German Wehrmacht to rearm for war,² running a concentration camp in which tens of thousands of prisoners were worked to death,³ and allowing doctors to carry out medical experiments on concentration camp prisoners.⁴

The *I.G. Farben* trial was one of twelve trials held as part of the Nuremberg Military Tribunal (NMT). The United States established the NMT in 1946 to try a larger number and more varied group of alleged war criminals than the International Military Tribunal (IMT), which tried twenty-two high-ranking Nazi political leaders.⁵ Together, the NMT and IMT constituted what is commonly known as the Nuremberg Trials. This Note looks at one aspect of the *Farben* trial: the evidentiary standards and procedures developed for and used in the trial.

Evidentiary standards and procedures set the ground rules for a trial. They establish what evidence is admissible, as well as how and by whom that evidence can be submitted, key aspects for ensuring a minimum level of fair procedure and due process.⁶ Of course, there are many ways to create a fair trial. Both common law and civil law trials can be “fair” despite variations in what evidence is admissible and different roles for prosecutors, judges, and defense attorneys.⁷ A trial's specific rules, including its evidentiary rules and procedures, are therefore less important than that the tribunal provides the same rules and opportunities to both the prosecution and the defense,

1. Transcript of Record at 43, *United States v. Krauch*, published in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1948) [hereinafter Transcript of Record].

2. Judgment at 1,095–96, *United States vs. Krauch*, (July 30, 1948), published in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [hereinafter Judgment, *United States v. Krauch*].

3. *Id.* at 1171–73.

4. *Id.* at 1167, 1169–72.

5. SUZANNE BROWN-FLEMING, NAZI PERSECUTION AND POSTWAR REPERCUSSIONS: THE INTERNATIONAL TRACING SERVICE ARCHIVE AND HOLOCAUST RESEARCH 173 (2016). The IMT was in session from November 14, 1945 to October 1, 1946.

6. See, e.g., Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. OF INT'L L. 111, 114–15 (2002) (“First, are the substantive rights accorded to the accused adequate? This approach focuses on the rights delineated in the tribunals’ statutes, rules of procedure and evidence, and case law—for example, the right to confront witnesses or / the right to counsel.”); Gwynn MacCarrick, *The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition From Nuremberg to East Timor)* 7, (LEGAL TOOLS DATABASE, 2008), <https://perma.cc/CAQ4-KZT6> (“Procedural regularity then, is the foundation of a fair trial and the safeguard of the fundamental rights and freedoms guaranteed by various international instruments, and refined by jurisprudence.”).

7. See, e.g., Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 241 (1970) (“The difference between German and American procedural law does not lie, therefore, in the high ideals which have been set, but rather in the methods chosen to obtain them.”).

both the prosecution and the defense have the ability to present their arguments, and the tribunal makes uniform decisions for all defendants.⁸

Evidentiary standards and procedures were especially important at the NMT because it was a newly-established international tribunal. With no basis in an established legal system, the evidentiary standards and procedures were central to establishing the NMT's legitimacy. A court's legitimacy comes from a variety of factors, including whether the procedures are fair and impartial.⁹ While standards and procedures are always important, this is especially true for trials not embedded in established legal structures.¹⁰ As new creations, the *Farben* trial (and the eleven other trials held at the NMT) had to prove that they were not just a form of victor's justice. They had to show that they were fair courts, despite being organized, judged, and prosecuted by the victors.

Because the *Farben* trial was not bound by "technical rules of evidence,"¹¹—formal rules used in the U.S. common law system to decide the admissibility of evidence¹²—the three judges on the tribunal had broad discretion to develop evidentiary rules and standards. Unlike in the American legal system, in which evidentiary rules provide that certain evidence, such as hearsay evidence—out-of-court statements made for the truth of the matter asserted—is generally not admissible, the *Farben* trial had no such rules. Although established under U.S. military rule with American judges,¹³ the *Farben* judges were free to make rules that followed common law or civil law traditions, that were based on decisions at the IMT or other NMT trials, or that diverged from other international trials or conventional common law practice. Because there were only broad guidelines for evidentiary rules, the *Farben* judges had to develop many of the evidentiary standards and procedures during the trial while balancing competing interests. These included the defendants' due process rights, the interests of justice for victims and the Allied powers, the prosecution's right to present its case fully, as well as external factors, such as the pressure to finish the trial quickly due to the onset of the Cold War and the increasing need to defend Germany from the Soviet Union.¹⁴

8. Cogan, *supra* note 6, at 114–15.

9. Harlan Grant Cohen et al., *Introduction: Legitimacy and International Courts*, in LEGITIMACY AND INTERNATIONAL COURTS 6 (2018), <https://perma.cc/9E4V-9SGC> ("Regarding process-oriented factors, fair and even-handed procedures and the open-mindedness of judges are also considered essential to legitimacy. If an international court does not provide equal opportunities to be heard to all the relevant parties, then its authority may suffer.")

10. *See, e.g.*, Cogan, *supra* note 6, at 114.

11. Ordinance No. 7 (Oct. 18, 1946), <https://perma.cc/HK5F-4DWD> [hereinafter Ordinance No. 7].

12. *See* FERGAL GAYNOR ET AL., INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES 1017 (Goran Sluiter et al., eds., 2013).

13. Ordinance No. 7, *supra* note 11, at arts. I, II(b).

14. *See, e.g.*, KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 97 (2011) (*citing* PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 184 (2001)).

The *Farben* tribunal appears to have created evidentiary rules as they arose during the trial, with no preexisting philosophy or vision. Faced with competing factors, the judges based their decisions on which factor—speed and efficiency, due process protections, fairness, the prosecution’s rights—they weighed more heavily in that instance, often choosing efficiency in order to finish the trial more quickly. This ad hoc creation of standards and procedures led to a number of unorthodox practices and a lack of uniformity both within the trial and across trials at the NMT. As one of the first international criminal trials, the *Farben* trial (and the other NMT trials) had a responsibility to set high procedural standards. The *Farben* trial provided the defendants with procedural due process protections and attorneys of their choice, allowed the defendants to cross-examine witnesses, translated all relevant documents into German, and generally complied with the substantive rights standards for a “fair” trial.¹⁵ However, its evidentiary standards and rules were too ad hoc and inconsistent to serve as the underpinnings for future international tribunals.

Although the twelve NMT trials were central to the development of international criminal law, comparatively little has been written on them. Kevin Jon Heller’s 2012 monograph, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, is the only comprehensive overview of the NMT.¹⁶ Heller discusses all twelve trials, situating them in the broader historical context of post-World War II Europe. He also includes chapters on “Evidence” and “Procedure,” which detail how the NMT dealt with different types of evidence across the twelve trials.¹⁷ While Heller’s monograph is a helpful starting point, his focus on all twelve trials means he provides a high-altitude approach, discussing overarching themes and variations across trials. By focusing on a single trial, this Note looks more closely at evidentiary standards and procedures. It delves into the details of the *Farben* trial.

Other than Heller’s work, there is little scholarship on procedure or evidentiary standards at the NMT. A few articles include general discussions of procedure and evidentiary rules at the post-World War II international tribunals: the IMT, NMT, and the International Military Tribunal for the Far East (IMTFE).¹⁸ Additionally, two men involved in the NMT have written on evidentiary procedures. Benjamin Ferencz, Chief Prosecutor for the

15. See generally Cogan, *supra* note 6.

16. See HELLER, *supra* note 14.

17. See *id.* at 139–67.

18. See, e.g., Ben Ferencz, *Nuremberg Trial Procedure and the Rights of the Accused*, 39 LOY. L.A. INT’L & COMP. L. REV. 87 (2017); Tessa McKeown, *The Nuremberg Trial: Procedural Due Process at the International Military Tribunal* (2013) (unpublished L.L.B. Honors Thesis, Victoria University of Wellington) (2013), <https://perma.cc/7S2E-MUUH> (discussing procedure at the IMT); Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II Crimes Trials: Did They Provide an Outline for International Legal Procedure*, 37 COLUM. J. TRANSNAT’L L. 851 (1999) (comparing the Nuremberg and Tokyo trials’ procedures and how they influenced one another); GAYNOR ET AL., *supra* note 12, at 1015–1149 (comparing, in the chapter on evidence, evidentiary rules at the IMT and IMTFE, as well as

Einsatzgruppen trial,¹⁹ explains the official procedures as laid out in Ordinance No. 7, defending the procedures used in the tribunals and arguing that they accorded the defendants fair process.²⁰ In contrast, August von Knieriem, a defendant in the *Farben* trial and I.G. Farben's General Counsel for many years,²¹ gives a scathing account of the procedure at the NMT.²² This Note attempts to provide a more balanced view while looking specifically at the rules and standards in a single trial.

Scholarship on the NMT and the *Farben* trial is also underdeveloped. Many works on the NMT were written by those involved in the trials, including lawyers for both the defense and prosecution.²³ A few works focus on the *Farben* case, but these emphasize what was learned during the trial and examine the substantive crimes and the history of I.G. Farben rather than the trial's procedure.²⁴ Works on corporate accountability often mention the *Farben* trial and the two other industrialist cases (the *Krupp* and *Flick* trials) as the first time corporate executives were charged with crimes under international law.²⁵ However, these works generally brush over the trials without going into detail.

This Note seeks to fill these gaps by examining the evidentiary standards and procedures established by the *Farben* tribunal. Section I begins with a brief history of I.G. Farben. It discusses Farben's early years and the company's cooperation with the Nazi regime, including its use of slave labor in Auschwitz. Section II focuses on the trial's historical context and the NMT's legal basis. Section III explains the background of the evidentiary standards developed during the *Farben* trial, including the standard and burden of

at more recent tribunals such as the ICTY, ICTR, ICC, and others); AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* (1959).

19. Samuel Rubinfeld, 'No War Is Won': Benjamin B. Ferencz Continues His Fight for Justice at 98; *The Last Surviving Prosecutor of the Nuremberg Trials is the Subject of a New Documentary*, WALL ST. J., Feb. 20, 2019, <https://perma.cc/R8GC-SCFZ>.

20. Ferencz, *supra* note 18; cf. Ordinance No. 7, *supra* note 11.

21. VON KNIERIEM, *supra* note 18, at ix.

22. *See id.* at 106–89.

23. *See, e.g.*, Telford Taylor, *The Nuremberg War Crimes Trials*, 27 INT'L CONCILIATION 243, 314 (1949) [hereinafter Taylor, *The Nuremberg War Crimes Trials*]; TELFORD TAYLOR, OFFICE, CHIEF OF COUNSEL FOR WAR CRIMES. FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949) [hereinafter Taylor, FINAL REPORT]; Paul M. Hebert, *The Nurnberg Subsequent Trials*, 16 INS. COUNSEL J. 226 (1949); TELFORD TAYLOR, *NUREMBERG TRIALS: WAR CRIMES AND INTERNATIONAL LAW* (1949); VON KNIERIEM, *supra* note 18; Otto Kranzbuehler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1965); Ferencz, *supra* note 18, at 87.

24. *See* JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEN* (1978); JOSIAH E. DUBOIS JR., *THE DEVIL'S CHEMISTS: 24 CONSPIRATORS OF THE INTERNATIONAL FARBEN CARTEL WHO MANUFACTURE WARS* (1952); DIARMUID JEFFREYS, *HELL'S CARTEL: I.G. FARBEN AND THE MAKING OF HITLER'S WAR MACHINE* (2009); Mark Spicka, *The Devil's Chemists on Trial: The American Prosecution of I.G. Farben at Nuremberg*, 61 THE HISTORIAN 865 (1999); Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495 (2006).

25. *See, e.g.*, Alexandra Garcia, *Corporate Liability for International Crimes: A Matter of Legal Policy since Nuremberg*, 24 TUL. J. INT'L & COMP. L. 97 (2015); Jonathan Kolieb, *Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability under International Law*, 32 AM. U. INT'L. L. REV. 569, 583 (2017).

proof and procedural protections for defendants. Section IV examines the evidentiary standards and procedures for three categories of evidence: testimonial evidence, documentary evidence, and judicial notice. This Section argues that the *Farben* tribunal established evidentiary rules in an ad hoc manner which led to unconventional rules, a lack of uniformity within the trial, and rules that diverged from those in other NMT trials. Many of these decisions were made because the tribunal became increasingly concerned with bringing the trial to a close and thus prioritized the trial's speed.

I. THE HISTORY OF I.G. FARBEN

A. *The Early Years*

In the early twentieth century a group of German chemical corporations formed a conglomeration known as the Combine of Interests of the German Dyestuffs Industry (die Interessengemeinschaft Farbenindustrie Aktiengesellschaft), commonly known as I.G. Farben.²⁶ For much of the early twentieth century, I.G. Farben was a behemoth of German industry, the largest company in Germany and the fourth largest in the world.²⁷ It employed almost 120,000 people and owned over one hundred plants and mines.²⁸ It invented aspirin²⁹ and produced products that ranged from nylon stockings³⁰ to dyes, pharmaceuticals, explosives, aluminum, fuel, and rubber.³¹ I.G. Farben was a household name and dominated the German chemical industry.³²

I.G. Farben was not an early convert to the Nazi regime and did not initially support the Nazi party.³³ Instead, it put its support behind the bourgeois political parties.³⁴ Farben depended on exports and foreign trade

26. See, e.g., NATIONAL ARCHIVES, RECORDS OF THE UNITED STATES NUERNBERG WAR CRIMES TRIALS, UNITED STATES OF AMERICA VS. CARL KRAUCH ET AL., (CASE VI) AUGUST 14, 1947-JULY 30, 1948, 3 (1948).

27. PETER HAYES, *INDUSTRY AND IDEOLOGY: IG FARBEN IN THE NAZI ERA* 16 (1989). Only General Motors, United States Steel, and Standard Oil of New Jersey were larger than I.G. Farben. See *id.*

28. See *id.* at 17.

29. See JEFFREYS, *supra* note 24, at 32.

30. See Grietje Baars, *Capitalism's Victor's Justice? The Hidden Story of the Prosecution of Industrialists Post-WWII*, in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* 163, 166 (K. J. Heller & G. Simpson eds., 2013).

31. See HAYES, *supra* note 27, at 16–17; Doreen Lustig, *The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials*, 43 N.Y.U. J. INT'L L. & POL. 965, 976 (2011) (quoting STEPHAN LINDNER, *INSIDE IG FARBEN: HOECHST DURING THE THIRD REICH* xiii (Helen Schoop trans. 2008)).

32. Baars, *supra* note 30, at 166; HAYES, *supra* note 27, at 1.

33. HAYES, *supra* note 27, at 67–68 ("Concerning IG Farben, even more than German big business in general, the repeated attempt by some historians to draw an ascending curve of support for Nazism from 1930 to 1933 runs afoul of the ample surviving evidence. The pattern of corporate interest in Nazism resembled a 'fever chart,' which moved in direct relation to the election returns and inverse relation to the economic indicators.")

34. See *id.* at 48, 52; Henry Ashby Turner, Jr., *Big Business and the Rise of Hitler*, 75 AM. HIST. REV. 56, 64 (1969).

and was therefore skeptical of the Nazi vision of German economic independence.³⁵ For their part, the Nazis initially viewed Farben as too Jewish.³⁶ In addition to the fact that ten Jews served on Farben's governing board, the conglomerate was involved in a number of global cartels, something the Nazis abhorred and which led them to view Farben as "an agent of destructive Jewish international finance."³⁷

However, in the early 1930s, I.G. Farben hedged its bets and began to cultivate relationships with the Nazi party.³⁸ Already in 1931, worried about the bad press the company was receiving for being "an instrument of international finance capital," I.G. Farben had a young employee with strong Nazi connections contact his former professor, a leading Nazi intellectual, to ask for help in limiting such bad press.³⁹ In 1932, I.G. Farben included the Nazi party in its donations during the election campaigns, although only ten to fifteen percent of total donations went to the Nazi party.⁴⁰ As the Nazi party grew more powerful and became the largest political party in the Reichstag in 1932, I.G. Farben increased its support.⁴¹ In February 1933 Farben representatives, along with representatives from other major German companies like Krupp, met with Adolf Hitler and Hermann Göring at Göring's home.⁴² In 1933 it also donated to Nazi accounts.⁴³ Although most I.G. Farben executives were not enthusiastic supporters of the Nazi regime, the company increasingly formed a "marriage of convenience" with the government.⁴⁴ It hoped to gain economically from the Nazi regime and was willing to work within the system to do so.

B. *I.G. Farben During World War II*

By the time World War II broke out, I.G. Farben had become deeply enmeshed with the Nazi regime. Throughout the 1930s, I.G. Farben became increasingly complicit in the Nazi regime. In 1938, it released all the Jewish members of its governing board and its Jewish employees,⁴⁵ thereby becoming fully "Aryanized." That same year, as Nazi Germany annexed Austria and the Sudetenland in Czechoslovakia, I.G. Farben entered the an-

35. See HAYES, *supra* note 27, at 64–65.

36. See BORKIN, *supra* note 24, at 54–58.

37. HAYES, *supra* note 27, at 65.

38. See BORKIN, *supra* note 24, at 54–55.

39. *Id.* at 54.

40. See Turner, Jr., *supra* note 34, at 63.

41. See BORKIN, *supra* note 24, at 54–55.

42. See Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes against Humanity*, 56 A. F. L. REV. 167, 177–78 (2005).

43. See HAYES, *supra* note 27, at 87.

44. Peter Hayes, *I.G. Farben Revisited: Industry and Ideology Ten Years Later*, in *THE GERMAN CHEMICAL INDUSTRY IN THE TWENTIETH CENTURY* 7, 9 (John E. Lesch ed., 2000).

45. See Peter Löhner & Manfred Gill, *The Relationship of I.G. Farben's Agfa Filmfabrik Wolfen to its Jewish Scientists and Scientists Married to Jews, 1922–1939*, in *THE GERMAN CHEMICAL INDUSTRY*, *supra* note 44, at 123, 134–35.

nexed territories and took over Austrian and Czech companies.⁴⁶ Once the war began, I.G. Farben also moved into the Nazi occupied territories, including Poland and France, and worked to take over and profit from factories owned by non-Germans.⁴⁷

In 1941, I.G. Farben entered its next phase of collaboration by building an addition to the Auschwitz concentration camp. Known as Auschwitz III, or Camp Buna-Monowitz, the camp was named for the factory I.G. Farben built to produce synthetic rubber, known as buna.⁴⁸ Although the camp was owned and paid for by I.G. Farben, Buna-Monowitz looked and functioned like a regular Nazi work camp, with watchtowers, searchlights, and *Schutzstaffel* (SS) guards.⁴⁹ In Buna-Monowitz, Farben used tens of thousands of slave laborers, working them to death to build and run synthetic fuel and buna factories.⁵⁰ What began as a small camp grew quickly. In 1941 only about 1,000 prisoners worked at Buna-Monowitz at any given time.⁵¹ Then, in 1942, I.G. Farben added living quarters to Buna-Monowitz to increase productivity and eliminate the time prisoners spent walking miles to work from the other parts of Auschwitz.⁵² When the barracks officially opened in late October 1942, they housed 600 prisoners.⁵³ Just one month later, in November 1942, the camp held 1,388 prisoners, which increased to 3,700 in early January 1943 and 11,600 by the end of 1944.⁵⁴

In 1943, the first “selection” at Monowitz occurred.⁵⁵ This was the beginning of a system in which the SS brought prisoners who had just arrived in Auschwitz to Buna-Monowitz to do grueling work in eleven-hour shifts, reducing these prisoners to “walking skeletons”⁵⁶ and “shattered remnants of human beings.”⁵⁷ After about three months, most prisoners either died from exhaustion and malnutrition or were sent to Auschwitz-Birkenau,

46. See JEFFREYS, *supra* note 24, at 243–45.

47. See *id.* at 253–56 (discussing I.G. Farben’s take-over of factories in Poland); *id.* at 260–64 (discussing I.G. Farben’s actions in France during the war and its role in making French factories subordinate to Farben); *id.* at 265 (discussing I.G. Farben’s activities in Belgium and Holland during World War II).

48. See Eliezer Schwartz, *The Role of IG Farben-Auschwitz*, 38 YAD VASHEM STUD. 11, 31 (2010).

49. See BORKIN, *supra* note 24, at 121; JEFFREYS, *supra* note 24, at 310 (“Monowitz, or Auschwitz III as it was sometimes known, resembled a state-owned concentration camp in almost every respect. Although I.G. Farben built it (using prisoner labor) and paid its running costs, it was equipped with the same watchtowers, armed guards, electric fences, sirens, gallows, punishment cells, mortuary, and searchlights as Auschwitz and Birkenau.”).

50. See *id.* at 11, 19. For more on the history of Auschwitz, see SYBILLE STEINBACHER, *AUSCHWITZ: A HISTORY* (2018); *ANATOMY OF THE AUSCHWITZ DEATH CAMP* (Yisrael Gutman & Michael Berenbaum eds., 1998). Although Monowitz was established to produce buna rubber, it never actually did so. See HAYES, *supra* note 27, at 368; BORKIN, *supra* note 24, at 127 (“Despite the investment of almost 900 million Reichsmarks and thousands of lives, only a modest stream of fuel and not a single pound of Buna rubber was ever produced.” It had a net loss for “the development of buna.”).

51. See JEFFREYS, *supra* note 24, at 246.

52. See Schwartz, *supra* note 48, at 11, 31.

53. See *id.* at 31.

54. See *id.* at 32.

55. HAYES, *supra* note 27, at 358–59.

56. *Id.*

57. Schwartz, *supra* note 48, at 40.

where they were gassed⁵⁸—using Zyklon B, a pesticide sold to the SS by a company controlled by a Farben subsidiary⁵⁹ and used to gas over one million prisoners in Auschwitz-Birkenau.⁶⁰ In this way, although at any given time the camp held about 10,000 inmates, about 30,000 prisoners were murdered in Buna-Monowitz.⁶¹ I.G. Farben also used slave labor in three mines near Auschwitz. From 1942 to 1944, Farben employed 6,000 inmates in the mines. The mortality rate was extreme, with life expectancy dropping between four and six weeks at the end of the war.⁶²

In addition to these crimes, I.G. Farben facilitated medical experiments on concentration camp prisoners. Beginning in 1942, I.G. Farben sent anti-typhus drugs and sleeping pills to SS doctors at Auschwitz and Buchenwald, who tested these drugs on inmates.⁶³ An SS doctor at Auschwitz injected healthy inmates with typhus and waited until they were sick and “the disease had reached its delirious stage.”⁶⁴ He then injected the anti-typhus drug into their systems to see whether it worked.⁶⁵ Other doctors carried out “nerve gas experiments designed by Farben employees” on prisoners.⁶⁶ By 1945, I.G. Farben and its executives were deeply embedded in the Nazi regime, including with Auschwitz, the symbol of ultimate evil.

II. THE I.G. FARBEN TRIAL

A. *The Nuremberg Military Tribunal*

The *Farben* trial was one of twelve trials held as part of the Nuremberg Military Tribunal between 1946 and 1949.⁶⁷ The NMT, which began try-

58. See HAYES, *supra* note 27, at 359.

59. I.G. Farben was a part owner of the company that sold Zyklon B to the SS, which was used to gas over one million prisoners in Auschwitz. The Deutsche Gesellschaft für Schädlingsbekämpfung (German Corporation for Pest Control), known as Degesch, had a monopoly on manufacturing Zyklon B. I.G. Farben owned 42.5 percent of Degesch; it also owned one-third of Deutsche Gold und Silberscheidanstalt, which owned 42.5 percent of Degesch. I.G. Farben also dominated its supervisory board — five of the eleven members of the board, including the chairman, were I.G. Farben executives. See BORKIN, *supra* note 24, at 122; Franciszek Piper, *Gas Chambers and Crematoria*, in ANATOMY OF THE AUSCHWITZ DEATH CAMP, *supra* note 50, at 157, 176.

60. See Franciszek Piper, *Gas Chambers and Crematoria*, in ANATOMY OF THE AUSCHWITZ DEATH CAMP, *supra* note 50, at 176.

61. See BENJAMIN B. FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION 30 (2002); Schwartz, *supra* note 58, at 11. In contrast, Joseph Robert White places the number between 23,000 and 25,000. See Joseph Robert White, “*Even in Auschwitz . . . Humanity Could Prevail*”: *British POWs and Jewish Concentration-Camp Inmates at IG Auschwitz, 1943–1945*, 15 HOLOCAUST AND GENOCIDE STUD. 266, 270 (2001) (placing the number between 23,000 and 25,000).

62. See HAYES, *supra* note 27, at 359–60.

63. See *id.* at 370.

64. DUBOIS, *supra* note 24, at 125.

65. See *id.*

66. HAYES, *supra* note 27, at 370.

67. The twelve trials were the *Doctors’ Trial*, *Milch Trial*, *Judges’ Trial*, *Pohl Trial*, *Flick Trial*, *I.G. Farben Trial*, *Hostages Trial*, *RuSHA Trial*, *Einsatzgruppen Trial*, *Krupp Trial*, *Ministries Trial*, and *High Command Trial*. The United States charged a total of 185 defendants in the twelve subsequent trials. See Taylor, FINAL REPORT, *supra* note 23, at 91.

ing defendants while the IMT was still in progress, was an early attempt to create an international criminal tribunal. While the IMT focused on the major war criminals, the United States established the NMT to hold accountable a greater number of influential Nazis and collaborators. With 177 defendants,⁶⁸ these trials showed how a broader spectrum of German society—doctors, judges, industrialists, soldiers, and others—willingly cooperated with the Nazi regime.

The industrialist trials—against the I.G. Farben, Krupp, and Flick companies—were a major impetus for the NMT.⁶⁹ U.S. prosecutors believed that the “codes and manners of German corporate culture, such as cartels and universal banking, then both outlawed in the United States, epitomized illiberal traditions of German authoritarianism and economic feudalism that were believed to correlate with Prussian militarism and National Socialism.”⁷⁰ This emphasis on “economic feudalism” is evident in the fact that a quarter of the NMT trials focused on companies that had collaborated with the Nazi regime—the first time corporate executives were individually charged with violating international law.⁷¹ By charging individual high-ranking members of these companies with waging aggressive war, war crimes, crimes against humanity, and/or conspiracy to commit these crimes,⁷² the prosecution asserted that these executives could not hide behind their corporate shields.

68. See KAI AMBOS, *INTERNATIONAL CRIMINAL LAW: VOLUME III: FOUNDATIONS AND GENERAL PART* 17 (2016).

69. See Kim C. Priemel, *Tales of Totalitarianism: Conflicting Narratives in the Industrialist Cases at Nuremberg*, in *REASSESSING THE NUREMBERG MILITARY TRIBUNALS: TRANSITIONAL JUSTICE, TRIAL NARRATIVES, AND HISTORIOGRAPHY* 161–162 (Kim Christian Priemel & Alexa Stiller eds., 2012).

70. *Id.* at 162.

71. Florian Jessburger, *On the Origins of Individual Criminal Responsibility Under International Law for Business Activity: IG Farben on Trial*, 8 *J. OF INT'L CRIM. JUST.* 783, 784 (2010).

72. In the *Krupp* trial the defendants were charged with “planning, preparation, initiation, and waging aggressive war,” “plunder and spoliation,” “crimes involving prisoner of war and slave labor,” and “common plan or conspiracy to commit crimes against peace.” Judgment at 1329, *United States v. Krupp* (July 31, 1948), published in 9 *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10* [hereinafter *Judgment, United States v. Krupp*].

The *Flick* defendants were charged with “participation in the slave-labor program of the Third Reich and the use of prisoners of war in armament production,” “spoliation of public and private property in occupied territories,” “crimes against humanity in compelling by means of anti-Semitic economic pressure the owners of certain industrial properties to part with title thereto,” contribution of “large sums to the financing of” the SS, and membership in a criminal organization. See Judgment at 1190, *United States v. Flick* (Dec. 22, 1947), published in 6 *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10* [hereinafter *Judgment, United States v. Flick*].

The *I.G. Farben* defendants were charged with crimes against peace, war crimes and crimes against humanity for participating in plunder, war crimes and crimes against humanity for using forced labor, and conspiracy to commit crimes against the peace. Judgment, *United States v. Krauch*, *supra* note 2, at 1082.

B. *The Legal Basis for the Nuremberg Military Tribunals*

On December 20, 1945, the Allies⁷³ signed Control Council Law No. 10.⁷⁴ This law provided the legal basis for the subsequent Nuremberg trials⁷⁵ and granted the commander in each occupation zone the authority to “cause all persons . . . arrested and charged” with violating Control Council Law No. 10 “to be brought to trial before an appropriate tribunal.”⁷⁶ Control Council No. 10 granted jurisdiction over four crimes: “crimes against peace,” “war crimes,” “crimes against humanity,” and “membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.”⁷⁷ Under Control Council Law No. 10, the occupying powers could establish international tribunals to prosecute individuals for their actions during the Nazi regime.⁷⁸ It granted them the flexibility to work with the other Allied powers to establish international tribunals like the IMT or to set up independent tribunals like the NMT.⁷⁹

Based on its authority under Control Council Law No. 10, the U.S. Military Government in Germany passed Military Ordinance No. 7, a U.S. military law which granted the United States the authority 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.”⁸⁰ Ordinance No. 7 mandated that each tribunal consist of three judges and an alternate.⁸¹ All judges had to 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.”⁸² Under Military Ordinance No. 7, all decisions and judgments had to be made by a majority vote of the sitting judges.⁸³ Although the NMT did not have an appeals process, the U.S. Military Governor, who was in charge of the U.S. occupation zone in Germany,⁸⁴ had the power to

73. The Allied powers consisted of the United States, the Soviet Union, Great Britain, and France.

74. See Control Council No. 10, Dec. 29, 1945, <https://perma.cc/E32M-RFMG> [hereinafter Control Council No. 10].

75. See *id.*

76. *Id.* at Article III(1)(d).

77. *Id.* at Article II(1).

78. In addition to Control Council Law 10, Executive Order 9679 (Jan. 16, 1946), U.S. Military Ordinance 7 (Oct. 18, 1946), U.S. Military Ordinance 11 (Feb. 17, 1947), and U.S. Forces, European Theater General Order 301 (Oct. 24, 1946) provided further authority for the tribunals. See *id.*; see also NATIONAL ARCHIVES, *supra* note 26, at 2; William Allen Zeck, *Nuremberg: Proceedings Subsequent to Goering Et Al.*, N.C. L. REV. 350, 360 (1948).

79. In addition to Control Council Law 10, Executive Order 9679 (Jan. 16, 1946), U.S. Military Ordinance 7 (Oct. 18, 1946), U.S. Military Ordinance 11 (Feb. 17, 1947), and U.S. Forces, European Theater General Order 301 (Oct. 24, 1946) provided further authority for the tribunals. See NATIONAL ARCHIVES, *supra* note 26, at 2.

80. Ordinance No. 7, *supra* note 11, at art. I.

81. See *id.* at art. II(b).

82. *Id.*

83. See *id.* at art. II(h).

84. See, e.g., F.A. Mann, *The Present Legal Status of Germany*, 33 TRANSACTIONS YEAR 119, 126 (1947).

“mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.”⁸⁵ Additionally, death sentences could not be carried out “unless and until confirmed in writing by the Military Governor.”⁸⁶

C. *The I.G. Farben Trial*

On May 3, 1947, twenty-four I.G. Farben executives were indicted and charged with various combinations of five counts: crimes against peace; war crimes and crimes against humanity for participating in plunder; war crimes and crimes against humanity for using forced labor; membership in a criminal organization, namely the SS; and conspiracy to commit crimes against the peace.⁸⁷ These men had been I.G. Farben’s leaders and had made key decisions on behalf of the company during the Nazi period. Nineteen defendants had been members of I.G. Farben’s Managing Board of Directors, five had been Plant and Division Managers; and the lead defendant, Carl Krauch, had been Chairman of the Supervisory Board of Directors and Chief of Research and Development of German raw materials and synthetics as part of Göring’s Four Year Plan.⁸⁸

The judges at the NMT were American attorneys, current or former state court judges, and academics.⁸⁹ Federal judges were visibly absent. Having witnessed the backlog of cases created by Justice Jackson’s attendance at the IMT, Chief Justice Fred Vinson refused to grant leaves of absence to federal judges.⁹⁰ The *Farben* tribunal was typical in its composition.⁹¹ The President, Judge Curtis Grover Shake, was former Chief Justice of the Indiana Supreme Court.⁹² Judge James Morris was a North Dakota Supreme Court justice and Judge Paul M. Hebert was the former Dean of Louisiana State

85. Ordinance No. 7, *supra* note 11, at art. XVII(a).

86. *Id.* at art. XVIII.

87. Count one: crimes against peace “through the planning, preparation, initiation, and waging of wars of aggression and invasions of other countries.” Count two: war crimes and crimes against humanity “through participation in the plunder of public and private property in countries and territories which came under the belligerent occupation of Germany.” Count three: war crimes and crimes against humanity “through participation in enslavement and forced labor of the civilian population of countries and territories occupied or controlled by Germany, the enslavement of concentration-camp inmates within Germany and the use of prisoners of war in operations and illegal labor.” Additionally, count three charges “the mistreatment, terrorization, torture, and murder of enslaved persons.” Count four: Christian Schneider, Heinrich BueteFisch, and Erich von der Heyde were also charged with “membership in a criminal organization.” Count five: conspiracy to commit crimes against the peace. Not all defendants were charged with all counts. Judgment, United States v. Krauch, *supra* note 2, at 1081.

88. Zeck, *supra* note 78, at 354.

89. Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT’L L. 651, 659 (2006).

90. *See id.*

91. *See* HELLER, *supra* note 14, at 85–105.

92. *See id.* at 94.

Law School.⁹³ The alternate, Clarence F. Merrell, was a lawyer from Indiana.⁹⁴

The *Farben* trial began on August 27, 1947 and lasted almost a year.⁹⁵ The tribunal found the defendant Max Brueggemann too ill to stand trial.⁹⁶ His case was dropped, leaving twenty-three defendants.⁹⁷ The tribunal rendered judgment on July 30, 1948,⁹⁸ acquitting ten defendants⁹⁹ and giving relatively light sentences to the other thirteen, ranging from one and a half to eight years.¹⁰⁰ These thirteen defendants were convicted on counts two and three, of spoliation or slave labor.¹⁰¹ Only one defendant, Fritz ter Meer, Chairman of I.G. Farben's Technical Committee, was convicted on both counts.¹⁰² The tribunal dropped counts one and five—crimes against the peace and conspiracy to commit crimes against the peace—holding that none of the defendants had “specific knowledge” of Hitler's plans for waging aggressive war.¹⁰³

Throughout the trial those involved felt pressure to finish quickly. Already in 1947, General Lucius D. Clay, Military Governor of the U.S. Occupation Zone in Germany, told Chief Prosecutor Telford Taylor to wrap up the trials, even though they had not yet begun.¹⁰⁴ As the threat from the Soviet Union grew, the pressure to finish the trials increased. The Soviet overthrow of the Czechoslovak government in February 1948, combined with a Soviet order preventing access to Berlin to other occupying powers in the summer of 1948, made the threat of a Soviet invasion into Germany more real.¹⁰⁵ In addition to the fear of what a Soviet invasion would mean for the U.S. occupation zone, there was a shifting sense among Americans that the Soviets, not the Nazis, were now the real enemy. A prosecutor from

93. *See id.*

94. *See BORKIN, supra* note 24, at 140.

95. *See* Judgment, United States v. Krauch, *supra* note 2, at 1082.

96. Brueggemann's case was severed. *See id.*

97. *See id.*

98. *See id.*

99. The following ten defendants were acquitted: Fritz Gajewski, Heinrich Gattineau, Erich von der Heyde, Heinrich Hörlein, August von Knieriem, Hans Kühne, Carl Lautenschlaeger, Wilhelm Rudolf Mann, Christian Schneider, and Carl Wurster. *See* Transcript of Record, *supra* note 1, at 7.

100. The 13 defendants received the following sentences: Otto Ambros, 8 years; Ernst Buergin, 2 years; Heinrich Bueteufisch, 6 years; Walter Dürrfeld, 8 years; Paul Haefliger, 2 years; Max Ilgner, 3 years; Friedrich Jähne, 1.5 years; Carl Krauch, 6 years; Hans Kugler, 1.5 years; Heinrich Oster, 2 years; Hermann Schmitz, 4 years; Georg von Schnitzler, 5 years; Fritz ter Meer, 7 years. *See id.* at 7–8.

101. *See* Judgment, United States v. Krauch, *supra* note 2, at 1204–07; Taylor, *The Nuremberg War Crimes Trials, supra* note 23, at 319.

102. *See* Judgment, United States v. Krauch, *supra* note 2, at 1206; Taylor, *The Nuremberg War Crimes Trials, supra* note 23, at 319.

103. Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 *IND. INT'L & COMP. L. REV.* 1, 13 (citing Judgment, United States v. Krauch, *supra* note 2, at 1113).

104. *See* Baars, *supra* note 30, at 178.

105. *See* WOLFGANG BENZ, *DIE GRÜNDUNG DER BUNDESREPUBLIK: VON DER BIZONE ZUM SOUVERÄNEN STAAT* 9–38 (1984); LUCIUS D. CLAY, *ENTSCHEIDUNG IN DEUTSCHLAND*, 397–432 (1950); HELLER, *supra* note 14, at 101–02.

the *Ministries* case stated that it had been “bluntly asserted to the prosecution staff and to the judges in private conversations . . . that the real enemy, Russia, was growing stronger and the trials were further weakening efforts to restore Germany to the necessary economic viability that would permit her to serve as a bulwark against communism.”¹⁰⁶

III. EVIDENTIARY STANDARDS AT THE NMT

A. *The Rules of Evidence at the Nuremberg Military Tribunals*

The NMT’s rules of evidence and procedure developed out of four sources: (1) Ordinance No. 7; (2) the NMT’s Uniform Rules of Procedure; (3) general principles of law; and (4) judge-made law.¹⁰⁷ Ordinance No. 7 provided the main framework for the NMT’s rules of evidence.¹⁰⁸ It established that the “tribunals shall not be bound by technical rules of evidence . . . and shall admit any evidence which they deem to have probative value relating to the charges.”¹⁰⁹ Under Ordinance No. 7, many common law rules about the admissibility of certain evidence, such as rules against hearsay, were not applicable.¹¹⁰

Ordinance No. 7 also granted the tribunals 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 tribunals or by the committee of presiding judges as provided in Article XIII.”¹¹¹ Under this grant of power, Tribunal I, the first tribunal to sit at the NMT, drafted the second source, the Uniform Rules of Procedure (URPs), and

106. HELLER, *supra* note 14, at 102 (citing PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 184 (2001)).

107. Heller states that the rules of evidence and procedure developed from three sources. *See id.* at 159.

108. According to Heller, Article VII of Ordinance No. 7 was the “most important” source for the rules of evidence. *Id.* at 139. Ordinance No. 7 was amended on October 18, 1946 by Ordinance No. 11. Ordinance No. 7, *supra* note 11, at art. VII.

109. Article VII of Ordinance VII states: “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.” Ordinance No. 7, *supra* note 11, at art. VII.

110. The Federal Rules of Evidence were not passed until 1973. However, the common law had developed many “technical rules” that the Federal Rules codified. *See, e.g.*, Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1556–57, 1562–67 (1999).

111. Ordinance No. 7, *supra* note 11, art. V.

adopted them in the *Medical Case*,¹¹² the first case to go to trial.¹¹³ The URPs filled in holes left by Control Council No. 10 and Ordinance No. 7 and were binding on all tribunals. For instance, they established rules of procedure for oaths taken by witnesses before testifying,¹¹⁴ motions at trial,¹¹⁵ rulings during the trial,¹¹⁶ the defendant's right to examine evidence,¹¹⁷ opening statements,¹¹⁸ and other procedural questions.¹¹⁹

The third source of evidentiary rules, general principles of law, referred to "fundamental principles of justice which have been accepted and adopted by civilized nations generally."¹²⁰ This source of law appears to have developed naturally during the trials. According to Tribunal V, the tribunal that heard the *Hostage* case at the NMT, if "most nations in their municipal law" included a specific legal principle, "its declaration as a rule of international law would seem to be fully justified."¹²¹ While this source undergirded many of the tribunals' decisions, the *Farben* judges rarely mentioned it.

Finally, because the trials had "no technical rules of evidence,"¹²² meaning there were no formal rules to decide the admissibility of evidence,¹²³ the judges established many of the standards and procedures during the trials. They decided on the scope of direct and cross-examination, what qualified as probative evidence, if and when hearsay evidence was prohibited, and many similar questions. As explained below, procedural decisions by early tribunals influenced the tribunals that heard later cases at the NMT. However, because decisions by other tribunals were not binding, each tribunal had discretion to establish its own rules and procedures, creating variation across trials.

112. See HELLER, *supra* note 14, at 133.

113. The tribunals amended the URPs during the trials. See *id.* at 139; *Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 8 January 1948*, THE AVALON PROJECT (Jan. 8, 1948), <https://perma.cc/8SRB-9GC4> [hereinafter UNIF. R. P.]; *Development of Uniform Rules of Procedure Action by Individual Tribunals, Executive Sessions of Several Tribunals, and the Committee of Presiding Judges*, THE AVALON PROJECT, <https://perma.cc/W8EP-NGFM>.

114. See UNIF. R. P. 9, *supra* note 113.

115. See UNIF. R. P. 10, *supra* note 113.

116. See UNIF. R. P. 11, *supra* note 113.

117. See UNIF. R. P. 12, *supra* note 113.

118. See UNIF. R. P. 16–17, *supra* note 113.

119. See generally *id.*

120. HELLER, *supra* note 14, at 133 (citing Judgment at 1235, *United States v. Wilhelm List* (Feb. 19, 1948), published in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10).

121. Heller mentions convicting defendants only with proof beyond a reasonable doubt and the presumption of innocence as examples that would qualify as "fundamental principles of justice which have been accepted and adopted by civilized nations generally." *Id.*

122. Ordinance No. 7, *supra* note 11, at art. VII.

123. See INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES 1017 (Goran Sluiter et al., eds., 2013).

B. Procedural Protections for Defendants

Although not evidentiary rules, procedural due process protections for defendants are a central part of any trial.¹²⁴ Control Council No. 10, Ordinance No. 7, and the URPs—the written procedural rules—were silent on the standard and burden of proof. Each tribunal therefore had to establish these standards. The *Farben* tribunal followed the *Flick* trial, holding that:

1. There can be no conviction without proof of personal guilt.
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.¹²⁵

Like the *Flick* tribunal, the *Farben* tribunal “sought to apply these fundamental principles of Anglo-American criminal law” in this international case.¹²⁶

Ordinance No. 7 and the URPs also provided due process protections for defendants. Under the URPs each defendant had the right to be represented by an attorney he had chosen.¹²⁷ The URPs included rules for providing notice to defendants¹²⁸ and mandated that each defendant be served with the indictment at least thirty days before the beginning of his trial.¹²⁹ Additionally, Ordinance No. 7 granted defendants the right to present evidence at trial and to cross-examine the prosecution’s witnesses.¹³⁰ It provided that defendants could “apply in writing to the tribunal for the production of witnesses or of documents.”¹³¹ It also mandated that defendants receive a copy of a “pleading, document, rule, or other instrument” both in English and in a language the defendant understood, typically German.¹³² It included rules for defendants to request evidence¹³³ and required an “accurate stenographic record of all oral proceeding[s].”¹³⁴ The URPs also required the prosecution to provide all evidence to be used at trial to the defense at

124. See, e.g., Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155, 156 (2017).

125. Transcript of Record, *supra* note 1, at 15,680.

126. *Id.*

127. See UNIF. R. P. 7, *supra* note 113.

128. See UNIF. R. P. 3, *supra* note 113.

129. See UNIF. R. P. 4, *supra* note 113.

130. Article IV(e) of Ordinance No. 7 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.” Ordinance No. 7, *supra* note 11, at art. IV(e).

131. *Id.* at art. IV(f).

132. UNIF. R. P. 2, *supra* note 113.

133. UNIF. R. P. 12, *supra* note 113.

134. UNIF. R. P. 13, *supra* note 113.

least twenty-four hours ahead of time.¹³⁵ They do not, however, appear to have required the defense to provide its evidence in advance.¹³⁶ Additionally, any party calling a witness to the stand had to provide the Secretary General with basic information at least twenty-four hours before the witness was to be called to testify.¹³⁷

IV. EVIDENTIARY STANDARDS AND PROCEDURES AT THE *I.G. FARBEN* TRIAL

Judges at the NMT had broad discretion and flexibility. Control Council No. 10 and Ordinance No. 7 provided guidelines and clarity on specific issues, but did not include all-encompassing rules. Each tribunal therefore developed its own evidentiary rules, leading to variations across trials. This section examines the evidentiary standards and procedures for three main categories of evidence submitted in the *Farben* trial: documentary evidence, testimonial evidence, and judicial notice. The standards and procedures the *Farben* tribunal developed highlight the tribunal's unsystematic development of rules. The judges filled in relevant gaps as they arose during trial. They often created standards and procedures that sped up the trial, but at times their decisions instead favored the defendants' or the prosecution's rights. This led to rules that were unorthodox, as well as to inconsistency within the trial and rules that differed from those in other trials.

A. *Documentary Evidence*

Documentary evidence played a central role in the *Farben* trial, as many *Farben* defendants left detailed records of their activities during World War II. Although some documents were destroyed—Allied soldiers accidentally threw some away while occupying the area,¹³⁸ refugees burned others for heat while squatting in the *Farben* building after the war,¹³⁹ and *Farben* employees destroyed some at the end of the war¹⁴⁰—the Allies captured thousands of pages of relevant material. Both the prosecution and the defense thus had enormous numbers of records at their disposal. Both sides submitted thousands of these documents into evidence; the prosecution sub-

135. UNIF. R. P. 17, *supra* note 113.

136. See UNIF. R. P. 17, *supra* note 113 (stating only that the "prosecution" was required "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" to "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.").

137. UNIF. R. P. 19, *supra* note 113.

138. See DuBois, *supra* note 24, at 38.

139. See Jonathan A. Bush, *The Prehistory of Corporation and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1111 (2009).

140. See DIV. OF INVESTIGATION OF CARTELS AND EXTERNAL ASSETS, U.S. OFFICE OF MIL. GOV'T (GERMANY), REPORT ON THE INVESTIGATION OF I.G. FARBENINDUSTRIE A.G. (Nov. 1945), at 6, 25, 59, 90, <https://perma.cc/R9CY-VH76>.

mitted 2,282 documents and the defense submitted 4,102, for a total of 6,384.¹⁴¹ Documentary evidence consisted of reports, maps, photographs, newspapers, books, letters, and other similar documents, as well as affidavits and other “interrogations of various individuals.”¹⁴²

The *Farben* tribunal established simple procedural rules for submitting documentary evidence. Additionally, the *Farben* tribunal had a broad understanding of what evidence qualified as “relevant” and therefore admitted almost all documentary evidence. However, it was much more cautious about affidavits, diverging from rules established in five of the NMT tribunals to protect defendants’ rights.¹⁴³ This section examines five aspects of evidentiary rules and standards related to documentary evidence: (1) how documentary evidence was submitted; (2) how the judges assessed probative value; (3) what documentary evidence was admissible under Ordinance No. 7; (4) the *Farben* tribunal’s rules about affidavits; and (5) the tribunal’s rules about affidavits provided by defendants.

1. Admission of Evidence

The rules for submitting evidence in the *Farben* trial were simple. Unlike in a common law trial, in which a witness must lay the foundation for documentary evidence, attorneys in the *Farben* trial could submit exhibits into evidence with no foundation and little discussion of the documents.¹⁴⁴ The *Farben* judges had watched earlier NMT trials and noticed that those tribunals “receiv[ed] in evidence long excerpts from the exhibits at the trial.”¹⁴⁵ This seemed duplicitous to them,¹⁴⁶ as the tribunal planned to “study and read” the documents carefully on its own time.¹⁴⁷ The presiding judge, Judge Shake, therefore asked that attorneys “state very briefly the purpose of the document, or in general . . . the contents of it.”¹⁴⁸ This, he continued, “obviate[d] in any cases the necessity of reading the document formally in evidence.”¹⁴⁹ While this allowed the trial to move more quickly, it meant that the content of the documents were not included in the trials’ transcript.

141. See Judgment, United States v. Krauch, *supra* note 2, at 1082.

142. See, e.g., Transcript of Record, *supra* note 1, at 8–9.

143. HELLER, *supra* note 14, at 148 (stating that the *Einsatzgruppen*, *High Command*, *Medical*, *Milch*, and *Ministries* tribunals held that “affidavits by available witnesses who refused to testify . . . were admissible even in the absence of cross-examination”).

144. See, e.g., Transcript of Record, *supra* note 1, at 1025–34. *cf.* MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE 157 (2012) (“As does the law in England and Wales and contrary to general belief about civil law systems, German law frowns in principle on the independent use of documents as evidence without the involvement of a human agent who introduces them into the trial record, ie if a certain document is to be used in evidence, it should in principle be accompanied by a witness and/or expert who can testify as to its creation and reliability, unless one of the exceptions under the law applies.”).

145. Transcript of Record, *supra* note 1, at 199–200.

146. *Id.*

147. *Id.* at 5910.

148. *Id.* at 199–200.

149. *Id.*

Because the documents were often admitted without asking questions of witnesses about the documents, there was little, if any, discussion or further information about the document.

Judge Shake emphasized that these rules were meant to speed up the trial, stating that “[w]e are not announcing any formal rule, perhaps in some cases it might be a conservation of time to read a short document rather than to state its contents.”¹⁵⁰ This allowed attorneys to summarize the documents briefly and submit them, making it possible for dozens of documents to be submitted in a short period.¹⁵¹ The prosecution and the defense generally followed the tribunal’s suggestion and often submitted documents into evidence by stating short summaries of the document and drawing the tribunal’s attention to key parts or sentences.¹⁵² When they failed to do so, the tribunal sometimes reprimanded them, reminding them to hurry along.¹⁵³ By the end of the trial, the tribunal was anxious to finish, telling the defense to state the document and exhibit numbers with no explanation.¹⁵⁴

2. *Probative Value*

The *Farben* tribunal admitted almost all documentary evidence that had probative value. Because the NMT was not bound by “technical rules of evidence,”¹⁵⁵ judges were supposed to “adopt and apply to the greatest possible extent expeditious and nontechnical procedure” and “admit any evidence which they deem[ed] to have probative value relating to the charges.”¹⁵⁶ This mirrored the IMT rules and focused on efficiency rather than excluding certain types of evidence, trusting to judges’ ability to weigh evidence correctly.¹⁵⁷ This contrasted with American common law rules, which limit the admission of certain types of evidence, such as hearsay, so that juries are not swayed by unfairly prejudicial evidence, it is more in line with the German civil law tradition, which admits almost all evidence and depends on the judge to weigh the evidence appropriately.¹⁵⁸ Judge Shake even spoke to this point specifically, explaining that the American system was not needed in this case because it aims to “keep[] from the jury of laymen evidence that was prejudicial or had no probative value.”¹⁵⁹ He noted that the *Farben* case had “no jury in this case, and whether the Tribunal rules on the competency of evidence when it is offered, or merely notes

150. *Id.* at 200.

151. *See id.*

152. *See, e.g., id.*, at 1035–43.

153. *See, e.g., id.*, at 5909–10.

154. *See id.* at 14,357.

155. Ordinance No. 7, *supra* note 11, art. VII.

156. *Id.*

157. *See* Charter of the International Military Tribunal art. 19, Aug. 8, 1945, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, annex, 59 Stat. 1544, 82 U.N.T.S. 279.

158. *See e.g.,* BOHLANDER, *supra* note 144, at 145–46.

159. Transcript of Record, *supra* note 1, at 2595.

the objection, and gives consideration to its competency when it comes to considering evidence, really gets us to the same point.”¹⁶⁰

The *Farben* tribunal often allowed evidence to be submitted with the caveat that it would make determinations at a later date about whether the evidence would ultimately be admitted.¹⁶¹ This cut down on lengthy discussions and kept the trial moving. The tribunal clarified that if, later in the trial, “it is apparent that this exhibit, or any of the preceding exhibits to which objections were made, are not of probative value, the motion can be made to reject them, and the entire subject matter can be surveyed and the Court will then make a final ruling on the subject.”¹⁶² What ultimately mattered was whether the judges believed the evidence had probative value and that they “afford[ed] 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[d].”¹⁶³

Although the *Farben* tribunal admitted most documentary evidence, it was stricter than other tribunals. While some tribunals admitted essentially all evidence,¹⁶⁴ the *Farben* tribunal often insisted that evidence truly have probative value. Moreover, despite being a bench trial the *Farben* tribunal retained a loose prohibition on hearsay evidence,¹⁶⁵ although this was not a clear-cut rule. For example, the tribunal admitted an affidavit by defendant Fritz ter Meer, including a “statement given to him by Dr. Schmitz, which the affiant ter Meer discusses at considerable length in his affidavit.”¹⁶⁶ Likely due to time constraints, the tribunal vacillated between insisting that evidence have probative value¹⁶⁷ and stating that it would weigh the evidence accordingly.¹⁶⁸

160. *Id.*

161. *See, e.g., id.* at 216.

162. *Id.*

163. Ordinance No. 7, *supra* note 11, art. VII.

164. *See, e.g., HELLER, supra* note 14, at 133–134 (explaining that the *Einsatzgruppen* tribunal had admitted “statements made during the war by the Kremlin, articles from a Russian encyclopedia, and various speeches given by Stalin. Tribunal II acknowledged that all of the exhibits were ‘strictly irrelevant and might well be regarded as a red herring drawn across the trial,’ but it nevertheless admitted them on the ground that ‘the Tribunal’s policy throughout the trial has been to admit everything which might conceivably elucidate the reasoning of the defense.’” (*citing* Judgment at 465, *United States vs. Otto Ohlendorf* (Apr. 8–9, 1948), published in 4 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*)).

165. *See* Transcript of Record, *supra* note 1, at 5886 (discussing the prohibition on hearsay evidence).

The *Einsatzgruppen* tribunal coined the “Penguin Rule,” which came from a statement by one of the judges that he would admit evidence about a penguin’s social life if it helped a defendant. *See* HILARY EARL, *THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945–1958* (2010).

166. Transcript of Record, *supra* note 1, at 14,250.

167. *See, e.g., id.* at 5290, 5714–15, 5718.

168. *See id.* at 5905.

3. *Article VII of Ordinance No. 7*

Under Article VII of Ordinance No. 7, documentary evidence that would have been inadmissible hearsay evidence under common law evidence rules was made expressly admissible.¹⁶⁹ Article VII stated that “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” were admissible.¹⁷⁰ Having captured thousands of documents—reports, records, orders, diaries, letters, and similar documents—Ordinance No. 7 allowed U.S. prosecutors to use this treasure trove.¹⁷¹ However, the *Farben* tribunal seems to have understood Article VII of Ordinance No. 7 to admit only “contemporary” evidence from the Nazi era, meaning documents created during the 1930s and 1940s.¹⁷² Documents written after World War II were not necessarily admissible without a witness to testify about their contents.¹⁷³

4. *Affidavits*

Affidavits were a key form of evidence at the *Farben* trial. The parties submitted a total of 2,813 affidavits: 419 by the prosecution and 2,394 by the defense.¹⁷⁴ Article VII of Ordinance No. 7 also applied to affidavits. It provided that “[w]ithout limiting the foregoing general rules, [affidavits] shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges.”¹⁷⁵ However, Ordinance No. 7 provided no guidelines about whether affidavits were admissible without the affiant present. A majority of tribunals understood Article VII to mean affidavits were always admissible.¹⁷⁶ The *Farben* tribunal, however, prohibited the use of affidavits if the affiant was unavailable to testify (or provide counter affidavits or interrogatories), regardless of its probative value.¹⁷⁷ Thus, affidavits by individuals who could not testify—because they could not be found, could not travel to Nuremberg, or were deceased—were inadmissible.¹⁷⁸ The court held that “[a]mong the guaranties for a fair trial ac-

169. HELLER, *supra* note 14, at 152.

170. Ordinance No. 7, *supra* note 11, at art. VII.

171. *See id.*

172. *See, e.g.*, Transcript of Record, *supra* note 1, at 4248 (discussing “contemporaneous documents.”).

173. *See, e.g., id.* at 5915–20.

174. *See* Judgment, United States v. Krauch at 1083. This disparity in the number of documents submitted by the prosecution and defense may be explained by the fact that the prosecution could use the same document to prove a number of defendants’ culpability, while each defendant had to individually rebut the charges.

175. Ordinance No. 7, *supra* note 11 at art. VII.

176. HELLER, *supra* note 14, at 140–41. Nine tribunals dealt with the issue of whether affidavits were admissible if the witnesses did not testify. Of the nine tribunals to consider the issue, five (*Einsatzgruppen*, *High Command*, *Medical*, *Milch*, and *Ministries*) held that they were admissible, while four tribunals (*Farben*, *Hostages*, *Krupp*, and *Pobl*) held that they were not. *See id.*

177. *See id.*, at 140–42.

178. *See id.* at 142.

corded defendants by Article IV of said Ordinance is the right 'to cross-examine any witness called by the prosecution.'"¹⁷⁹ The *Farben* tribunal followed the common law rule that a defendant should be able to confront all witnesses testifying against him.¹⁸⁰ However, the tribunal did, on occasion, allow affidavits to be admitted into evidence if the affiant provided interrogatories or counter-affidavits, a form of questioning that the tribunal found could satisfy the defendant's right to confront the witness.¹⁸¹

The *Farben* tribunal's blanket rule against admitting affidavits by unavailable affiants meant affidavits by deceased individuals were inadmissible.¹⁸² This contrasted with the rule followed by the majority of tribunals at the NMT.¹⁸³ Most tribunals followed the rule established in the *Medical Case*, which admitted an affidavit into evidence even though the witness had committed suicide.¹⁸⁴ Because of the *Farben* tribunal's decision, the prosecution could not submit certain affidavits into evidence, including one by Fritz Sauckel, former General Plenipotentiary for Work Deployment under the Nazi regime and a defendant at the IMT.¹⁸⁵ After being convicted of war crimes and crimes against humanity, he was sentenced to death and hanged prior to the *Farben* trial.¹⁸⁶ The *Farben* tribunal refused to admit his affidavit into evidence—even though both the *Milch* and *Flick* tribunals had already admitted the very same affidavit.¹⁸⁷ Similarly, the prosecution wanted to submit an affidavit by Rudolf Hoess, Commandant of Auschwitz, into evidence, although Hoess had already been sentenced to death and hanged.¹⁸⁸ The prosecution argued that the *Pobl* tribunal had admitted two affidavits

179. Judgment, *United States v. Krauch*, *supra* note 2, at 1084.

180. The *Farben* tribunal was not the only one to rule this way. The *Hostage* and *Krupp* tribunals did as well. See HELLER, *supra* note 14, at 141.

181. See Transcript of Record, *supra* note 1, at 14,361.

182. See Transcript of Record, *supra* note 1, at 3542–43 (concluding that “[t]he right of a defendant who is being tried in a [c]riminal action or proceeding to interrogate witnesses who testify against him is a fundamental right and not merely a rule of evidence 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.”).

183. The *Medical*, *Milch*, *Justice*, *Pobl*, *Flick*, *Einsatzgruppen*, *Ministries*, and *High Command* tribunals admitted affidavits by individuals who had been executed or committed suicide. See HELLER, *supra* note 14, at 142.

184. Transcript of Record, *supra* note 1, at 3242 (explaining that Dr. Erwin Ding, who had provided the affidavit, had since committed suicide).

185. See Transcript of Record, *supra* note 1, at 3236–37, 3542–43; see also Ulrich Herbert, *Forced Laborers in the Third Reich: An Overview*, 58 INT'L LAB. AND WORKING-CLASS HIST. 192, 195 (2000); *Sketches of the 11 Nazi Leaders Who Paid With Their Lives at Nuremberg for War Crimes*, N.Y. TIMES, Oct. 16, 1946, at 21; *Sauckel's Widow Guilty: Convicted as a 'Lesser Nazi'*, N.Y. TIMES, June 18, 1947, at 7.

186. Associated Press, *Counts in the War Crimes Trial And How Each Defendant Fared*, N.Y. TIMES, Oct. 2, 1946, at 20.

187. See Transcript of Record, *supra* note 1, at 3,243; HELLER, *supra* note 14, at 150.

188. See Transcript of Record, *supra* note 1, at 3,237, 3,239; John K. Roth, *Holocaust Business: Some Reflections on Arbeit Macht Frei*, 450 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCIENCE, 68, 77 (1980).

by Hoess.¹⁸⁹ Although this was done while Pohl was still alive and was being prosecuted in Poland, he had still been “unavailable” for the *Pohl* trial.¹⁹⁰ Because Hoess was deceased by the time the *Farben* trial took place, the tribunal held that his affidavits were inadmissible as well.¹⁹¹

Although the *Farben* tribunal did not admit affidavits by unavailable witnesses, the judges were divided over the issue. Judge Shake, the President of the tribunal, and Judge Morris supported this rule,¹⁹² while Judge Hebert and Judge Merrell, the alternate judge, disagreed with it.¹⁹³ Judge Hebert believed 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 Number 7.”¹⁹⁴ He added:

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.¹⁹⁵

In addition to reading Ordinance No. 7 explicitly to admit all affidavits, Judge Hebert may have been responding to the difficulties in bringing witnesses to Nuremberg in post-war Europe, when travel and communication across occupation zones and countries was complicated.

The alternate judge, Judge Merrell, agreed with Judge Hebert, stating 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.”¹⁹⁶ He added that the absence of cross-examination “goes to the weight of the evidence and not to its admissibility.”¹⁹⁷ Judges Hebert and Merrell believed that the *Farben* tribunal should be allowed to assess these affidavits’ relevance and that Ordinance No. 7 provided for this divergence from common law rules. However, the majority of the *Farben* judges—whose votes counted—held that the affida-

189. See Transcript of Record, *supra* note 1, at 3,242.

190. *Id.* at 3,242.

191. See *id.* at 3,542–43.

192. See *id.* at 14,249–50, 14,255.

193. See *id.* at 14,251–52, 14,254–55.

194. *Id.* at 14,251.

195. *Id.* at 14,251–52.

196. *Id.* at 14,254.

197. *Id.* at 14,254–55.

vits of individuals unavailable to testify were inadmissible.¹⁹⁸ While Hebert's and Merrell's view was in line with that of most other tribunals, Judges Shake's and Morris's view provided more protection for the defendants by retaining the right to cross-examine all witnesses.

5. Defendants' Affidavits and Statements

After World War II ended, the Allies rounded up and imprisoned the *Farben* defendants.¹⁹⁹ Under interrogation, they provided affidavits and statements about their activities with I.G. Farben during the Nazi period.²⁰⁰ The U.S. prosecutors used many of these affidavits as evidence in the *Farben* trial.²⁰¹ The *Farben* tribunal held that affidavits by defendants were admissible as statements against interest,²⁰² meaning a statement made by a defendant that is so contrary to his self-interest that he would not have made it if it were not true.²⁰³ This meant that if the defendant testified, the affidavit could be used against his co-defendants, as they would have the opportunity to cross-examine him.²⁰⁴ However, if a defendant chose not to testify, the *Farben* tribunal held that his affidavits could still be used against him, but not against other defendants.²⁰⁵ Some tribunals, such as the *Krupp* tribunal, followed the *Farben* tribunal's lead, finding that an affidavit could not be used against a defendant's co-defendants if the defendant did not testify.²⁰⁶ However, other tribunals, including the *Justice* tribunal, held that all affidavits by defendants were admissible, as a defendant could explain the circumstances surrounding the affidavit if he chose to testify.²⁰⁷

198. See *id.* at 14,249–50, 14,255.

199. See, e.g., *id.* at 14,295–307; Baars, *supra* note 30, at 168 (citing Tim Schanetzky, *Unternehmer: Profiteure des Unrechts*, in *HITLERS ELITEN NACH 1945* 74 (Norbert Frei ed., 2003)).

200. See, e.g., DuBois, *supra* note 24, at 56, 65 (“After [Ilgner] and Schmitz and Von Knieriem were put in Prungsheim jail, they were released every day for a few hours to be interrogated over at the Reichsbank building.”).

201. See Transcript of Record, *supra* note 1, at 15,643–44; Minute Book, Judgment at 5–223, United States vs. Krauch, published in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10.

202. See Transcript of Record, *supra* note 1, at 15,644; HELLER, *supra* note 14, at 143.

203. See Michael D. Bergeisen, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CAL. L. REV. 1189, 1189–90 (1978).

204. See Transcript of Record, *supra* note 1, at 5839 (Dr. Berndt stating that “During the session of 22 December 1947, the morning session, the Tribunal announced that if any affidavits by the defendants had been presented who are not going to take the witness stand, and who, for that reason, will not be cross-examined by their co-defendants, in such a case the Tribunal shall set down on the record after a proper motion has been made that this particular affidavit can not be regarded as evidence against other defendants who are incriminated by it.”); *id.* at 15,643–44.

205. See *id.* at 15,644; see also HELLER, *supra* note 14, at 140 (stating that “the tribunals reached different conclusions concerning the admissibility of affidavits by available witnesses who refused to testify. Of the nine tribunals that specifically considered the issue, five—two early, three late—held that such affidavits were admissible even in the absence of cross-examination. . . . Four other tribunals, by contrast, refused to admit affidavits given by available witnesses who refused to appear.”).

206. See Heller, *supra* note 14, at 144.

207. *Id.* at 151.

The defense attorneys fought to have the defendants' affidavits ruled inadmissible. Some defense attorneys claimed that their clients had only provided the affidavits under duress.²⁰⁸ While the tribunal found most of these claims meritless, defendant Hermann Schmitz, the former CEO of I.G. Farben, successfully argued that he had provided his affidavit under duress.²⁰⁹ As a result, the tribunal found the affidavit inadmissible.²¹⁰ The defense attorneys also argued that admitting these affidavits violated the defendants' Fifth Amendment rights by forcing the defendants to testify against themselves.²¹¹ The tribunal was unsympathetic, holding that admitting these affidavits did not force defendants to incriminate themselves:²¹²

Recognizing the fact that a defendant may not be compelled to offer evidence against himself, it is very generally held that admission of his voluntary statements does not violate that principle. That is as far as we intended to go, and I believe perhaps that that is an answer to the question that Counsel for the defendant has propounded to us at this time.²¹³

Moreover, although the judges and prosecutors were American and the trial was influenced by common law rules, the NMT was an international tribunal which had jurisdiction under Control Council No. 10, an international treaty. As the *Flick* and *Krupp* tribunals stated, these tribunals were "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."²¹⁴ Although a minimum level of due process common to both civil and common law certainly applied, the protections enumerated in the Fifth Amendment did not.

However, the *Farben* tribunal followed the common law rule for statements by defendants and held that they were admissible as statements against interest, even if they had not been "sworn or verified."²¹⁵ The common law rule admitting statements against interest was based on the idea that a defendant would not make a false statement against his own interest unless it was really true.²¹⁶ The tribunal explained that "[i]t might be a letter, it might be a memorandum, it might be a mere scrap of paper, even unsigned, if shown to be executed by the defendant and being pertinent,

208. See, e.g., Transcript of Record, *supra* note 1, at 316, 15,644.

209. See HELLER, *supra* note 14, at 143 (citing Judgment, United States v. Krauch, *supra* note 2, at 1084).

210. See *id.*

211. See Transcript of Record, *supra* note 1, at 226–28.

212. See *id.* at 230.

213. *Id.* at 243.

214. Judgment, United States v. Krupp, *supra* note 72, at 1331; Judgment, United States v. Flick, *supra* note 72, at 1188.

215. Transcript of Record, *supra* note 1, at 281.

216. See, e.g., John P. Cronan, *Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 SETON HALL L. REV. 1, 2 (2002); Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 152 (1973).

would be admissible.”²¹⁷ Although the U.S. Constitution did not apply to the NMT, the tribunal imported many common law rules of evidence.

B. Testimonial Evidence

Testimonial evidence was an important part of the *Farben* trial. The tribunal heard a total of 189 witnesses: 87 called by the prosecution and 102 by the defense.²¹⁸ These witnesses included defendants, high-ranking Nazi officials, employees of I.G. Farben, and prisoners who had worked in Farben factories.

The tribunal established a number of unconventional procedures for testimonial evidence. In addition to creating commissions that heard almost one-third of the witnesses, it allowed defendants to cross-examine certain witnesses and limited the prosecution’s cross-examinations to twenty percent of the time the defense used for its direct examination. Yet it also followed many common law rules for the scope of examination. This section looks at six areas of testimonial evidence: (1) the rules for testimony; (2) the scope of examination; (3) limits on the prosecution’s cross-examination; (4) testimony by defendants; (5) the commissions; and (6) cross-examination by defendants.

1. Procedure for Testimony

The procedure for testimony was outlined in Ordinance No. 7. Article V granted the tribunals 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; . . .
- (d) to administer oaths.²¹⁹

In addition to summoning witnesses and administering oaths—powers necessary to run a trial—the judges could ask witnesses questions and interrogate defendants. In fact, the judges did occasionally ask questions, but these were generally to clarify points in the testimony.²²⁰ On the whole, testimony was structured as it would be in a traditional common law court, with a direct-examination followed by the cross-examination, followed by re-direct. Each party called its own witnesses, as in a common law trial, and each party

217. Transcript of Record, *supra* note 1, at 281.

218. Judgment, *United States v. Krauch*, *supra* note 2, at 1083.

219. Ordinance No. 7, *supra* note 11 at art. V.

220. *See, e.g.*, Transcript of Record, *supra* note 1, at 3048, 8571.

was responsible for that witness's credibility.²²¹ At its core, the trial was an adversarial proceeding rather than an inquisitorial one.

2. *Scope of Examination*

Ordinance No. 7 and the URPs provided little guidance on the scope of examination.²²² Ordinance No. 7 merely provided that tribunals had the power to "put questions to" witnesses and "interrogate any defendant who takes the stand."²²³ Although Article VII of Ordinance No. 7 called for the admission of "any evidence which [the tribunal] deem[s] to have probative value,"²²⁴ the tribunal kept to a loose version of American common law rules for testimonial evidence. The judges made sure that questions to witnesses were within the scope of examination and were relevant.²²⁵ They also prohibited certain types of questions, such as leading questions on direct examination and argumentative questions,²²⁶ as well as hearsay evidence.²²⁷ This was generally in line with the other NMT tribunals, which also applied American common law rules.²²⁸

The *Farben* tribunal did not permit questions about issues outside the scope of examination,²²⁹ including about "collateral issues."²³⁰ The judges made sure that questions to witnesses did not wander from the main subjects.²³¹ The tribunal was also alert to the relevance of questions asked during cross-examinations and whether they focused on issues that had been discussed during the direct examination. For instance, while cross-examining Walter Schieber, former head of the Armaments Delivery Office and an SS member,²³² the prosecution asked if Schieber had received directions to negotiate with the German Army Weapons Agency to use certain concentration camps for armament production.²³³ The defense objected, arguing that the question was outside the scope of discussion in the direct examination.²³⁴ The tribunal sustained the defense's objection, finding that allowing the question "would be opening the door to a wholly collateral inquiry apart

221. *See id.* at 5706.

222. *See* HELLER, *supra* note 14, at 143.

223. Ordinance No. 7, *supra* note 11 at art. V.

224. *Id.* at art. VII.

225. *See, e.g.*, Transcript of Record, *supra* note 1, at 5287–89, 8570.

226. *See id.* at 2025, 3394, 3796, 5738.

227. *See, e.g., id.* at 5886.

228. HELLER, *supra* note 14, at 143 ("In general, those issues [the scope of examination] were uncontroversial and followed normal American trial practice.").

229. *See, e.g.*, Transcript of Record, *supra* note 1, at 8570.

230. *See id.* at 5741.

231. *See id.*

232. ALBERT SPEER, *INSIDE THE THIRD REICH: MEMOIRS* 209, 556 n.14 (Richard Winston & Clara Winston trans. 1970); BERNHARD R. KROENER ET AL., *V/II GERMANY AND THE SECOND WORLD WAR: ORGANIZATION AND MOBILIZATION IN THE GERMAN SPHERE OF POWER* 441 (2003).

233. *See* Transcript of Record, *supra* note 1, at 5289.

234. *See id.* at 5287–89.

and separate from anything about which the witness has testified heretofore.”²³⁵

Similarly, following the American common law tradition, leading questions were not permitted in direct examination, although they were in cross-examination.²³⁶ Counsel could not be argumentative,²³⁷ nor could testimony be used “to elicit opinion evidence and legal conclusions which have no bearing on the case.”²³⁸ For instance, the tribunal sustained an objection when a witness, testifying about Auschwitz, began answering a question about whether he had ever believed that I.G. Farben’s employment of concentration camp inmates was “an illegal or punishable act.”²³⁹ In another instance the tribunal sustained an objection because the “technical witness . . . [was] being asked to make a judgment regarding legal questions about which the Tribunal itself would have to decide.”²⁴⁰ The tribunal also prohibited speculative evidence, sustaining objections to questions that asked about “what might have happened with regard to something that did not happen.”²⁴¹

Cumulative evidence was technically “within the control of the Tribunal” and could be limited if the opposing party objected to evidence “[a]fter a certain mass of evidence upon a certain point has been produced.”²⁴² Witnesses were supposed to answer specific questions and not read documents into the record. The tribunal explicitly prohibited the latter unless “the purpose of counsel . . . [was] to direct the attention of the witness to those documents or parts of these documents as preliminary to some inquiry about the documents.”²⁴³

The tribunal generally excluded hearsay testimony, occasionally reminding attorneys and witnesses to focus on “matters of fact about which [the witness] has knowledge or matters of expert opinion.”²⁴⁴ During one cross-examination the tribunal even cut off the prosecutor, stating that asking whether the “office manager in the personnel department” had told the witness “about the burning of human beings alive in Auschwitz” was inadmissible hearsay.²⁴⁵ However, the tribunal also admitted to having a “liberal policy” for hearsay compared to the traditional common law system, “when [the hearsay statement] is providing the basis of an opinion as to matters of

235. *Id.* at 5289–90.

236. The President told the prosecution that “the field of leading questions is much broader in cross examination than in chief. Leading questions are entirely permissible in cross examination.” *Id.* at 2025, 5738.

237. *See id.* at 3394, 3796.

238. *Id.* at 11,407–08.

239. *Id.* at 11,407.

240. *Id.* at 1397.

241. *Id.* at 5720–21.

242. *Id.* at 3876.

243. *Id.* at 5306–07.

244. *Id.* at 5886.

245. *Id.* at 11,429.

general knowledge.”²⁴⁶ Following this liberal view, the tribunal permitted statements by a witness stating that the camp physician had told him “there are too many sick inmates and I.G. wants to have a labor force in a better physical condition.”²⁴⁷ The tribunal explained that “what ordinarily might be regarded as hearsay is not so regarded when it is coming from someone in a place of authority speaking for a superior.”²⁴⁸

3. *Commissions*

Commissions played a central role in the *Farben* trial. Under Ordinance No. 7, tribunals had the power “to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission.”²⁴⁹ Following the IMT’s procedure,²⁵⁰ in which commissioners had heard over one-hundred witnesses,²⁵¹ the *Farben* tribunal appointed two commissioners. According to the tribunal,

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.²⁵²

Although the commissioners could not make rulings on evidentiary questions²⁵³—to ensure consistency, only the tribunal could—the tribunal stated that evidence heard by commissioners would “be considered by the Tribunal as of the same force and effect as evidence heard by the Tribunal in open court.”²⁵⁴ The commissioners were, in effect, taking depositions—sworn, out-of-court statements that were entered into evidence as transcripts. All testimony, including objections, would be “properly recorded, reported, certified to, and filed in the office of the Secretary General.”²⁵⁵ The tribunal clearly stated that it would make its final rulings based on all the evidence, including evidence given in front of commissioners.²⁵⁶ Despite these safeguards, the attorneys, especially the prosecution, preferred their witnesses to

246. *Id.* at 3791.

247. *Id.* at 3790.

248. *Id.* at 14,250.

249. Ordinance No. 7, *supra* note 11 at art. V.

250. See HELLER, *supra* note 14, at 137 (“Such out-of-court questioning [by commissioners] was permitted by Article V(e) of ordinance No. 7, which authorized the tribunals ‘to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission.’ Article V(e) was itself based on—and identical with—Article 17(e) of the London Charter.”).

251. See Judgment at 412, *United States v. Goering*, 6 F.R.D. 69 (Int’l Mil. Trib. at Nuremberg 1946), <https://perma.cc/3LJM-45LP>.

252. Transcript of Records, *supra* note 1, at 3235.

253. See Taylor, FINAL REPORT, *supra* note 23, at 90.

254. Transcript of Record, *supra* note 1, at 3235.

255. *Id.*

256. See *id.*

testify in front of the tribunal instead of the commissioners.²⁵⁷ The tribunal, however, was unsympathetic and told the attorneys: “I do not think you need to disturb yourselves about the evidence not receiving the same consideration if the commissioner hears it as if it was before the Tribunal.”²⁵⁸

The *Farben* tribunal appointed two commissioners in November 1947 because the judges were worried that the trial was moving too slowly. The judges wished to ensure there was no “unnecessary delay”²⁵⁹ without depriving the defense of “a fair and reasonable opportunity to cross examine a large number of witnesses whose affidavits were offered by the prosecution.”²⁶⁰ The two commissioners, Johnston T. Crawford and James T. Mulroy,²⁶¹ primarily heard defense witnesses, a byproduct of the fact that the prosecution’s case was more than half finished when the tribunal appointed the first commissioner. These commissioners heard over fifty witnesses, nearly one-third of the total.²⁶² Of the four other NMT trials that used commissioners, only in the *Krupp* trial did commissioners hear more witnesses.²⁶³ In the three other trials, commissioners heard between one and thirteen witnesses.²⁶⁴

By appointing commissioners, the *Farben* tribunal created a separate and parallel track of the trial that was held while the main trial was in session. This had two main effects. First, because witnesses were called to testify about specific defendants, one of the defendant’s attorneys was present at the commission, instead of at the hearings in front of the tribunal.²⁶⁵ The tribunal also allowed defendants to attend the commission.²⁶⁶ This meant some defendants and defense attorneys missed parts of the main trial. Second, the use of commissioners meant that the judges, the ultimate fact-finders, read

257. See *id.* at 14,292.

258. *Id.*

259. *Id.* at 3234–35.

260. *Id.* at 3234.

261. The tribunal first appointed John H. B. Fried, but the defense objected to his appointment. Fried had provided an affidavit for the prosecution’s case, although the tribunal had not known that when they chose him. Fried had also authored the ILO slave labor study and had been employed by the Office, Chief of Counsel for War Crimes (OCCWC). *Id.* at 3235, 3281–82; KIM PRIEMEL, *THE BETRAYAL: THE NUREMBERG TRIALS AND GERMAN DIVERGENCE* 211 n.59 (2016). The tribunal instead appointed James G. Mulroy and Johnson T. Crawford. Transcript of Record, *supra* note 1, at 4946, 11,442. Judge Crawford was a justice of the Oklahoma District Court and also sat as a judge in the *Medical* and *RuSHA* trials. See HELLER, *supra* note 14, at 83, 95.

262. See *id.* at 147. Judge Crawford heard 37 witnesses and Mr. Mulroy heard 17. See Transcript of Record, *supra* note 1, at 121–22.

263. According to Tilo Frhr. von Wilmowsky, commissioners heard twenty prosecution witnesses and 100 defense witnesses. Of the 227 witnesses heard at the *Krupp* trial, 120 testified in front of commissioners. See TILO FRHR. VON WILMOWSKY, *WARUM WURDE KRUPP VERURTEILT? LEGENDE UND JUSTIZIRRTUM* 63, 72 (1962); see also Judgment, *United States v. Krupp*, *supra* note 72, at 1327 (“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 (U.S.) establishing the procedure for these trials.”).

264. See HELLER, *supra* note 14, at 137–38.

265. See Transcript of Record, *supra* note 1, at 3247–48. Most defendants had more than one attorney, although some were associate attorneys. See Taylor, *The Nuremberg War Crimes Trials*, *supra* note 23, at 275–76.

266. See Transcript of Record, *supra* note 1, at 3247–48.

transcripts of one-third of the testimony instead of hearing it in person. In an adversarial system, cross-examination is seen as a means to find the truth. Seeing and hearing witnesses and how they respond to questions is thought to be key to ascertaining the truth,²⁶⁷ as it allows the fact-finder to evaluate both the witness' demeanor and his words. Testimony in front of commissioners therefore limited the tribunal's ability to assess this testimony fully, as the judges only had partial information, having not witnessed the testimony first-hand. These different tracks for different witnesses created a lack of uniformity within the trial, privileging some testimony over others.

4. *Cross-examination by the Prosecution*

One of the tribunal's most unconventional decisions was its ruling that limited the prosecution's cross-examination of defense witnesses to twenty percent of the time the defense used for its direct examination.²⁶⁸ Implemented to keep the trial on track, this rule was a substantial deviation from traditional cross-examination rules in an adversarial, common law system, which permit both the prosecution and the defense reasonable time to present their cases. These time limits caused the prosecution difficulties.²⁶⁹ For instance, the tribunal tried to cut the prosecution off while an important defense witness was on the stand testifying about his work at Auschwitz for I.G. Farben.²⁷⁰ Although the tribunal allowed the prosecution to finish cross-examination, it repeatedly pressured the prosecutors to move faster, even threatening to transfer the rest of the cross-examination to a commissioner.²⁷¹ The prosecution was clearly frustrated by the tribunal, arguing "that of the various witnesses that the defense has indicated will be called before the Tribunal, this present witness has the highest position and would be the one who would be likely to know most of the relevant facts with which we are concerned with here."²⁷² Arguing that this witness was especially important and that cross-examination should be allowed to go longer, the prosecution explained that other cross-examinations would be shorter, since most witnesses would not be able to answer nearly as many questions.²⁷³ The tribunal, however, was uninterested and repeated that counsel

267. See ANDREW PORWANCHER, JOHN HENRY WIGMORE AND THE RULES OF EVIDENCE: THE HIDDEN ORIGINS OF MODERN LAW 79 (2017) ("It [cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth" and "the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.") (citing JOHN HENRY WIGMORE, 2 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 1697-98 (1904)). *But see* Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727-88 (2007).

268. See Transcript of Record, *supra* note 1, at 11,420.

269. See *id.* at 11,440-42.

270. See *id.* at 11,419.

271. See *id.* at 11,421, 11,428.

272. *Id.* at 11,419.

273. See *id.*

had already agreed to stick to the time limit.²⁷⁴ The tribunal also emphasized that the prosecution was best placed to know how long it would need for a cross-examination, despite the prosecution pointing out that this time limit “might be construed as an invitation by some [witnesses] to be much more evasive than would otherwise take place.”²⁷⁵

The tribunal held that the prosecution could have longer to cross-examine the defense’s witnesses—but only if the prosecutors stated at the outset that they needed more time. The cross-examination would then be transferred to a commissioner.²⁷⁶ While the prosecution would have as much time as it desired to cross-examine a witness in front of a commissioner, the prosecution found this to be a less desirable forum. As mentioned above, the adversarial system is based on the premise that cross-examination, through seeing and listening to witnesses, brings out the truth.²⁷⁷ By pushing the prosecution either to shorten its cross-examination or to relocate to a different forum, the tribunal limited the prosecution’s ability fully to present its case to the judges.²⁷⁸ By forcing the prosecution to choose between shortening its cross-examinations or cross-examining in front of commissioners, the judges again demonstrated their focus on ensuring the trial’s speed, even when such efficiency meant compromising on gaining information relevant for the ultimate finding.

5. *Testimony by Defendants*

Testimony by defendants combined common law and civil law traditions and provided defendants with two opportunities to be heard. Following common law rules, each defendant could choose whether to testify under oath during the trial. As with other witnesses, defendants, if they chose to testify, had to do so under oath.²⁷⁹ This contrasted with the German civil law tradition, in which the defendant does not testify under oath.²⁸⁰ As had been the case at the IMT, after a defendant’s direct testimony ended, counsel for co-defendants were allowed to cross-examine the witness.²⁸¹ This meant twenty-two attorneys for the co-defendants could cross-examine each defendant who testified. Under Ordinance No. 7, defendants also had the right to “make a statement to the tribunal.”²⁸² The *Farben* tribunal, like the other

274. See *id.* at 11,420–21.

275. *Id.* at 11,421.

276. See *id.* at 11,440–42.

277. See PORWANCHER, *supra* note 267, at 79.

278. While the transcript of record does not provide direct information about how the prosecution dealt with this limitation, the prosecution’s frustration is palpable, and it appears that the prosecution limited its cross-examination to fit into the timeframe. See, e.g., Transcript of Record, *supra* note 1, at 11,440–42.

279. UNIF. R. P. 9, *supra* note 113.

280. BOHLANDER, *supra* note 144, at 7 (noting that under the German system, a defendant “is not a witness in her own cause, not an object of but a subject in the proceedings.”).

281. See Andy Logan, *Letter From Nuremberg*, NEW YORKER, Dec. 27, 1947, at 44.

282. Ordinance No. 7, *supra* note 11, at art. XI.

tribunals at the NMT, allowed defendants to make unsworn statements after closing arguments.²⁸³ This followed the civil law procedure of granting defendants a chance to speak at the end of a trial without being under oath.²⁸⁴ Fourteen of the *Farben* defendants took advantage of this rule to speak for ten minutes each.²⁸⁵

6. *Cross-Examination by Defendants*

The *Farben* tribunal also allowed three defendants to cross-examine witnesses.²⁸⁶ This was an unconventional procedural choice and a departure from IMT practice, which had denied defendants who were represented by counsel this right.²⁸⁷ However, this followed the *Medical* tribunal, which permitted defendants to question witnesses about technical issues.²⁸⁸ This was also in line with German civil law practice, which permitted defendants to cross-examine witnesses.²⁸⁹ The defense attorneys in the *Farben* case pushed for defendants to be allowed to cross-examine certain witnesses, arguing that the defense attorneys “lack[ed] the expert knowledge,” and did not “have the time to acquire the knowledge” to cross-examine effectively technical witnesses.²⁹⁰ They contended that because of the testimony’s complexity, allowing defendants to cross-examine these witnesses would be more efficient.²⁹¹ The tribunal agreed, but told the defense attorneys to make sure their clients stayed within bounds during cross-examination.²⁹² The prosecution supported allowing defendants to cross-examine witnesses, as long as the cross-examination focused solely on technical questions.²⁹³

Three *Farben* defendants cross-examined three prosecution witnesses. Early in the trial Fritz ter Meer’s defense attorney argued that “the defendant, Dr. ter Meer appears to be particularly qualified” to cross-examine the witness, “since he was the chief of the Technical Office.”²⁹⁴ The tribunal allowed ter Meer to cross-examine Brigadier General J.H. Morgan about Allied efforts after World War I to stop Germany from rebuilding its chemical field.²⁹⁵ A few weeks later the Tribunal also allowed defendants ter Meer, Heinrich Buetefisch, and Otto Ambros to cross-examine Nathaniel Elias, an American chemical engineer.²⁹⁶ The tribunal again allowed ter

283. See HELLER, *supra* note 14, at 138.

284. See VON KNIERIEM, *supra* note 18, at 121–22; Ferencz, *supra* note 18, at 87, 93.

285. See Kathleen McLaughlin, *Farben Attorney Condemns Allies: Accuses Them of Spoliation of Property in Germany as Trial Comes to End*, N.Y. TIMES, June 12, 1948, at 5.

286. See, e.g., Transcript of Record, *supra* note 1, at 750–58, 1397–99, 4100–13, 4118–28.

287. See HELLER, *supra* note 14, at 142.

288. See Transcript of Record, *supra* note 1, at 749.

289. See BOHLANDER, *supra* note 144, at 7 n.4.

290. Transcript of Record, *supra* note 1, at 748.

291. See *id.* at 1397–98.

292. See *id.* at 749.

293. See *id.* at 1397–99, 4099.

294. *Id.* at 749.

295. See *id.* at 749.

296. See *id.* at 1397–99, 1399–1412, 1418–31, 1435–41, 1456–62.

Meer to cross-examine a witness in November, when he questioned Dr. Struss, former head of the Secretariat of Farben's Technical Committee, about specific exhibits entered into evidence.²⁹⁷ The tribunal was willing to be flexible, especially if it led to an efficient process.

C. Judicial Notice

The principles of judicial notice were especially important for the NMT cases because historical events were central to the charges. Under Ordinance No. 7, tribunals could take judicial notice of "facts of common knowledge," official government documents, U.N. reports, and "records and findings of military or other tribunals of any of the United Nations."²⁹⁸ Facts of common knowledge referred to facts that are "of such notoriety, so well-known and acknowledged that no reasonable individual with relevant concern can possibly dispute them."²⁹⁹ The URPs also provided procedural rules, such as that the tribunal "may refuse to take judicial notice" of a "document, rule, or regulation unless the party proposing to ask this Tribunal to judicially notice such a document, rule, or regulation, places a copy therefore in writing before the Tribunal."³⁰⁰

The *Farben* prosecutors asked the tribunal to take judicial notice of governmental records and other documents.³⁰¹ This was an efficient way of getting facts into the record and helped to speed up the trial, as it permitted large amounts of information to be added to the record without reading long documents into evidence.³⁰² The tribunal generally took judicial notice of technical documents. For example, early in the case the prosecution asked the tribunal to take judicial notice of "an excerpt" from the United States Strategic Bombing Survey from January 1947, an official U.S. government document.³⁰³ It also asked the tribunal to take judicial notice of information from the "German statistical year book concerning statistics on the results of the Reichstag elections between 1913 and 1933, showing the political strength of the Nazi Party during the periods involved."³⁰⁴ Throughout the trial, the tribunal took judicial notice of these and many other documents.

Ordinance No. 7 also granted the NMT the authority to take judicial notice of "determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes,

297. See *id.* at 4098–4113, 4118–28; DIV. OF INVESTIGATION OF CARTELS AND EXTERNAL ASSETS, *supra* note 140, at 59.

298. Ordinance No. 7, *supra* note 11, at art. IX.

299. GAYNOR ET AL., *supra* note 12, at 1015, 1110. It does not appear that there were ever any issues in the *Farben* trial about taking judicial notice of "facts of common knowledge." HELLER, *supra* note 14, at 146.

300. UNIF. R. P. 20, *supra* note 113.

301. See, e.g., Transcript of Record, *supra* note 1, at 267–68, 305.

302. See *id.*

303. *Id.* at 267.

304. *Id.* at 268.

atrocities or inhumane acts were planned or occurred.”³⁰⁵ This was supposed to make the trials more efficient and create consistency and uniformity across trials for fact-specific issues.³⁰⁶ Because the *Farben* case was so fact-heavy, the prosecution repeatedly asked the tribunal to take judicial notice of facts and IMT findings. For instance, the *Farben* tribunal took judicial notice of issues such as the “IMT’s findings concerning the deportation and use of slave labor”³⁰⁷ and the IMT’s finding about “fact[s] . . . in connection with the political situation existing at that time.”³⁰⁸ By taking judicial notice of such facts, the tribunal moved the trial along.

V. CONCLUSION

Evidentiary standards and procedures are a central part of any trial and can impact whether a trial is viewed as legitimate. A criminal trial gains legitimacy from having procedures that are uniform and even-handed.³⁰⁹ This means the procedures protect defendants’ as well as victims’ rights, allow both sides to present their arguments, and are consistent throughout the trial as well as with other similar trials.³¹⁰ Questions of legitimacy are present in any trial, but are especially important in trials like the NMT, for which there was no established legal system to fall back on. No doubt, the judges were more concerned with the trial in front of them than with the historical importance of the NMT. Still, international criminal trials, particularly these early pioneering ones, had a responsibility to develop and make use of legitimacy-establishing procedures.

Looking back, the *Farben* judges focused too much on efficiency; they should have accepted that a trial of twenty-three defendants could take longer than planned. Of course, the pressure from Congress to finish and the political and military threat from the Soviet Union were real. Still, political exigencies do not change the fact of procedural defaults. While the trial was fair to the defendants (in fact, the evidence shows that the judges were sympathetic to the defendants), the tribunal made unorthodox decisions that decreased the trial’s legitimacy. Limiting the prosecution’s cross-examination to twenty percent of the time used for direct examination likely affected how the prosecution presented its case, and the frequent use of commissioners meant that many witnesses testified in front of judges who did not sit on

305. See Ordinance No. 7, *supra* note 11 at art. X.

306. See GAYNOR ET AL., *supra* note 12, at 1015, 1112.

307. HELLER, *supra* note 14, at 147 (citing Judgment, United States v. Krauch, *supra* note 2, at 1172).

308. Transcript of Record, *supra* note 1, at 269.

309. See, e.g., Gwynn MacCarrick, The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition from Nuremberg to East Timor) 3, (paper presented at the 19th International Conference of the International Society for the Reform of Criminal Law (June 26–30, 2005)), <https://perma.cc/MJ6U-D6PV>.

310. See Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 LEIDEN J. INT’L L. 491, 495 (2012).

the tribunal. Moreover, the NMT's grant of considerable discretion to judges led to procedural variation across trials. The *Farben* tribunal was more conscious of defendants' rights than many other tribunals and it implemented rules that better protected these rights. This may have been simply because two of the *Farben* judges valued protections for the defendants more than other judges at the NMT did. However, these judges may also have had more sympathy for the *Farben* defendants because they were businessmen, rather than SS members or members of *Einsatzgruppen*. Whatever the cause, while their decisions were noteworthy, it was unfortunate that there was such variation in standards across NMT trials.

The *Farben* tribunal's ad hoc process for creating evidentiary standards and procedures is understandable. The judges had a massive case, with twenty-three defendants charged with combinations of five crimes. They had to deal with thousands of pieces of evidence and hundreds of witnesses. Perhaps it is unrealistic to expect them to have formulated a clear vision of evidentiary standards and procedures from the beginning of the trial under these circumstances. The judges were working in a messy world, full of confusion, translation, different legal traditions, and the difficulties that accompany a war-torn continent. And it may be too much to ask them to have adjudicated the *Farben* case with an eye to the future. Nevertheless, looking back seventy years later, one wishes for a more consistent and, perhaps most important, a more clearly defensible set of procedures in one of the earliest international criminal trials.