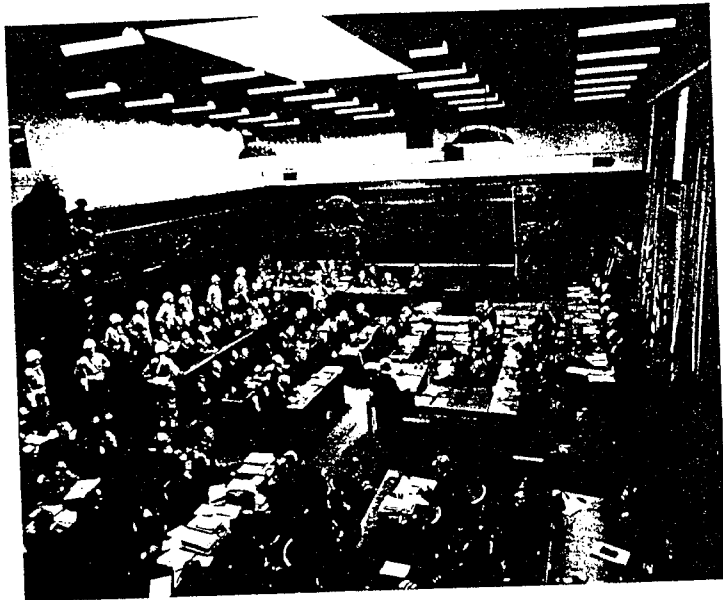


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The International Military Tribunal in session, summer 1946. *National Archives*

THE ANATOMY OF THE NUREMBERG TRIALS

A Personal Memoir

CHIEF OF THE AMERICAN
PROSECUTORS WITH JACKSON.
TELFORD TAYLOR



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in judgment.* The judgment of the Tribunal might cause new harm.
... The punishment must not be a revenge.

Lord Lawrence thanked Servatius for having "kept within the limit of time." In my opinion he had done about all he could have done for his clients.

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The Tribunal next turned to what might well be called the "Himmler Organization of Groups," comprising both civil and military groups. According to the Indictment, the charges were brought against the Schutzstaffel (Protection Squad) of the Nazi Party, which Himmler had commanded since 1929 and which included the Waffen (armed) SS, which fought with and under the command of the army, but remained administratively under Himmler, and "all other offices and departments" of the SS, including the RSHA (Reich Security Main Office), originally led by Heydrich and after his death by Kaltenbrunner. This included among its numerous departments the Sicherheitsdienst (SD, Security Service), the Sicherheitspolizei (SIPO), and the Gestapo (Secret State Police). The last-named had been in existence since 1933, several years before it was made a part of the RSHA, and for that reason was described in the Indictment separately from the other SS agencies. From 1935 until the end of the war it was headed by Heinrich Mueller, commonly called "Gestapo" Mueller.

Storey had presented the case against the Gestapo, and it certainly contained much evidence of terrible atrocities, especially in the German-occupied Eastern regions. In fact, many of the atrocities described by the prosecution involved a mingling of Gestapo, SD, and SIPO participants, and Storey's presentation did not always indicate the Gestapo's role in the crime.

There was little that the lawyer for the Gestapo, Dr. Rudolf Merkel, could do against the mass of really hellish evidence. He called as a witness Dr. Werner Best, a lawyer and civil servant who had been an administrative chief in the Gestapo from 1936 to 1940 and in 1942 had been appointed Reich Plenipotentiary in Denmark. Dr. Best tried to portray the Gestapo members as professional police for the prevention of "political crimes." But he then referred to their part in the arrest of 20,000 Jews during Kristallnacht and declared that the Gestapo members were "misused and abused" by higher authority. Cross-examining, Whitney Harris brought up other crimes, such as the surreptitious killing of prominent Danes to counteract Danish sabotage, in which the Gestapo had been directly involved. An odd

*Under Article 10 of the Charter, it was envisaged that members of an organization declared criminal by the Tribunal might be brought to trial before national or occupation courts.

feature of the cross-examination was that virtually no mention of Gestapo Mueller occurred, despite Kaltenbrunner's frantic efforts to pin many of the crimes charged against him on Mueller. If the Gestapo was in fact an "organization," presumably its Chief's crimes would be valuable in criminalizing the organization.

In his final argument, Dr. Merkel spent little time on legal arguments and had the good sense not to dispute Gestapo crimes that were proven and notorious. He had some success in showing that there were many Gestapo members who had no part in the crimes. But Merkel put major emphasis on his final pages, pointing out particular sections of the Gestapo, including office employees, telephone operators, and other such categories, whom Justice Jackson had previously proposed to exempt from the Indictment. Merkel also mentioned administrative officials and technical employees whose work had nothing to do with police activities. Merkel concluded: "I have not considered it my duty to excuse crimes and evil deeds or to whitewash those who disregarded the laws of humanity. But I desire to save those who are innocent; I desire to clear the way for a sentence which will dethrone the powers of darkness and reconstitute the moral order of the world."

The Indictment, in identifying the SS as a criminal organization, had a final clause: "including Der Sicherheitsdienst (Commonly Known as the SD)." This verbal coupling of the SD with the SS caused endless confusion, as may be seen from the fact that Storey, in presenting evidence against the Gestapo, had repeatedly linked the SD not with the SS but with the Gestapo. And other misunderstandings arose from the structure of the RSHA, which was divided into seven departments (*Amten*)* and was not part of the SS. On December 20, 1945, Storey, undertaking to present the evidence against both Gestapo and SD, had told the Tribunal that the SD had four sections, as follows: "Section A dealt with questions of legal order and structure of the Reich. B dealt with national questions, including minorities, race, and health of the people. C dealt with culture, including science, education, religion, press, folk culture, and art; and D with economics, including food, commerce, industry, labor, colonial economics, and occupied regions."

This range of activities was certainly wide, but far from bloodthirsty. Furthermore, Storey continually described events as perpetrated by "Gestapo and SD" so that one could not be sure that the SD proper—i.e., *Amts* III and VI—were involved. An affidavit by Walter Schellenberg, Chief of Amt VI, gives a good picture of the loose usage of the initials "SD" and also the small size of the "real" SD as compared to the Gestapo and the Kripo (Criminal Police):

*A department was called an *Amt*, and the seven were I and II administration, III SD, IV Gestapo, V Criminal Police, VI SD offices outside of Germany, and VII ideological research.

THE ANATOMY OF THE NUREMBERG TRIALS

The "Sipo and SD" were composed of the Gestapo, Kripo, and SD. In 1943-45 the Gestapo had a membership of about 40,000 to 50,000, the Kripo had a membership of about 15,000, and the SD had a membership of about 3,000. In common usage and even in orders and decrees the term "SD" was used as an abbreviation for the term "SIPO and SD." In most such cases actual executive action was carried out by personnel of the Gestapo rather than of the SD or the Kripo. In occupied territories members of the Gestapo frequently wore SS uniforms with SD insignia.

The upshot of Storey's presentation of the SD was that he had very little evidence of crime that was undeniably perpetrated by the SD. And later, when Dr. Hans Gawlik called his two witnesses in defense of the SD, he soon undertook to capitalize on that situation.

Gawlik turned to the prosecution's evidence and cited half a dozen criminal episodes where better-informed individuals—Jodl, Kaltenbrunner—had corrected Keitel and others by pointing out that the SD had no executive power and that the executions in question had been performed by the Gestapo.* Gawlik further explained that in German-occupied areas, "All members of the RSHA, including . . . even those who were not members of the SS . . . wore the SS uniform with SD insignia" on the sleeve, and "measures carried out by the Security Police were considered to be SD measures."

As for the Einsatzgruppen, Gawlik referred to an SS officer, Brigade Fuehrer Franz Stahlecker, who was Chief of Einsatzgruppe A and whose report on the actions of his command up to October 1941 included a breakdown showing the affiliations of the 990 members of the Einsatzgruppen. The SD numbered 35 men comprising 3.5 percent of the whole, compared to 340 Waffen-SS, 133 Order Police, 89 Gestapo, and 41 Kripo. The remainder were motorcycle riders, interpreters, and other supporting staff.

Gawlik reminded the Tribunal of evidence that Himmler had ordered the creation of the Einsatzgruppen with the agreement of the German Army High Command. Accordingly, Gawlik concluded, the SD Amt III as an entity was not involved in the activities of the Einsatzgruppen. Lawrence had had enough and intervened sharply:

L.: Dr. Gawlik, the Tribunal understands that the SS, the Gestapo, and the SD all disclaim responsibility for the Einsatzgruppen. Could you tell the Tribunal who is responsible for the Einsatzgruppen?

G.: The Einsatzgruppen were subordinated to—the responsibility may be seen from my statement on Page 61. I should like to refer you to the testimony of Dr. Best, Schellenberg, Ohlendorf, and to the document. . . .

*I must confess that I was not among the well-informed on this subject when I presented the case against the General Staff in early January, and I used Storey's statement that the Einsatzgruppen were formed by "the SIPO and SD."

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L.: Dr. Gawlik, the Tribunal would like to know who you say was responsible for the Einsatzgruppen. They do not want to be referred to a crowd of documents and a crowd of witnesses. They want to know what your contention is.

G.: The Einsatzgruppen, in my opinion, were organizations of a special kind which were directly under Himmler, and for the rest, the testimony of the witnesses diverges as to how far they were subordinate to the [army] commanders-in-chief.

Dr. Gawlik had missed his chance. Instead of puttering around, he should have at once answered, as he surely knew, that Himmler and Heydrich* were the responsible parties. Of course, they could not have proceeded without the acquiescence and cooperation of the Germany Army. Gawlik's assertion that Ohlendorf and the other SD members who joined the Einsatzgruppen did not go in their capacity as members of Amts III or VI appears to be solid, but of course they were liable as individuals for their participation in the Einsatzgruppen's atrocities.

Taking the SD in the strict sense of the members of Amts III and VI, it does not appear to me that the prosecution's evidence was sufficient to support a declaration of organizational criminality. But the presence of Ohlendorf as Chief, the presence of SD members among the Einsatzgruppen, the proximity of Amt III to Amt IV, and the general confusion in which the SD was bracketed with the police were too much for Gawlik's arguments. Perhaps he pushed the Tribunal too hard; Dr. von der Lippe recorded his opinion that Gawlik had overplayed his hand. However, Gawlik closed his speech with a careful assemblage of various occupations and situations of SD employees who should be excluded from the organizational accusation. Such a solution might help to satisfy Gawlik's closing plea that "the number of persons affected by this decision ought to be strictly limited."

The SS comprised virtually all the rest of Himmler's empire.† It had many mansions, of which the two largest were the Allgemeine (General) SS, the first and only embodiment of the SS until 1939, and the Waffen-SS, the fighting arm of the SS, so named in 1940. There were some ten other branches, of which the more important included the RSHA and the SS Economic and Administrative Main Office (WVHA), which, among other activities, administered the concentration camps.

In December 1945 Major Warren Farr had delivered a well-organized and forceful presentation of the prosecution's evidence against the SS, covering the concentration camps, persecution and extermination of the

*It is altogether probable that Hitler had approved the Einsatzgruppen project, but I know of no evidence on that question.

†In July 1944 Himmler succeeded General Fritz Fromm (shot because of his implication in the abortive effort to kill Hitler) as Commander of the Home Army, and in February 1945 he was made Commander in Chief of Army Group Vistula on the Eastern Front.

Jews, and involvement in preparations for aggressive war. This had taken less than a full day's session. But when, seven months later, Horst Pelckmann presented his defense of the SS against the charge that it was a criminal organization, the issues and evidence were so numerous and varied that more than five full days' sessions were required to complete the oral evidence, much to the Tribunal's annoyance.

Pelckmann's first witness was a nobleman, Friedrich Karl Freiherr von Eberstein, appearing in behalf of the General SS. Farr had described this organization as "the backbone" of the SS, but this was true only until the outbreak of war in 1939. The chief responsibilities of these early SS men were to escort and protect officials and guests at Nazi public meetings. The members were otherwise employed, and their part-time SS duties were unpaid. After the Nazi seizure of power, and particularly in 1934 after the downfall of Roehm and the SA leaders, the General SS grew rapidly, and by 1939 it had reached a strength of 240,000 men. But when war came in 1939, virtually all the able-bodied members went into military service or other war work. Eberstein testified that "The General SS had practically ceased to exist during the war."

During its years of strength, Farr had charged, the General SS had participated in anti-Jewish actions during Kristallnacht, an accusation which Eberstein rejected. Whatever the truth of the matter, Kristallnacht was not a war crime, and Eberstein acknowledged no such crimes committed by the General SS.

In 1934 Eberstein became Police Chief in Munich and later was appointed Higher SS and Police Leader in that area. Cross-examining him, Elwyn Jones asked him questions about conditions in the Dachau concentration camp near Munich, about the actions of Oswald Pohl and other SS potentates to appropriate the properties of murdered Polish Jews, and about the use of concentration-camp inmates for atrocious medical experiments. Jones used newly available captured documents to lay the basis for his questions, most of which Eberstein declared himself unable to answer.

Elwyn Jones thus accumulated damning criminal evidence against various unscrupulous and murderous SS individuals. However, none of these documents, or Eberstein's answers to these questions, related to the General SS. So as regards the General SS, the prosecution produced no evidence to support a finding of organizational criminality.

Pelckmann next turned his attention to the Waffen-SS, a fighting force which by the end of the war comprised some thirty-five divisions and approximately 550,000 men. It embodied from two-thirds to three-quarters of all members of the SS. Rightly or wrongly, the Waffen-SS acquired the reputation of spreading terror, not only among enemy troops but also among civilians. It was, surely, the horror spread by these half a million soldiers which moved Colonel Bernays to propose criminalization of the Nazi organizations, among which the Waffen-SS was the prime target.

The lawyers at Nuremberg were in general agreement that Article 9 of the Charter should not be applied to an organization unless most of its members had joined voluntarily. The prosecution had been proceeding on the basis that this was true of the Waffen-SS, although it was known that toward the end of the war some recruits had been forced to join. Pelckmann's second witness, Robert Brill, was a junior Waffen-SS officer whose task it had been to register the source and flow of recruits. Based on records, Brill now showed that drafting for the Waffen-SS had been going on since its very beginnings, when its first 100,000 included 36,000 who had been drafted into the police and then combined with 64,000 Waffen-SS volunteers. Drafting continued during the following years. During the war 320,000 casualties were suffered, the majority of whom were volunteers, and by the end of the war the Waffen-SS draftees somewhat outnumbered the surviving volunteers.

Pelckmann's principal Waffen-SS witness was Paul Hausser (incorrectly spelled "Hauser" in the trial record), who, as an army general, had retired in 1932 and two years later joined the SS to train its military units. By the end of the war he was a *Generaloberst*, commanding an Army Group. Hausser interestingly described the background and development of the Waffen-SS but, despite his high rank and experience, contributed little on war crimes issues. He stated that his troops were "instructed on the rules of the . . . Hague Rules of Land Warfare" and insisted that the Waffen-SS, under the operational command of the army as it was, complied with the regular rules of warfare. But Hausser completely ignored the fact that Himmler retained control of all administrative, financial, and legal matters concerning the Waffen-SS and that the army commanders had no authority to try SS members for serious offenses.

Cross-examining Hausser, Jones confronted him with numerous documents describing SS atrocities in Poland, Yugoslavia, and the Soviet Union. These were strong evidence against the SS, but Hausser was quick to point out that with two exceptions (one of which was the notorious Prinz Eugen Division, operating in Yugoslavia) the troops in question were not of the Waffen-SS. Later Jones drew attention to the infamous atrocity at Oradour-sur-Glane in southern France, where troops of the Waffen-SS Das Reich division (which Hausser had formerly commanded) drove several hundred women and children into the town church and burned them alive. Jones could have made his point even sharper had he brought out that all the major military atrocities in Western Europe were committed by Waffen-SS—for further example, the Malmédy massacre of American troops in Belgium and the shooting of sixty-four British and American troops by the Waffen-SS Hitlerjugend Division.*

Pelckmann's last two witnesses were lawyers; Gunther Reinecke had

*This was the atrocity that so angered General Eisenhower. See p. 110.

been the Chief Judge of the Supreme SS and Police Courts, and George Konrad Morgen had been drafted into the SS and became a criminal investigator detailed to the Kripo. The witnesses sought to put all the blame on a few SS leaders—especially Oswald Pohl, Gestapo Mueller, Dr. Ernst Grawitz, and Himmler himself—who selected men like Hoess and Karl Koch (of Buchenwald) as concentration-camp chiefs.

Reinicke and Morgen, in their legal and investigative capacities, testified that they both had endeavored to expose the villains and bring them to trial. At first they believed that Himmler would support them, and Koch was tried, convicted, and hanged, but in mid-1944 Himmler moved to render their efforts ineffective.

To establish that Waffen-SS men were not separated from but were engaged in all the other SS agencies, Jones, cross-examining Reinecke, produced a German report entitled "Total Strength of the SS on June 30, 1944." That strength was stated at 794,941 persons and the Waffen-SS at 594,443, of whom 368,654 were members of the combat divisions; most of the others were occupied in training, recruiting, and other combat-supportive activities. However, 39,415 Waffen-SS were engaged in other SS occupations, including 24,091 of the WVHA guarding concentration camps. The remainder were at the SS main office and lesser SS enterprises.

Jones seized on these tabulations as proof that the Waffen-SS was linked with and part of the entire SS establishment. Reinicke, however, retorted that these were only "nominal SS," who were labeled "Waffen-SS" but performed nonmilitary duties and had nothing to do with the Waffen-SS troops. To this Jones answered: "All these men were carried on the strength of the SS; they were members of the Waffen-SS; they wore Waffen-SS uniforms, and they were paid by the Waffen-SS." Reinecke replied that the 24,000 "Waffen-SS" at the WVHA were nothing but camp guards having nothing to do with the Waffen-SS. Elwyn declared that the "document speaks for itself" and ended his cross-examination of Reinicke. After Morgen's brief testimony, Pelckmann had completed his case.

Thereafter Elwyn Jones cross-examined Wolfram Sievers, who had testified in support of the SS. Sievers was Reich Manager of the Ahnenerbe (Ancestral Heritage Society), a small and little-known branch of the SS engaged in scientific research of various types. Before the commission, Sievers had mentioned the close relation between Himmler and Dr. Sigmund Rascher, known to have used concentration-camp inmates for painful and often lethal medical experiments. Sievers had claimed to know nothing of the details, but immediately after his testimony Alexander Hardy, a young Boston lawyer who had joined my staff for the subsequent trials and was collecting evidence for a trial of Nazi doctors, came to Jones's office with a file of documents on Sievers that had been sent to Nuremberg from the Berlin Document Center. After reading them, Elwyn

successfully applied for permission to cross-examine Sievers before the Tribunal.

The Sievers file proved revolting beyond all imagining. It began with a letter from Sievers to Himmler's personal assistant, Rudolf Brandt, enclosing a report, dated February 9, 1942, by Dr. August Hirt, of the Reich University of Strasbourg,* as follows:

Subject: Securing of skulls of Jewish-Bolshevik commissars for the purpose of scientific research. . . .

We have large collections of skulls of almost all races and peoples at our disposal. Of the Jewish race, however, only very few specimens of skulls are available, with the result that it is impossible to arrive at precise conclusions from examination. The war in the East now presents us with the opportunity to overcome this deficiency. By procuring the skulls of the Jewish-Bolshevik commissars, who represent the prototype of the repulsive, but characteristic, subhuman, we have the chance to obtain scientific material.

The best practical method for obtaining and collecting this skull material could be followed by directing the Wehrmacht to turn over alive all captured Jewish-Bolshevik commissars to the Feldpolizei. The Feldpolizei, in turn, would be given special directives to inform a certain office at regular intervals of the numbers and places of detention of these captured Jews, and to give them close attention and care until a special delegate arrives. This special delegate, who will be in charge of securing the material . . . will be required to take a previously stipulated series of photographs, make anthropological measurements, and, in addition, determine as far as possible descent, date of birth, and other personal data.

Following the subsequently induced death of the Jew, whose head should not be damaged, the physician will sever the head from the body and will forward it to the proper point of destination in a hermetically sealed tin can especially made for this purpose and filled with a conserving fluid. Having arrived at the laboratory, the comparison tests and anatomical research on the skull, as well as determination of the race membership and of pathological features of the skull form, the form and size of the brain, *et cetera*, can be undertaken by photos, measurements, and other data supplied on the head and the skull itself.

According to the report, there were 150 victims of this process. Further "research" at Strasbourg called for the assemblage of the dead bodies of 109 Jewesses. In September 1944, as the Allied armies were approaching Strasbourg, there was much discussion about what to do with Dr. Hirt's "Collection of Jewish Skeletons." Writing to Rudolf Brandt, Sievers explained:

*At that time, Alsace had been virtually annexed by Germany.

The corpses can be stripped of the flesh and thereby rendered unidentifiable. This, however, would mean that at least part of the whole work had been done for nothing and that this unique collection would be lost to science, since it would be impossible to make plaster casts afterward. The skeleton collection as such is inconspicuous. The flesh parts could be declared as having been left by the French at the time we took over the Anatomical Institute and would be turned over for cremating. Please advise me which of the following three proposals is to be carried out: (1) The collection as a whole to be preserved; (2) The collection to be dissolved in part; (3) The collection to be completely dissolved.

Elwyn Jones clinched the legal relevance of these appalling documents by reading Himmler's certification that the "*Ahnenerbestiftung* are parts of my personal staff and thus departments of the SS."

Pelckmann's closing argument was not a success. It is true that he had met the hardest task of all the lawyers dealing with the organization cases, for the size and spread of the SS and its activities were enormous. This feature might well have justified giving him more time than the half day to which Lawrence was limiting everyone. But no exception was made for Pelckmann, and he did his own cause no good by speaking in generalities during the first part of his speech, after which Lawrence rode herd on him mercilessly.

But perhaps more time would not have helped Pelckmann. He was dealing with over 700,000 members of the SS. The evidence clearly showed that many thousands of them had known of and been involved in war crimes, some of appalling evil. But could one say the same of hundreds of thousands? Pelckmann and his witnesses had raised the issue, and, in his way, he stated it in his conclusion:

I indict every one of the murderers and criminals who belonged to that organization or one of its units—and there are more than a few of them.

I acquit the thousands and hundreds of thousands of those who served in good faith, and who therefore share only morally and metaphorically, not criminally, the guilt which the German people must bitterly bear.

But I warn the world and its judges against the commitment of mass injustice in legal form, against the creation of a mass of condemned and outlawed individuals in the heart of Europe; I warn so that the longing of all peoples and men may be fulfilled.

On August 9, 1946, Dr. Hans Laternser began his defense of the General Staff and High Command of the German Armed Forces, described in the Indictment as "Functioning . . . in association as a group at a highest level in the German Armed Forces Organization" in violation of all four counts in the Indictment.

My own attitude toward the effort to bring this "group" within the ambit of Article 9 of the Charter had changed since I had stated the prosecution's case early in January. Up to that time, despite my doubts about the sufficiency of the "group's" definition and the legal validity of Article 9, I had proceeded on the basis that there was merit in Bernays's concern about the great multitude of probable war criminals, and my superiors had chosen this way of dealing with the problem—an attitude supported by the great volume of documentary material revealing much criminal activity by Germany's military leaders.

As previously described, for me the whole picture had been changed when General Clay launched the Denazification Program, under which the vast majority of Nazi organization members would be dealt with in German administrative proceedings or courts. Even more immediately important, it had become clear that the purpose Bernays had had in mind did not apply to the German Staff-High Command case (or the Reich Cabinet as well), which numbered only some 135 members who could best be dealt with in regular court proceedings. For enforcement of international penal law against the German military leaders the "organizational" procedure was quite unnecessary.

It now appeared to me, however, that Jackson wished (although he never said this to me) to fix the stigma of criminality on the German military leadership as a whole by the Tribunal's declaration. I had no right to abandon the course that Jackson had assigned me to take, and, furthermore, to drop the project would be regarded by many as a whitewash of the German leaders, which, in my view, they ill deserved. It was up to me to carry on, although I was by no means sanguine that the Tribunal would find that the General Staff as defined in the Indictment was a "group" within the meaning of Article 9 of the Charter.* To me, the most important objective was to ensure that the result did not appear to be an exoneration of German military leadership.

*Although I did not read the records of the Tribunal's meetings until many years later, I was not surprised to find that at the meeting of May 14, 1946, "The President [Lawrence] asked the members of the Tribunal to give thought to the question of the trying of the High Command, i.e., is there or is there not a case against it."