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ACCIDENTAL JUSTICE: THE TRIAL OF OTTO OHLENDORF AND THE
EINSATZGRUPPEN LEADERS IN THE AMERICAN ZONE OF OCCUPATION,
GERMANY, 1945-1958

By

Hilary Camille Earl

A Thesis submitted in conformity with the requirements
for the Degree of Doctor of Philosophy,
Graduate Department of History,
University of Toronto

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ABSTRACT
ACCIDENTAL JUSTICE: THE TRIAL OF OTTO OHLENDORF AND THE
***EINSATZGRUPPEN* LEADERS IN THE AMERICAN ZONE OF OCCUPATION,**
GERMANY, 1945-1958
Doctor of Philosophy, 2002
Hilary Camille Earl
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This dissertation concerns the trial of twenty-four SS-*Einsatzgruppen* leaders in Nuremberg, Germany in 1947-1948. The dissertation is organized chronologically in nine chapters and analyses the origins, judicial procedure, judgment and aftermath of the *Einsatzgruppen* trial. It seeks to understand the trial through those who planned and participated in it by analysing the personalities and motivations of some of the major perpetrators of the Nazi Holocaust, and those who brought them to justice. It also offers insight into political and social issues such as American understanding of the Third Reich, and their policy toward Germany after the war. The dissertation is based on the materials and transcript of the trial, extensive archival research in Germany and the United States, and the personal papers of several of the major participants.

Following the introduction, Chapters 2 and 3 of the dissertation describe the process by which the Americans came to hold distinct zonal trials subsequent to the International Military Tribunal. The dissertation argues that the American decision to hold zonal trials independent of their allies was the result of their negative experiences during quadripartite prosecution at the IMT, whereas their decision to prosecute leaders of the *Einsatzgruppen* was accidental. Initially the Americans had planned to prosecute a variety of SS leaders, but because investigators accidentally located and analysed a copy of the Operational Situation Reports of the *Einsatzgruppen*, and Ohlendorf confessed to the crime of mass-murder, they

decided to transform a general trial of the SS leadership into one dealing specifically with *Einsatzgruppen* personnel. Chapters 4 and 5 provide an analysis of the background, personalities, and behaviour of the *Einsatzgruppen* leadership, concluding that the defendants constituted a homogenous group, sharing common attributes such as age and education, but that not all were motivated to commit murder for ideological reasons. Chapters 6, 7 and 8 analyse the trial, the role of the judge and the judgment. The dissertation contends that individuals such as Ohlendorf and Michael Musmanno, the presiding judge, significantly influenced the course and outcome of the trial. The dissertation concludes with an overview of the aftermath of the trial, and argues that political considerations had a significant impact on the fate of these defendants.

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ABBREVIATIONS

BA	Bundesarchiv
BA-MA	Bundesarchiv-Militärarchiv
BDC	Berlin Document Center
CCPAC	Chief of Counsel for the Prosecution of Axis Criminality
CIC	Central Intelligence Corps
Gestapo	Geheimstatpolizei
HICOG	The Office of the American High Commissioner for Germany
IMT	International Military Tribunal
JAG	Judge Advocate General
JCS	Joint Chiefs of Staff
Kripo	Kriminalpolizei
LKA	Landeskirchlichesarchiv
MMP	Michael Musmanno Papers
NARA	National Archives and Records Administration
NO	Nazi Organizations
OCCPAC	Office of the Chief of Counsel for the Prosecution of Axis Criminality
OCCWC	Office of the Chief of Counsel for War Crimes
OKW	Oberkommando der Wehrmacht
OMGUS	The Office of the Military Government, United States
Orpo	Ordnungspolizei
RSHA	Reichssicherheitshauptamt
RuSHA	Rasse- und Siedlungshauptamt
SD	Sicherheitsdienst
SEA	Staff Evidence Analysis
Sipo	Sicherheitspolizei
USA-WWII	United States Army in World War II
USHMM	United States Holocaust Memorial Museum
USOH	United States Occupation Headquarters
WCB	War Crimes Branch
WCR	War Crimes Records

***EINSATZGRUPPEN AND KOMMANDO LEADERS INDICTED BY THE OCCWC,
1947***

Name	Rank	Position of Responsibility
Otto Ohlendorf	SS Brigadeführer	Commander of Einsatzgruppe D
Heinz Jost	SS Brigadeführer	Commander of Einsatzgruppe A
Erich Naumann	SS Brigadeführer	Commander of Einsatzgruppe B
Otto Rasch	SS Brigadeführer	Commander of Einsatzgruppe C
Erwin Schulz	SS Brigadeführer	Commander of Einsatzkommando 5
Franz Six	SS Brigadeführer	Commander of Vorkommando Moscow
Paul Blobel	SS Standartenführer	Commander of Sonderkommando 4a
Walter Blume	SS Standartenführer	Commander of Sonderkommando 7a
Martin Sandberger	SS Standartenführer	Commander of Sonderkommando 1a
Willy Seibert	SS Standartenführer	Deputy Chief of Einsatzgruppe D
Eugen Steimle	SS Standartenführer	Commander of Sonderkommando 7a and 4a
Ernst Biberstein	SS Standartenführer	Commander of Einsatzkommando 6
Werner Braune	SS Obersturmbannführer	Commander of Einsatzkommando 11b
Walter Haensch	SS Obersturmbannführer	Commander of Sonderkommando 4b
Gustav Nosske	SS Obersturmbannführer	Commander of Einsatzkommando 12
Adolf Ott	SS Obersturmbannführer	Commander of Einsatzkommando 7b
Eduard Strauch	SS Obersturmbannführer	Commander of Einsatzkommando 2
Emil Hausmann	SS Sturmbannführer	Officer of Einsatzkommando 12
Waldemar Klingelhöfer	SS Sturmbannführer	Officer of Sonderkommando 7b and Commander of Vorkommando Moscow
Waldemar von Radetzky	SS Sturmbannführer	Deputy Chief of Sonderkommando 4a
Lothar Fendler	SS Sturmbannführer	Deputy Chief of Sonderkommando 4b
Felix Rühl	SS Hauptsturmführer	Officer of Sonderkommando 10b
Mathias Graf	Untersturmführer	Officer of Einsatzkommando 6

COMPARABLE RANKS OF THE EINSATZGRUPPEN LEADERS

Obergruppenführer	General
Gruppenführer	Lieutenant-General
Brigadeführer	Major-General
Oberführer	Brigadier-General
Standartenführer	Colonel
Obersturmbannführer	Lieutenant-Colonel
Sturmbannführer	Major
Hauptsturmführer	Captain
Obersturmführer	First-Lieutenant
Untersturmführer	Second-Lieutenant

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Chapter 1

Introduction

1. Historical Background and Approach

When one hears the word "Nuremberg" what usually comes to mind is the trial, before the International Military Tribunal (IMT), of twenty-two major Nazi war criminals, including such notorious figures as Hermann Göring and Albert Speer.¹ Albeit the most well-known, this was but the first of thirteen "Nuremberg" trials of major Nazi war criminals held between 1945 and 1949 in the American zone of occupation of Germany. Following the first and only internationally prosecuted Nuremberg trial, the Americans, British, French and

¹ Some of the most important works on the subject include: Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York, 1946); Whitney Harris, *Tyranny on Trial: The Evidence at Nuremberg* (New York, 1954); Wilbourn E. Benton and Georg Grimm (eds.), *German Views of the War Crimes Trials* (Dallas, 1955); Joe Heydecker and Johannes Leeb, *Der Nürnberger Prozeß* (Cologne, 1958); Robert K. Woetzel, *The Nuremberg Trials in International Law* (New York, 1962); Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg* (New York, 1966); Robert Kempner, *Das Dritte Reich im Kreuzverhör. Aus den unveröffentlichten Vernehmungsprotokollen des Anklägers Robert M.W. Kempner* (Munich, 1969); William J. Bosch, *Judgment on Nuremberg* (Chapel Hill, 1970); Werner Maser, *Nuremberg: A Nation on Trial* (New York, 1977); Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York, 1977); Tom Bower, *Blind Eye to Murder: Britain, America, and the Purging of Nazi Germany – A Pledge Betrayed* (London, 1981); Robert Conot, *Justice at Nuremberg* (New York, 1983); Ann Tusa and John Tusa, *The Nuremberg Trial* (London, 1983); George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht, 1990); Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston, 1992); Ray D'Addario and Klaus Kastner, *Der Nürnberger Prozeß. Das Verfahren gegen die Hauptkriegsverbrecher 1945-1946* (Nuremberg, 1994); Michael R. Marrus (ed.), *The Nuremberg War Crimes Trial 1945-46. A Documentary History* (New York, 1997); and Arie J. Kochavi, *Prelude to Nuremberg. Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, 1998).

Soviets all held further trials of war criminals in their respective zones of occupation.² The subject of this dissertation is one of those proceedings by the Americans: the trial of Otto Ohlendorf and the *Einsatzgruppen* leaders, officially titled, "The United States of America v. Otto Ohlendorf et al.," but more commonly known as the *Einsatzgruppen* case.³ This trial and eleven others were conducted in civilian courts by the United States government in the

² The first war crimes trial was held in 1943 in the Soviet Union, the so-called Krasnodar trial of thirteen Nazi collaborators. Both the French and Soviets took full advantage of the laws created to try war criminals. The French for example tried over two thousand war criminals in their zone, whereas the British opted to try war criminals by Royal Warrant.

War crimes trials were also held in virtually every European country, scholarship on postwar war crimes trials includes, E. Levai, "The War Crimes Trials relating to Hungary," *Hungarian Jewish Studies* 2 (1969), 252-296 and *idem*, "The War Crimes Trials relating to Hungary: A Follow-up," *Hungarian Jewish Studies* 3 (1973), 251-290; H.L. Mason, *The Purge of Dutch Quislings: Emergency Justice in the Netherlands* (The Hague, 1952); Central Committee for the Investigation of German Crimes in Poland, *German Crimes in Poland* (Warsaw, 1947); Marian Muszkat, *Polish Charges against War Criminals* (Warsaw, 1948); Sir Thomas Hetherington and William Chalmers, *War Crimes: Report of the War Crimes Inquiry* (London, June 1989); Priscilla Dale Jones, "British Policy towards German Crimes against German Jews, 1939-1945," *Leo Baeck Institute Yearbook* 36 (1991), 339-366; Donald Bloxham, "Punishing German Soldiers during the Cold War: The Case of Erich von Manstein," *Patterns of Prejudice* 4:33 (1999), 25-45 and *idem*, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford, 2001); Gerhard Schreiber, *Deutsche Kriegsverbrechen in Italien* (Munich, 1996); Peter Maguire, *Law and War. An American Story* (New York, 2000); and Alice Kaplan, *The Trial and Execution of Robert Brasillach* (Chicago, 2000).

³ The trial was referred to as the "Ohlendorf case" because Ohlendorf was the primary defendant. The entire trial transcript is available from the National Archives Records and Administration Microfilm Publications M895, *The United States of America v. Otto Ohlendorf et al.*, 38 rolls (from here forward simply *Trial*, roll, page or frame). An abridged version of the trial is published under *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4 (Washington, 1951). Also published by NARA is a comprehensive finding aid to the trial, referred to as "Special List No. 42," John Mendelsohn (ed.), *Nuernberg. War Crimes Trials Records of Case 9: United States of America v. Otto Ohlendorf et al.* (Washington, 1978).

American occupation zone of Germany between October 1946 and April 1949.⁴ These trials were part of the American plan to punish members of the Nazi hierarchy and educate Germans about the criminal and inhumane behaviour of their leadership, as well as to assist in the denazification and democratization of Germany.⁵ The American trials were held after the major German war criminals had been tried before the International Military Tribunal at Nuremberg and hence became known as the "Subsequent Nuremberg Proceedings" or the *Nachfolgeprozessen*.⁶

In the Subsequent Proceedings, the American Military Government for Germany (OMGUS) used legal precedents set during the IMT proceedings to try Nazi war criminals. Under these laws the Americans indicted 185 individuals in twelve separate cases. Four of the defendants committed suicide before they could be tried and an additional four were judged too sick to stand trial. Thus only 177 individuals were brought to justice. Of these, thirty-five defendants were acquitted, twenty-four were sentenced to death, and twenty were sentenced to life in prison, while the majority, ninety-eight, were sentenced to prison terms ranging from eighteen months to twenty years. The average sentence for those convicted was

⁴ For a full history of the twelve Subsequent Nuremberg Proceedings and their organization, see the American Chief of Counsel, Telford Taylor, *Final Report of the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10* (Washington, 1949).

⁵ By identifying and punishing former members of the Nazi Party, the Americans hoped to remove all vestiges of Nazism from postwar Germany and rebuild the country along democratic lines.

⁶ In addition to being called the Subsequent Nuremberg Proceedings, these trials are also referred to as the Subsequent Nuremberg Trials or simply the Subsequent Trials or Proceedings. All of these various forms are used throughout.

ten years.⁷

Each of the twelve Subsequent Proceedings represented a particular aspect of the Nazi machinery of destruction.⁸ These included Nazi doctors who had conducted medical experiments on the inmates of death and concentration camps and who had participated in the murder of the mentally ill in the euthanasia program (Case 1); those who had been involved in the slave labour program such as Field Marshal Erhard Milch (Case 2); leading judicial figures from Nazi Germany (Case 3); those involved in the administration of the concentration camp system, such as *Waffen* SS General Oswald Pohl (Case 4); representatives of three of the major industrial combines – Flick, IG Farben, and Krupp – whose companies had helped advance the war through the criminal utilization of slave labour (Cases 5, 6 and 10); representatives of the *Wehrmacht* involved in the murder of civilians (Case 7); representatives of the *Rasse- und Siedlungshauptamt* or Race and Resettlement Main Office (RuSHA) who had been involved in the deportation and murder of Jews from Poland and Western Europe, including Ulrich Greifelt (Case 8); the leaders of the *Einsatzgruppen* responsible for the genocidal murder of Soviet Jewry (Case 9); a catch-all trial of government officials involved in the design and implementation of the racial laws, the “aryanization” of Jewish agriculture, the confiscation of Jewish property, and the deportation of Jews, including former State Secretary Ernst von Weizsäcker, SS General

⁷ Taylor, *Final Report*, 90-93.

⁸ *Ibid.*, 106-161, Taylor identifies five main groups: (1) thirty-nine professional men (doctors and lawyers) tried in Cases 1 and 3; (2) fifty-six SS and policemen tried in Cases 4, 8 and 9; (3) forty-two industrialists and financiers tried in Cases 5, 6 and 10; (4) twenty-six military leaders tried in Cases 7 and 12; (5) twenty-two government ministers tried in Cases 2 and 11

Walter Schellenberg, and Chief of the Reich Chancellery Hans Lammers (Case 11); and finally leaders and officers of the German High Command who were tried for violations of the military laws of war as well as crimes committed on the eastern front, especially with regard to the support they gave the units of the *Einsatzgruppen* (Case 12).⁹ Fewer than two hundred individuals were tried in these twelve trials, but because of their scope, the Subsequent Nuremberg Proceedings remain, as one historian has noted, “the single most concerted prosecution effort” against Nazi criminals in the postwar period.¹⁰

The trials of Nazi officials such as Otto Ohlendorf generated a great deal of controversy at the time, especially between 1949 and 1951 – a period when German opposition to the prosecution and execution of war criminals was most pronounced – but have received surprisingly little attention from scholars since.¹¹ It is this gap in the literature

⁹ The twelve Subsequent Nuremberg Trials, in order of prosecution, include the trial of Nazi doctors (1); the Milch trial (2); the Justice case (3); the Pohl trial (4); the Flick trial (5); the IG Farben trial (6); the Hostages case (7); the RuSHA case (8); the *Einsatzgruppen* trial (9); the Krupp case (10); the Ministries case (11) and finally the trial of the German High Command (12). The complete transcripts of all the Subsequent Proceedings are available on microfilm Record Group (RG) 238, from the National Archives of the United States. The proceedings of all twelve Subsequent Trials are published in abridged form as *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, 15 vols. (Washington, 1951), sometimes referred to as “the green series.” For a summary of the twelve Subsequent Trials see Telford Taylor, “The Nuremberg War Crimes Trials,” in *idem*, *Final Report*, 162-217.

¹⁰ Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany. The ‘Euthanasia’ and ‘Aktion Reinhard’ Trial Cases* (The Hague, 1996), 19.

¹¹ In contrast to the IMT trial, very little has been written about the Subsequent Proceedings generally or the *Einsatzgruppen* trial in particular. For an overview of the history of the postwar trials see Raul Hilberg, *The Destruction of the European Jews*, vol.3 (New York, 1985), 1060-1109. For a discussion of the origins of the Nuremberg “Doctor’s Trial,” see Jürgen Peter, *Der Nürnberger Ärzteprozess* (Münster, 1994) and Paul Weindling, “From International to Zonal Trials: The Origins of the Nuremberg Medical Trial,”

of post World War II war crimes trials that this dissertation aims to fill. It analyses the origins, proceedings, judgment, and aftermath of the *Einsatzgruppen* trial in the context of American denazification policy and the postwar international political climate. Because the history of the *Einsatzgruppen* trial has not been told, this inquiry constitutes a significant

Holocaust and Genocide Studies 3:14 (Winter, 2000), 367-389. Other sources that deal with some aspects of the Subsequent Proceedings include Adalbert Rückerl, *NS-Verbrechen vor Gericht: Versuch einer Vergangenheitsbewältigung* (Heidelberg, 1982); *idem*, *The Investigation of Nazi Crimes 1945-1978. A Documentation* (Heidelberg, 1979); Jörg Friedrich, *Die Kalte Amnestie: NS-Täter in der Bundesrepublik* (Frankfurt, 1984); Helge Grabitz, *NS-Prozesse: Psychogramme der Beteiligten* (Heidelberg, 1985); Frank Buscher, *The United States War Crimes Trial Program in Germany, 1946-1955* (New York, 1989); Ernst Klee, *Persilscheine und falsche Pässe. Wie die Kirchen den Nazis halfen* (Frankfurt, 1991); Peter Maguire, "Nuremberg: A Cold War Conflict of Interest," unpublished PhD dissertation, Columbia University, 1995 and *idem*, *Law and War* (2000); Thomas A. Schwartz, "John J. McCloy and the Landsberg Cases," in *American Policy and the Reconstruction of West Germany, 1945-1955* (Washington, 1995), 433-454; Michael R. Marrus, "The Nuremberg Doctors' Trial in Historical Context," *History and Medicine* 73 (1999), 107-123; Gerd R. Überschär (ed.), *Der Nationalsozialismus vor Gericht: die alliierten Prozesse gegen Kriegsverbrecher und Soldaten* (Frankfurt, 1999); Bloxham, "Punishing German Soldiers during the Cold War," 25-45 and *idem*, *Genocide on Trial* (2001); and, Helmut Kramer, "Kriegsverbrechen, deutsche Justiz und das Verjährungsproblem - Amnestie durch die legislative Hintertür," in Wolfram Wette and Gerd R. Ueberschär (eds.), *Kriegsverbrechen im 20. Jahrhundert* (Darmstadt, 2001), 493-506.

Other scholars have looked at the trials in quite a general way; that is, as part of the American plan to denazify Germany, or peripherally as Jean Smith has in his political biography of Lucius Clay, Military Governor of the American zone of occupation in Germany, *idem*, *Lucius D. Clay. An American Life* (New York, 1990). From the legal perspective see Matthew Lippman, "The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany," *Indiana International and Comparative Law Review* 3 (Fall, 1992), 1-100; Susanne Jung, *Die Rechtsprobleme der Nürnberger Prozesse: dargestellt am Verfahren gegen Friedrich Flick* (Tübingen, 1992); John Mendelsohn, "Trial by Document: The Problem of Due Process for War Criminals at Nuernberg," *Prologue* 7 (1975), 227-234; Robert Kempner, *SS im Kreuzverhör* (Munich, 1964); Benjamin Ferencz, "Nuremberg Trial Procedure and the Rights of the Accused," *Journal of Criminal Law, Criminology and Police Science* 39 (July-August 1948), 144-151; William Franklin Fratcher, "American Organization for the Prosecution of German War Criminals," *Missouri Law Review* (1948), 45-75; William Alan Zeck, "Nuremberg: Proceedings Subsequent to Goering et al.," *North Carolina Law Review* 26 (1948), 350-389; and Telford Taylor, *Nuremberg Trials: War Crimes and International Law* (New York, 1949).

addition to the history of the prosecution of major war criminals after the Second World War.¹² It also offers insight into broader political and social issues such as the postwar and American understanding of the Third Reich and its policies, and the personalities, behaviour and legal defenses of some of the major perpetrators of the Nazi Holocaust. It examines those who defended these mass-murderers and those who brought them to justice and shows how individuals can influence historical events.

The dissertation comprises nine chapters, organized chronologically, following the *Einsatzgruppen* trial from its ideological, political and historical origins through to the final

¹² Scholars who deal with the *Einsatzgruppen* trial in part or whole include, Michael Okroy, "Vor 50 Jahren in Nürnberg: Der Einsatzgruppenprozess und Paul Blobel," in *Tribüne, Zeitschrift zum Verständnis des Judentums* 142 (2. Quartal 1997), 21-32; Ronald Headland, *Messages of Murder: A Study of the Reports of the Einsatzgruppen of the Security Police and the Security Service, 1941-1943* (Toronto, 1992) contains a chapter on the trial as does Lutz Hachmeister, *Der Gegnerforscher. Die Karriere des SS-Führers Franz Alfred Six* (Munich, 1998); Klee, *Persilscheine und falsche Pässe* (1991) discusses how German church officials assisted the defendants of the *Einsatzgruppen* trial to secure early releases from prison; Robert Wolfe, "Putative Threat to National Security as a Nuremberg Defense for Genocide," *Annals of the American Academy of Political and Social Science* 450 (1980), 46-67 provides an analysis of Ohlendorf's defense at trial and *idem* (ed.), *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944-1952* (Carbondale, IL, 1984), is a collection of essays on the American occupation of Germany, including several articles on the Subsequent Proceedings and Tokyo Trial; and Andrej Angrick, "Die Einsatzgruppe D. Struktur und Tätigkeiten einer mobilen Einheit der Sicherheitspolizei und des SD und der deutsch besetzten Sowjetunion," unpublished PhD dissertation (Technical University of Berlin, 1999) discusses the trial briefly in his conclusion, 480-494. Michael Musmanno, *The Eichmann Kommandos* (London, 1961), is the only known memoir of the trial. Klaus-Michael Mallmann, "Die Türöffner der 'Endlösung'," in Gerhard Paul and *idem* (eds.), *Die Gestapo im Zweiten Weltkrieg* (Darmstadt, 2000), 437-463 briefly looks at Ohlendorf and his testimony at Nuremberg as does de Mildt, *In the Name of the People*, (1996) and Bloxham, *Genocide on Trial* (2001). In 1982, John Mendelsohn edited a collection of documents from the various Subsequent Trials titled, *The Holocaust* (18 volumes), in which two of the volumes deal specifically with the Ohlendorf case: volume 17 *Punishing the Perpetrators of the Holocaust: The Brandt, Pohl and Ohlendorf Cases*, and volume 18 *Punishing the Perpetrators of the Holocaust: The Ohlendorf and Von Weizsäcker Cases* (New York, 1982).

judgment against the defendants and their fate after the trial. The dissertation poses six fundamental questions about the *Einsatzgruppen* trial. The first question, dealt with in Chapter 2, concerns how the Americans came to decide on judicial proceedings against high-ranking, albeit lesser-known, Nazis; in short, why did the Americans decide to hold additional war crimes trials subsequent to Nuremberg? In his book on the American war crimes trial program in Germany, Frank Buscher argues that the Subsequent Proceedings were part of the American plan to "reeducate the German people" in order to demonstrate the virtues of democracy and "the evils of totalitarianism."¹³ While Buscher's assessment is essentially vindicated, the evidence also suggests that the United States pursued further trials of high-ranking Nazis (as the *Einsatzgruppen* commanders were considered) as a way to avoid further international cooperation with the Soviets. According to the American Chief Prosecutor of the first Nuremberg trial, Robert H. Jackson, the United States needed to free itself from the Soviets, partially because of the emerging Cold War, but also because the Soviets were, in his view, dangerously close to treating the International Military Tribunal at Nuremberg as a *fait accompli*: not a genuine judicial procedure but rather a show trial. Jackson, President Truman's personal appointee as Chief Prosecutor in the IMT proceedings and perhaps the most influential person in the early phase of policy-making on the war crimes issue, recommended to Truman in the autumn of 1946 that the United States avoid further cooperation with the Soviets if at all possible. A good way to do this, in Jackson's estimation, was to hold zonal trials where the United States could indict, try and punish not only individual members of criminal organizations but also some of the more serious war

¹³ Buscher, *The U.S. War Crimes Trial Program in Germany*, 8-9.

criminals who escaped indictment in 1945. Jackson believed that it was imperative to follow through on the process begun at Nuremberg in 1945, but he felt it would be too risky politically to work with the Soviets on an additional international trial.

This leads to the second issue which the dissertation addresses, the aims and goals of the planners of the Subsequent Nuremberg Proceedings, the most important of which were to achieve justice, to improve international law and to educate the German people about the crimes of the regime they had supported. While the Americans recognized the impossibility of trying every last Nazi war criminal – there were literally tens of thousands of interned perpetrators in American prisons in Germany in 1945 and 1946 – they did hope that by trying a representative sample of men from some of the major Nazi economic, political and military organizations, they would achieve a measure of justice. The American planners, particularly those who were lawyers by profession, wanted to ensure that the Subsequent Proceedings would aid in the development of “a workable and enlightened system of international law.”¹⁴

Prior to Nuremberg, generally speaking, the behaviour of belligerent nations was loosely kept in check through diplomacy, conventions and the application of force. The international and judicial character of Nuremberg, it was hoped, would establish authority and precedent for future international standards of behaviour.¹⁵ In other words, the

¹⁴ Taylor, *Final Report*, 101.

¹⁵ While the IMT trial was the only internationally prosecuted trial, the Americans nonetheless persisted in viewing the Subsequent Proceedings as international in character. They justified this claim by pointing to Control Council Law No. 10, the law under which war criminals were indicted and tried, which was signed by representatives of the United States, Soviet Union, Britain and France.

precedents established at Nuremberg would force nations and the individuals who acted in their behalf, to be accountable in future for their actions under the newly defined laws. Nuremberg, as one participant aptly noted, should be seen as a process and not an episode.¹⁵ In this sense, the *Einsatzgruppen* trial can be viewed not only as part of a larger judicial process – that is, in the context of the thirteen Nuremberg trials – but also as a test case in international law. The trial successfully affirmed that individuals should be held accountable for the crimes they committed pursuant to superior orders, and it was also the first time war criminals had been indicted on the charge of genocide, a crime that evoked such outrage at the time that members of the United Nations were inspired to define it in 1948. While extremely broad, the UN’s definition of genocide is still widely accepted today. Given the unprecedented nature of the legal concept of genocide, this dissertation attempts to show that even though they indicted twenty-four defendants on the charge of genocide, in practice the prosecutors of the *Einsatzgruppen* trial did not fully grasp the scope of the charge. As a result, they did not offer a strong or convincing case for the crime at trial and ultimately the prosecution’s case was presented more or less as an instance of mass murder and not genocide. Yet it was from this very process that international law and many international institutions were developed to deal with the crime of genocide and other war crimes. The *Einsatzgruppen* trial can thus be seen as one step toward the practice of international intervention on a legal rather than political basis, especially in cases where individuals have committed crimes against humanity.

The Americans also had extra-legal aims for the Subsequent Proceedings, the most

¹⁵ Taylor, *Final Report*, 108-109.

important of which was didactic.¹⁶ The planners of the Subsequent Proceedings hoped that by offering a fair and impartial hearing of the facts, under established rules of law, they would demonstrate to the Germans the benefits of democratic justice and thereby encourage the development of democracy in Germany. They also believed that by exposing publicly the crimes of the Third Reich, they would convince Germans of the mistake they had made in supporting Hitler.¹⁷ Learning from these trials, it was hoped, would encourage Germans to embrace democracy. In other words, the Subsequent Nuremberg Proceedings could serve as a lesson in history for the German people. As Brigadier General Telford Taylor remarked before the International Military Tribunal at Nuremberg, “We cannot here make history over

¹⁶ The literature on war crimes trials and their didactic value is a current focus of scholarly attention, as is the relationship between law, history, and memory. Examples of this literature include, Lawrence Douglas, *The Memory of Judgment. Making Law and History in the Trials of the Holocaust* (New Haven, 2001). Compare with Michael R. Marrus, “History and the Holocaust in the Courtroom,” in Gary Smith and Florent Brayard (eds.), *Vom Prozeß zur Geschichte: Die juristische und historische Aufarbeitung der Shoa in Frankreich und Deutschland* (Berlin, 2001), 1-35 (forthcoming). See also Christopher Browning, “German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony,” in Saul Friedlander (ed.), *Probing the Limits of Representation: Nazism and the “Final Solution”* (Cambridge, MA; 1992), 22-36; Lawrence Douglas, “Wartime Lies. Securing the Holocaust in Law and Literature,” 16-36 and Mark Osiel, “Constructing Memory with Legal Blueprints,” 411-430, both in F.C. Decoste and Bernard Schwartz (eds.), *The Holocaust’s Ghost. Writings on Art, Politics, Law and Education* (Edmonton, 2000); Leora Y. Bilsky, “When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt’s Concept of Judgment,” *History and Memory. Studies in Representation of the Past* 2:8 (Fall/Winter, 1996), 137-174; Jared Stark, “The Task of Testimony. On ‘No common Place’: The Holocaust Testimony of Alina Bacall-Zwirn,” *History and Memory. Studies in Representation of the Past* (1999), 37-61; Carlo Ginzburg, *The Judge and the Historian* (London, 1999); and most recently, Bloxham, *Genocide on Trial* (2001).

¹⁷ In his opening remarks to Tribunal II, prosecutor Benjamin Ferencz remarked of the trial, “as we here record the massacre of thousands of helpless children, the German people may reflect on it to assess the merits of the system they so enthusiastically acclaimed.” Benjamin Ferencz, opening remarks of the prosecution, 29 September 1947, *Trial*, roll 1, 32-33.

again. But we can see that it is written true.”¹⁸ But, as Chapter 6 of the dissertation will demonstrate, not only was the goal of “historical truth” not fully achieved, but in some ways trial testimony given at Nuremberg confused the historical record.

The third question this dissertation addresses in Chapter 3 is how and why the Americans decided to try the leaders of the *Einsatzgruppen*. By late 1945 and early 1946 the Americans had largely affirmed their commitment to hold a series of subsequent war crimes trials, at one point planning as many as eighteen. Unlike at the first Nuremberg trial where political considerations superceded all others in the selection of defendants for indictment, they had decided that only those persons against whom they had substantial evidence would be indicted. Ohlendorf, the principal defendant in the trial, was considered a possible candidate for the dock from the very beginning of the planning phase of the Subsequent Proceedings, because he had provided the Americans with damning evidence, without which it is doubtful that the *Einsatzgruppen* leaders would have been brought to justice in 1947.

In January 1946, American prosecutors in the original IMT trial called Ohlendorf as a witness for the prosecution. He testified that *Einsatzgruppe D*, the mobile killing unit he commanded in the Crimea, was responsible for the murder of approximately 90,000 Jews during its operations in 1941 and 1942. Even before Ohlendorf admitted to such atrocities he was considered a possible target for prosecution, because he was head of what the Americans considered to be one of the most important offices in the *Reichssicherheitshauptamt – Amt III* as well as being an economic expert in the Reich. As Chapter 3 will demonstrate, early on in the planning phase for the Subsequent Proceedings,

¹⁸ Telford Taylor quoted in Robert Conot, *Justice at Nuremberg* (New York, 1983), xiii.

however, American investigators only had a rudimentary understanding of the RSHA and opinion was divided about what to do with Ohlendorf. Some planners wanted to delay trying the former *Einsatzgruppe* leader because he was such a valuable source of information against other leading Nazis, particularly those formerly involved in the economic sphere. Unlike at the IMT trial, political factors did not play a significant role in the selection of defendants; rather Taylor was determined to bring indictments against leading Nazi war criminals based on evidence unearthed in the course of the IMT case. This, coupled with the fact that one of the major purposes of holding further trials was to expose the criminal scope of the Nazi regime, made certain members of the SS very likely candidates for prosecution. The fact that Taylor's organization already had Ohlendorf's own admission, combined with the discovery of the *Einsatzgruppen* Reports late in 1946 or early in 1947, almost certainly assured Ohlendorf a place in the dock. Initially Taylor planned to try Ohlendorf as part of a general case against the leaders of the SS, including various other members of the SD and Gestapo, and not just leaders of the *Einsatzgruppen*. It was not, however, until sometime after the discovery and analysis of the *Einsatzgruppen* Reports and the assurance that there were enough of the leaders in American custody that the general case against SS leaders was transformed into one which dealt solely with the leaders of the mobile security and killing units.

Overall, this dissertation demonstrates that the American decision to prosecute leaders of the SS *Einsatzgruppen* was accidental. In 1945 and 1946, the Americans had planned to prosecute a representative sample of the SS leadership. But, while screening captured documents for evidence in late 1946, the Evidence Division of the Berlin Branch of the Office of Chief of Counsel of War Crimes (OCCWC) accidentally located and analysed

a near complete copy of the *Ereignismeldungen UdSSR* or Operational Situation Reports of the *Einsatzgruppen*.¹⁹ Legally, the evidence was damning. These reports documented the activities of the *Einsatzgruppen* in the east between June 1941 and May 1943. The reports were compiled regularly, and chronicled in meticulous detail the mass murder of Jews and other civilians in occupied Soviet territory. Once the reports were completed, they were sent to the *Reichssicherheitshauptamt* in Berlin. The reports were not used at the IMT trial as their existence was, as yet, unknown.²⁰ In 1947, American authorities analyzed them and discovered that they elucidated the particulars of the murder of nearly one million Jews and other innocents in Soviet Russia: a scale of killing almost unfathomable to the prosecutors at Nuremberg and one that led them to indict twenty-four *Einsatzgruppen* leaders on the unprecedented charge of genocide.²¹ The fortuitous discovery of the reports changed the

¹⁹ The four units of the *Einsatzgruppen* wrote 195 Operational Situation Reports between June 1941 and April 1942, all of which have survived with the exception of Report 158. These reports should not be confused with other SD reports such as the *Tätigkeits- und Lageberichte der Einsatzgruppen der Sicherheitspolizei und des SD in der UdSSR* (Activity and Situation Reports) which are summary reports of the Operational Situation Reports and therefore far less detailed, and the *Meldungen aus den besetzten Ostgebieten* (Reports from the Occupied Eastern Territories), compiled between May 1942 and May 1943, many of which were entered into evidence during the IMT proceedings. The Operational Situation Reports are the most important of all the so-called *Einsatzgruppen* Reports because they offer a level of detail not found in the others. For a full explanation and analysis of these and other reports see Headland, *Messages of Murder*.

²⁰ *Ibid.*, 23.

²¹ The prosecutors of the *Einsatzgruppen* case went through each of the 194 existing Operational Situation Reports to determine the number of civilians murdered by the four units of the *Einsatzgruppen*. According to their calculations units A, B, C, and D (with the help of other para-military and police units) murdered nearly one million non-combatants between May 1941 and July 1943. Determining exactly how many civilians, let alone Jews, were murdered by the mobile security and killing units is a difficult if not impossible task given the inaccuracy of the reports, the possibility of duplications and omissions in the reporting process, and because of the complexity of the killing operations and the involvement of non-*Einsatzgruppen* personnel in murder. Estimates of Jews murdered range

course of the American legal investigation. Ultimately, the planners of the Subsequent Proceedings decided to transform a catch-all trial of the SS leadership into one dealing solely with the leadership cadre of the *Einsatzgruppen*. Once the Americans digested these *Ereignismeldungen*, and once they determined they could locate a sufficient number of these criminals, the lawyers from the Office of Chief of Counsel put the wheels in motion to bring them to justice. Twenty-four former *Einsatzgruppen* leaders were thus indicted in the summer of 1947.

The fourth question of this dissertation, dealt with in Chapters 4 and 5, concerns the personality and backgrounds of the twenty-four leaders of the *Einsatzgruppen* indicted at Nuremberg in 1947 and what motivated them to commit the crimes for which they were indicted. Trial documents can help bring to life the perpetrators of mass murder. They can also help us to reconstruct their personalities, thereby providing insight into their backgrounds and even their motivation, which ultimately helps us understand the Nazi genocide of the Jews. Chapter 4 will show that the leaders of the *Einsatzgruppen* were a surprisingly homogeneous group, sharing many common attributes, including youth, religious affiliation, and political ideology. Most, but not all, were extremely well educated, and many were lawyers by profession; in short, they were the elite of German society. Their so-called “route to crime,” as one historian refers to the perpetrator’s path to murder, was very similar.²² These similarities have led many historians to characterize all SS men as

from a low of 700,000 according to Hilberg, *Destruction*, 1201-1220 to a maximum of 1,152,731 by Headland, *Messages of Murder*, 96-106. For the purposes of this work the figure of one million is accepted.

²² De Mildt, *In the Name of the People*, 15-16.

ideologically motivated killers. Recent research has shown, however, that perpetrator motivation is more complex than this, calling into question the predominant interpretation of the *Einsatzgruppen* leadership as “ideological soldiers.” Certainly most of these men did concur with Nazi racial policies and in fact all of them carried them out, but the evidence also suggests that in the case of some of the defendants – admittedly a minority – they harboured feelings of moral conflict regarding their role as mass murderers.

The fifth question this dissertation addresses is the role of Michael Musmanno, the presiding judge in this trial, how he interpreted the evidence and judged the crimes. The aim of Chapter 7 is to analyze the personality, arguments and perspective of the presiding judge who was called upon at Nuremberg to evaluate the *Einsatzgruppen*'s criminal behaviour. Musmanno was extremely well qualified for the job, having first trained as a defense attorney and then having served several years on the bench at the Court of Common Pleas in Pennsylvania before going to Nuremberg. The other two judges, Robert Dixon and John Speight, were less experienced. Because of this and the fact that Musmanno was such a dominant personality, Speight and Dixon were insignificant judicial figures at the trial. After Ohlendorf, Musmanno was the most influential and important person at the trial, setting its course and tone. As a seasoned jurist with a flare for the dramatic, he virtually usurped the role of the prosecution, taking over much of the direct examination of the defendants during the trial, particularly when he felt the defendants were not forthcoming with their responses. His active participation in the trial, his razor-sharp logic and persistent cross-examination ensured that the defendants received a scrupulously fair hearing. Chapter 8 will show that his judgment is also historically significant. It brings the personalities of the perpetrators to life as well as providing a detailed account of their crimes and a solid evaluation of the evidence.

The sixth and final issue this dissertation addresses is the aftermath of the trial, specifically those events that led to the revision of the sentences of the *Einsatzgruppen* defendants. In his final assessment of the Subsequent Proceedings written in 1949, Taylor maintained that with the passage of each Subsequent Trial “sentences became lighter.”²³ The exception to this rule was the trial of the *Einsatzgruppen* leaders. More death sentences were imposed in this trial than in any other of the eleven Subsequent Proceedings, as well as in the original Nuremberg IMT proceedings. Not allowed to appeal their sentences, those who were condemned to death in the IMT proceedings were executed almost immediately. This was not the case with the Subsequent Proceedings, however, where nearly all of the defendants filed appeals almost as soon as their sentences were passed. In the case of the *Einsatzgruppen* defendants, they too appealed to the Military Governor, Lucius Clay, for clemency. Surprisingly, even after Clay had approved the sentences in 1949, only four of the original fourteen death sentences were upheld and carried out and then only in 1951, whereas the rest of the defendants had their sentences commuted to terms ranging from ten years to life. One of the defendants, Waldemar von Radetzky (Deputy Chief of *Sonderkommando* 10a of *Einsatzgruppe D*), was even released with time served even though he had been sentenced to twenty years. Sentence reductions, commutations, and clemency was the result of a new policy implemented by the US High Commissioner for Germany, John McCloy, who had replaced Clay in 1949. Thomas Schwartz has recently demonstrated that we should not be surprised by such sentence reductions, given that by 1949 domestic and international political considerations were taking precedence over American war crimes

²³ Taylor, *Final Report*, 101.

policy. Despite McCloy's denial at the time, Schwartz argues that Cold War stresses coupled with mounting pressure from an increasingly skeptical US Congress and a disgruntled German public forced US policy-makers, especially John McCloy, to overturn the convictions of as many as one half of all those tried for war crimes.²⁴ German public opinion, it would seem, influenced McCloy's decision to reduce sentences. As Chapter 9 will show, certain German nationalist organizations, but particularly some highly positioned German clergy and defense attorneys, were instrumental in securing clemency for some of the most notorious Nazi perpetrators.

2. The *Einsatzgruppen* and their Crimes

Einsatzgruppen were special paramilitary task forces of the SS and police, originally formed in 1938 to operate as the vanguard of security-police presence in the annexed territories of Austria and Bohemia-Moravia. Further units were then created one year later for action in the Polish campaign, during which *Einsatzgruppen* personnel initiated the first large-scale killing operation of the war directed against Poland's educated elite and leading social and political classes.²⁵ Although the focus of *Einsatzgruppen* activities changed over time to incorporate mass murder in ever greater measure, their security and intelligence

²⁴ Schwartz, "John J. McCloy and the Landsberg Cases," 435-440.

²⁵ For a discussion of the early activities of the *Einsatzgruppen* in Austria and Czechoslovakia see Helmut Krausnick, *Hitlers Einsatzgruppen. Die Truppe des Weltanschauungskrieges, 1938-1942* (Frankfurt, 1993), 13-25. For a discussion of the *Einsatzgruppen*'s activities in Poland see Alexander Rossino, "Nazi Anti-Jewish Policy During the Polish Campaign: The Case of the Einsatzgruppe von Woysch," *German Studies Review* 1:24 (February, 2001), 35-54 and *idem*, "September 1939: The German Army and the Invasion of Poland" (unpublished PhD dissertation, Syracuse University, New York, 1999).

gathering functions remained constant throughout the period from 1938 to their deployment in the Soviet Union in 1941 when German policy makers expanded their activities to include wholesale murder of Soviet Jews as part of the broader security aims.²⁶ At the beginning of

²⁶ The history of the Third Reich became the object of scholarly research almost immediately upon the demise of the regime, and historians began to write about the “Final Solution to the Jewish Question,” which has come to be called the Holocaust, not long thereafter. Early contributions to the subject came from such scholars as Gerald Reitlinger, *The Final Solution: The Attempt to Exterminate the Jews of Europe, 1939-1945* (London, 1953) and *idem*, *The SS: Alibi of a Nation 1922-1945* (London, 1957); Leon Poliakov, *Breviaire de la haine* (1954) translated as *Harvest of Hate* (1971); and, Raul Hilberg’s pioneering work on the subject, *The Destruction of the European Jews*, 3 vols. (1961). While Helmut Krausnick and Martin Broszat were pioneers in writing about the activities of the *Einsatzgruppen* in their book *Anatomie des SS-Staates* (1965), which first raised the issue of the role of the *Einsatzgruppen* in the origins of the “Final Solution,” it was not until the late 1970s, when the question of the origins of the “Final Solution” began to be debated that some historians began to take a more active interest in the perpetrators of the Holocaust and, in particular, the *Einsatzgruppen*. Alfred Streim, the former senior public prosecutor and acting director of the German *Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen* (The Central Office of the Land Judicial Authorities for the Investigation of National Socialist Crimes) in Ludwigsburg, published widely on the subject of the *Einsatzgruppen* and their activities. For example, *idem*, “Das Sonderkommando 4a der Einsatzgruppe C und die mit diesem Kommando eingesetzt gewesenen Einheiten während des Russlandfeldzuges in der Zeit vom 22.6.1941 bis Sommer 1943,” (1964); *idem*, “Zum Beispiel: Die Verbrechen der Einsatzgruppen in der Sowjetunion,” in Adalbert Rückerl (ed.), *NS-Prozesse. Nach 25 Jahren Strafverfolgung: Möglichkeiten-Grenzen-Ergebnisse* (Karlsruhe, 1971), 65-106; *idem*, “Zur Eröffnung des allgemeinen Judenvernichtungsbefehls gegenüber den Einsatzgruppen,” in Eberhard Jäckel and Jürgen Rohwer (eds.), *Der Mord an den Juden im zweiten Weltkrieg: Entschlussbildung und Verwirklichung* (Stuttgart, 1985), 107-119; and *idem*, “The Tasks of the SS Einsatzgruppen,” *Simon Wiesenthal Center Annual* 4 (1987), 309-328.

Other works which examine the role of the *Einsatzgruppen* in the murder of the Jews include Yehoshua Buchler, “Kommandostab Reichsführer-SS: Himmler's Personal Murder Brigades in 1941,” *Holocaust and Genocide Studies* 1 (1986), 11-25; Yaacov Lozowick, “Rollbahn Mord: The Early Activities of Einsatzgruppe C,” *Holocaust and Genocide Studies* 2 (1987), 221-241; Willi Dreßen, Ernst Klee, and Volker Riess, (eds.), “Schöne Zeiten.” *Judenmord aus der Sicht der Täter und Gaffer* (Frankfurt, 1988); Philippe Burrin, *Hitler et les Juifs: Genèse d'un génocide* (Paris, 1989); Richard Breitman, *The Architect of Genocide: Himmler and the Final Solution* (New York, 1991); Headland, *Messages of Murder* and *idem*, “The Einsatzgruppen: The Question of their Initial Operations,” *Holocaust and Genocide Studies* 4 (1989), 401-412; Christian Streit, “Wehrmacht, Einsatzgruppen, Soviet POWs and anti-Bolshevism in the emergence of the Final Solution,” in David Cesarani (ed.),

Operation Barbarossa in June 1941, these motorized units of the SS were formed into four groups designated A, B, C, and D and were officially assigned the task of providing security for German troops in areas behind the front line.²⁷ Neither the leadership cadre nor regular members of the mobile security units received much in the way of formal military training, highlighting the more political nature of their assignment. While the *Einsatzgruppen* of the Security Police and SD operated under the tactical command of the German army in Russia,

The Final Solution. Origins and Implementation (New York, 1994), 103-118; Ralf Ogorreck, *Die Einsatzgruppen und die Genesis der Endlösung* (Frankfurt, 1997); Peter Longerich, *Politik der Vernichtung: Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung* (Munich, 1998); and, Christoph Dieckmann, "The War and the Killing of the Lithuanian Jews," in Ulrich Herbert (ed.), *National Socialist Extermination Policies. Contemporary German Perspectives and Controversies* (New York, 2000), 240-295. 1981. Most recently, Andrej Angrick, "Die Einsatzgruppe D. Struktur und Tätigkeiten einer mobilen Einheit der Sicherheitspolizei und des SD in der deutsch besetzten Sowjetunion," unpublished PhD dissertation, Technical University of Berlin, 1999 has written on the history of *Einsatzgruppe D*. In addition to these sources, the Holocaust Library of New York has published an abridged edition of the *Einsatzgruppen* Reports as Yitzhak Arad, Shmuel Krakowski and Shmuel Spector (eds.), *The Einsatzgruppen Reports: Selections from the Dispatches of the Nazi Death Squads' Campaign Against the Jews in Occupied Territories of the Soviet Union, July 1941-January 1943* (New York, 1989). Most recently, Peter Klein edited a collection of essays on the four units of the *Einsatzgruppen* was published in 1997 under the title, *Die Einsatzgruppen in der besetzten Sowjetunion 1941/42. Die Tätigkeits- und Lageberichte des Chefs der Sicherheitspolizei und des SD* (Berlin, 1997).

Despite the interest of historians in the activities of the *Einsatzgruppen*, the most comprehensive work on the subject remains, Helmut Krausnick and Hans-Heinrich Wilhelm, *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942*, published more than twenty years ago in 1981.

²⁷ For a discussion of the cooperation between the *Wehrmacht* and the *Einsatzgruppen* see especially Christian Streit, *Keine Kameraden. Die Wehrmacht und die sowjetischen Kriegsgefangenen 1941-1945* (Bonn, 1991) and *idem*, "Wehrmacht, *Einsatzgruppen*, Soviet POWs and Anti-Bolshevism in the Emergence of the Final Solution," in David Cesarani, (ed.), *The Final Solution: Origins and Implementation* (New York, 1996), 103-118. See also, Hannes Heer, "Killing Fields: The Wehrmacht and the Holocaust in Belorussia, 1941-1942," *Holocaust and Genocide Studies* 11 (Spring, 1997), 79-101. For an overview of the development of the historiography on this subject see Omer Bartov, "German Soldiers and the Holocaust. Historiography, research and implications," in *idem* (ed.), *The Holocaust. Origins, Implementation, Aftermath* (New York, 2000), 162-184.

but in reality they were mobile field offices of the *Reichssicherheitshauptamt* or RSHA and therefore their leaders took their orders from Heydrich who was the chief of the RSHA and from which most of the leaders of the units were drawn.²⁸ In practice, their principal task was security, which in the context of Operation Barbarossa meant not only intelligence gathering and protection from partisan attacks, but also the "elimination" of perceived political and racial enemies of the Reich, particularly Soviet Jews and communists, but also the mentally ill, the infirm, and Gypsies. In order to cover a larger geographic area, the *Einsatzgruppen* were divided into smaller formations called *Sonderkommandos* and *Einsatzkommandos*. These sub-commands then frequently divided into still smaller units called *Teilkommandos* and *Vorkommandos*.

One month before they were deployed, the *Einsatzgruppen* were assembled at Pretzsch, a small German town bordering on Soviet territory. Here they were briefed about their assignments and given some rudimentary military training. The men were then allocated to one of the four mobile security units and each one of these was assigned to work with an army group. Each army group was responsible for conquering a particular geographic region of the western Soviet Union. *Einsatzgruppe A*, led by Franz Walter Stahlecker and later Heinz Jost, was assigned to Army Group North which operated in and around Lithuania, Latvia and Estonia. *Einsatzgruppe B*, led by Arthur Nebe and later Erich Naumann, was assigned to Army Group Centre and it operated in and around the area of Minsk. *Einsatzgruppe C*, led by Otto Rasch, was attached to Army Group South and

²⁸ For instance, ten defendants from the *Einsatzgruppen* trial, Otto Ohlendorf, Heinz Jost, Martin Sandberger, Willy Seibert, Erwin Schulz, Franz Six, Werner Braune, Emil Hausmann, Heinz Schubert, and Walter Haensch, came from various agencies of the RSHA. On the SS, the *Einsatzgruppen* and the RSHA see Headland, *Messages of Murder*, 17-26.

operated in the Ukraine. Finally, *Einsatzgruppe D*, led by Otto Ohlendorf, was assigned to the Eleventh Army that operated in and around the Crimea.²⁹ The *Einsatzgruppen* joined the invasion of the Soviet Union on June 22, 1941, and almost immediately began to murder innocent civilians. For the first six to eight weeks of the campaign the mobile units, with a few exceptions, limited their killing to communist functionaries, Jewish men, Gypsies, and occasionally the infirm. Beginning in August, however, their targeted killing escalated into a full-scale genocidal campaign against Soviet Jewry. During the Soviet campaign their role as killers of civilians, particularly Jews, has led many to refer to the *Einsatzgruppen* as “mobile killing units,” even though “mobile security unit” more aptly describes their function.³⁰

After August 1941, when killing operations had expanded and civilians were being killed in large numbers, the *modus operandi* of all four *Einsatzgruppen* was remarkably consistent. Once the German army had cleared an area, one of the mobile killing units would immediately enter the sector, round up the Jews and other civilians targeted for murder, rob their victims of their belongings and finally kill them in open-air shootings. Initially the murders were carried out in public, but because this endangered the “special security task”

²⁹ For a map of the areas of operation of the *Einsatzgruppen*, see Martin Gilbert, *Atlas of the Holocaust. Revised and Updated* (Toronto, 1993), map 71, 65. See also, Raul Hilberg, *Destruction*, vol. 1, 287 and 290.

³⁰ Nuremberg helped to create the impression that the sole task of the *Einsatzgruppen* was murder, and hence one frequently sees the term “mobile killing unit” used to describe the *Einsatzgruppen*. While it is true that one of the main functions of these groups was murder on a grand scale, this task was really part of the intelligence and security work that was at the heart of *Einsatzgruppen* formations. In other words, identifying and killing the foreign enemies of the Reich was viewed as part and parcel of the intelligence and security work of these groups. For the purposes of this work the terms “mobile killing unit,” “mobile security unit,” “mobile security and killing unit” and *Einsatzgruppen* will be used interchangeably.

of the *Einsatzgruppen*, the murder sites were soon moved to more secluded areas, usually outside of town. The victims would be led to a collection point from where they were then taken in groups of between ten and fifty (more in the case of the Babi Yar massacre) to a grave where they were told to strip off their clothing. One of three methods of execution was then employed. Some group leaders preferred to have the Jewish victims line-up on the edge of the grave and have “specialists” shoot them in the back of the neck.³¹ Ohlendorf disliked this method of execution and instead had his men shoot as a group from a distance, more like a military firing squad, which helped minimize individual responsibility. Still other commanders had victims lie face-down at the bottom of the grave where the victims would be shot from above. Once the victims were dead, another group would be forced to lie on top of them. They too were then shot. Because many Jews escaped the initial round-ups, especially if they received prior warning that the Germans were advancing, the mobile security and killing units would frequently return to an area more than once to ensure that they captured and killed all of a community’s Jews. Hilberg estimates that of the five million Jews living in Soviet territory in June 1941, as many as 1.5 million Soviet Jews either escaped from the advancing German forces or were evacuated further east.³² Despite such evasions, the four units of the *Einsatzgruppen* and their helpers rounded up and murdered on

³¹ These shooters were not specialists in the sense that they were trained to shoot civilians in the back of the neck; rather they were “specialists” in the sense that killing individuals was their singular job.

³² Hilberg, *Destruction*, 291-295. Hilberg’s figure of five million includes nearly one and a half million Jews residing in former Polish territory annexed by the Soviet Union in 1939.

average, 100,000 people per month.³³

Although the massacre of Jews by shooting proved highly effective in terms of the large numbers killed, it had distinct disadvantages as a method of mass murder. For the perpetrators, such massacres caused considerable psychological stress, which could not always be overcome. Some of the men could only cope with their job by consuming large quantities of alcohol and others had nervous breakdowns. It was not that they had any great moral objection to what they were doing in theory, but in practice shooting women and children at close range took its toll on the murderers. Himmler was well aware of this situation. He had visited the site of a mass shooting in Minsk in the late summer of 1941 and had allegedly fainted when blood landed on his face during one execution. Shaken by the incident, he later remarked that shooting was not the most “humane” and “rational” method of mass killing. Of course he was not thinking of the victims here, but the perpetrators. In Himmler’s view, what was needed was an alternate method of mass murder which could still “liquidate” large numbers of people quickly, but would also be psychologically easier on the men of the killing units.

One solution was the gas van. The use of poison gas had already been tested in the autumn of 1941 on Soviet prisoners of war in Sachsenhausen, and even earlier, in 1940, it had been used as part of the euthanasia program against the mentally ill in Germany. The first gas van was deployed in the Soviet Union in December 1941 and, over the next three years, some fifteen were used by the *Einsatzgruppen* in the Soviet Union.³⁴ Although many

³³ *Ibid.*, 317.

³⁴ Longerich, *Politik der Vernichtung*, 441-448, and Schmucl Spektor, “Killings in the Gas Vans behind the Front,” in Eugen Kogon, Hermann Langbein and Adalbert Rückerl

thousands of Jews were killed in this way, the gas vans were not popular with SS personnel because they proved even more unpleasant to operate than shooting victims at close range, since gassing required more effort and contact with the victims than shooting. As one member of a killing unit described his experience using the gas van:

The Jews had to climb into the van fully clothed. There was no sorting out. Men, women and children all had to get in together. I estimate that about sixty people had to get in each time. They had to climb up some steps to get into the van. It did not seem as if the Jews knew that they were about to be gassed. After the doors had been closed we then drove to a disused coal shaft. The gas-van could not be driven right up to the shaft and we had to pull the bodies out of the vans and drag them to the shaft, which was about eight metres away, and then throw them in. When the doors were opened a cloud of smoke wafted out. After the smoke had cleared we could start our foul work. It was frightful. People had vomited and defecated. You could see that they had fought terribly for their lives. Some of them were holding their noses. The dead had to be dragged apart. It was while doing this that I first found out how heavy a human being can be.³⁵

Despite the ability of the gas vans to kill large numbers of people at once, they were not always as efficient as Himmler had hoped. Over time the doors of the vans lost their seal, allowing fresh air to mix in with the noxious fumes. As a result, it often took more time for those inside to die.

It has been estimated that in their campaign of murder, the *Einsatzgruppen*, which themselves never numbered more than three thousand men, mostly taken from the SS-*Sicherheitsdienst* (SD), the *Sicherheitspolizei* (Sipo), and the *Geheimstaatspolizei* (Gestapo) along with thousands of reinforcements from the *Kriminalpolizei* (Kripo), the

(eds.), *Nazi Mass Murder: A Documentary History of the Use of Poison Gas* (New Haven, 1993), 52-63.

³⁵ “A member of Sonderkommando 6 on the deployment of gas-vans in Stalino and Rostov,” in Ernst Klee, Willi Dreßen, and Volker Riess (eds.), *The Good Old Days. The Holocaust as Seen by Its Perpetrators and Bystanders*, trans. Deborah Burnstone (New York, 1991), 72-73.

Ordnungspolizei (Orpo), the *Waffen SS*, and the *Wehrmacht*, were responsible for the murder — by shooting and gassing — of approximately one million Jews.³⁶ The activities of

³⁶ The *Einsatzgruppen*, it was once thought, were responsible for all of the Jews murdered in open-air shootings during the war in the Soviet Union. While they were at the centre of the killing process, the situation in the east was far more complex than we once thought. One of the earliest publications of non-*Einsatzgruppen* involvement in the murder of Soviet Jews was the war diary of the 1st SS Infantry Battalion, discovered in the Czech archives and published in 1965 under the title Fritz Baade et al. (ed.), *Unsere Ehre heißt Treue: Kriegstagebuch des Kommandostabes Reichsführer SS* (Vienna, 1965). Recent scholarship, particularly research into the activities of the *Ordnungspolizei* or Order Police and regional studies of collaborators, has shown that the *Einsatzgruppen* constituted but a fraction of the German para-military organizations and their helpers that were involved in mass murder in the east. Our enhanced understanding of the front-line perpetrators is the result of a number of factors, not the least of which was the opening of the archives in the former Soviet Union which led to an upsurge in research on local auxiliary police units and their role in the Holocaust. The war crimes trials of the last decade and a half in the United States, Britain, Canada and Australia of east European collaborators have also contributed to this trend. While narrowly focussed on one battalion, Christopher Browning's seminal study *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York, 1992) also unwittingly contributed to this shift. As a result of all of these factors, research on the perpetrators has shifted away from the activities of the *Einsatzgruppen* to the involvement of other para-military organizations, especially the role of the *Ordnungspolizei*, in the murder of the Jews. Some recent examples of the new scholarship include, Heiner Lichtenstein, *Himmlers grüne Helfer: Die Schutzpolizei und Ordnungspolizei in "Dritten Reich"* (Cologne, 1990); Konrad Kwiet, "Auftakt zum Holocaust: Ein Polizeibatallion im Osteinsatz," in Wolfgang Benz et al. (eds.), *Der Nationalsozialismus: Studien zur Ideologie und Herrschaft* (Frankfurt, 1993), 191-208; Andrej Angrick, Martina Voigt, et al., "'Da hätte man schon ein Tagebuch führen müssen.' Das Polizeibatallion 322 und die Judenmorde am Bereich der Heeresgruppe Mitte während des Sommers und Herbstes 1941," in Helge Grabitz et al. (eds.), *Die Normalität des Verbrechens: Festschrift für Wolfgang Scheffler* (Berlin, 1994), 325-385; Jürgen Matthäus, "What About the 'Ordinary Men'?": The German Order Police and the Holocaust in the Occupied Soviet Union," *Holocaust and Genocide Studies* 2:10 (Fall, 1996), 134-150; Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York, 1996); Edward B. Westermann, "'Ordinary Men' or 'Ideological Soldiers'? Police Battalion 310 in Russia, 1942," *German Studies Review* 1:21 (February, 1998), 41-68; Michael Mann, "Were the Perpetrators of Genocide 'Ordinary Men' or 'Real Nazis'? Results from Fifteen Hundred Biographies," *Holocaust and Genocide Studies* 14 (Winter, 2000), 331-366; Christian Gerlach, "German Economic Interests, Occupation Policy, and the Murder of the Jews in Belorussia, 1941/43," in Ulrich Herbert (ed.), *National Socialist Extermination Policies. Contemporary German Perspectives and Controversies* (New York, 2000), 210-239; Christopher Browning, "German Killers. Orders from Above, Initiative from Below, and the Scope of Local

the *Einsatzgruppen* and their helpers in Russia in the summer of 1941 represented a watershed in Nazi racial policy toward the Jews, a policy which, in 1942, proliferated into a European-wide program of genocide. The indictment against Otto Ohlendorf and the *Einsatzgruppen* leaders was based largely on the evidence gathered from their own Operational Situation Reports that thoroughly chronicled the part they played in this initial phase of the Nazi "Final Solution."³⁷

3. Trial Summary

The *Einsatzgruppen* trial was the ninth of twelve Subsequent Proceedings held at the Palace of Justice, Nuremberg, Germany, beginning with the so-called Doctor's trial in December 1946. In many respects, the Subsequent Proceedings are a landmark in international law, combining the Anglo-Saxon adversarial system and the Continental accusatorial system of law. The Subsequent Proceedings derived their authority from international agreement, in particular from the London Agreement of August 8, 1945 and Allied Control Council Law No. 10 of December 20, 1945. Both of these laws were signed

Autonomy – the Case of Brest-Litovsk,” and “German Killers. Behavior and Motivation in the Light of New Evidence,” in *idem*, *Nazi Policy, Jewish Workers, German Killers* (Cambridge, 2000), 116-169; and Martin Dean, *Collaboration in the Holocaust. Crimes of the Local Police in Belorussia and Ukraine, 1941-1944* (New York, 2000).

³⁷ Headland has analyzed the Operational Situation Reports in *Messages of Murder*, but Gerald Reitlinger was the first to use the *Einsatzgruppen* Reports and trial documents as a basis for research in his, *Die Endlösung: Hitlers Versuch der Ausrottung der Juden Europas 1939-1945* (Berlin, 1951) translated as *The Final Solution—The Attempt to Exterminate the Jews of Europe 1939-1945* (London, 1953). But Hilberg, who also drew extensively on records produced by the *Einsatzgruppen* trial for *The Destruction of the European Jews*, was one of the first historians to offer an in-depth analysis of the role of the *Einsatzgruppen* in the larger “machinery of destruction.”

by representatives of the United States, Britain, France and the Soviet Union. But the Subsequent Proceedings were also governed by zonal law, especially American Military Ordinance No. 7 of October 18, 1946, which laid out the rules under which the tribunals would function.³⁸

In an attempt to ensure fairness, the organizers of the Nuremberg Proceedings permitted full access to selected members of the German public and to the international press. The trials themselves were bilingual, carried out simultaneously in German and English, and after the trials were completed, the transcripts were made available to the public.³⁹ Defense attorneys fluent in both languages frequently corrected the official record when they detected mistakes in translation. Moreover, each defendant had the right to counsel of his own choosing. Defense attorneys at Nuremberg outnumbered prosecution staff by more than two to one. The American Military Government not only paid the defense salary of 3500 marks per month, but also provided them with three meals per day (with a caloric content calculated at 3900, more than American soldiers received at the time), as well as supplying them with a much coveted carton of cigarettes per week.⁴⁰ Defense counsel was also provided with office space and furniture, and a "Defendants' Information Center" was

³⁸ Introduction, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10*, vol. 15, 1; London Agreement, 8 August 1945, in *ibid.*, 8-18; Allied Control Council Law No. 10, 20 December 1945 in *ibid.*, 23-28; and Military Government Ordinance No. 7, 18 October 1946, in *ibid.*, 28-35.

³⁹ "Handling of Language Problems Arising because of the Bilingual or Multilingual Nature of the Nuernberg Trials," in *ibid.*, 118-119.

⁴⁰ Interim Report Secretariat for Military Tribunals Nuernberg, Germany, in *ibid.*, 156 and 173-175. See also, Ferencz, "Nurnberg Trial Procedure and the Rights of the Accused," 146-147.

established whereby defense attorneys could procure documents and witnesses. This office acted ostensibly as the liaison between the defense, prosecution and the tribunal.⁴¹ Under the uniform rules of procedure outlined in Control Council Law No. 10, each defendant had to be supplied with an indictment, in German, at least thirty days before trial began. Each defendant was also given the right to be present at trial, testify in his own behalf and to present evidence in support of his defense.⁴² With the rules and procedures in place to ensure as fair a trial as possible, the leaders of the *Einsatzgruppen* were brought to Landsberg, a prison for war criminals located in the Bavarian city of Landsberg-am-Lech, where they were indicted in the summer of 1947.

On July 29, 1947 the American Office of the Chief of Counsel for War Crimes (OCCWC), the American legal organization, headed by Brigadier General Telford Taylor, which planned, organized and prosecuted all of the Subsequent Nuremberg Proceedings, indicted twenty-four *Einsatzgruppen* leaders on three counts of criminality: Crimes against Humanity, War Crimes, and Membership in Organizations declared Criminal by the IMT.⁴³ Prior to their recruitment to the *Einsatzgruppen* all twenty-four defendants had been members of the SS, SD, or Gestapo, organizations declared criminal in the judgment of the IMT. The majority of the leaders were well educated. Professionally, many were lawyers, one was a university professor, another an opera singer and yet another a Protestant pastor.

⁴¹ Final Report of the Defense Center, in *ibid.*, 187-188.

⁴² Ferencz, "Nurnberg Trial Procedure and the Rights of the Accused," 148.

⁴³ The original indictment was filed 3 July but was amended 29 July. See *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No.10*, vol. 4, 3.

Twenty-four defendants were indicted, but only twenty-two were tried. One of the defendants, Emil Hausmann, an officer in *Einsatzkommando* 12, committed suicide in his prison cell immediately after receiving his indictment. Another indictee, Otto Rasch, was excluded from the case after the trial had begun due to a severe and advanced case of Parkinson's disease that limited his ability to participate in his own defense. Thus, while twenty-three of the twenty-four men indicted stood trial, only twenty-two defendants were ultimately tried and sentenced.

Each of the twenty-four defendants was charged with all three counts, covering the period of their activity from May 1941 to July 1943. Each defendant entered a plea of "not guilty in the sense of the indictment." Few denied participating in the genocidal campaign in the Soviet Union; rather they maintained that, under the circumstances of total war and a state of emergency, they were not legally responsible "in the sense of the indictment," for their crimes. Their defense hinged on the argument they had acted legally, as soldiers, and had merely been following orders.⁴⁴

⁴⁴ On the issue of superior orders see Robert Kempner in *SS im Kreuzverhör* (Munich, 1964) who analyses various trials against SS officials including the *Einsatzgruppen*. He reviews the testimony of Otto Ohlendorf and his defense counsel's argument, especially the defense of following superior orders. See also David Kitterman "Those who Said 'No!': Germans Who Refused to Execute Civilians during World War II," *German Studies Review* 2:11 (1988), 241-254, who has identified more than 100 cases where Germans refused to participate in the illegal executions of civilians and were not punished for their refusal. On more general applications of the defense of following superior orders see especially, Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Leyden, 1965); Aubrey Daniel, "The Defense of Superior Orders," *University of Richmond Law Review* 7 (1973), 477-509; Stanley Milgram, *Obedience to Orders* (New York, 1974); David G. Paston, *Superior Orders as Affecting Responsibility for War Crimes* (New York, 1946); and Martin Redish, "Military Law—Nuremberg Rule of Superior Orders—United States Court Martial Tribunal Admits Evidence of United States War Crimes in Vietnam in Support of Superior Orders of Defense," *Harvard International Law Journal* 9 (1968), 169-181.

The defendants were arraigned between September 15 and 22, 1947 at the Palace of Justice in Nuremberg before Military Tribunal II-a (later renamed Military Tribunal II). The tribunal consisted of three judges: Michael Angel Musmanno (presiding) was a Reserve Naval Captain and judge from the Court of Common Pleas, Allegheny County, Pennsylvania; John Joshua Speight was a leading member of the Alabama bar; and, Richard Dillard Dixon was a judge from the Superior Court of North Carolina. The trial began September 29, with the presentation of the prosecution's case led by a very young Chief Prosecutor, Benjamin B. Ferencz. The trial ended eight months later on April 10, 1948, after the judgment had been rendered and sentences passed by the tribunal. The presentation of the prosecution's evidence (mainly excerpts from the Operational Situation Reports of the *Einsatzgruppen* and sworn affidavits of the defendants – 253 exhibits in all) lasted less than two days, the remainder of the time was taken up by the direct testimony of the defendants and their cross examination by the prosecution and the presiding judge. Other than Ralph Wartenberg, the chief interrogator of the Office of the Chief of Counsel of War Crimes, and Francois Bayle, Commander of the Medical Corps of the French Navy, the prosecution called no witnesses.

Witnesses make for a more dramatic presentation of a case than documents, and certainly there were plenty Ferencz could have called. Calling witnesses, however, involves time (war crimes investigators would have to be dispatched to the Soviet Union to track down witnesses) as well as costing a lot of money, commodities the OCCWC was short on at the time. In any event, Ferencz believed that witness testimony was unreliable and besides, most of the defendants had admitted their crimes in pre-trial interrogations. For those who had not, the *Einsatzgruppen* Reports would prove their guilt. Thus, for the

prosecutors of the commanders of the mobile killing units, witnesses were not essential for the successful prosecution of their case.

Each defendant was permitted to choose his own advocate and the vast majority of indictees also opted for an additional assistant defense attorney to represent them. All twenty-three surviving defendants in the trial testified in their own behalf, except Dr. Otto Rasch, who was physically unable to do so because of his advanced case of Parkinson's. Rasch's case was eventually severed from the trial in February 1948 and he died in prison nine months later in November, only months after its conclusion. Under German criminal law, the right to testify before the court is determined by the judge who determines if defendant testimony is reliable enough to be heard before the court. At Nuremberg the defendants were automatically granted the right to testify under oath as well as being permitted to address the court after closing statements were made, which they did, but not under oath.⁴⁵ Along with the defendants, the defense called only eighteen witnesses to the stand.⁴⁶ This was unusual, but given the time constraints and the tribunal's desire for fairness, Musmanno ruled that the defense was permitted to submit any and all evidence (including hearsay evidence) that might exonerate the defendants.⁴⁷ The ruling led to the

⁴⁵ "Oral Testimony by Defendants," in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No.10*, vol. 15, 714-715.

⁴⁶ *Ibid.*, vol. 4, 3-4.

⁴⁷ This ruling was referred to as the "Penguin Rule" because Musmanno had declared for the record that he would admit all evidence, including evidence of the social life of the "Antarctic Penguin" if it would help prove the innocence of the defendants. Because the rules of evidence were flexible and because Musmanno felt that the gravity of the charges dictated that the defendants have every opportunity to prove their innocence, he stretched the rules of evidence by allowing just about anything for the record see *Trial*, roll 4, 2841.

submission of 549 affidavits (mostly statements about the defendants' characters from school teachers, ministers, family, friends and colleagues) in behalf of the defense and in lieu of direct testimony.⁴⁸ In Musmanno's estimation, the submission of affidavits in lieu of direct testimony saved more than five months of court time. Along with the affidavits an additional 204 defense exhibits were entered into evidence in behalf of the twenty-two surviving defendants. Under the rules that governed the trial, each defendant was given the right to make a final statement to the court. All the defendants, except Rasch, read their statements into the record.

After 138 court sessions the trial came to an end. Musmanno, a devout Catholic who actively campaigned for the abolition of the death penalty in the United States, spent two weeks in a monastery contemplating the fate of these men. On April 10, 1948 he pronounced sentences in open court. In all, he handed down fourteen death sentences. Ernst Biberstein, Paul Blobel, Walter Blume, Werner Braune, Walter Haensch, Waldemar Klingelhöfer, Erich Naumann, Otto Ohlendorf, Adolf Ott, Martin Sandberger, Heinz Schubert, Willy Seibert, Eugen Steimle and Eduard Strauch were all sentenced to death by hanging. Heinz Jost and Gustav Nosske were sentenced to life in prison. Waldemar von Radetzky, Erwin Schulz and Franz Six received twenty years in prison, whereas Lothar Fendler and Felix Rühl were sentenced to ten years each. Matthias Graf, the lowest-ranking SS officer indicted, was released based on time served.

After the trial was completed, all the defendants except Gustav Nosske applied for clemency, first with the American Military Governor Lucius D. Clay and later with

⁴⁸ *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No.10*, vol. 4, 3-4.

American High Commissioner John J. McCloy. In March 1949, General Clay affirmed all fourteen death sentences in the *Einsatzgruppen* case, but United States officials nevertheless granted a stay of execution when irregularities were detected in other, non-Nuremberg (army), trials. During this period, Clay also introduced a system whereby all convicted war criminals received a credit of five days per month for time served in pretrial confinement and for good behaviour. This decision reduced the sentences of all convicted war criminals – including the *Einsatzgruppen* leaders – by one quarter.

Those sentenced to death by hanging had their executions postponed until officials in Washington had determined that the American army trials had been fair to the defendants. The United States Senate investigated the accusations and declared in the spring of 1949, that while there had been some irregularities, the army trials had generally been carried out in a humane and just fashion. In June 1949, after executions had resumed at the rate of ten prisoners per day at Landsberg (the prison where the war criminals were housed), the convicted men fearful of the execution of their sentences again flooded the American Military Government with requests for clemency until 1950, when John McCloy, Clay's replacement as United States High Commissioner for Germany, acquiesced to German demands for the establishment of an Advisory Board on Clemency. On January 31, 1951 the Peck Panel, as the Advisory Board came to be called, after hearing only from representatives of the defense, reaffirmed only four of the original fourteen death sentences, commuting four of the death sentences to life in prison; the remainder of the former *Einsatzgruppen* leaders had their sentences drastically reduced, and several were even released with time served. The high commissioner could not bring himself to commute the death sentences of Otto Ohlendorf, Paul Blobel, Ernst Biberstein and Erich Naumann because, as he said, he found

their crimes without doubt the most clear-cut and “shocking,” of all those tried and found guilty at Nuremberg.⁴⁹ The lengthy legal battle came to an end on June 7, 1951 when the above-named four former *Einsatzgruppen* leaders were hanged at Landsberg prison. Between 1951 and 1958 all but three of the remaining convicted murderers were released from prison either through an act of clemency or parole. On May 9, 1958, only ten years after they had been originally sentenced for the murder of approximately one million people, the three remaining *Einsatzgruppen* leaders still in Landsberg prison were released.

4. Conclusion

As a result of the fiftieth anniversary of the International Military Tribunal, the recent war crimes trials in the former Yugoslavia and Rwanda, and subsequent efforts to establish a permanent international court of justice, there is renewed interest in war crimes, war criminals and war crimes trials in general. Because the history of the *Einsatzgruppen* trial has not been told, this inquiry should constitute a significant addition to the history of the prosecution of war criminals in general, and specifically those tried after the Second World War. The trial of the *Einsatzgruppen* leaders was an important historical event. Not only is their trial and punishment a noteworthy addendum to the criminal Nazi regime, the trial is also important for our understanding of the history and the development of international criminal law. The indictment against the *Einsatzgruppen* leaders in 1947 represents the first time in history that a group of individuals were charged with the crime of genocide. As imperfect as the prosecution of this crime was, it laid the groundwork for

⁴⁹ *Special List No. 42, 3.*

future trials of this scope. The Nuremberg legacy is not just legal however. The *Einsatzgruppen* trial, as part of the larger Nuremberg project, is also important historically. These thirteen trials, what is collectively referred to as “Nuremberg,” were instrumental in shaping our historical understanding of Nazi criminality and, in the case of the *Einsatzgruppen* trial specifically, in shaping the historiography of the “Final Solution.” As noted at the beginning, scant attention has been given to these trials in general and the historiography is still in its infancy. A comprehensive analysis of the *Einsatzgruppen* trial will help fill this void. The following chapters recount the story of the fate of twenty-two high-ranking members of the Nazi regime who perpetrated the murder of more than one million human beings; but it also provides a detailed analysis at how the perpetrators of mass murder justified or denied their participation in genocide, and how a group of three American judges carefully weighed the evidence, determined their guilt, and ordered their punishment.

Chapter 2

From International Cooperation to Zonal Trials: The United States and the Origins of the Subsequent Nuremberg Proceedings

It is generally acknowledged, among symphony conductors and trial lawyers alike, that the vital work is done before the show begins. Gesticulate and exhort as the conductor may during a concert, the quality of the performance will be largely determined by the caliber of the players he has selected, and the sensitivity and unity of purpose that he has imparted to them in rehearsal.

Telford Taylor¹

I. Introduction

On November 1, 1943, in what became known as “The Moscow Declaration on German Atrocities,” Winston Churchill, Franklin Roosevelt and Joseph Stalin explicitly warned the German government that at the war’s end, “all those who have taken a consenting part in atrocities, massacres and executions” of innocent people will be pursued “to the uttermost ends of the earth and will [be] delivered to [their] accusers in order that justice may be done.”² Despite such strongly stated intentions, the Allies did very little during the remainder of the war to prepare for such an eventuality, supporting one historian’s assertion that “there never was a fixed or well-defined Nuremberg plan or

¹ Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No.10* (Washington, 1949), 86.

² The complete text of “The Moscow Declaration” can be found in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* vol. 4, (Washington, 1949), x (from here forward simply *Trials of War Criminals*).

policy.”³ This comes as no surprise to students of American foreign policy especially since it is well-known that the American war-time president, Franklin Roosevelt, kept a tight rein on foreign policy and was loathe to reveal his plans for the postwar world, particularly with respect to Germany.⁴ American planning for the punishment of war criminals was deferred until 1944-1945 and, as a result, the Allies were forced to grapple with the “German problem.” Should they strip Germany of its war-making potential and turn it into an agricultural wasteland or should they attempt rehabilitation by purging German society of Nazism and punish only the most important surviving officials of the regime?

It was not until early 1945 that the Allies came to any semblance of an agreement

³ Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York, 1977), xvii. In 1948, one American lawyer concluded that the American war crimes trial program in Germany was unorganized. He attributed this to a “lack of high-level planning in Washington.” See William Fratcher, “American Organization for Prosecution of German War Criminals,” *Missouri Law Review* 13 (1948), 70. While not denying that the war criminals issue was a low priority for the Allies before the end of the war, Arieh J. Kochavi, *Prelude to Nuremberg. Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, 1998), has recently argued that the issue was widely discussed in London and Washington from 1941 on, but that the issue was not given serious consideration until 1944. His research shows that a number of factors influenced and shaped the Allies’ approach to the issue of war crimes and that these factors prevented the British and Americans from reaching agreement on the treatment of war criminals before the end of the war. In terms of the Subsequent Nuremberg Trials, Michael R. Marrus, “The Nuremberg Doctors’ Trial in Historical Context,” *Bulletin of the History of Medicine* 73 (1999), 110, has argued that “the subsequent proceedings in general – and the Doctors’ Trial, as the first of these, in particular – had a haphazard, improvised character.”

⁴ Prior to February 1945 (the Yalta Conference), Roosevelt refused to settle political issues with his allies. He preferred to concentrate his energies on winning the war and wait until victory was closer at hand before engaging in the wrangling that would inevitably accompany negotiations. For overviews of Roosevelt’s foreign policy during the war see Robert D. Schulzinger, “The Politics of Coalition Warfare, 1939-1945,” in *idem, American Diplomacy in the Twentieth Century* (New York, 1990), 167-200 and Stephen E. Ambrose, *Rise to Globalism: American Foreign Policy since 1938* (New York, 1991). The best discussion of Roosevelt’s foreign policy remains Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932-1945* (New York, 1995 <1979>).

about the “German problem.” Along with unconditional surrender, they decided that Germany should be divided into four zones of occupation. The Soviets would occupy the eastern portion of the country, the British the northwest, the Americans the south, and the French would take that small portion of southwest Germany which bordered their country. As for the war criminals question, initially they could not agree.⁵ The British favoured summary execution as did the Russians, but only after some form of political inquiry, while American opinion was divided.⁶ Some officials in Washington supported the infamous proposal of the Secretary of the Treasury, Henry Morgenthau Jr., who argued that war criminals should be executed and Germany should be dismembered, demilitarized, denazified, and de-industrialized.⁷ Along with his supporters Morgenthau believed Germans were incapable of rehabilitation. Convinced that Morgenthau’s plan for the break-up of Germany would be disastrous for the reconstruction of a stable Europe, Secretary of War Henry Stimson, Assistant Secretary of War John McCloy and others in the War Department responded with an alternative plan which included the recovery and reintegration of Germany into the European community plus a judicial solution to the war criminals problem.⁸ That Roosevelt refused to commit to either Morgenthau’s or Stimson’s solution

⁵ For a good discussion of the level of disagreement between the British and Americans see Kochavi, *Prelude to Nuremberg*, 201-217.

⁶ Schulzinger, “The Politics of Coalition Warfare,” 186. For a discussion of Russian attitudes toward the question of punishment see Kochavi, *Prelude to Nuremberg*, 217-222.

⁷ Peter Maguire, *A Cold War Conflict of Interest* (unpublished PhD dissertation, Columbia University, 1995), 150-151.

⁸ On the differences between the Stimson and Morgenthau plans see especially Kochavi, *Prelude to Nuremberg*, 80-87 and Robert Wolfe, “Flaws in the Nuremberg Legacy: An Impediment to International War Crimes Tribunals’ Prosecution of Crimes against

before the war was over highlights the difficulty the Americans had in planning for the transition from war to peace. Indeed, it was not until after the death of Roosevelt on April 12, 1945, when Harry S Truman took office, that a decision was made concerning the war criminals issue.

Known for quick decision-making, Truman, the plain-talking president from Missouri, immediately opted for the War Department's solution.⁹ Truman was "easily persuaded" by Roosevelt's former legal advisor, Samuel Rosenman, that his predecessor would have favoured a judicial rather than draconian solution to the war criminals problem.¹⁰ Thus, Truman reasoned, the best way to solve the "German problem" was to rehabilitate the country. This could be accomplished through the process of denazification of German society, the aim of which was the "liquidation of Nazism as a sociopolitical system," by destroying all Nazi institutions, its leadership, and legal system as well as its culture, symbols and ideology.¹¹ Denazification coupled with the trial and punishment of the highest-

Humanity," *Holocaust and Genocide Studies* 3:12 (Winter, 1998), 435-438. For details of Morgenthau's plan see Warren F. Kimball, *Swords or Ploughshares? The Morgenthau Plan for Defeated Nazi Germany, 1943-1946* (Philadelphia, 1976).

⁹ For an interesting discussion of Truman's life see David McCullough, *Truman* (New York, 1992). For solid discussions of the Truman administration and its policies see Barton Bernstein (ed.), *The Politics and Policies of the Truman Administration* (Chicago, 1970); Schulzinger, "The Early Cold War, 1945-1952," in *American Diplomacy in the Twentieth Century*, 201-231; and, Robert J. Donovan, *Conflict and Crisis. The Presidency of Harry S Truman, 1945-1948* (New York, 1977). For the War Department's plan see Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War* (New York, 1948).

¹⁰ Kochavi, *Prelude to Nuremberg*, 217-218.

¹¹ Elmer Plischke, "Denazification in Germany. A Policy Analysis," in Robert Wolfe (ed.), *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944-1952* (Carbondale, IL; 1984), 198-200. Denazification was Central to the Allies' plan of remaking German society. It was a mammoth and controversial task that would drag on

ranking Nazi war criminals, the Americans hoped, would go some way toward reeducating Germans and thereby remaking German society. To this end, on April 26, 1945, Truman

for years and never be completed. Denazification was the attempt by the Allies to identify and eliminate all traces of Nazism from German life, including redrafting laws to eliminate Nazi ideological content and removing former party members from all spheres of public life. Denazification went deep into German society: not only Nazi leaders, but all party members no matter how insignificant, were to be identified and tried before the so-called denazification courts to determine the extent to which they had been Nazified. If the courts found an individual guilty, not only was he forbidden to hold public office, but he was often sentenced to hard labour. Between 1946 and 1948 in the American, British and French zones, more than 15 million Germans were required to fill out a *Fragebogen* or questionnaire, explaining their relationship to the Nazi party. As a result, hundreds of thousands of German officials lost their jobs or were imprisoned. In the Russian zone 850,000 former party members were questioned by the Soviet authorities; 65,000 received some form of punishment. Whether or not the Soviets used the denazification process as a pretext to eliminate their political enemies is a matter for debate. Germans were largely dissatisfied with the denazification process, particularly in its later stages, when the program began to fall apart and its structural weaknesses became increasingly apparent. The result of the denazification program, in the western zones at least, was that many former Nazis who had committed particularly heinous crimes during the war, emerged from the process relatively unscathed or were never punished at all, while insignificant party members received particularly harsh sentences. Thus, it appeared to many average Germans that Allied justice (at least in the case of denazification) was hypocritical and arbitrarily applied.

Much has been written on the subject, but most recent scholarship has focussed on regional analyses of denazification. See especially, Jorg D. Kramer, *Das Verhaltnis der politischen Parteien zur Entnazifizierung in Nordrhein-Westfalen* (Frankfurt, 2001); Timothy R. Vogt, *Denazification in Soviet-occupied Germany: Brandenburg, 1945-1948* (Cambridge, MA; 2000); Olaf Reichert, *“Wir müssen doch in die Zukunft sehen” – die Entnazifizierung in der Stadt Oldenburg unter britischer Besatz* (Oldenburg, 1998); Damien van Melis, *Entnazifizierung in Mecklenburg-Vorpommern: Herrschaft und Verwaltung 1945-1948* (Munich, 1999), John P. Teschke, *Hitler's Legacy: West Germany Confronts the aftermath of the Third Reich* (New York, 1999); Wolfgang Daum, *Entnazifizierung in Landsberg am Lech: das Befreiungsgesetz vom 5. März 1946 und seine praktische Durchführung* (St. Ottilien, 1996); Robert G. Moeller (ed.), *West Germany under Construction: Politics, Society and Culture in the Adenauer Era* (Ann Arbor, Mich., 1997); Arthur Lee Smith, *The War for the German Mind: Re-educating Hitler's Soldiers* (Providence, RI; 1996); Rainer Mohler, *Entnazifizierung in Rheinland-Pfalz und im Saarland unter französischer Besatzung von 1945 bis 1952* (Mainz, 1992); James F. Tent, *Mission on the Rhine: Reeducation and Denazification in American-occupied Germany* (Chicago, 1982); and, Lutz Niethammer, *Entnazifizierung in Bayern: Säuberung und Rehabilitierung unter amerikanischer Besatzung* (Frankfurt, 1972).

approved a directive, Joint Chiefs of Staff (JCS) 1067.¹² The directive, which had been in the works for quite some time and closely mirrored the War Department's proposal, was designed to govern the initial phase of the American occupation of Germany.¹³ Among other things, it called for the apprehending and automatic arrest of thousands of war criminals including all Nazi party officials, members of the *Gestapo*, the *Sicherheitsdienst* (SD), the *Allgemeine* and *Waffen-SS*, as well as all other Nazis and Nazi sympathizers, an enormous number of individuals by any standard.¹⁴ As a result of this far-reaching directive, literally hundreds of thousands of Germans were arrested and interned until the Americans decided

¹² Plischke, "Denazification in Germany," 207.

¹³ In late 1944, when Roosevelt was certain the Allies would win the war, he approved JCS 1067, which outlined the principles, policies and procedures that would be pursued during the initial phase of the American occupation of Germany. Between September 29, 1944 – the day Roosevelt approved the directive – and April 26, 1945, JCS 1067 was rewritten six times. On the American occupation of Germany and its policies see John H. Backer, *Priming the German Economy: American Occupational Policies, 1945-1948* (Durham, NC; 1971); Rebecca Boehling, *A Question of Priorities: Democratic Reform and Economic Recovery in Postwar Germany* (Providence, RI; 1996); Tom Bower, *Blind Eye to Murder: Britain, America and the Purging of Nazi Germany – A Pledge Betrayed* (London, 1981); Davis Franklin, Jr., *Come as a Conqueror: The United States Army's Occupation of Germany, 1945-1949* (New York, 1967); Wolfgang Drieger, *General Lucius D. Clay und die amerikanische Deutschlandpolitik, 1945-1949* (Stuttgart, 1987); John Willoughby, *Remaking the Conquering Hero: The Social and Geopolitical Impact of the Post-War American Occupation of Germany* (New York, 2000); Reiner Pommerin (ed.), *The American Impact on Postwar Germany* (Providence, 1997); Anna J. Merritt and Richard L. Merritt, *Public Opinion in Occupied Germany* (Urbana, IL; 1970); and, Jeffrey Diefendorf (ed.), *American Policy and the Reconstruction of West Germany, 1945-1955* (Cambridge, MA; 1993).

¹⁴ JCS 1067/6, Joint Chiefs of Staff Directive to Commander in Chief of US Forces of Occupation Regarding the Military Government of Germany, 26 April 1945, in Alvin J. Rockwell Papers, OMGUS file, Harry S. Truman Presidential Library, Independence, Missouri (from here forward title of collection, file, folder, HST). On the issue of JCS 1067 and reparations see Lloyd C. Gardner, "America and the German 'Problem' 1945-1949," in Barton J. Bernstein (ed.), *Politics and Policies of the Truman Administration* (Chicago, 1970), 113-148.

exactly how to punish them.¹⁵

One week after JCS 1067 was approved, Truman asked Supreme Court Justice Robert H. Jackson to take responsibility for developing American policy on war criminals including how they should be tried. To this end Truman placed Jackson in charge of the future prosecution of the most prominent Nazi war criminals by appointing him Chief of Counsel for the Prosecution of Axis Criminality (CCPAC).¹⁶ Jackson firmly believed in his task. In his opinion creating a legal framework to try and punish Nazi perpetrators was imperative, especially if the Allies wanted to avoid vigilante justice and reeducate Germans on the principles of democracy.¹⁷ In his first report to President Truman on June 7, 1945, he outlined his proposals for American war crimes policy. Jackson argued that the United States had a responsibility, in league with their allies or by themselves if necessary, to enquire "into the culpability of those whom there is probable cause to accuse of atrocities and other crimes."¹⁸ He was of the view that "to free [war criminals] without a trial would [be to] mock the dead and make cynics of the living."¹⁹

¹⁵ Many of these individuals would be dealt with through the denazification process.

¹⁶ Copy, Executive Order No. 9547, "Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War crimes against the Leaders of the European Axis Powers and their Principal Agents and Accessories," Harry S. Truman, 2 May 1945 in National Archives and Records Administration Record Group 260 (Records of the United States Occupation Headquarters, from here forward USOH), OMGUS, Records of the Executive Office, The Office of the Adjutant General, box 640, Ordinance No. 7 folder (from here forward simply NARA RG, file name, box, folder).

¹⁷ Smith, *The Road to Nuremberg*, 247-248.

¹⁸ Report, Robert H. Jackson to Harry S Truman, 7 June 1945, White House Office File 325A, Office of the Chief of Counsel, HST.

¹⁹ *Ibid.*

Once the Americans had finally decided how they wanted to proceed, they needed to convince the allies – who still favoured summary execution of the Nazi leadership – that the US plan to pursue a judicial solution, should be adopted. On the suggestion of the Americans, representatives of the Allied powers met in San Francisco in early May 1945 to discuss the issue of punishment. The Americans took the lead at the meeting. The Soviets immediately embraced the American proposal. Without an alternative plan for the treatment of major war criminals, the British were forced to “yield” to the American initiative.²⁰ Besides, given the deaths of the most important Nazi leaders, Hitler, Himmler, Goebbels and possibly Bormann (many were convinced that Bormann was still alive, despite rumours to the contrary), the British plan for the summary execution of the leading Nazi figures had lost much of its appeal.²¹ Thus, in May 1945, the Allied powers agreed that the solution to the problem of punishment of major Nazi war criminals would be judicial, and that these

²⁰ Kochavi, *Prelude to Nuremberg*, 220.

²¹ Michael R. Marrus (ed.), *The Nuremberg War Crimes Trial, 1945-1946: A Documentary History* (New York, 1997), 38. The origins of the International Military Tribunal have been the subject of numerous studies, some of these include: United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948); Stimson and Bundy, *On Active Service in Peace and War* (1948); Sidney S. Alderman, “Negotiating the Nuremberg Trial Agreement, 1945,” in Raymond Dennett and Joseph E. Johnson (eds.), *Negotiating with the Russians* (Boston, 1951); Bradley F. Smith, *The Road to Nuremberg* (New York, 1981) and *The American Road to Nuremberg: The Documentary Record, 1944-1945* (New York, 1982); Robert Conot, *Justice at Nuremberg* (New York, 1983); George Ginsburgs, “The Nuremberg Trial: Background,” in George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht, 1990), 9-37; Priscillia Dale Jones, “British Policy towards German Crimes against the Jews, 1939-1945,” *Leo Baeck Institute Year Book* 36 (1991), 339-366; Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York, 1992); Anthony Glees, “The Making of British Policy on War Crimes: History as Politics in the UK,” *Contemporary European History* 1:2 (July 1992), 171-197; and Kochavi, *Prelude to Nuremberg* (1998).

individuals would be tried before an international military tribunal to be composed of representatives of the Allied powers, including France.

Once a judicial solution had been accepted, American, British, Soviet and French jurists met in London in July and August 1945 to work out an agreement for the unprecedented international trial, and to decide whom to indict. Negotiations for the establishment of the International Military Tribunal (IMT) took the better part of a month. The task of reconciling discrepancies that arose because of substantive differences in the legal systems of the four countries proved to be exceedingly challenging – at times almost impossible – for the jurists. The delegates decided the trial would be held in Nuremberg (a symbolic and practical venue for the Allies because that city's former importance to the Nazi party and because its palace of Justice was still relatively intact) and not in Berlin, as the Soviets hoped. The main charge against the Nazi leadership was the common plan or conspiracy to commit aggressive war, more commonly known as crimes against peace. This created serious problems for the French and Soviet representatives because their national laws included no provision for the crime of "conspiracy." Finally, the Americans insisted that particular Nazi organizations such as the SS, SA, German High Command, and the Reich Cabinet be prosecuted in the expectation that conviction of these organizations would facilitate the conviction of individual members in later proceedings. The result of these negotiations was the London Agreement and its Charter of August 8, 1945, a compromise agreement signed by the British, Americans, Soviets and French which, although flawed, provided the Allies with a legal foundation to try and punish the highest-ranking Nazi war

criminals.²²

The IMT was convened at the Palace of Justice in Nuremberg in November 1945. On trial were twenty-four of the highest-ranking political and military leaders of the former regime, including Albert Speer, Hermann Göring, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Karl Dönitz and Alfred Jodl.²³ The trial lasted a year, produced eleven death sentences and was well publicized in the German press. The conduct of the IMT and the outcome of the trial would have a significant impact on later American war crimes policy. Almost as soon as the trial began difficulties arose among the prosecutors from the four Allied nations. These conflicts prompted the Americans to promulgate new legislation that would allow for a continuation of judicial proceedings against additional Nazi war criminals, but on a national rather than international level. What resulted were twelve Subsequent Nuremberg Proceedings between 1946 and 1949, prosecuted by the Americans alone, one of which was the *Einsatzgruppen* trial.

Many historians have written on the subject of the origins of the original IMT trial in 1945. But very little has been written about the additional twelve Subsequent Nuremberg Proceedings, and there is scarcely a reference anywhere in the literature to their origins.²⁴

²² Charter of the International Military Tribunal, 8 August 1945 in *Trials of War Criminals*, xii-xviii. On the issue of the Nuremberg Charter see Wolfe, "Flaws in the Nuremberg Legacy," 441-442.

²³ In reality only twenty-one defendants appeared in the dock at Nuremberg. Gustav Krupp von Bohlen und Halbach, the German industrialist, was indicted but never appeared in front of the IMT because he was judged too infirm to stand trial. Martin Bormann was tried in absentia in the event he was found alive, and Robert Ley hanged himself as the trial was beginning.

²⁴ This trend is in the process of changing. Recently, Paul Weindling has written about the origins of the Doctors' Trial, "From International to Zonal Trials: The Origins of

This chapter attempts to go somewhat toward correcting this trend by explaining why and how the Americans came to decide holding war crimes trials subsequent to Nuremberg was necessary. In doing so, the chapter traces the development of American war crimes policy in Germany from 1945 to 1946, the transitional period between the IMT and the Subsequent Nuremberg Proceedings. It shows that Robert H. Jackson, the American Supreme Court Justice appointed by President Truman in May 1945 to prosecute the most prominent Nazi war criminals, was not only instrumental in the planning and preparation of the original IMT trial, but he also played a significant role in planning the Subsequent Nuremberg Proceedings as well.²⁵ By the end of 1946, once the Americans had experienced an internationally-prosecuted war crimes trial first hand, they were certain of three things. First, they knew they did not want to pay the heavy financial costs of another international trial. Second, they were certain they did not want to work with the Soviets again. And third, they believed quite sincerely that they had an obligation to try those German industrialists and financiers who had escaped punishment at the first internationally-prosecuted Nuremberg trial. Ultimately it was Jackson who convinced President Truman of the need to adopt a broader approach toward Nazi war criminals. To avoid further international entanglements

the Nuremberg Medical Trial,” *Holocaust and Genocide Studies* 3:14 (Winter, 2000), 367-389 and Peter Maguire has published his PhD dissertation which analyzed the Ministries Trial (Case 12 of the Subsequent Nuremberg Proceedings), in *Law and War: An American Story* (New York, 2000) in which he discusses some of the political factors that contributed to the Subsequent Nuremberg Proceedings. In addition Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford, 2001) briefly discusses the origins of the American trials. Jonathan Bush, a PhD in law and Fellow at the Center for Advanced Holocaust Studies, Washington, DC is in the process of writing a history of Telford Taylor and the Subsequent Nuremberg Proceedings.

²⁵ Marrus, *The Nuremberg War Crimes Trial*, 43.

and to ensure that more German war criminals were prosecuted, the United States would hold trials in its occupation zone. What resulted were twelve additional trials involving 185 high-ranking Nazi officials in the American zone. The following pages discuss the origins of these war crimes trials.

2. JCS 1023, Control Council Law No. 10, and American War Crimes Policy

The Americans formulated their war crimes policy for Germany between June 1945 and November 1946. Planning began in the summer of 1945, while Justice Jackson was in London negotiating with America's allies to establish an international tribunal to try war criminals. During this time a legal team was assembled in the United States to work with Jackson on the unprecedented international trial, and Jackson's interim report of June 7, 1945 allowed the policy makers in Washington to begin work on the formulation of a basic war crimes policy for occupied Germany. The Chief of Counsel's interim report became the basis of Joint Chiefs of Staff (JCS) 1023/10, a directive which took a much broader approach to the war crimes problem than merely indicting a few high-ranking Nazis as the IMT had. In fact, JCS 1023 called for the punishment of individuals who committed "atrocities and offenses including atrocities and persecutions on racial, religious or political grounds, committed since 30 January 1933." Given eight million Germans were members of the Nazi party in May 1945, the number of war criminals could reach into the millions.²⁶ The

²⁶ Memorandum, "Organization for Further Proceedings against Axis War Criminals and Certain Other Offenders," 5 December 1945, in NARA RG 153 (Records of the Judge Advocate General), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 2, I 84-1 folder (from here forward JAG). On the number of Germans who were members of the Nazi party see Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge, MA; 1997), 202-203.

expectation, evidently, was that acts committed prior to the war would be prosecuted. The IMT of course, saw matters quite differently. Charges laid in that case consisted of crimes committed only after September 1, 1939. Yet, under JCS 1023 those who directly took part in crimes and those who aided them were indictable, but more significantly for later trials, the directive also stated that those who were "members of groups or organizations connected with the commission of such crimes," were also potential war criminals.²⁷ Because of its vast scope, JCS 1023 posed enormous challenges for those planning the additional war crimes trials, especially the Subsequent Nuremberg Proceedings, despite its far-reaching potential it nonetheless became the basis of American war crimes policy for the next four years.²⁸

The directive of the Joint Chiefs of Staff, entitled "The Identification and Apprehension of Persons Suspected of War Crimes," was intended as a more concrete statement of policy on the issue of war criminals than JCS 1067, which broadly outlined American occupation policy in Germany immediately after the war.²⁹ Whereas JCS 1067 was draconian in tenor, calling for the denazification and reeducation of Germans, JCS 1023 specifically authorized American Military authorities to "investigate, apprehend and detain all persons" it suspected of war crimes.³⁰ The directive also made it clear that American

²⁷ Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington, 1949), 4-5.

²⁸ *Ibid.*, 6.

²⁹ Maguire, *Law and War*, 145-146.

³⁰ JCS 1023/10 was approved by the Joint Chiefs of Staff on July 15, 1945 in Taylor, *Final Report*, 4. In July 1947 American occupation policy in Germany changed course, the result of James Byrnes Stuttgart speech that called for German self-government. No longer was the aim of the Americans to punish Germany, they now looked to its recovery. This new policy was reflected in JCS 1779 which replaced the more punitive JCS 1067. Bloxham,

military authorities should "urge" the other occupying powers to adopt policies for their zones of occupation similar to the one the Americans were planning for theirs.³¹ General Eisenhower charged Brigadier General Edward C. Betts, the Theater Judge Advocate and former Professor of Law at the United States Military Academy, with the task of implementing and administering the directive.³² The immediate result of this policy was the arrest of nearly 100,000 Germans who were held in custody by the Americans for future trial. Most of these minor criminals it was hoped, would be dealt with by the denazification courts then being set up, but several hundred were considered to be major war criminals, at least as important as those being tried by the International Military Tribunal at Nuremberg, and Betts wanted to deal with them separately.³³

Not long after JCS 1023 was approved, the American Legal Division of the Control Council (the quadripartite organizational authority formed in June 1945 to deal with

Genocide on Trial, 27 and Maguire, *Law and War*, 145-147.

³¹ Joint Chiefs of Staff 1023/10, "Directive on the Identification and Apprehension of Persons Suspected of War crimes or other Offenses and Trial of Certain Offenders," 8 July 1945, quoted in Taylor, *Final Report*, 242-249. See also Memorandum to General Clay, "Law Providing for the Punishment of War Criminals and Similar Offenders," 28 September 1945, in NARA RG 260 (USOH), OMGUS, Records of the Executive Office, the Office of the Adjutant General, box 642, Control Council Law No. 10 folder.

³² General Betts was made Deputy Director for War Crimes in the Legal Division of the American element of the Control Council. Betts died in May 1946. Fratcher, "American Organization for Prosecution of German War Criminals," 53-54 and 70.

³³ Memorandum for Justice Jackson, "Further Trials," 30 January 1946 in NARA RG 260 (USOH), OMGUS, Records of the Functional Offices and Divisions, OCCWC, box 2, Subsequent Proceedings Division folder. See also Taylor, *Final Report*, 16. That the Americans were willing to deal with the majority of minor war criminals in denazification courts suggests to Weindling that "the Allies adopted a highly selective policy of bringing only the most conspicuous perpetrators to trial," see *idem*, "From International to Zonal Trials," 366.

occupation issues of which the United States Military Government [OMGUS] was the American component), headed by Charles Fahy, a former legal adviser in the Department of State, was ordered by General Betts to work on developing a new legal strategy for the punishment of war criminals.³⁴ In particular, Betts asked Fahy to draft a law that would allow the Americans to deal with the ever-growing number of detained war criminals. More importantly than dealing with the large number of detainees, the US sponsored the development of this law in order to address tensions that had already begun to develop between the American and the Soviet legal teams at Nuremberg. Moreover, from the very beginning of Allied negotiations on war crimes, Jackson thought zonal trials rather than international prosecution were a far more expeditious way of dealing with Nazi war criminals. Thus, when problems among the prosecution teams at Nuremberg surfaced, Jackson reiterated his previous idea to American officials in Washington and Berlin: the most effective and least costly way to punish the remaining major war criminals, in particular German financiers and industrialists, he argued, was to ensure the continuation of trials, but on a zonal basis rather than by quadripartite prosecution. If the Americans were to proceed alone, as it seemed Jackson favoured, they needed an alternative to the *London Charter* of August 8, 1945, which was the only law on the books that dealt with the punishment of major war criminals. In any case, the *London Charter* was due to expire on August 8, 1946 and if the Americans were to continue their judicial exercise they needed a

³⁴ Under the Potsdam Agreement "supreme authority in Germany" was to be the Control Council, which consisted of the United States, Great Britain, the Soviet Union, and France. While responsibility was to be shared, each power had supreme control over their own zone. The Legal Division was the American component of the Legal Directorate which was the quadripartite legal body of the Control Council. Quoted in Charles Fahy, "Legal Problems of German Occupation," *Michigan Law Review* 47 (1948), 15 and 17.

law that would sanction the trial of individuals other than those currently under indictment at Nuremberg.³⁵

To this end, the American legal team submitted to the Allied Control Council the draft of a law permitting the punishment of war criminals on a zonal basis, rather than by quadripartite, international prosecution.³⁶ After much rewriting the draft was approved by the Coordinating Committee of the Control Council on November 1, 1945 and promulgated on December 20 as Law No. 10. It was signed by representatives of the United States, Great Britain, France and the Soviet Union and was patterned on the Nuremberg Charter, the strategy of which was, in effect, still before the court. The promulgation of Control Council Law No. 10 not only satisfied the demands of JCS 1023 which called for the adoption of uniform legal policies for Germany, but more importantly, it also provided the Americans an escape valve if they decided it was desirable to extricate themselves from further international legal cooperation.³⁷ Control Council Law No. 10 granted each occupying government the authority to arrest, indict, and prosecute anyone considered to have committed a crime under Article 2 of the law, which was similar to the London Charter's

³⁵ Letter from Justice Robert H. Jackson to Robert P. Patterson, Secretary of War, 7 February 1946 in NARA RG 466 (Records of the United States High Commissioner for Germany from here forward HICOG), Prisons Division, Security Segregated Records, box 10, War Crimes Trials 1949 folder.

³⁶ Minutes of the Twelfth Meeting of the Coordinating Committee, 6 October 1945 in NARA RG 260 (USOH), Records of the US Element of Inter-Allied Organizations, Records of the US Element, Allied Control Authority, Records of the Coordinating Committee 1945-1948, box 135, Minutes 1945 folder.

³⁷ Allied Control Authority Control Council CONL/P(45)53(Final), 20 December 1945 in NARA RG 260 (USOH), Records of the U.S. Element of inter-Allied Organizations, Records of the U.S. Element Allied Control Authority, Records of the Control Council, box 125, master file CONL/P(45)51-64 folder.

Article 6 which specified four acts as criminal: Crimes against Peace, War Crimes, Crimes against Humanity, and Membership in Organizations Declared Criminal by the IMT.³⁸ In the indictment filed with the IMT, the charge of conspiracy, that is participation in a common plan to commit crimes against peace, war crimes, and crimes against humanity, was used as the “unifying element” for all of the other charges then before the court at Nuremberg.³⁹ Although the charge of conspiracy was included in Control Council Law No. 10, it never held the same sway as at the IMT trial; in fact, the judges convened for the Subsequent Proceedings, after meeting and hearing defense arguments, eventually dismissed the charge in the first three trials, the “Medical,” “Justice” and “Pohl” cases.⁴⁰

Article 1 of Control Council Law No. 10 was intended to incorporate the London Charter of August 8, 1945, although it eventually ended-up replacing it since the London Charter would cease to be law if any one of its signatories, after one year, decided to terminate the agreement.⁴¹ Article 1 also gave official sanction to the Moscow Declaration signed by Roosevelt, Churchill and Stalin in 1943 which had promised that those Germans responsible for atrocities in specific geographic areas would “be sent back to the countries in

³⁸ Indictment, National Archives Microfilm Publication, M895, *The United States v. Otto Ohlendorf et al.*, roll 1, 3 (from here forward simply *Trial*, roll, page). See also “Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,” in *Trials of War Criminals*, vol. 4, xviii-xxi.

³⁹ Taylor, *Final Report*, 70-71.

⁴⁰ *Ibid.*

⁴¹ “Comparison between the London Charter and Control Council Law No. 10,” undated in NARA RG 238 (World War II War Crimes Records, from here forward WCR), Office Chief of Counsel of War Crimes, Executive Office, Publications Division, box 5, folder 6.

which their abominable deeds were done" so that they could be punished accordingly and by local authorities. To facilitate this possibility, rules of extradition had to be written.⁴² Thus, Articles 4 and 5 of Control Council Law No. 10 provided for the exchange and extradition of suspected war criminals.⁴³ Article 2 replicated in large part the crimes outlined in the London Charter: Crimes against Peace, War Crimes, and Crimes against Humanity. The fourth crime, Membership in organizations declared criminal by the International Military Tribunal was new and was written in response to the need for a provision in the law that would permit the courts to try and punish individual members of the organizations then being prosecuted at Nuremberg.⁴⁴

Articles 2, 3 and 4 of the law were also designed to provide a uniform legal foundation to try war criminals in the four zones of occupation, authorizing zone commanders to arrest and indict suspects as well as establish tribunals to try them. While the intention of these articles was to provide uniformity, ultimately only the Americans and French made use of the provisions. The British were to handle war crimes in military courts and under Royal Warrant.⁴⁵ As well, they set-up German tribunals to try individuals previously guilty under Law No. 10. The Soviets, on the other hand, had been trying war

⁴² "Declaration on German Atrocities," 1 November 1943 in *Trials of War Criminals*, x.

⁴³ Articles IV and V of "Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity," in *Trials of War Criminals*, xx-xxi.

⁴⁴ Control Council Law No. 10, "Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity," 20 December 1945, quoted in Taylor, *Final Report*, 250.

⁴⁵ On the limitations of the Royal Warrant see Bloxham, *Genocide on Trial*.

criminals since 1943, but under Law No. 10 they established no tribunals whatsoever.⁴⁶ No provisions were made for rules of procedure nor were any tribunals established under the law. That was left to the zonal commanders to establish later, and at their own discretion.⁴⁷ The promulgation of Control Council Law No. 10 established a legal basis for the Subsequent Nuremberg Proceedings.

While Fahy's legal team was writing Control Council Law No. 10, General Betts was grappling with the logistics of implementing JCS 1023. Betts immediately recognized the enormous task before him and felt it was imperative to draw on the recently acquired expertise of Justice Jackson. Accordingly, on October 19, the General wrote to the Chief of Counsel suggesting how they might best implement the directive. Betts felt it was essential to immediately appoint someone to direct the American program for the future prosecution of war criminals and, as far as he was concerned, Jackson was the best man for the job. He sincerely hoped Jackson would consider extending his commitment and embrace the new program. He also believed that Jackson's legal team was the most qualified to administer the war crimes program, and he told the Chief of Counsel that he intended to rely on Jackson's office to conduct the future prosecutions. Given the difficulties with quadripartite prosecution, Betts's preference, like Jackson's, was to avoid another four power trial if at all possible. The future prosecution of war criminals should be conducted by American military courts in the United States zone and not by an international tribunal. Betts suggested an

⁴⁶ Robert K. Woetzel, *The Nuremberg Trials in International Law* (New York, 1962), 220. See also Telford Taylor, "Nuremberg Trials: War Crimes and International Law," appendix B, in *idem*, *Final Report*, 136-137.

⁴⁷ Taylor, *Final Report*, 7-10.

alternative to Jackson, however. If Jackson did not want to extend his commitment and head the future prosecution team, then he should appoint someone from his office to take on this task.⁴⁸

Jackson's response was unequivocal. While he regarded his work at Nuremberg as a "gratifying experience," he wanted to return to his job at the Supreme Court in Washington and not prolong his stay in Europe.⁴⁹ On the other hand, he felt very strongly that the American war crimes program would be discredited if US authorities failed to follow through with the prosecution of members of criminal organizations and other war criminals currently in American custody. Thus, he encouraged Betts to pursue additional war crimes trials in the American zone; he would help with the planning personally he promised, before he returned to the United States. But, he also warned Betts that if his office were to take on the responsibility of further proceedings Washington would have to ensure that there was adequate staffing and funding to do the work properly. As Telford Taylor (Jackson's successor) would later discover, the staffing problem at Nuremberg was to plague the Office of Chief of Counsel for its entire existence.⁵⁰

⁴⁸ Letter to Justice Robert H. Jackson from Brigadier General Edward Betts, Theater Judge Advocate, 19 October 1945 in the Papers of Robert H. Jackson, Library of Congress Manuscript Division, box 110, Nuremberg War Crimes Trial Office File, Subsequent Trials folder (1) (from here forward simply RHJ Papers, box number, file, folder).

⁴⁹ Jackson was in Europe for nearly a year and a half. During that time twenty Supreme Court cases were delayed as a result of his absence. Jeffrey D. Hockett, "Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial," Gerhard Casper, Dennis J. Hutchinson, and David A. Strauss (eds.), *The Supreme Court Review: 1990* (Chicago, 1990), 257 and 274.

⁵⁰ Letter to Brigadier General Edward Betts from Justice Robert H. Jackson, 24 October 1945 in RHJ Papers, box 110, Nuremberg War Crimes Trial Office File, Subsequent Trials folder (1).

Over the next few months Jackson, Betts and the Theater Commander, Lieutenant General W. Bedell Smith, Chief of Staff of the United States Forces, European Theater, held discussions about how best to organize the prosecution of further cases. At issue was who was to take over Jackson's job as Chief of Counsel when Jackson retired, which US agency should be in charge of supervising the prosecution of war criminals, and the feasibility of trying potentially hundreds of thousands of war criminals as dictated by the JCS 1023 directive which included the possibility of punishment for individuals who had committed atrocities since January 30, 1933.⁵¹ All three men agreed that time was of the essence; they should begin preparing immediately for further proceedings rather than wait until the completion of the IMT trial. Even at this early date there is evidence to suggest that American officials felt constrained for time, and many expressed the view that they wanted an expeditious end to programs that had not yet been implemented such as zonal war crimes trials. Thus, in December 1945, Betts decided that Jackson's Office of the Chief of Counsel would extend its work "beyond the present trial," and take on the work of "all further war crimes proceedings."⁵²

Because Jackson had refused to assume responsibility for the prosecution of additional war criminals, many officials believed that Telford Taylor, one of Jackson's most able assistants at Nuremberg, should replace Jackson as Chief of Counsel. Until that time, Taylor would hold the rank of Deputy Chief of Counsel and would be placed in charge of a

⁵¹ Memorandum, "Organization for Further Proceedings against Axis war Criminals and Certain Other Offenders," 5 December 1945 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration files 1944-1949, box 2, I 84-1 folder.

⁵² Taylor quoted in Weindling, "From International to Zonal Trials," 366.

new section of Jackson's office. Taylor's job would be "to organize and plan for further prosecutions – before another international military tribunal, or in zonal courts, or in both, as developments may dictate."⁵³ Taylor was a Harvard trained lawyer and "New Dealer" who, during the war, was Chief of the Military Intelligence Service in London.⁵⁴ At the IMT at Nuremberg he had been responsible for the prosecution of the General Staff and High Command of the German Armed forces.⁵⁵ Taylor admitted he was not an expert on European affairs, but in some ways his military training and experience during the war made him better qualified for the job of Chief Prosecutor than Jackson, even though he did not carry the same clout as the latter in Washington nor was his name as widely recognized in legal circles.⁵⁶ The decision to appoint Taylor as Jackson's deputy was made in December 1945 although Taylor did not officially accept the position until three months later in March 1946.⁵⁷ By the end of December 1945, with the promulgation of Control Council Law No.

⁵³ Letter to President Harry S. Truman from Justice Robert H. Jackson, 4 December 1945 in NARA RG 466 (HICOG), Records of the Office of HICOG Board, Records of War Criminals, box 15, folder 43. See also Letter to Lieutenant General W.B. Smith from Justice Robert H. Jackson, 4 December 1945 in *ibid.*, Records of the Office of HICOG Board; Records of War Criminals, box 15, Subsequent Proceedings folder; and, in RHJ Papers box 110, Nuremberg War Crimes Trials Office File, United States Chief of Counsel Subsequent Trials folder.

⁵⁴ Maguire, *Law and War*, 148.

⁵⁵ Taylor, *Anatomy of the Nuremberg Trial*, 236.

⁵⁶ Biographical Data, Brigadier General Telford Taylor, Deputy Chief of Counsel, May 1946 in RHJ Papers, box 110, Nuremberg War Crimes Trial Office File, US Chief of Counsel, Subsequent Trials folder.

⁵⁷ Taylor delayed accepting the position until he could ensure that his wife could be brought to Germany for the duration of his stay. When Jackson discovered this he was furious as he felt it had embarrassed him in front of the President who he informed in January of his decision to appoint Taylor as his deputy. Telegram from Justice Robert H.

10, Bett's commitment to pursue future war crimes trials, and the appointment of a successor to Jackson, the Americans ensured that the legal, political and administrative foundations for the Subsequent Nuremberg Trials had been laid.

Jackson, Betts and Smith believed that with Jackson's resignation the entire war crimes operation should be regularized and come under the authority of the Military Government. As Chief of Counsel for the Prosecution of Axis Criminality, Jackson was responsible solely to President Truman and not the Military Governor or the Theater Commander.⁵⁸ American participation in the IMT in essence, was an executive decision. To normalize the system for the future prosecution of war criminals in occupied Germany, the system had to be restructured. To this end, General Betts decided it would be best if the office of the Theater Judge Advocate maintain authority to try and punish military crimes, particularly crimes committed against US nationals and prisoners of war, as well as atrocities committed in concentration camps that the US forces liberated. Taylor's organization, on the other hand, would handle the most important and high-profile trials of war criminals. Clearly Betts wanted to ensure that the highest-profile war criminals be tried by civilian rather than military courts. Taylor, as Jackson's deputy at the Office of Chief of Counsel, would be responsible for the planning and organization of future trials against leaders of the European Axis powers and members of groups or organizations declared

Jackson to War Department and Charles Fahy, 14 March 1946 in *ibid*.

⁵⁸ Unlike the later organization, Jackson was only responsible to President Truman. Letter to Justice Robert H. Jackson from Lieutenant General W.B. Smith, 1 December 1945 in NARA RG 466 (HICOG), Records of the Office of HICOG Board, War Criminals, box 15, Subsequent Proceedings folder. See also RHJ Papers, box 110, Nuremberg War Crimes Trials Office File, United States Chief of Counsel, Subsequent Trials folder.

criminal by the IMT.⁵⁹ Taylor's new responsibilities could be likened to those of a district attorney under American state law. To handle the planning of any future trials Jackson established within the Office of Chief of Counsel a "Subsequent Proceedings Division." Again, very much like an office of a district attorney, where the DA decides against whom indictments are filed. On January 16, 1946, President Truman agreed with the group's proposals, issuing Executive Order 9679, which officially sanctioned the new course American war crimes policy would take.⁶⁰

3. A Second International Trial

Having put the wheels in motion for the future prosecution of war criminals in the American zone there was but one major question left to answer: should the Americans also participate in a second international trial? The issue of a second international trial was intimately connected with the prosecution of German financiers and industrialists. It was first raised a few weeks before the beginning of the original Nuremberg trial in the fall of 1945 and was the result of a legal blunder regarding the Nazi industrialist Gustav Krupp von Bohlen und Halbach. From the outset of negotiations in London in the summer of 1945, the Allies debated the matter of who should be included in the original indictment. Ultimately a

⁵⁹ Letter Robert H. Jackson to Harry S. Truman, 4 December 1945 in White House Office File 325A, Office of the US Chief of Counsel for the Prosecution of Axis Criminality, HST. See also memorandum from the Headquarters European Theatre of Operations U.S. Army, 1946 in NARA RG 466 (HICOG), Records of the Office of HICOG Board, Records of War Criminals, box 15, folder 43.

⁶⁰ "Executive Order No. 9679," 16 January 1946 in NARA RG 260 (USOH), OMGUS, Records of the Executive Office, Office of the Adjutant General, Military Government Ordinances 1945-1949, box 640, ordinance No. 7 folder.

cross section of leading Nazis were selected, not because the evidence against them was conclusive but rather because the planners of the trial wanted to try the highest-ranking and most recognizable of the leading Nazi personalities still alive as well as wanting those indicted to represent the various sectors of Nazi society.⁶¹ From the very beginning of negotiations, the Americans in particular, but the French and Soviets as well, had considered German industrialists and financiers major war criminals, responsible in large part for the planning and perpetration of aggressive war which was the essence of the American case. The defendants should, the argument went, be tried for crimes against peace and crimes against humanity and should be held as responsible as the German military leadership and high-ranking party officials for the planning and waging of aggressive war.⁶²

In the summer of 1945, during the negotiations which led to the indictment of the first twenty-three high-ranking Nazis, Jackson and his colleagues decided that Gustav Krupp von Bohlen und Halbach (the patriarch of the industrialist Krupp empire) should be included in the indictment. Unfortunately however, none of the Allied prosecutors bothered to check whether or not the elderly Krupp was capable of standing trial. Nor did anyone realize that Gustav's son, Alfried, had taken over sole control of the Krupp empire when his father retired in 1943. As it turned out in 1945, the senior Krupp was both senile and bed-ridden and therefore incompetent to stand trial, but because none of the prosecutors had prepared for this eventuality they did not include the son Alfried, who was just as guilty as his father, in the original indictment. Once the indictment was filed there was little the chief

⁶¹ Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* (New York, 1995), 28-30.

⁶² Taylor, *Anatomy of the Nuremberg Trial*, 81.

prosecutors could do to have the son added to the roster of defendants, other than to appeal to the judges of the International Military Tribunal. The judges interpreted the appeal for an indictment against Alfried as a request for the substitution of one defendant for the other and rejected the idea out of hand. In effect, because of carelessness in planning and the omission of Alfried from the indictment, neither father nor son would appear in the dock at Nuremberg; more importantly for the origins of the Subsequent Proceedings, no representatives of German industry would be tried.⁶³

The French were particularly unhappy with this situation primarily because large numbers of French slave-labourers had been used by German industrialists during the war. In their view, something had to be done to rectify this situation and punish the perpetrators. To placate its citizens and bring justice to the victims of slave labour, the French enlisted the support of the British and publicly declared on November 20, 1945 that they were further examining the case of the Krupps and other leading German industrialists, hoping they would be indicted and tried in a second four-power trial.⁶⁴ Even though Jackson agreed with the French, that German industrialists and financiers should be held accountable, as chief prosecutor and the person responsible for American war crimes policy, he was unwilling to commit his country to a second international trial, especially if the Soviets were involved, and certainly not before the conclusion of the IMT.⁶⁵

⁶³ *Ibid.*, 87-94.

⁶⁴ Taylor, *Final Report*, 23.

⁶⁵ For example, as early as August 1, 1945, Samuel Rosenman, Truman's legal advisor, said of Jackson, "Bob has come to feel very strongly that it would be better not to have a joint tribunal because of the difficulty of working with the Russians in a trial...." Rosenman quoted in Taylor, *Anatomy of the Nuremberg Trial*, 72 and Taylor, *Final Report*,

Jackson deeply distrusted the motives of the Soviets. From the very beginning of the Nuremberg process in the summer of 1945, he had felt frustrated by the Russian view of the trial as “mere formality.”⁶⁶ As Jackson saw it, the Russians made a habit of wasting the court’s time by endlessly questioning witnesses who had already been cross-examined by the Americans, French or British prosecutors. He believed the Soviets did this purely for domestic consumption and not for legitimate legal purposes. He feared that if the Soviets were allowed to continue in this vein, Nuremberg could potentially be seen by the Germans, and the world, as mere politics; a show trial only “organized to convict.”⁶⁷ Jackson worried that the public would lose respect for the landmark judicial process he helped establish at Nuremberg, especially now that a second four-power trial was being considered and one where the Soviets vied for control in planning. If a second four-power trial were to take place, Jackson worried that the Soviets would insist on holding it in their zone of occupation because they felt, perhaps rightly so, that the first trial was too much an “American show.”⁶⁸ Worse still, in Jackson's view, was the likelihood that the Soviets would demand that a Russian jurist preside over the tribunal. Later Jackson would maintain that he took this position not because he was “anti-Soviet,” in fact he said that the Soviets had acted quite

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⁶⁶ Memorandum to Robert Jackson from Lt. Col. J.W. Brabner-Smith, 22 July 1946 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 2, I84-1 folder.

⁶⁷ Jackson quoted in Hockett, “Justice Robert H. Jackson,” 259 and 278.

⁶⁸ Memorandum to Justice Robert Jackson from Lt. Col. J.W. Brabner-Smith, 22 July 1946 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 2, I84-1 folder.

professionally, rather what he feared most was the possibility of a backlash at home. That a Soviet judge might make an “innocent” comment or ruling which could be misconstrued by the American public and totally discredit the war crimes trial process he helped to develop, could be potentially devastating.⁶⁹ If this were to happen, Jackson believed the Americans would be placed in a most “difficult situation,” politically, legally, and above all, morally.⁷⁰ What is more, even if the Russians agreed to a location other than one in their zone, there was no guarantee that they would in any way help pay the costs of a second four-power trial; after all, neither the Soviets nor the French had made good on their commitments to provide adequate staffing for the Nuremberg trial. As a result, the burden of staffing and ultimately most of the costs – estimated at a massive five hundred million dollars by Truman – of the original Nuremberg trial, fell on the United States.⁷¹

Interestingly, Jackson’s new Deputy, Telford Taylor did not share his superior’s concerns. While Taylor agreed with Jackson about the question of location, he believed that a second four-power trial would not be a mere repetition of the first. Rather it would be much narrower in scope dealing primarily, even exclusively, with Nazi industrialists and

⁶⁹ Letter to Howard Peterson, Assistant Secretary of War from Justice Robert H. Jackson, 22 May 1946 in *ibid.*, box 1, Second International Trial folder.

⁷⁰ Memorandum to Telford Taylor from Justice Robert H. Jackson, 5 February 1946 in *ibid.*

⁷¹ Telegram from Justice Robert H. Jackson to War Department, 7 February 1946 in RHJ Papers, box 110 Nuremberg War Crimes Trial Office File, US Chief of Counsel, Subsequent Trials folder. On the cost of the trial see letter from Harry S. Truman to Michael Musmanno, 15 October 1958, file 1470, President Truman folder, Michael Musmanno Papers, Gumberg Library, Duquesne University, Pittsburgh, Pennsylvania (from here forward simply file number, folder, MMP).

financiers and therefore would not be as legally problematic as the first trial, nor as costly.⁷² To this end, on January 30, 1946, Taylor predicted “one more international trial,” where leading defendants would include those industrialists and financiers who had escaped punishment the first time round.⁷³ Sensing Taylor's preparedness and concerned that he might press the issue of a second four-power trial, Jackson immediately telegraphed the War Department in Washington outlining his concerns.⁷⁴ Jackson still had sway in Washington and the issue of a second four-power trial was thus discussed at length, but no consensus was reached at this time. The best they could do was adopt a wait and see attitude, at least until the conclusion of the current trial which was still before the IMT.⁷⁵

The prospect of a second international trial resurfaced sooner than the Americans hoped, when the British Attorney General, Sir Hartley Shawcross, raised the issue at a meeting of the Chief Prosecutors in the spring of 1946. When asked directly if the United States would participate, Jackson was noncommittal. The French and Soviets both favoured a second international trial, although the Soviets tended to agree with Jackson that before they could fully support the idea they would have to await the conclusion of the trial in progress. In alliance with their French allies the British publically supported the prospect of

⁷² Memorandum to Justice Robert H. Jackson from Telford Taylor, 30 January 1946, and memorandum to Jackson from Taylor, 5 February 1946 both in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files, box 1, Second International Trial folder.

⁷³ Taylor quoted in Weindling, “From International to Zonal Trials,” 368.

⁷⁴ Telegram from Justice Robert H. Jackson to War Department, 7 February 1946 in RHJ Papers, box 110, Nuremberg War Crimes Trial, Office File, US Chief of Counsel, Subsequent Trials folder.

⁷⁵ *Ibid.*

a future four-power trial of Nazi industrialists. In confidence, however, Shawcross admitted to Jackson that he "doubted the wisdom of such" a trial.⁷⁶ As a compromise and a way to avoid dealing with the issue directly, at the end of the meeting all parties agreed they would begin to collect evidence for a future trial of "a dozen" or so industrialists, but with the understanding that this evidence did not have to be used in a four-power trial.⁷⁷ Immediately following the meeting, Jackson relayed this news to Washington along with his assessment of the situation which again focussed on the problems he had encountered with four-power prosecution – but particularly with the Soviets. Word came back from Washington on April 24 when the Secretary of War, Patterson, informed Jackson that the Secretary of State and he agreed that a second international trial was "highly undesirable."⁷⁸ While the War Department frowned on the prospect of a second internationally prosecuted war crimes trial, Patterson conceded that Taylor and his team should continue preparations for it just in case the Americans changed their minds.⁷⁹ While Patterson's and Jackson's negative attitudes were to become the basis of American policy, the issue of a second international trial was

⁷⁶ Memorandum to the Secretaries of State and War from Justice Robert H. Jackson, 8 April 1946, in *ibid.* See also, Appendix I, "Minutes of Chief Prosecutors held in room 117, 5 April 1946, in Taylor, *Final Report*, 269-270. Compare with Weindling, "From International to Zonal Trials," 369-369 who argues that Shawcross initially supported a second international trial. He also notes that the British Foreign Office was opposed to a second international trial and tried to convince the Americans "to adopt a unilateral policy" for zonal trials, *ibid.*

⁷⁷ Memorandum to the Secretaries of State and War from Justice Robert H. Jackson, 8 April 1946, in RHJ Papers, box 110, Nuremberg War Crimes Trial, Office File, US Chief of Counsel, Subsequent Trials folder. See also, Appendix I, "Minutes of Chief Prosecutors held in room 117, 5 April 1946, in Taylor, *Final Report*, 269-270.

⁷⁸ Taylor, *Final Report*, 24.

⁷⁹ *Ibid.*

not settled immediately, particularly since Samuel Rosenman, Truman's legal advisor, strongly disagreed with Jackson. Rosenman felt that if the United States failed to cooperate with its allies on a second internationally prosecuted trial of industrialists the United States would run the risk of compromising its moral position publicly – something Rosenman and others wanted to avoid.⁸⁰

Negotiations and discussions for a future international trial continued throughout the course of the IMT proceedings. By all accounts Jackson was still responsible in large measure for war crimes policy and in May he took the opportunity to lobby the President on his position.⁸¹ In a rather lengthy letter to Truman he set out the reasons why he believed a second international trial would be politically "risky." In addition to his feelings of animosity toward the Soviets he added that in all likelihood the proposed trial of Nazi industrialists and financiers was, based on the current problems associated with the

⁸⁰ Letter, Samuel I. Rosenman to Harry S. Truman, 27 May 1946 in Subject File (Foreign Affairs, Germany), Nuremberg War Crimes folder, HST.

⁸¹ For example see Charles Fahy's letter to Justice Robert H. Jackson, in which he wrote, "my own preference is that the making of policy remain with you, with such help as others can give you as desired, even though the execution of future plans is to be in the hands of your successor under OMGUS as contemplated by the recent Executive Order. It will of course not be possible for you to carry out plans adopted beyond the time of your return to the Supreme Court; but I feel that the program should be one which has your approval and your help in having it agreed upon by the other nations to the extent such agreement is necessary, such as the question whether or not there should be any further international trial," 20 February 1946 in RHJ Papers, box 110, Nuremberg War Crimes Trial Office File, US Chief of Counsel, Subsequent Trials folder. See also, telegram from Lucius D. Clay (OMGUS) to War Department, 19 February 1946, who writes, "The suggestion if adopted would entail possible loss of Jackson weight in policy determinations on further trials, on question whether or not industrialists should be included, and number of additional leaders who should be tried by US. His judgment and responsibility in these respects should be preserved if possible," in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 3, Bk4 85-2 folder.

prosecution of the former Nazi financier Hjalmar Schacht, weak at best and this did not bode well for a future high-profile trial of similar defendants. Moreover, argued Jackson, a trial that dealt only with financiers and industrialists ran the risk of being perceived by the public as suspect because it might "give the impression they [were] being prosecuted merely because they [were] industrialists. This [was] the more likely since we would be associated in prosecuting them with the Soviet Communists and the French Leftists."⁸² Jackson also felt that any trial that dealt solely with industrialists would highlight the real weakness in quadripartite prosecution in that it ran the risk of exposing the role of the Soviet Union in the early years of the war, particularly in the invasion of Poland, which could potentially embarrass the entire prosecution team. Given Jackson's personal stake in the Nuremberg trial and its potential contribution to international law it is not surprising that he would shudder at the thought of publically exposing the aggressive actions of the Soviets in the early part of World War II.⁸³ Moreover, during a period when the United States was growing increasingly wary of Soviet actions it is not surprising that Jackson recommended that the United States "shed responsibility [for an additional international trial] rather than assume more" responsibility.⁸⁴ Jackson's deputy, Telford Taylor, on the other hand, still fully

⁸² Letter to President Harry S Truman from Justice Robert H. Jackson, 13 May 1946, in President's Secretary File, box 179, Subject file (Foreign Affairs), HST. See also memorandum for the President on American Participation in Further International Trials of Nazi War criminals fro Justice Robert H. Jackson, 13 May 1946, quoted in Taylor, *Final Report*, 276-279.

⁸³ Hockett, "Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial," 257-263.

⁸⁴ Letter to President Harry S Truman from Justice Robert H. Jackson, 13 May 1946 in President's Secretary File, box 179, Subject file (Foreign Affairs), HST. See also "Memorandum for the President on American Participation in Further International Trials of

supported the idea of a second international trial.

Well before any decision was taken concerning further international prosecutions, Taylor was sent back to the United States to recruit manpower for the future zonal trials that would be under his authority when Jackson resigned. When he returned to Nuremberg at the end of April 1946, Jackson kept Taylor busy. He appointed Taylor his personal representative and gave him the additional task of consulting delegates of the other powers concerning the logistics of a future international trial. Between May 15 and July 2, 1946, Taylor and the spokesmen from the other Allied nations met on three occasions to discuss the issue of a second internationally prosecuted trial.⁸⁵ At issue in these meetings were who would be indicted, where the trial would be held, and who would preside over it. Taylor, as US representative, put forward the names of two of the managing directors of the I.G. Farben chemical combine, Hermann Schmitz and Georg von Schnitzler. US authorities had investigated the chemical giant and discovered the company had participated in the elaborate slave labour programme. The British wanted the Cologne banker Kurt von Schroeder to be included and the French proposed Hermann Roehling, an important figure in the Saarland's coal and steel industry. All agreed that Alfried Krupp, the man who had escaped punishment originally, would head the roster of indictees. Oddly, the Soviets did not put any names forward for consideration, although they reserved the right to add names to the list.

The group also discussed where the trial should be held and who should preside over it. While Taylor reserved judgment on the location of a second trial, the British and French

Nazi War Criminals," from Justice Robert H. Jackson, 13 May 1946, quoted in Taylor, *Final Report*, 276-279.

⁸⁵ Taylor, *Final Report*, 24-25.

agreed that Nuremberg should be the site, arguing that it would preserve continuity of staffing and facilities, although presumably the British at least shared Jackson and Taylor's fears about holding an international trial in the Soviet zone. The Soviets preferred Berlin, in their zone of occupation. The delegates could not agree on who should preside over the trial and, in any event, if there were to be a second international trial, the judges themselves would select their own president as had been done for the IMT trial. Following the final meeting of July 2, 1946 the committee broke up and the delegates took the proposals back to their governments for consideration.⁸⁶

Taylor's findings merely confirmed Jackson's worst fears and prompted high-level discussions in Washington. During the summer and fall of 1946, the issue of a second internationally prosecuted trial was discussed at length by the Secretary of State, James Byrnes, the Assistant Secretary of War, Howard C. Peterson (Peterson was officially in charge of all matters involving war crimes), Jackson and Taylor. Jackson felt so strongly about the issue that he even travelled back to the United States to discuss the issue personally with Byrnes.⁸⁷ Undoubtedly, Jackson's arguments induced policy makers in Washington to err on the side of caution. While Jackson was in Washington it was decided that the unofficial American position was "to avoid a second international trial" if at all

⁸⁶ Minutes of Meeting of Committee (Mr. Jones, M. Dubost, Col. Pokrovsky, General Taylor), 6 June 1946 in RHJ Papers, box 110, Nuremberg War Crimes Trial Office File, US Chief of Counsel, Subsequent Trials folder. And, "Minutes of Meeting of Committee" (Mr. Patrick Dean, Mr. Elwyn Jones, M. Dubost, General Zorya and General Taylor) 15 May 1946 in NARA RG 260 (USOH), Records of Functional Offices and Divisions, Office Chief of Counsel War Crimes, box 1, Support of OCCWC folder. See also Taylor, *Final Report*, 25-26.

⁸⁷ Taylor, *Final Report*, 25-27 and 271-284.

possible. But Rosenman's concerns were also taken seriously: if avoiding a second internationally prosecuted trial so would cause embarrassment or political problems, the United States would participate rather than give the appearance of abandoning their moral position on the issue of Nazi war criminals.⁸⁸ It was also agreed that if the United States decided not to participate in another international trial, the evidence that Taylor and the Subsequent Proceedings Division had gathered on industrialists and financiers would be used to try these individuals in American courts in Germany. But, under no circumstances, they all agreed, would they recommend to the President, who had the final say in the matter, that the United States participate in another four-power trial.⁸⁹ In any event, they knew that Truman wanted to wait until after Jackson had submitted his final report on the IMT trial to decide whether or not to proceed with a second four-power trial and it was here that Jackson could be most forceful.⁹⁰

The IMT came to an end in the autumn of 1946, and one week later, after the judgments had been rendered, Jackson sent his final report to President Truman. In the report Jackson reiterated his earlier arguments against a second internationally prosecuted

⁸⁸ Memorandum, "War Crimes," from Secretary of State Byrnes to the Secretary of War and President Truman, 29 May 1946 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 1, Second International Trial folder. And, letter to Brigadier General Telford Taylor from Howard C. Petersen Assistant Secretary of War, 17 June 1946 in *ibid.*

⁸⁹ Memorandum to Telford Taylor from Justice Robert H. Jackson, 16 August 1946 and memorandum to Telford Taylor from Robert Jackson, 21 August 1946, in RHJ Papers, box 110, Nuremberg War Crimes Trial File, United States Chief of Counsel Subsequent Trials folder.

⁹⁰ Memorandum to Secretary of State Byrnes, from Justice Robert H. Jackson. 21 August 1946 in *ibid.*

trial. He summed up his position as follows:

Although my personal undertaking is at an end, any report would be incomplete and misleading which failed to take account of the general war crimes work that remains undone and the heavy burden that falls to successors in this work. A very large number of Germans who have participated in the crimes remain unpunished. There are many industrialists, militarists, politicians, diplomats, and police officials whose guilt does not differ from those who have been convicted....The unsettled question is by what method these [individuals] should be tried. The most expeditious method of trial and the one that will cost the United States the least in money and in manpower is that each of the occupying powers assume responsibility for the trial within its own zone [and] with the prisoners in its own custody. Most of these defendants can be charged with single and specific crimes which will not involve a repetition of the whole history of the Nazi conspiracy. The trials can be conducted in two languages instead of four, and since all of the judges in any one trial would be of a single legal system no time would be lost adjusting [to] different systems of procedure.

A four-power, four-language international trial is inevitably the slowest and most costly method of procedure. The chief purposes of this extraordinary and difficult method of trial have been largely accomplished....

There is neither moral nor legal obligation on the United States to undertake another trial of this character. While the International Agreement makes provision for a second trial, minutes of the negotiations will show that I was at all times candid to the point of being blunt in telling the conference that [the] United States would expect one trial of the top criminals to suffice to document the war to establish the principles for which we contended, and that we would make no commitment to engage in another.

It has been suggested by some of our Allies that another international trial of industrialists be held. The United States proposed to try in the first trial not only Alfred Krupp, but several other industrialist and cartel officials. Our proposal was defeated by the unanimous vote of our three Allies. After indictment, when it appeared that the elder Krupp was too ill to be tried, the United States immediately moved that Alfred Krupp be added as a defendant and tried for the crimes which he had committed as chief owner and president of the Krupp armament works. This was likewise defeated by the combined vote of all our Allies....This is not recited in criticism of my associates....However if they were unwilling to take the additional time necessary to try industrialists in this case, it does not create an obligation on the United States to assume the burdens of a second international trial. The quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out in the event that such is your decision. Of course, appropriate

notifications should be given to the nations associated with us in the first trial.⁹¹

While Jackson did not make his feelings about the Soviets explicit in this report, he and others in the State and War Departments were growing wary of Soviet intentions. Many feared that the Soviets wanted to use a second internationally prosecuted trial as a vehicle for propaganda at home, and what better case to do so than one against "business, finance, and capital," which, given the emerging icy climate, could be used as an "indirect attack on the American free enterprise philosophy."⁹² By the autumn of 1946, most cold-warriors in Washington simply did not want to give the Soviets this opportunity. Jackson's arguments were persuasive with Truman, the United States would not participate in a second four-power trial, they would, it was decided, try war criminals in their custody and alone.

The decision to abandon a second four-power prosecution was made in November 1946, yet Truman waited until late January 1947 to advise his former allies that the United States would not be participating in any further international trials. He hoped that if he waited long enough the issue would simply disappear. The matter, in all likelihood, would have been ignored entirely had it not been for the French government who sent official notes to the Americans, Soviets and British requesting that a committee of prosecutors convene

⁹¹ Justice Robert H. Jackson, "Final Report on the Nuremberg War Crimes Trial," 7 October 1946 in White House Office File 325A, Office of the US Chief of Counsel for Prosecution of Axis Criminality, HST. Also quoted in Taylor, *Final Report*, 26-27.

⁹² Letter from Col. B.C. Andrus, War Department to Father Edmund Walsh, May 1946 in RHJ Papers, box 110, Nuremberg War Crimes Trials Office File, US Chief of Counsel, Subsequent Trials, folder 2.

"as soon as possible" to prepare for a second international trial.⁹³ By this time the Americans had already enacted Military Ordinance No. 7 authorizing the establishment and organization of tribunals in its zone of occupation and Taylor's organization was well on its way to prosecuting former Nazi doctors in the first of the Subsequent Nuremberg Proceedings.⁹⁴ Taylor's organization was also busy gathering evidence to indict additional members of the National Socialist hierarchy. In all, eighteen additional trials including several of Nazi financiers and industrialists were being planned. Given the magnitude of this program the last thing the Americans needed or wanted was further entanglement with an ally they believed could not be trusted.

4. Planning the Subsequent Nuremberg Proceedings

Just as the IMT trial was hastily planned in the summer of 1945, so too were the Subsequent Nuremberg Trials.⁹⁶ As one scholar has recently commented of the Subsequent Proceedings, they had a "haphazard, improvised character."⁹⁷ Indeed, it took but one year –

⁹³ "Substance of Note Addressed by Embassies London, Moscow, and Paris to British, French, and Soviet Governments," 22 January 1947, quoted in Taylor, *Final Report*, 285.

⁹⁴ Military Government--Germany, United States Zone, Ordinance No. 7, "Organization and Powers of Certain Military Tribunals" quoted in *Trials of War Criminals*, xxiii-xxvii.

⁹⁶ As one participant in the IMT recalled, "The organization [Office of the Chief of Counsel for the Prosecution of Axis Criminality] has suffered for the lack of a strong, guiding hand. The indictment was rushed through and did not have the thorough going over it should have had for such an historical document." Letter from Katherine Fite Lincoln to her parents, 8 October 1945, Nuremberg Letters, 1945 folder, Correspondence file, Papers of Katherine Fite Lincoln, HST.

⁹⁷ Marrus, "The Nuremberg Doctors' Trial in Historical Context," 110

May 1946 to May 1947 – for Taylor and his office to gather evidence, interrogate suspects and form a plan of action to indict and try 185 high-ranking Nazi war criminals.⁹⁸

Preparations for their program of zonal trials under the authority of the American Military Government (OMGUS) took place during the same period the Americans were debating the wisdom of participating in a second international trial, and many of those involved in the planning of the Subsequent Proceedings were themselves working with Jackson on the IMT. With such staff shortages and the sheer volume of work, it is no wonder that the planning of the trials was hurried.

The first concrete step toward planning the trials was a change in the administrative structure for dealing with war crimes. As the American authority in Germany, the Military Government or OMGUS was put in charge of overseeing the entire American zonal trial program. But, a number of other American agencies also became involved in the organizational process as well. It had been decided in the spring of 1946, that once Jackson resigned his position, full responsibility for the prosecution of war crimes in Germany, including responsibility overseeing the Office of Chief of Counsel, would devolve to the American Military Government, then under the leadership of Lieutenant General Lucius D. Clay, who would thus be in charge of administration and policy issues concerning the Subsequent Nuremberg Proceedings in Germany. In Washington, the War Department's War Crimes Branch, under the direction of Colonel David "Mickey" Marcus, was responsible for recruiting staff in the United States, while the Assistant Secretary of War, Howard Petersen,

⁹⁸ Taylor, *Final Report*, 57.

would oversee all policy decisions.⁹⁹ As it will be recalled, Taylor was unofficially made Deputy Chief of Counsel in December 1945, and in January the Subsequent Proceedings Division of the Office of Chief of Counsel for Prosecution of Axis Criminality was formed (this would later become the Office of Chief of Counsel of War Crimes). Taylor was not officially appointed to the position of Deputy Chief of Counsel until March 29, 1946, and only replaced Jackson as Chief of Counsel on October 24, 1946 three weeks after the judgment had been rendered in the IMT case and one week after Jackson resigned. Unlike Jackson however, Taylor would not have sole control over the Subsequent Proceedings.¹⁰⁰ As Deputy Chief and later Chief of Counsel, Taylor was responsible for deciding which individuals would be indicted and tried. This proved to be a challenging and onerous task.

Concerns about whom to indict came to the fore in January 1946, when Taylor received an alarming memorandum from Charles Fahy, Director of the Legal Division of OMGUS. Fahy warned that under Article 2 of Control Council Law No. 10, which stated that membership in organizations declared criminal by the IMT was an indictable offense, close to two million former Nazis would be considered war criminals. The problem was that the IMT was not willing to “make a blanket and categorical finding of criminality” as to the members of the indicted organizations. Instead, it had to be shown that the individual members knew that the organizations they joined were criminal or that they participated in

⁹⁹ *Ibid.*, 13-14.

¹⁰⁰ General memorandum No 15 from Justice Robert H. Jackson, 29 March 1946 in RHJ Papers, box 110, Nuremberg War Crimes trial Office File, US Chief of Counsel, Subsequent Trials folder.

the criminal activities of the organization.¹⁰¹ To try two million members of former Nazi organizations was, needless to say, impossible. To address this issue, Taylor prepared a memorandum for Jackson. In it he outlined how the United States might best deal with a problem of this magnitude. Other than holding a second international trial, Taylor thought the majority of those found guilty of membership in organizations declared criminal by the IMT would have to be dealt with by the denazification courts, as it would be simply impossible to arrange trials for so many. Besides, Taylor thought the most important part of the new American program would be the trial of major war criminals, those whose crimes were so serious the death penalty would be warranted.¹⁰² Those to be tried before the denazification courts were not viewed so much as war criminals as they were “a dangerous and undesirable factor” in “German public and economic life;” in short, a menace to German reconstruction.¹⁰³ Although Taylor could not give an exact number, he estimated that there were approximately one hundred (when later he became more familiar with the operation of the Third Reich he revised this figure to between two to five hundred) individuals in the “major” war criminal category.¹⁰⁴ The Assistant Secretary of War Petersen agreed with

¹⁰¹ Taylor, *Final Report*, 16-17.

¹⁰² Memorandum for Justice Robert H. Jackson from Telford Taylor, Re: Other Trials, 30 January 1946 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 1, Second International Trial folder. See also RG 260 (USOH), OMGUS, Records of Functional Offices and Divisions, Office Chief of Counsel War Crimes, box 2, Subsequent Proceedings Division folder.

¹⁰³ “Denazification,” *Monthly Report of the Military Governor, US Zone*, 20 December 1945, No. 5, 4, HST.

¹⁰⁴ Memorandum for Justice Robert H. Jackson from Telford Taylor, Re: Further Trials (No. 2), 5 February 1946 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 1, Second International Trial folder. See also

Taylor: no individual should be indicted and tried on the basis of membership alone.

Petersen, anxious to expedite the process outlined by Taylor, asked the future Chief of Counsel to return to Washington to coordinate plans for the future American trials as well as to recruit staff.¹⁰⁵

When Taylor returned from the United States in April 1946 he began the task of deciding who to indict. By then the Subsequent Proceedings Division of the Office of Chief of Counsel, under the guidance of Drexel Sprecher, a US prosecutor at Nuremberg, was well on its way to amassing a large amount of evidence against Nazi industrialists and financiers. In fact, Sprecher had set up a section of the Subsequent Proceedings Division to deal specifically with the case against Nazi financiers and industrialists in the event that they would be prosecuted in a second four-power trial, but if not, by the Americans alone. In April 1946, the issue was how extensive the American program of war crimes trials should be and how far down the scale of Nazi criminality the Americans should go.

Taylor decided that unlike the original IMT proceeding, the Office of Chief of Counsel of War Crimes would not indict anyone because of their political leadership in the Nazi enterprise. As Taylor phrased it, "it was not the purpose of Nuremberg to try *Nazis* who might or might not also be criminals, but to try suspected *criminals* who might or might not also be Nazis."¹⁰⁶ In his opinion, membership in the Nazi party, *per se*, was not sufficient

Memorandum for Mr. Justice Jackson and Mr. Charles Fahy, Re: Further Trials, 6 February 1946 in *ibid.*

¹⁰⁵ Telegram from Justice Robert H. Jackson to War Department, 7 February 1946 in RHJ Papers, box 110, Nuremberg War Crimes Trial Office File, US Chief of Counsel, Subsequent Trials folder.

¹⁰⁶ Taylor, *Final Report*, 84.

cause to indict a person, as there were millions of such individuals and they could be processed through the denazification courts; rather "substantial evidence of criminal conduct" had to be demonstrated before a prosecution at Nuremberg was warranted.¹⁰⁷ Moreover, Taylor thought that only those who were *most* responsible for the planning and execution of mass atrocities in the Third Reich and in American custody should be tried in the Subsequent Trials. But who were these individuals and how could they be identified? Needless to say it was impossible for Taylor's small organization (initially twenty-five lawyers in May 1946 which grew to one hundred and thirteen by July) to examine the case of every individual within the Third Reich.¹⁰⁸ Instead he decided to grapple with this problem by making "an over-all study of Germany's political, military, economic, and social organizations" in order to determine who was responsible for atrocities in each of these branches of the regime.¹⁰⁹ To accomplish this he formed an "over-all study section" within the Subsequent Proceedings Division whose job it was to narrow the scope of possible defendants. The group, headed by Werner Peiser and assisted by Paul Gantt and Barton Watson, had to act quickly because OMGUS was coming under increasing pressure to release civilian internees and the Deputy Military Governor, Lucius Clay felt that it was

¹⁰⁷ Taylor, "Nuremberg Trials, War Crimes and International Law," in *Ibid.*, Appendix B, 160.

¹⁰⁸ By October 31, 1947 the number of people employed by the OCCWC peaked at 1,746, of which 904 were German, 539 were American, 192 Allied personnel and 111 military personnel. Memorandum from the Public Information Office, Office Chief of Counsel for War Crimes, "Background Information for Correspondents," 1 February 1949 in NARA RG 238 (WCR), OCCWC, Executive Office, Publications Division, Correspondence 1948-1949, War Crimes Data, box 2, E196 folder (II). See also Taylor, *Final Report*, 14 and 43-44 who states that numbers peaked on October 17 at 1,774 with 919 German employees.

¹⁰⁹ Taylor, *Final Report*, 54.

"impossible" to stabilize Germany as long as so many people were left waiting to find out their fate.¹¹⁰

In addition to the "over-all study section" several other groups were formed within the Subsequent Proceedings Division. Two groups were put in charge of investigating the case against German industrialists and financiers, another was to prepare evidence against Nazi organizations such as the military and navy, and a fourth group was in charge of investigating the SS and leaders of the German medical profession. The fifth group concerned itself with evidence against leading officials in the German foreign office.¹¹¹ Each group was also instructed to familiarize itself with the structure and operations of the Third Reich; this made their job significantly less complicated when they began to sort out the evidence and compile lists of the most culpable individuals.¹¹²

The first task of these groups was to sift through the massive amounts of documentary evidence housed in "captured document centers" throughout Germany. Taylor sent a representative (Benjamin Ferencz) from his office to Berlin where the documents of the SS and Foreign Office were located, thereby establishing the Berlin Branch of the Office of Chief of Counsel. Another office was created in Frankfurt, the headquarters of the IG

¹¹⁰ "Summary of Points Covered in an OCC-OMGUS Meeting," 28 May 1946 in NARA RG 260 (USOH), OCCWC 1933-1949, Chief of Counsel General Records, Correspondence 1945-1949, box 1, NM-70, entry 159, Subsequent Proceedings Basic Policies folder and Letter Lieutenant General Lucius D. Clay to Major General Oliver P. Echols, War Department, 28 June 1946 in *ibid.*, RG 466 (HICOG), Records of OMGUS, Records of War Criminals, box 22, War Crimes and War Criminals folder.

¹¹¹ Memorandum from Telford Taylor to the Subsequent Proceedings Division, 17 May 1946 in NARA RG 260 (USOH), OMGUS, Records of the Functional Offices and Divisions, OCCWC, box 2, Subsequent Proceedings Division folder.

¹¹² Taylor, *Final Report*, 75.

Farben company, and another office in Washington because German Army documents had been sent there. Little by little a team of American attorneys and research analysts, some German speaking and some not, studied and analyzed the masses of captured German documents. A system of filing the analyzed documents was also devised during this period. Those documents which pertained to Nazi organizations such as the SS or Hitler Youth were designated "NO," those dealing with the Nazi industrials were given the designation "NI," and documents relating to the German government were labelled "NG." A final category of documents relating to the German army were labelled "NOKW" – N for Nuremberg and OKW for *Oberkommando der Wehrmacht* – to distinguish them from the military documents used during the first Nuremberg trial. In addition to the documentary evidence, interrogations of internees such as Otto Ohlendorf (head of *Amt III* of the Reich Security Main Office and former leader of *Einsatzgruppe D*) were a valuable source of information for the Division.¹¹³ By August 1946, the group had amassed enough evidence to form a basic picture of the most guilty Nazis. They then compiled a list of just under five thousand names identified as suspected major war criminals, which Taylor next distributed to the commanders of the various prisoner-of-war camps asking them not to release these individuals because they were wanted for possible trial in Nuremberg.¹¹⁴

The process of whittling down the list of five thousand took the better part of a year,

¹¹³ *Ibid.*, 17-18. Between August 1946 and May 1948 Ohlendorf gave evidence against hundreds of his former Nazi colleagues when he was interrogated on thirty-six different occasions by representatives of the OCCPAC and OCCWC. See Interrogations of Otto Ohlendorf, National Archives Microfilm Collection M1019 (Records of the United States Nuernberg War Crimes Trial, Interrogations 1946-1949), rolls 50-51.

¹¹⁴ Taylor, *Final Report*, 54.

until the summer of 1947. Determining who was to be indicted was the exclusive domain of Taylor, who likened this part of his job to that of an American District Attorney. Taylor knew from the beginning of the planning process that his office would indict – in a four-power trial or in zonal trials, whatever the case might be – certain Nazi industrialists and financiers, including Alfried Krupp, several of the managing directors of the IG Farben chemical combine, and Friedrich Flick, owner of one of the Ruhr's largest industrial combines.¹¹⁵ This had been clear since the first Nuremberg trial. Beyond these men, however, there were so many other possible candidates for indictment that Taylor was forced to conduct his own investigation. He believed he would not exhaust the list of the truly guilty even if he were to indict several thousand individuals, and thus he had to content himself with what he decided was a representative sample from each of four categories: government officials, party officials including the SS and police, military leaders; and, bankers and industrialists.¹¹⁶ Next he made a list of the most important individuals in each category. The evidence was then analyzed and an attempt was made to locate each one. The Locator branch of the Military Government was largely responsible for finding the defendants and this proved to be a difficult and lengthy process. Administrative considerations – "time, staff, and money" as Taylor referred to them – also influenced who was to be indicted, just as did such mundane things as the size of the court room and the size of the dock.

¹¹⁵ "Summary of Points Covered in an OCC-OMGUS Meeting," 28 May 1946 in NARA RG 238 (WCR), OCCWC 1933-1949, box 1 NM-70, entry 159, Subsequent Proceedings Basic Policies folder. See also Taylor, *Final Report*, 78-79.

¹¹⁶ Memorandum from Telford Taylor to Justice Robert H. Jackson, 30 October 1946, in RHJ Papers, Nuremberg War Crimes Trial, Final Report to the President folder.

Military Government officials felt that the Subsequent Trials were important politically and that it was vital that public interest in them not be allowed to lag, and therefore they should begin as soon as possible.¹¹⁷ Unlike the first Nuremberg trial, defendants would not be tried in one comprehensive trial, but rather in separate trials focussing upon the areas of the Third Reich in which the defendants worked and the nature of their crimes.¹¹⁸ Taylor decided that the first group to be tried in November 1946 would be those medical professionals who had carried out experiments on human beings because his organization had enough evidence on them to begin prosecution immediately and he did not feel that the case was particularly complicated.¹¹⁹

At the time Taylor was busy attempting to narrow the scope of the Subsequent Trials, he and General Clay had to decide when it would be appropriate to issue an ordinance authorizing the Military Governor to appoint a successor to Jackson as well as setting up the required "military" tribunals to try war criminals not charged with offenses under the authority of the Theatre Judge Advocate.¹²⁰ Of course, the Americans had not yet decided

¹¹⁷ Taylor, *Final Report*, 73-77.

¹¹⁸ Memorandum to Lt. General Lucius D. Clay from Telford Taylor, 1 November 1946 in NARA RG 466 (HICOG), Security Segregated Records 1945-1947, Prisons Division, box 10, War Crimes Trials Correspondence, 1946-1947 folder.

¹¹⁹ Memorandum to Lt. General Lucius D. Clay from Telford Taylor, 1 November 1946 in *ibid.*

¹²⁰ Taylor insisted on civilian rather than military judges because he wanted to ensure that judicial opinions were written. Normally military courts do not write legal judgments. Taylor, *Final Report*, 28-29. The War Department had decided that even though the tribunals were to be composed of civilian judges, they preferred to call them, for obvious reasons, "Military" rather than "Occupational" tribunals. Memorandum from War Department to Lucius D. Clay, OMGUS, 24 October 1946 in NARA RG 260 (USOH), OMGUS, Records of the Executive Office, the Office of the Adjutant General, Military Government

whether they would be participating in a second four-power trial, thus the timing of their announcement was important for political reasons. They decided against releasing news of the ordinance immediately, preferring to wait until after the completion of the IMT proceeding.¹²¹ On October 24, the day Military Ordinance No. 7 was announced, the Military Governor ordered the dissolution of Jackson's organization, OCCPAC, and the creation of the successor organization, Office of Chief of Counsel for War Crimes or OCCWC, as a division of the Military Government.

Ordinance No. 7 proscribed that each tribunal should comprise three judges and one alternate, none of whom were to have less than five years judicial experience. All had to be from State or Federal benches, and the judges of each tribunal would select their own presiding judge.¹²² In an attempt to keep some vestige of the international character of the trials, Ordinance No. 7 adopted the same rules of procedure as those under the *London Charter* of August 8, 1945, which combined English common law and Continental law. While the trials were to be held in the American zone, Ordinance No. 7 also provided for the possibility of joint prosecutions. In practice no such case arose even though the United States did invite the French to participate in the prosecution of the German diplomat and former State Secretary of the Foreign Office, Ernst von Weizsäcker. The French however

Ordinances 1945-1949, box 640, Nos. 1-18, Ordinance No. 7 folder.

¹²¹ "Military Ordinance No. 7-Legal and Judicial Affairs," in *Monthly Report of the Military Governor, US Zone*, 1-31 October 1946, No. 16, 7, HST.

¹²² "Establishment of Tribunals for Trials of War Criminals Pursuant to Allied Control Council Law No. 10," by command of General Joseph T. McNarney, Headquarters, US Forces European Theater, APO 757, in the Papers of Eleanor Bontecou, World War II file, F-Sh, box 13, Authority for IMT folder, HST.

declined the offer.¹²³ Under Article 3 of Military Ordinance No. 7, Taylor, as Chief of Counsel was authorized to determine who should be indicted, the main criterion being who was most responsible for crimes committed during the years of the Third Reich.¹²⁴ By this time Taylor and his organization had largely settled on the scope of the Subsequent Proceedings, but still the final decision on individual defendants was often left to the very last minute as in the case against the *Einsatzgruppen* leaders which was not finalized and an indictment filed until July 1947.

Between the autumn of 1946 and May 1947, Taylor refined his program. Initially he decided on eighteen trials, but by May the number had dwindled to sixteen and by mid-September 1947 to twelve.¹²⁵ Together with the cases against Friedrich Flick, Alfred Krupp, and IG Farben, Taylor's organization planned on filing its first indictment against twenty-three physicians in a "Medical Experiments Case," tentatively scheduled to begin on November 15. The "Doctors' trial" was to be followed by the trial of Otto Thierack (who

¹²³ Taylor, *Final Report*, 29.

¹²⁴ "Press Release, Department of the Army, Public Information Division, Press Section," 17 May 1948, quoted in Taylor, *Final Report*, Appendix A, 114 and 155-156.

¹²⁵ By September 1947 Taylor was under increasing pressure from OMGUS to complete the Subsequent Trials as soon as possible and he was informed that all indictments had to be filed before December 1947 to ensure that all trials would come to an end in the 1948 fiscal year. Six of the sixteen originally scheduled trials had yet to begin. Because of problems in staffing (particularly in the recruitment of judges) Taylor realized it would be impossible to complete these cases and began making preparations to merge some of the trials as well as dropping the case against the members of the Economics and Agriculture Ministries as well as the press and propaganda case. Telegram from Lucius D. Clay to Kenneth Royall, War Department, 8 September 1947 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files, box 1, File III folder. Less than a week later, Secretary of War Kenneth Royall recommended to Clay that the trial against the German banks (the Dresdner Bank case) be terminated as it was "undesirable." See memorandum from Kenneth Royall to Lucius D. Clay, 12 September 1947 in *ibid.*

incidentally committed suicide in 1946 while in British custody) and a group of leading Nazi jurists (the Justice case) which was slated to begin in December.¹²⁶ Also scheduled were trials against Field Marshal Erhard Milch and Oswald Pohl of the Main Economic and Administrative Department of the SS. There was also a substantial amount of evidence against members of the RuSHA (the Main Race and Resettlement Office) as well as those involved in the planning and destruction of the Warsaw ghetto. In addition, the Office of Chief of Counsel was gathering evidence against leading representatives of the Dresdner Bank and government officials in the economic field including officials in the Ministry of Food and Agriculture, the Labour Ministry and the Ministry of Economics.¹²⁷ Generals Warlimont, Reinecke, and Rendulic were also scheduled to appear in the dock at Nuremberg. Finally, Taylor planned a trial of leading officials of the SS, *Gestapo* and the RSHA (Reich Security Main Office); the principal defendant was to be Otto Ohlendorf who had confessed to murdering 90,000 people in the Soviet Union while testifying as a prosecution witness before the IMT. The other defendants in this case were to be selected from a grab-bag of leading SS and police personnel.¹²⁸ Initially six "military tribunals" (in

¹²⁶ Memorandum to All Section Chiefs of the OCCWC from Benjamin B. Ferencz, 2 October 1946, in NARA RG 238 (WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 2, Correspondence 1946, Correspondence August 46-January 47 folder. The "Justice case" as it came to be called, was the third trial. After Thierack committed suicide, Franz Schlegelberger, the former undersecretary in the Ministry of Justice, was the highest-ranking judicial official to be tried by the Americans. See Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider (Cambridge, MA, 1991), 270-271.

¹²⁷ These two trials were eventually cancelled due to difficulty obtaining the requisite number of judges to hear the cases.

¹²⁸ Taylor outlined his program in two memoranda, one in March and the other in May 1947. See memorandum to the Deputy Military Governor, OMGUS, Lucius D. Clay

reality these were civilian courts, staffed by leading American jurists) were to operate simultaneously, but because of the enormous difficulties Taylor had experienced in attracting respected and reliable jurists from the United States, only four tribunals ever sat at one time. Even so, by the spring of 1947, the United States Military Government had scheduled twelve additional trials at Nuremberg and was well on the way to prosecuting a list of defendants comprised of 185 leading Nazi personalities.

5. Conclusion

When Robert Jackson took on the job of Chief of Counsel in May 1945, the United States had no definite plans to try more Nazis than those originally indicted for trial before the IMT, even though the Americans had thousands in custody. How then did the idea to hold additional war crimes trials subsequent to Nuremberg originate? The idea emerged early in the American planning process for Germany. Indeed, it was first articulated in the summer of 1945 when Jackson was in London negotiating with America's allies for the unprecedented international trial. It was here that Jackson first experienced the frustration of dealing with three allies whose legal systems and aims were divergent. At the last minute these problems were smoothed over, compromises were reached and ultimately plans went forward for the unprecedented international trial of Nazi war criminals. The idea of zonal trials were put on hold, at least for the time being.

The issue of zonal trials again surfaced after the Nuremberg trial got under way in

from Telford Taylor, 14 March 1947 and memorandum to Deputy Military Governor, OMGUS, Lucius D. Clay from Telford Taylor, 20 May 1947, both in NARA RG 338 (Records of the United States Army in World War II, Judge Advocate Division), War Crimes Branch, General Administration Records, box 1, Organization 1947 folder.

the autumn of 1945. It was then that the Americans encountered additional problems with quadripartite prosecution. When their allies did not come through with promises of financial support and the Americans assumed the entire cost of the prosecution, American policy-makers began to have doubts about the viability of a second internationally-prosecuted trial. Moreover, Jackson found the Soviet approach to prosecution distasteful. He believed that their moral position was compromised by their early aggression in the war, especially with the division of Poland. But worst of all for the Supreme Court justice, was the Soviet attitude toward prosecution. In Jackson's view the Soviets were using the Nuremberg trial to placate domestic opinion; he worried that the trials might be misconstrued as serving a political rather than juridical end. He feared that this could reflect badly on the United States, whose main aim it was to demonstrate to the German people the benefits of democratic justice. He also feared that if Nuremberg was tarnished by Soviet actions it would reflect badly on himself in the United States where he intended to return to his position of Supreme Court Justice as soon as the Nuremberg trial concluded.

Thus, as early as the autumn of 1945, contingency plans were being made for the future treatment of Nazi war criminals. To this end, the Americans drafted additional laws under which they could try war criminals if the time should come when they would want to free themselves of further international cooperation. The promulgation of Control Council Law No. 10 in December 1945 offered them just such an escape. This, coupled with the appointment of a successor to Jackson, Telford Taylor, gave the Americans a basic administrative and legal framework to continue their program of punishment on their own.

Plans for the Subsequent Nuremberg Proceedings could not be finalized until the issue of a second international trial was resolved. Ultimately the decision was Truman's.

While Jackson's successor as Chief of Council, Telford Taylor, was amenable to the prospect of conducting a second internationally-prosecuted trial of Nazi industrialists and financiers who had escaped punishment at the first Nuremberg trial, President Truman took seriously Jackson's critical analysis of the problems encountered at Nuremberg. While Jackson was guarded about the prospects of a second international trial he still maintained the United States had an obligation to try the German industrialists and financiers who had initially escaped punishment. As far as Jackson was concerned, carrying out a second four-power trial simply was too risky. The only way for the United States to save moral face was to continue prosecuting major war criminals, but without their former allies. Thus, in the autumn of 1946, after the judgment in the IMT case had been rendered, the Americans abandoned the idea of a second international trial and Taylor and his team were authorized to begin devising a list of possible suspects for indictment in American zonal courts.

Recently one historian has claimed that the "SS was at the centre of Allied perceptions of Nazi criminality."¹²⁹ This is not entirely true however. As has been demonstrated here, it was German financiers and industrialists, along with military personnel and representatives of the SS whom the Americans targeted for prosecution in subsequent trials. Certainly Taylor recognized the depth to which Nazi criminality extended, but given the pressures he was under, the best he could hope to achieve in the American zonal trials was a representative sample of Nazi criminality. The result was an additional twelve trials – the Subsequent Nuremberg Proceedings – of 185 high-ranking Nazi officials from five different elements of German society, in the American zone of occupation. Just as the IMT

¹²⁹ Bloxham, *Genocide on Trial*, 195-196.

was a hurried process, so too was the planning of the Subsequent Nuremberg Proceedings. The first indictment against a group of Nazi doctors was filed in November 1946, only one month after the conclusion of the IMT. The rushed planning of the first Subsequent Trial against Nazi doctors was typical and would remain the pattern for all of the twelve Subsequent Nuremberg Proceedings, including the trial of the *SS-Einsatzgruppen* – as we shall see in the next chapter.

Chapter 3

Otto Ohlendorf and the Origins of the Einsatzgruppen Trial

In Ohlendorf's case I am completely convinced that he believed in the necessity and rightness of what he was doing...Ohlendorf did not picture himself as a ruthless killer. Nor should he be made to appear as an ordinary felon or madman. He was a man of great intellect and dedication. He was one of the very few men tried at Nuremberg who appeared to be telling the truth.

Benjamin Ferencz¹

1. Introduction

In the fall of 1946, at the conclusion of the IMT trial, the American Military Government's Office of the Chief of Counsel for War Crimes (OCCWC), under the direction of Telford Taylor, planned a broad program of eighteen additional war crimes trials. As explained in the previous chapter, these trials were designed to focus on representative segments of the Nazi regime. From the inception of the planning process Taylor had hoped to indict and try some of the very highest-ranking members of the SS, an organization the IMT had declared criminal in its judgment handed down between September and November 1946.² Included in the roster of those SS leaders were members of

¹ Letter from Benjamin Ferencz to Michael G. Shanahan, 7 July 1972, United States Holocaust Memorial Museum, Record Group 12.000 Benjamin B. Ferencz Collection 1919-1994, Drawer 24 War Crimes Trials, box 2, Folder C Nuremberg Supplementary Material.

² The IMT declared in its judgment that the leadership corps of the Nazi Party as well as the Gestapo, SD, and SS were criminal organizations and therefore membership in one of these organizations was an indictable offense in the Subsequent Trials under Control Council Law No. 10. See, International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*,

the *Sicherheitsdienst* or SD, the Gestapo and the RSHA. The principal defendant to be indicted in this trial was *Brigadeführer* Otto Ohlendorf, former head of *Einsatzgruppe D*, who had admitted during interrogations by the Americans in 1945 that he and his mobile security and killing unit were responsible for the deaths of 90,000 people – an astounding number by any account.³ Under Taylor's original plan, Ohlendorf and several other high-ranking (and identifiable) officials of the security, intelligence, and police branches of the SS such as Adolf Eichmann, were to stand trial as important representatives of the criminal SS organization.⁴ Even though Ohlendorf had confessed to mass murder and had implicated the *Einsatzgruppen* in the murder of the Jews, Taylor did not plan to limit the scope of the SS trial to one dealing exclusively with *Einsatzgruppen* members or even leaders.⁵ In the context of this research, an intriguing and important question is why Taylor's plan for a

vol. 22 (Nuremberg, 1947), 498-518. On this issue see also, Michael R. Marrus (ed.), *The Nuremberg War Crimes Trial, 1945-1946* (New York, 1997), 236-237. In Taylor's May 1947 memorandum on the issue of an SS trial, possible candidates were described as "Leaders of the SS, Officials from the SD, the Gestapo, and the RSHA," memorandum to Chief of Staff, OMGUS, APO 742," 20 May 1947, in National Archives Records and Administration, Record Group 269 (Records of the United States Occupation Headquarters, World War II from here forward simply USOH), OMGUS, Records of Functional Offices and Divisions, OCCWC, box 2, Program War Crimes Trials Per. Gen. Taylor folder.

³ *Ibid.*

⁴ Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington, 1949), 79-80.

⁵ For instance, Franz Six, former leader of *Vorkommando* Moscow of *Einsatzgruppe B*, was originally scheduled to be tried in the case against cabinet ministers and other government officials for his work on cultural issues for the Foreign Office, see memorandum to Deputy Military Governor, OMGUS, APO 742, 14 March 1947, NARA RG 338 (United States Army in World War II, from here forward simply USA-WWII), Judge Advocate Division, War Crimes Branch, General Administrative Records, box 1, Organization 1947 folder.

general trial of the SS turned into a trial of the leaders of the *Einsatzgruppen* exclusively. The answers to this question will be shown to reside in the personality of Ohlendorf, his testimony to American interrogators after his arrest and to the fortuitous discovery and subsequent analysis of the *Einsatzgruppen* reports sometime in late 1946 or early 1947.⁶

As explained in the preceding chapter, the process of selecting defendants was quite different for the Subsequent Nuremberg Proceedings than it was for the original IMT trial where political considerations played a significant role. Taylor was determined that indictments were to be based strictly on documented evidence of criminal wrong-doing, that

⁶ No one has undertaken the task of writing a biography of Ohlendorf. Most of what has been written about him pertains to his roles as an economic expert, as *Amtchef* in the RSHA, or as leader of *Einsatzgruppe D*. The most comprehensive attempt to come to terms with Ohlendorf's life and career is Hanno Sowade, "Otto Ohlendorf: Non-conformist, SS Leader and Economic Functionary," in Ronald Smelser and Rainer Zitelmann (eds.), *The Nazi Elite*, trans. Mary Fischer (New York, 1993), 155-164 and David Kitterman, "Otto Ohlendorf: Gralshüter des Nationalsozialismus," in R. Smelser and E. Syring (eds.), *Die SS: Elite unter dem Totenkopf* (Schöningh, 2000), 379-393. Andrej Angrick, "Die Einsatzgruppe D: Struktur und Tätigkeiten einer mobilen Einheit. Der Sicherheitspolizei und des SD in der deutsch besetzten Sowjetunion," (unpublished PhD dissertation, Technical University of Berlin, 1999) is the first thorough history of *Einsatzgruppe D*. In the second volume of his dissertation (pages 273-76) Angrick also provides a biographical and social profile of Ohlendorf. Angrick has also written on Ohlendorf's role as leader of *Einsatzgruppe D*, "Die Einsatzgruppe D," in Peter Klein (ed.), *Die Einsatzgruppen in der besetzten Sowjetunion 1941/42: Die Tätigkeits- und Lageberichte des Chefs der Sicherheitspolizei und des SD* (Berlin, 1997), 88-110. Others who have looked at some aspect of Ohlendorf's career include, Shlomo Aronson, *Reinhard Heydrich und die Frühgeschichte von Gestapo und SD* (Stuttgart, 1971), who examines Ohlendorf's position within the SD; Ludolf Herbst, *Der totale Krieg und die Ordnung der Wirtschaft: Die Kriegswirtschaft im Spannungsfeld von Politik, Ideologie und Propaganda 1939-1945* (Stuttgart, 1982) who analyzes Ohlendorf's role as an economic functionary; and, most recently, Peter Longerich, *Politik der Vernichtung. Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung* (Munich, 1998) who examines a number of issues, including Ohlendorf's leadership role in *Einsatzgruppe D* and his testimony on the existence and timing of the *Führerbefehl* at Nuremberg. Many others have raised the issue of Ohlendorf's testimony at the IMT proceedings, but seldom does the literature go beyond mentioning the fact that Ohlendorf killed 90,000 civilians in the Soviet Union in 1941 and 1942.

is to say on evidence unearthed by his researchers. The record suggests that Taylor's office did not target particular individuals independent of such consideration.⁷ Benjamin Ferencz, the chief prosecutor at the *Einsatzgruppen* trial remembers that, "we were not necessarily looking for evidence against particular individuals" but rather "we were fishing for evidence of crime."⁸ Taylor insisted that compelling documentary evidence had to be available to prove guilt beyond a reasonable doubt, and that the individuals targeted were in American custody or at least accessible through extradition. Certainly Ohlendorf met these prerequisites.

In practice, during the preparatory phase of the Subsequent Nuremberg Proceedings in 1946 and 1947, most of Taylor's staff, including Ferencz, was totally immersed in sifting through mountains of captured documents, located at various repositories around Germany and Europe, searching for incriminating evidence against individuals judged to be "major criminals." It will be recalled that in Taylor's opinion, major war criminals were defined as anyone whose crimes warranted the death penalty. At the same time the Locator Branch of the OCCWC was doing its best to find out if these individuals were in Allied custody and if so where. If they were in occupation zones other than the American, they had to arrange to have them extradited to Nuremberg.⁹ As it turned out, few of the top-ranking SS officials

⁷ Telford Taylor, *Anatomy of the Nuremberg Trial* (Toronto, 1992), 47-48.

⁸ Interview with Benjamin Ferencz by Hilary Earl, 24 April 1997, 1-2 who stated, "we didn't have specific lists of defendants at that time because we were very well aware, at least I certainly was very well aware, that you need two things to hold a trial: you need a defendant and you need evidence proving guilt beyond a reasonable doubt. If you have one and not the other you've got nothing so, one would follow from the other."

⁹ Taylor, *Final Report*, 15.

Taylor's office had identified as criminals could be located; many had escaped to neutral countries or were in hiding and several others had turned up dead or were presumed to have committed suicide. Unfortunately, US intelligence was not always accurate, as for example when the C.I.C. (Central Intelligence Corps) determined that Adolf Eichmann had committed suicide and the search for him was aborted.¹⁰ Still, numerous commanders and subordinate officers of the *Einsatzgruppen* were identified, located and apprehended. And most important of all, by sheer good luck, the Berlin Branch of the OCCWC, at the time under Ferencz's direction, accidentally located and analyzed the only surviving copies of the *Einsatzgruppen* Reports which fully detailed their criminal activities in the east. The discovery of these reports coupled with the Ohlendorf admission that he and his unit committed mass murder convinced Taylor to scrap the plans for a general trial of the SS in favour of one dealing exclusively with the activities of the mobile security and killing units. In July 1947, Ohlendorf and twenty-three others were indicted on the unprecedented charge of genocide, namely the murder of more than one million people, leading the press to dub the *Einsatzgruppen* case "the biggest murder trial in history."¹¹ This chapter examines that

¹⁰ For example, one attorney investigating the SS wrote, "Efforts to apprehend Adolf Eichmann so far have proven to be fruitless and the C.I.C. appears reasonably satisfied from the information available that this man committed suicide in late April or early May 1945." Memorandum to Mr. Edmund H. Schwenk, Section Chief OCC from P.W. Walton, 30 September 1946 in National Archives Record Administration Record Group 238 (Records of World War II War Crimes from here forward simply WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 2, Correspondence 1946 E202, Correspondence August 1946-January 1947 folder. From here forward document, NARA RG, file, box, folder).

¹¹ Benjamin B. Ferencz, United States Holocaust Memorial Museum, RG 50.030*269, Oral History Interview with Benjamin B. Ferencz 1994, 3 tapes, 26 August 1994, tape 2.

process.

2. The Surrender of Otto Ohlendorf, Early Interrogations and Confessions of Mass Murder

On May 7, 1945, the day Germany surrendered to the Allies, a confident Otto Ohlendorf was in his office in Flensburg (a town near the Danish border, where Hitler's successor, Admiral Karl Dönitz, had set up his headquarters and was later arrested), working on an outline for a plan to create an "opinion service" for Germany's new occupation authorities. As head of *Amt III* (Inland Intelligence) of the *Reichssicherheitshauptamt* or RSHA, Ohlendorf had been instrumental in shaping and refining Nazi intelligence gathering practices. He saw this work as important and was so arrogant and deluded that he actually believed that the Allies would utilize his expertise and experience when they realized his intellectual strengths as a opinion researcher. Thus in May 1945, Ohlendorf was buoyed by the idea that he might find purpose, a niche, in the "new [Allied] order" he knew was inevitable.¹² Two weeks later, on May 24, at 3 o'clock in the afternoon, after acknowledging the German defeat, Ohlendorf surrendered to British forces, convinced not only that he could demonstrate to the Allied authorities his intellectual value, but that they would recognize it.¹³

¹² Arthur L. Smith, Jr., "Life in Wartime Germany: Colonel Ohlendorf's Opinion Service," *The Public Opinion Quarterly* 36 (Spring, 1972), 7 and Herbst, *Der totale Krieg und die Ordnung der Wirtschaft*, 187.

¹³ At his trial in 1947, Ohlendorf claimed he had to ask the Allied authorities to arrest him. He maintained that at first they refused, but after some persuading they finally placed him in custody. This seems unlikely given that as a high-ranking SS man Ohlendorf would have fallen into the automatic arrest category. Testimony, Otto Ohlendorf, 8 October 1947, 510-512 in National Archives Microfilm Collection M895, *The United States of America v. Otto Ohlendorf et al.*, roll 2 (from here forward simply *Trial*, roll, page or frame). See also, Case Record of Otto Ohlendorf, Federal Bureau of Investigation, United States Department

Needless to say the British did not embrace Ohlendorf or his skills. They treated him as all other suspected war criminals, immediately imprisoning and interrogating him. Ohlendorf remained in British custody for several months, until the Americans requested his extradition. United States prosecutors had learned from their British Allies that Ohlendorf was a National Socialist of long-standing and an SS commander who was responsible for “mass atrocities” in the Crimea.¹⁴ Because of Ohlendorf’s position in the RSHA and his apparent willingness to talk, the Americans hoped to use him as a witness in their case against Ernst Kaltenbrunner (Heydrich’s successor and leader of the RSHA) at the IMT proceedings. In compliance with their Ally’s request, on October 18, British authorities transferred Ohlendorf to the war crimes prison at Nuremberg where the former head of *Amt III – Inland Intelligence* – would remain for the next three years.¹⁵

At Nuremberg Ohlendorf was interrogated by the American prosecution team that

of Justice, Civil Fingerprint Card, 27 April 1948 in NARA RG 338 (USA-WWII), Judge Advocate Division, War Crimes Branch, Records of Executed Prisoners 1946-1951, box 9, Ohlendorf file. Sowade states that Ohlendorf was actually arrested on May 23 not May 24, 1945 in “Otto Ohlendorf: Non-conformist, SS Leader and Economic Functionary,” 163; and, “Interrogation of Otto Ohlendorf,” 27 October 1945, Nurnberg. National Archives Microfilm Collection M1270, “Interrogation Records Prepared for War Crimes Proceedings at Nuernberg, 1945-1947, OCCPAC Interrogations,” roll 13 (from here forward simply document, M1270, roll) where Ohlendorf claimed that in early May 1945 he told Himmler that, “I had decided already to give myself up to explain in detail what the SD (Security Service) meant and what it has done.”

¹⁴ Summary of PW CS/2262 SS-Gruppenführer Otto Ohlendorf, CSDIC (UK), 19 August 1945, NARA RG 238 (WCR), United States Counsel for the Prosecution of Axis Criminality, Reports and Interrogations 53-56, box 12, NM 70 CSDIC PW Reports folder 53.

¹⁵ Whitney Harris maintains that he requested that the British turn over Ohlendorf to the United States for questioning to further their case against the Gestapo and SD. See Interview with Whitney Harris,” Harry James Cargas (ed.), *Voices from the Holocaust* (Lexington, 1993), 110.

had been assembled, charged with the task of preparing the case against the principal Nazi leaders. During his prolonged incarceration American authorities interrogated Ohlendorf on at least thirty-six different occasions, not only about his activities as head of *Einsatzgruppe D*, but also about the functioning of the RSHA, the structure of the SS, Nazi economic policy, and about his knowledge of many individuals, particularly Ernst Kaltenbrunner, and those responsible for economic matters.¹⁶ On October 24, 1945, the first time US officials interrogated Ohlendorf, the Americans found him to be not only an interesting character, but one they quickly discovered was willing to talk freely. They described him as a “dynamic, committed” and verbose Nazi idealist. He freely confessed that he had been head of *Einsatzgruppe D* in 1941 and 1942 in the Soviet Union, and he estimated that his group was responsible for the deaths of nearly one hundred thousand people during the period of his command.¹⁷ He was not ashamed, but rather self-confident, perhaps even boastful when he assured Lieutenant Colonel Smith W. Brookhart, Jr., his American interrogator, that he had not done anything wrong, his group, he insisted, had acted “humanely” and “legally” under the authority of Himmler and Hitler.

In the same interrogation Ohlendorf described to Brookhart when and how the order to murder the Jews of the Soviet occupied territories was given to the leaders of the mobile killing units. In May 1941, a few days before the invasion of the Soviet Union, Ohlendorf

¹⁶ For a complete record of American interrogations of Ohlendorf and other defendants and witnesses at Nuremberg see National Archives Microfilm Publications, M1019 (Records of the United States Nuernberg War Crimes Trials Interrogations, 1946-1949) and M1270.

¹⁷ “PW CS/2262 SS-Gruppenführer Otto Ohlendorf,” PW Paper 135, circa August 1945 in NARA RG 238 (WCR), US Counsel for the Prosecution of Axis Criminality, Report and Interrogations 53-56, box 12, number 70 CSDIC PW Reports folder 53.

explained, the leaders of the mobile security units were assembled in Pretzsch and were told that an integral part of their job was to “liquidate” the Jews. The order was repeated orally by Himmler to a group of *Einsatzgruppe* and *Kommando* leaders in September 1941 in Nikolayev, a city on the Black sea, during Himmler’s visit to the eastern front. Ohlendorf reasoned that the executions he supervised were not criminal, but entirely justified, especially because of Himmler’s superior orders, which had explicitly absolved the leadership of the *Einsatzgruppen* and *Kommandos* of any personal responsibility.¹⁸ Ohlendorf took Himmler’s assurance of absolution to heart. His belief that the Allies would want to utilize his particular expertise in their occupation government, coupled with his admission to mass murder attests to this and furthermore says much about the former leader of *Einsatzgruppe D*’s *Weltanschauung*. Ohlendorf’s attitude toward his crime suggests that his moral compass was so skewed that he genuinely believed that what he had done, supervise the murder of 90,000 civilians, was not wrong. His matter-of-factness, indeed, his rather blasé portrayal of his job in the Soviet Union baffled his American captors who had no documented studies or analysis of ideologically committed murderers to refer to and, therefore, had no frame of reference by which to evaluate his attitude. Having no guidelines by which to diagnose Ohlendorf, one prison psychologist, Major Leon Goldensohn was unable to understand how a man as intelligent and charming as Ohlendorf appeared to be, could also play such a critical and intimate role in mass murder, and then admit to it without any visible signs of remorse. Goldensohn, was so dumbfounded by Ohlendorf’s

¹⁸ Interrogation of Otto Ohlendorf by Lt. Colonel S.W. Brookhart, Nuremberg, 24 October 1945 and Interrogation of Otto Ohlendorf by Lt. Colonel S.W. Brookhart, Nuremberg, 25 October 1945, M1270, roll 13.

comportment that he could only conclude that the former leader of *Einsatzgruppe D* must have been “a sadist, a pervert or a lunatic” to have carried out such monstrous orders.¹⁹

Goldensohn’s response to Ohlendorf was typical of many of those involved in the investigation and prosecution of war criminals after the war which ultimately led to a spate of psychological studies of war criminals.

Ohlendorf was not unique in his frankness. Many captured Nazi war criminals spoke openly to American authorities. Telford Taylor recalls that during pre-trial interviews many perpetrators talked freely of the jobs they had held and the tasks they had performed during the Nazi period. Their bravado, however, was most usually an attempt to gain reprieve from prosecution themselves while emphasizing the actions of others whose crimes were worse. This suggests that most “typical” war criminals knew that what they had done was wrong, whereas Ohlendorf’s behaviour suggests the opposite. He was willing to talk freely of his crimes and expressed no remorse simply because he did not feel any. Ohlendorf truly believed that what he had done was right. Unable to reconcile the seeming contradictions of Ohlendorf’s personality, many American officials simply concluded that he had to be

¹⁹ Memorandum to Lieutenant Colonel Smith W. Brookhart from Mr. Sander Jaari, “Conversation with Otto Ohlendorf, 7 March 1946,” M1270, roll 13. Leon N. Goldensohn was the prison psychologist at Nuremberg for most of the IMT trial. See Gustav M. Gilbert, *Nuremberg Diary* (New York, 1947 and 1995), 3. Dr. Leon Goldensohn’s response to Ohlendorf was not unusual. Many people, including psychiatrists like Goldensohn stationed at the Nuremberg prison, took comfort in the notion that the Nazis were psychologically “abnormal.” This assessment of the Nazi personality gained increasing currency after the suicide of Robert Ley, the leader of the Labour Front, at Nuremberg in October 1945. An autopsy was performed by American doctors on his brain following his suicide in the Nuremberg prison and it was discovered that it showed definite signs of “neuropathology,” that is, brain damage. For a full accounting of this episode see Eric A. Zillmer, Molly Harrower, Barry A. Ritzler and Robert P. Archer, *The Quest for the Nazi Personality: A Psychological Investigation of Nazi War Criminals* (Hillsdale, NJ; 1995), 20-35.

psychologically disturbed. But Ohlendorf was not “crazy,” rather he was bright and well-educated. More importantly he was a committed National Socialist, an *Altkämpfer*, a true believer and arrogant.²⁰ He was a highly intelligent albeit ordinary man, capable of extraordinary acts of evil because of his belief in the greater task of National Socialism. To the end of his life he was convinced of the “rightness” of his acts even telling Benjamin Ferencz before he was hanged on June 7, 1951, that one day the world would see his truth. How did such a well-educated man come to be a perpetrator of genocide, that is to ask, what was Ohlendorf’s “route to crime?”

Ohlendorf was born on February 4, 1907, in Hoheneggelsen near Hannover, the youngest of four children.²¹ Nothing in his childhood presaged his later role in the activities of the mobile killing units. His middle-class Protestant family was ordinary enough. His father Heinrich owned a farm and his mother kept house.²² However, his father’s political beliefs (he was a member of the German Nationalist People’s Party or DNVP) may well have influenced the evolution of Ohlendorf’s political philosophy.²³ After World War II

²⁰ Aronson, *Reinhard Heydrich und die Frühgeschichte von Gestapo und SD*, 211-212 and 229. Aronson argues that unlike other leaders of the SD, such as Walter Schellenberg who only joined the NSDAP in 1933 and subsequently became Deputy Chief of *Amt VI* of the RSHA, Ohlendorf came to the SD in its infancy and out of conviction rather than for opportunistic reasons.

²¹ For basic information on Ohlendorf’s personal life and career see “Case Record Otto Ohlendorf,” 27 April 1948 in NARA RG 338 (USA-WWII), Judge Advocate Division, War Crimes Branch, Records of Executed Prisoners 1946-1951, box 9, Ohlendorf folder; testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 476-478; Questionnaire of Otto Ohlendorf, undated, M1270, roll 13; and Angrick, “Die Einsatzgruppe D,” (PhD), 273-276.

²² Angrick, “Die Einsatzgruppe D” (PhD), 273; Aronson, *Frühgeschichte von Gestapo und SD*, 210; and, Herbst, *Der Totale Krieg*, 182.

²³ Angrick, “Die Einsatzgruppe D” (PhD), 273 and Sowade, “Otto Ohlendorf,” 155.

Ohlendorf admitted he had been interested in politics from a young age and like many young men of his generation, his desire was “to build a national state” for Germany.²⁴ His interest in politics and his dream of uniting Germans made him a likely candidate for a nationalist political movement, particularly since he admitted he was far too “bourgeois” to become a Marxist.²⁵ Hoping to find solutions to Germany’s economic and political problems, he joined the NSDAP and SA in 1925 at the age of eighteen, and was given membership number 6531.²⁶ In 1926, he founded the first Hitler Youth organization in his town.²⁷ A year later he joined the SS and was given membership number 880.²⁸

In 1928, Ohlendorf entered university in Leipzig to study law and political economy, his first passion.²⁹ During his time at university he remained active in the NSDAP, campaigning to win “converts” to the Party, first at Leipzig and later at the University of Göttingen.³⁰ While in Göttingen, he worked tirelessly and was instrumental in assisting the

²⁴ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 477.

²⁵ *Ibid.*

²⁶ Angrick, “Die Einsatzgruppe D” (PhD), 273.

²⁷ Peter D. Stachura, *Nazi Youth in the Weimar Republic* (Santa Barbara, CA; 1975), 30-31.

²⁸ “Case Record Otto Ohlendorf,” 27 April 1948 in NARA RG 338 (USA-WWII), Judge Advocate Division, War Crimes Branch, Records of Executed Prisoners 1946-1951, box 9, Ohlendorf folder. See also Testimony of Otto Ohlendorf, October 8, 1947, *Trial*, roll 2, 476-478; Sowade, “Otto Ohlendorf,” 155; and, Angrick, “Die Einsatzgruppe D,” 273.

²⁹ Herbst argues that Ohlendorf “was little suited for a career as a lawyer” since his interests revolved around resolving problems dealing with the state and economics, *idem*, *Der Totale Krieg*, 182.

³⁰ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 478.

Nazis to win their first electoral victory at the *Gau* (district) level in Hannover-South.³¹ Upon graduating from the University of Göttingen in 1931, Ohlendorf received a scholarship to study Fascist economics at the University of Pavia, Italy.³² It was during this time that he developed his life-long political philosophy of “anti-Fascism.”³³ After the war he explained that he objected to the statism and corporatism of Italian Fascism, preferring instead a “community of the people through representation” which he believed better characterized the National Socialist ideal.³⁴ Ohlendorf was fundamentally opposed to what he called the “absolutist state” or totalitarianism, which he felt was essentially “un-Germanic,” he was also opposed to the “selfish capitalism” of big business. He objected to corrupt business practices, particularly if they helped benefit individuals and he disliked any attempts to expand enterprises owned by the Party. Instead he preferred a planned, centralized economic system for Germany.³⁵ Throughout his career, this political philosophy coupled with his unwillingness to tow the official party line, earned Ohlendorf a reputation as an “intellectual know all,” frequently bringing him into conflict with high-ranking members of the Party, particularly Heinrich Himmler who resented Ohlendorf’s “superior attitude” and viewed him

³¹ Aronson, *Frühgeschichte von Gestapo und SD*, 210-211; Angrick, “Die Einsatzgruppe D” (PhD), 273; and, Sowade, “Otto Ohlendorf,” 155.

³² Sowade, “Otto Ohlendorf,” 155 and Herbst, *Der Totale Krieg*, 181-183 .

³³ Herbst, *Der Totale Krieg*, 183.

³⁴ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 480.

³⁵ Interrogation of Otto Ohlendorf, 9 November 1945, M1270, roll 13. See also Felix Kersten, *The Kersten Memoirs, 1940-1945*, trans. Constantine Fitzgibbon and James Oliver (London, 1956), 206-208 and Robert Koehl, *The Black Corps: The Structure and Power Struggles of the Nazi SS* (Madison, WI; 1983), 231.

as a rogue National Socialist.³⁶ Ohlendorf's disagreements with Himmler never reached the breaking point; in fact, his hard work eventually earned him the respect of his colleagues and he steadily rose through the ranks of the SS, eventually becoming a *Brigadeführer*.³⁷

Ohlendorf had wanted an academic career. When he returned from his year in Italy he intended to pursue this aim and began work on a doctoral dissertation in economics. For reasons unknown however, this came to naught; instead, Ohlendorf began training for a career in law. In the fall of 1933, he gladly gave up this pursuit when his former supervisor in political economy, Professor Jens Peter Jessen, offered him a job as "assistant director" at the *Institut für Weltwirtschaft* (Institute for World Economics) in Kiel.³⁸ Ohlendorf happily accepted the position and remained in Kiel until 1934, when he and his mentor had a severe falling out with local Party officials over the content of their teaching which emphasized their particular brand of National Socialism.³⁹ Their criticism of National Socialist economic policy finally resulted in their expulsion from the Institute in December 1934.⁴⁰ Tutor and student went to Berlin where an incident similar to the one in Kiel again led to conflicts with local Party officials. Realizing that his career in academia was probably over, a despondent Ohlendorf, on the suggestion of Jessen, joined the *Sicherheitsdienst* (Security Service or SD)

³⁶ Sowade, "Otto Ohlendorf," 156. See also Heinz Höhne, *The Order of the Death's Head: The Story of Hitler's SS*, trans. Richard Barry (London, 1970), 234 and Kersten, *Memoirs*, 209-210.

³⁷ Sowade, "Otto Ohlendorf," 158.

³⁸ Angrick, "Die Einsatzgruppe D," (PhD), 274.

³⁹ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 484-488. See also Sowade, "Otto Ohlendorf," 156.

⁴⁰ Questionnaire of Otto Ohlendorf, undated, M1270, roll 13.

in 1936 as head of *Abteilung II* (Inland Economics), a decision that ended all hopes of an academic career and one that would alter the course of his life permanently by drawing him into the activities of the criminal Nazi police state.⁴¹

Ohlendorf was flattered and pleasantly surprised when he first encountered Professor Reinhard Höhn, the individual in charge of recruiting for the offices of the SD, who told him that the SD “needed critical intellects like his.”⁴² Moreover, he was an ambitious individual, intrigued by the possibility that he might be able to put his academic training to use in the SD.⁴³ Under Höhn’s supervision Ohlendorf first became director of *Abteilung II* (Inland Economics) and later he was promoted to leader of the entire Central Division of this office.⁴⁴ The job seemed ready made for him since his main task was to develop an economics information office. Ohlendorf had always preferred economics to law, spending many of his earlier years developing his own, “highly individual economic philosophy,” which he hoped would be taken seriously by the Party.⁴⁵ As head of *Abteilung II*, he gathered all information about economic matters, analyzed it and wrote reports designed to guide National Socialist economic policy.⁴⁶ In the SD, Ohlendorf thought he had finally found a niche for himself within the Party, a place where he could freely discuss his ideas about economics and their application to National Socialism. He became disillusioned, however,

⁴¹ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 489.

⁴² Höhne, *Death’s Head*, 212-213.

⁴³ Sowade, “Otto Ohlendorf,” 156.

⁴⁴ *Ibid*, 156-157.

⁴⁵ *Ibid.*, 155-156.

⁴⁶ Aronson, *Frühgeschichte von Gestapo und SD*, 213.

when he first discovered that the information offices of the SD were not as independent as Professor Höhn had promised him they would be. After the war, American prosecutors had great difficulty believing Ohlendorf when he told them about his disappointment with the SD and his discovery that “there was no such thing as an [independent] SD information organization.” Like all other Nazi organizations the offices of the SD were carefully scrutinized by Party bosses which proved to be very limiting for an arrogant and “free-thinker” like Ohlendorf.⁴⁷ Heinz Höhne argues that Ohlendorf was typical of the type of young intellectual attracted to the SD, an organization Heydrich was attempting to revitalize as a base for his personal power.⁴⁸ Ohlendorf and many other young men like him jumped at the chance to influence the Party by using the offices of the SD as a vehicle to expose and correct, what Ohlendorf referred to as “mistaken developments in the National Socialist philosophy.”⁴⁹ In the SD Ohlendorf felt he had at last found a place within the National Socialist movement where he could freely express himself and put his intellect to “practical” use to further the true National Socialist cause.⁵⁰ Thus, all the more reason for disappointment when this did not prove to be the case.

For nearly two years while working in *Abteilung* II of the SD Ohlendorf and a team

⁴⁷ Testimony of Otto Ohlendorf 8 October 1947, *Trial*, roll 2, 489. For an explanation of the development of the SD see Höhne, *Death's Head*, 196-225.

⁴⁸ Höhne, *Death's Head*. Lutz Hachmeister, the biographer of Franz Six (one of the defendants in the *Einsatzgruppen* trial who escaped execution), has recently argued that Six, like Ohlendorf, represented “the ideal type of SS-intellectual in the National Socialist Reich.” See *idem*, *Der Gegnerforscher: Die Karriere des SS-Führers Franz Alfred Six* (Munich, 1998), 7.

⁴⁹ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 489.

⁵⁰ Herbst, *Der Totale Krieg*, 183.

of economists investigated and reported on National Socialist economic policy. His reports were, more often than not, both critical of Nazi economic policy and extremely pessimistic about the future.⁵¹ Ohlendorf's reports were particularly critical of policy-makers' insistence on deficit spending, state control of business and the Four Year Plan.⁵² He believed that the future of Germany would be threatened if the state were allowed, as in Italy, to spend beyond its means and control big business. He foresaw an end to entrepreneurship and free enterprise in Germany if men like Hermann Göring or Robert Ley (leader of the Labour Front) were allowed to use big business as a means to power and wealth for themselves.⁵³ Of course because of Ohlendorf's training in Italy he believed himself to be an expert of fascist economics and his arrogance led him to be very critical of Party policy. This type of criticism was not well received and resulted in a severe reprimand first by Himmler, who felt Ohlendorf's arrogant and defeatist attitude was unbearable, and later by Heydrich, who in September 1937 forbade him from engaging in any critical analysis of the regime whatsoever.⁵⁴ Unhappy with the prospect of merely rubber-stamping the regime, Ohlendorf attempted to resign from the SD, but was denied permission to do so by Heydrich who, despite Ohlendorf's critique of the Party, felt his skills as an economist could still be

⁵¹ Aronson, *Frühgeschichte von Gestapo und SD*, 214.

⁵² Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 490-493.

⁵³ Interrogation of Otto Ohlendorf by Lt. Col. S.W. Brookhart, 9 November 1945, Nuremberg in M1270, roll 12; and, Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 498-499. See also Kersten, *Memoirs*, 207-208.

⁵⁴ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 498-499 and Kersten, *Memoirs*, 209-210. Herbst argues that "although the relationship between Ohlendorf and Himmler was at times personally difficult, they possessed a high measure of agreement in substantial points of economic policy." Herbst, *Der Totale Krieg*, 271.

valuable to the organization. In 1938, Heydrich finally acquiesced and allowed Ohlendorf to transfer to the Reich Group Commerce on the condition that he continue to work part-time for *Abteilung* II of the SD.⁵⁵ Thus, Ohlendorf maintained his position in the SD, on an honorary basis, working two hours a day, but he preferred his new position with the Reich Group Commerce where he worked until June 1939.⁵⁶ At this time Heydrich recalled him to the SD to work full time. Less than three months later (September) Ohlendorf was made Director of *Amt* III of the SD (Inland Intelligence) and was subsequently put in charge of compiling research on German public opinion.⁵⁷ During the initial phase of the war Heydrich wanted individuals in charge of the offices of the SD who would help gauge German attitudes to Party policy. As Hanno Sowade has noted, this job was tailor made for Ohlendorf who was more than willing to express views contrary to official Party lines.⁵⁸ Ohlendorf remained as head of *Amt* III until 1945, but was recruited in 1941 by Himmler for a leadership role in the mobile security and killing units.

As an outspoken critic of the Reich one might get the impression that perhaps Ohlendorf was a marginal figure. His persistent criticism of Nazi economic policy coupled with the hundreds of affidavits which spoke of his human qualities and which were entered into evidence at Nuremberg, certainly attest to this. But the fact is that by the summer of

⁵⁵ Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 490-493. See also Höhne, *Death's Head*, 235-236 and Herbst, *Der Totale Krieg*, 186.

⁵⁶ Sowade, "Otto Ohlendorf," 157.

⁵⁷ Angrick, "Die Einsatzgruppe D," (PhD), 275; Herbst, *Der Totale Krieg*, 185; and, Sowade, "Otto Ohlendorf," 157.

⁵⁸ Sowade, "Otto Ohlendorf," 158.

1941, Ohlendorf was irreversibly drawn into the horrors of the Nazi regime. This Nazi ideologue was now forced to put his theories into practice, and in the process, his loyalty to the state and its ideology would be tested.⁵⁹ Unfortunately, Ohlendorf would pass the test with honours. His transformation from intellectual critic of National Socialist economic policy to head of one of the mobile security and killing units in the Soviet Union is a good example of how the Nazis were able to implicate even the most “free-thinking” members of the Party into mass murder and how men like Ohlendorf would prove to be some of the most effective instruments of Nazi racial policy.

None of the commanders of the *Einsatzgruppen*, including Ohlendorf, volunteered for leadership roles in these security and killing units, except Arthur Nebe, the head of the *Kriminalpolizei* (Criminal Police or Kripo), who, apparently wanting to “curry favour” with Heydrich, volunteered for the assignment in the east. The circumstances of Ohlendorf’s recruitment to the *Einsatzgruppen* were different. According to his wife Käthe her husband had accepted the assignment in the Soviet Union because he felt the needed to redeem himself with Himmler.⁶⁰ The *Reichsführer*-SS, who was fond of characterizing the ambitious and arrogant young Ohlendorf as a “*Gralshüter*” (knight of the holy grail), felt that the clean SS intellectual needed to get his hands dirty.⁶¹ Thus, when Himmler was looking to staff his

⁵⁹ Herbst, *Der Totale Krieg*, 182 and 185.

⁶⁰ Höhne, *Death’s Head*, 356-357.

⁶¹ Herbst, *Der Totale Krieg*, 185 and Richard Breitman, *The Architect of Genocide: Himmler and the Final Solution* (Hanover, NH; 1991) 43-44. George Browder does not entirely agree with this conclusion. He writes, “Although men like Otto Ohlendorf claimed that Heydrich assigned them to lead *Einsatzgruppen* as a policy of Blutkitt, that may be the rationalization of a brutalized executioner trying to explain his own failure [to resist being drawn into the killing process].” See *idem*, *Hitler’s Enforcers: The Gestapo and the SS*

SS army with ideological soldiers, he recruited the “too noble” Ohlendorf who had twice previously rebuffed his request to serve in the east.⁶² To avoid the label of coward, and perhaps to lessen some of the tensions between him and his superiors, Ohlendorf claimed at trial that he reluctantly accepted the position of head of *Einsatzgruppe D* in the spring of 1941.⁶³ While hesitant at first, once given the task of leading a battalion of murderers, Ohlendorf performed his duties with military efficiency, later boasting about the strict regimen he had established with his men, even admitting to sending those too weak of heart to carry out their bloody task back to Berlin for reassignment.⁶⁴ His behaviour in the east, coupled with a strong ideological commitment to Nazism, suggests that perhaps he was not as averse to accepting the job as he maintained after the war. After all, he had a vested interest in stressing the involuntary nature of the assignment in court, his life depended on it. Moreover, Ohlendorf’s commitment to National Socialist ideology was so strong that he carried out his duties in the Soviet Union “to the best of his ability and with a clear conscience,” registering an astounding 90,000 murders for the National Socialist cause. When given the opportunity, he even refused an early discharge from his duties in the east, staying longer than all other *Einsatzgruppe* leaders who began work there the same time as he.⁶⁵ Just as he applied himself to his work in the SD, he also worked hard in the occupied

Security Service in the Nazi Revolution (New York, 1996), 157-158.

⁶² Testimony of Otto Ohlendorf, 8 October 1947, *Trial*, roll 2, 513-514.

⁶³ Herbst, *Der Totale Krieg*, 182 and Sowade, “Otto Ohlendorf,” 158.

⁶⁴ Testimony of Otto Ohlendorf, 14 October 1947, *Trial*, roll 2, 592.

⁶⁵ Sowade, “Otto Ohlendorf,” 159-160.

east. He remained in the Soviet Union for a full year convinced of the necessity of his task and of his ability to do more for the National Socialist cause in the field rather than in Germany proper.⁶⁶

If Ohlendorf was sent to Russia as a test, he passed with honours, but the rogue National Socialist was not tamed by his experience. When he returned to Germany in the summer of 1942, he was immediately put back to work as an opinion researcher for the SD, as head of *Amt III* (Inland Intelligence). For the remainder of the war, Ohlendorf the idealist spent his time documenting German opposition to National Socialist policy. He highlighted areas in which Germans were unhappy with the regime, and noted ways in which the Party could improve policy. Later in the war, even when his reports were ignored by Hitler, rather than give up his efforts, he diligently recorded public attitudes toward National Socialist policy. As a Nazi theorist he assumed it was his duty to do so.⁶⁷ But, as Sowade has aptly pointed out, Ohlendorf's willingness to critique the regime should in no way be construed as "opposition to Hitler," rather it was Ohlendorf's way of attempting to "stabilize" the regime by emphasizing areas where Germans were unhappy.⁶⁸

If there was such a thing as a typical SS or SD man, Ohlendorf was certainly not it. Or at least that is the way others have portrayed him and indeed he has characterized himself. Throughout his career in the Third Reich he refused to pay lip-service to National Socialist ideas with which he disagreed, even at the expense of his academic career which

⁶⁶ *Ibid.*

⁶⁷ Smith, Jr., "Life in Wartime Germany," 6; Kersten, *Memoirs*, 210-211 and 218-219; Herbst, *Der Totale Krieg*, 187; and, Sowade, "Otto Ohlendorf," 160-163.

⁶⁸ Sowade, "Otto Ohlendorf," 160.

was really his first calling. At the same time, this burgeoning intellect was willing to do the dirty work of the regime in the Soviet Union. Because of these seemingly contradictory positions Ohlendorf earned a reputation as an uncompromising and unselfish idealist, a characterization his wife was quick to point out to those who later enquired after her husband.⁶⁹ Even after the war Ohlendorf's behaviour could be characterized as unusual. He was one of the few, high-ranking Nazis, aside from Albert Speer, who actually took responsibility for his actions, albeit with none of Speer's remorse. His willingness to cooperate after the war and his sincerity about his crimes perplexed his captors leading Michael Musmanno, the presiding judge in the *Einsatzgruppen* trial, to lament that he wished all defendants were as forthcoming as Ohlendorf.⁷⁰ There is no doubt however, that this "Dr. Jekyll and Mr. Hyde" remained a committed National Socialist until the end, never disagreeing with the Reich's racial policies and never demonstrating unease at the path he had chosen.⁷¹ Indeed until his end, he believed in the rightness of his tasks, something his captors could not initially fathom.

Ohlendorf's comportment after the war also had a strong effect on his captors. During his numerous meetings with American authorities, Ohlendorf and his interrogators developed a relationship of mutual respect which may appear odd to outside observers.⁷²

⁶⁹ Letter Käthe Ohlendorf to Nikolaus Ehlen, Hoheneggelson, 26 October 1950, KLE 66, NL Ohlendorf, B2, BA.

⁷⁰ Opinion and Judgment of the Tribunal, 8 April 1948, *Trial*, roll 7, 132.

⁷¹ *Ibid.*, 131.

⁷² Ohlendorf's good relationship with his captors was not unusual. Even the notorious Hermann Göring developed a very strong bond, some might even say friendship, with prison psychiatrist Douglas M. Kelley, M.D. who returned the admiration. Frequently

According to Robert Conot, Ohlendorf grew very attached to his principal interrogator Lieutenant Colonel Smith W. Brookhart, so much so in fact that he hoped Brookhart would later help him write a book about his experiences.⁷³ Between his extradition to American authorities in October 1945 and the time he testified at Nuremberg in January 1946, Ohlendorf's trust in Brookhart grew. He told him about the secret agreement between the German High Command and the RSHA which enabled Hitler's plan for a *Vernichtungskrieg* (war of destruction) to be carried out in the east. He also explained in detail how the *Einsatzgruppen* operated, and he described their relationship to the army, what their tasks were and how and when they received their orders. Ohlendorf was unable to keep silent, even though his volubility might come back to haunt him. He was, to his detriment, more than willing to give American authorities all the information they requested and even some they did not solicit. Oblivious to the fact that he might offend some of his colleagues imprisoned in Nuremberg, he detailed all of their activities in the Soviet Union including the process of mass murder and during one interrogation he even helped the American prosecution team construct a chart outlining the structure of the *Sicherheitspolizei* (Security Police or Sipo) and the *Sicherheitsdienst* (Security Service or SD) explaining precisely the role and position of all officials.⁷⁴ This was later used in court as prosecution evidence and ultimately helped indict several of Ohlendorf's colleagues in the Subsequent Proceedings.

the prison officials were the only contact with other human beings the Nuremberg defendants had and as such they developed strong attachments to their captors. For a full recounting of the issue see Zillmer et al., *The Quest for the Nazi Personality*, 78-88.

⁷³ Robert E. Conot, *Justice at Nuremberg* (New York, 1983), 233.

⁷⁴ *Ibid.*

Ohlendorf kept little to himself. In fact, he was so forthright and earnest that when reading the interrogation record one gets the impression that he was not a hostile prisoner of the American authorities at all, but perhaps a confidant or even a friend. Of course, Brookhart masterfully exploited Ohlendorf's attachment to him, which undoubtedly encouraged the imprisoned war criminal to be more open and frank than he might otherwise have been.

On one occasion in March 1946, after being examined by an Army psychologist Ohlendorf was noticeably shaken. He told his interrogator, this time Sander Jaari, about the incident and recounted how upset he was about it and why. He informed Jaari that another Nuremberg doctor had told him that he had heard rumours that Ohlendorf might be extradited at the conclusion of the IMT proceedings to stand trial in the Soviet Union for crimes he had committed there in 1941 and 1942. Ohlendorf confessed that he feared this possibility and "begged" Jaari to visit him from "time to time" admitting openly that he needed "moral support."⁷⁵ This is the only time Ohlendorf ever expressed fear about his fate, either before he was indicted or subsequently. At one point, American authorities even raised the issue of the safety of his loved ones, pointing out to Ohlendorf that his family might be in jeopardy because of his public testimony at Nuremberg against the German High Command.⁷⁶ Ohlendorf seemed surprised at the suggestion that he or his family's safety might be in jeopardy and therefore in need of protection. Later, during the Subsequent Proceedings, his testimony against the High Command was to cause him a tremendous

⁷⁵ Memorandum to Lieutenant Colonel Smith W. Brookhart from Mr. Sander Jaari, "Conversation with Otto Ohlendorf, 7 March 1946," M1270, roll 13.

⁷⁶ Interrogation of Otto Ohlendorf by Lt. Colonel Smith W. Brookhart, 10 January 1946, *ibid.*

amount of grief and, as a result, he was labelled a “*Verräter*” (traitor) by certain military and nationalist factions in and outside of prison.⁷⁷ Although at this time Ohlendorf dismissed the Americans’ concerns over his well-being, the latter nonetheless offered his family protection. Whatever Ohlendorf’s relationship with his captors, his willingness to talk openly made him a remarkably effective witness for the prosecution.

Because of Ohlendorf’s willingness to discuss the criminal activities of the Nazi regime the Americans immediately recognized his potential as a witness for their prosecution of the major war criminals being tried at Nuremberg. Thus, on January 3, 1946, the day after the court heard an affidavit by Hermann Gräbe describing in excruciating detail an execution he had witnessed by an *Einsatzkommando* in the Soviet Union, Ohlendorf was called to the stand as a prosecution witness in the case against Ernst Kaltenbrunner, the sole member of the security branch of the SS then on trial.⁷⁸ Ohlendorf proved to be a star witness and captivated the court. Here was an extremely cultivated, well-educated SS officer who had joined the Nazi Party as a young man, rose through the ranks, and who during the war had held important positions within the intelligence and security service of the SS, speaking unreservedly about Kaltenbrunner and the criminal activities of the SS, and confirming his earlier declaration to Brookhart that “every individual will have to stand for

⁷⁷ Letter from Rudolf Aschenauer to Landesbischof D. Hauck, 26 February 1949 in Bestand D1 Nachlass D. Theophil Wurm, Band 310 Kriegsverbrechen, Landeskirchliches Archiv, Stuttgart (from here forward simply BD1, NL Wurm, file, LKA); and, letter from Rudolf Aschenauer to Johannes Neuhäusler, 26 February 1949, KLE 66, NL Ohlendorf, B2, BA.

⁷⁸ Case Record of Otto Ohlendorf, Federal Bureau of Investigation, United States Department of Justice, Civil Fingerprint Card, 27 April 1948 in NARA RG 338 (USA-WWII), Judge Advocate Division, War Crimes Branch, Records of Executed Prisoners 1946-1951, box 9, Ohlendorf file.

what he has done and be held responsible for what he has done, and also make a complete statement of what he has done.”⁷⁹

Ohlendorf was neither an imposing nor brutish figure, as was Kaltenbrunner, but when he spoke his was a commanding presence. Felix Kersten, Himmler’s Finnish doctor, remembered Ohlendorf as a dominant man who appeared quite authoritative.⁸⁰ He was young, handsome and spoke with precision and frankness and unlike other defendants and witnesses, he appeared very, very calm during his testimony.⁸¹ In open court he dispassionately repeated what he had said to his interrogators the previous October: that at least some of the German High Command had intimate knowledge of the role the *Einsatzgruppen* played in “liquidating” Soviet commissars and Jews, that the *Einsatzgruppen* leaders were given their orders in Pretzsch three or four days before they were mobilized for Operation Barbarossa in June 1941 and that *Einsatzgruppe* D, the mobile security and killing unit he commanded in the Crimea between June 1941 and June 1942, was responsible for the “liquidation” of approximately 90,000 men, women, and children. The men were shot, he told the court, and the women and children were asphyxiated by carbon monoxide in the so-called gas vans.⁸² When asked how he could be so precise about the number of victims, Ohlendorf explained to the court that the numbers of those murdered

⁷⁹ Otto Ohlendorf quoted in Conot, *Justice at Nuremberg*, 233.

⁸⁰ Kersten, *Memoirs*, 206.

⁸¹ Taylor, *Anatomy*, 246-249.

⁸² Testimony of Otto Ohlendorf, 3 January 1946, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, vol. 4 (Nuremberg, 1947), 308-355.

were compiled in reports that were sent back to Berlin. Naturally he knew the figures for his own group, and since he had access to other group leader's reports he was able to come up with an educated estimate of the total numbers of victims. He stated that in his opinion their figures, which incidently exceeded his, were exaggerated. His numbers, he was proud to say, were accurate.⁸³

Ohlendorf's testimony horrified the court. Many years later Telford Taylor noted in his memoir of the IMT trial that he could still recall "the stunned silence of the audience that followed" Ohlendorf's "cold, impassive statement."⁸⁴ And Dr. Gustav M. Gilbert, the German-born prison psychologist at Nuremberg, recorded in his diary that Ohlendorf's testimony had had a "depressing" effect on the defendants since it laid bare "the inescapable reality and shame of mass murder...by the unquestionable reliability of a German official."⁸⁵ Indeed, there is scarcely an account of the IMT proceedings that does not include at least one reference to Ohlendorf's testimony, a reminder that his comments had had a profound impact on both participants and spectators alike.

Ohlendorf's compulsion to explain and justify his actions in the Soviet Union would prove to be his downfall and ultimately sealed his fate. Because of his incriminating testimony and his willingness to give information freely to his American interrogators, the OCCWC had a growing body of evidence to use against him if they ever decided to put him on trial. Early on in the planning phase for the Subsequent Proceedings, American

⁸³ Testimony of Otto Ohlendorf, 3 January 1946, *ibid.*, 318-319.

⁸⁴ Taylor, *Anatomy*, 5.

⁸⁵ Gilbert, *Nuremberg Diary*, 101.

investigators were divided in their opinion about what to do with Ohlendorf.⁸⁶ Ironically, some of the investigators wanted to hold off trying the former *Einsatzgruppe* leader precisely because such a large proportion of the evidence they had against him dealt “only with his activities as Group leader of *Einsatzgruppe D*,” a crime they did not fully understand at the time. Moreover they argued, his crimes were committed on Russian soil, and so there was the possibility that the Soviets might want to extradite Ohlendorf and try him themselves. Some attorneys believed that the Americans should hold off trying Ohlendorf because thus far he had proved to be such a “valuable” source of information against many leading Nazis and, therefore, they should, “as a matter of expediency... postpone” Ohlendorf’s prosecution until they had obtained all possible information from him.⁸⁷ The fact that Taylor’s organization already had Ohlendorf’s confession together with the discovery of the *Einsatzgruppen* Reports late in 1946 or early 1947, and the projected scope of the trials virtually assured Ohlendorf a well deserved place in the dock at some point, but for the time being his case was put on the back burner while Taylor’s researchers scoured the archives for additional evidence against other members of the SS, Gestapo, and SD.

⁸⁶ Whitney Harris maintains that Ohlendorf’s testimony is what broke the *Einsatzgruppen* case wide open, but the evidence seems to indicate that Ohlendorf’s testimony and interrogations sealed his own fate, but not that of the other leaders of the mobile security and killing units. See “Interview with Whitney Harris,” Cargas (ed.), *Voices from the Holocaust*, 110-111.

⁸⁷ Memorandum, P.W. Walton, Attorney, Task Force Group to Mr. Edmund H. Schwank, Section Chief OCC, Berlin Branch, “Collection of Evidence in the Re the Gestapo and SD (Amt IV of RSHA,” 30 September 1946 in NARA RG 238 (WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 2, Correspondence 1946 E202, Correspondence August 1946 folder.

3. Benjamin Ferencz and the Discovery of the *Ereignismeldungen UdSSR*

The chief prosecutor in the trial of the *Einsatzgruppen* leaders, Benjamin B. Ferencz, was an important and dynamic member of Taylor's staff. In fact, it was his team in Berlin, searching for evidence against the SS, that uncovered and analyzed the *Einsatzgruppen* Reports. When Ferencz arrived in Nuremberg in May 1946, he was only twenty-six years old, one of the youngest attorneys there, but already an experienced war crimes investigator, having served nearly a year in the Theater Judge Advocate's Division as a field investigator for war crimes at Dachau and other camps as well as investigating the deaths of American fliers.

Ferencz was the child of Romanian-Jewish parents who immigrated to the US when he was an infant. While growing up in New York he wanted to be a lawyer and after college he won a scholarship to Harvard Law School where he worked with Sheldon Gleuck, the noted professor of criminal law.⁸⁸ During Ferencz's tenure at Harvard the war broke out.⁸⁹ He recalls that he attempted to enlist in the Air Force, but because he was told his parents had not been American citizens for fifteen years he was disqualified. After graduating from Harvard in May 1943, he again tried to enlist, this time he was successful. He was assigned to an anti-aircraft artillery battalion preparing for the invasion of France and was almost immediately promoted from Private to Corporal. Although his unit was involved in five

⁸⁸ Letter, Benjamin Ferencz to Eugene Kaufman, Executive Director Hias, Baltimore, 8 January 1958, USHMM, RG 12.000 Benjamin B. Ferencz Collection, Drawer 11, Biographical Material, folder A, Personal Correspondence 1957-1962.

⁸⁹ Gleuck was one of the American representatives of the United Nations War Crimes Commission, USHMM, RG 50.030*269, Oral History Interview with Benjamin B. Ferencz 3 tapes, 26 August 1994, tape 1.

major battles, Ferencz never killed a single person. Despite his good fortune, he intensely disliked the “military experience” finding it an humiliating and dehumanizing ordeal.⁹⁰ In February 1945, while Ferencz’s unit was stationed in Luxembourg and because he could speak French, he was transferred to the Judge Advocate’s Section of the Army to investigate war crimes.⁹¹ He was an investigator of war crimes in general, and in particular crimes against Allied soldiers. As the war drew to a close and more and more atrocities came to light, much of his work came to involve frantically travelling from concentration camp to concentration camp to gather evidence before it was destroyed. Field work of this type was gruesome and there were times Ferencz claimed, when he was forced to dig up corpses with his bare hands.⁹² He stayed with the Judge Advocate’s division investigating war crimes until December 26, 1945 when he received an honourable discharge from the military with the rank of Sergeant.⁹³ He immediately returned to the United States. He had not been in the US very long when he received a call from Colonel David “Mickey” Marcus who tried to recruit Ferencz to again work with the Army’s Theater Judge Advocate. But because of his intense dislike of the army, Ferencz could not envisage returning to work for a military organization, so he declined Marcus’ offer. At about the same time, Taylor was in

⁹⁰ Interview with Benjamin B. Ferencz, 24 April 1997, 3.

⁹¹ Letter, Benjamin B. Ferencz to Gertrude Ferencz, 20 February 1945, USHMM, RG 12.000 Benjamin B. Ferencz Collection, Drawer 31 *Einsatzgruppen* Trial, box 1, folder J, Letters from Benjamin B. Ferencz to Gertrude 1944-1945.

⁹² USHMM, RG 50.030*269, Oral History Interview with Benjamin B. Ferencz 3 tapes, 26 August 1994, tape 1.

⁹³ “Biographical Information and Material regarding Gertrude Ferencz,” USHMM, RG 12.000, Benjamin B. Ferencz Collection, Drawer 11, Biographical Material, box 1, folder A, Gertrude Ferencz Biographical Material.

Washington recruiting staff for the Subsequent Proceedings. Sheldon Gleuck, Ferencz's mentor at Harvard, called Taylor and recommended him for a job in Nuremberg. On March 20, 1946, Ferencz accepted a position as a civilian war crimes investigator for the OCCWC and left for Germany almost immediately.⁹⁴

When Ferencz arrived in Germany in mid-1946, Taylor's staff were busy searching for the evidence needed to indict those individuals his office had already decided to prosecute. Taylor had had a great deal of difficulty recruiting personnel to work on the Subsequent Proceedings, and his office was short staffed. So when Ferencz, an experienced field investigator, arrived on the scene he was immediately dispatched to Berlin to set up a team of analysts and researchers to scour the millions of seized Nazi documents housed there.⁹⁵ On August 16, a month after Ferencz's arrival in Berlin, Taylor appointed him Chief of the Berlin Branch of the Office of Chief of Counsel for War Crimes.⁹⁶ As head of the Berlin office, Ferencz's job description was broad enough to permit him to respond quickly to the needs of the prosecutors who were attempting to assemble cases against Nazi

⁹⁴ USHMM, RG 50.030*269 Oral History Interview with Benjamin B. Ferencz 3 Tapes, 26 August 1994, Tape 2. See also "Biographical Information and Material Regarding Gertrude Ferencz," USHMM, RG 12.000 Benjamin B. Ferencz Collection, Drawer 11, Biographical Material, box 1, folder A, Gertrude Ferencz Biographical Material. On Taylor's trip back to the United States for recruiting purposes see Taylor, *Anatomy*, 289-290.

⁹⁵ Letter from Telford Taylor, 18 July 1946 in NARA RG 238 (WCR), OCCWC 1933-1949, Chief of Counsel General Records, Correspondence 1945-1949, Correspondence file, box 4, NM70, entry 159, Mr. Ferencz folder.

⁹⁶ Memorandum, Benjamin B. Ferencz from the Office Chief of Counsel, APO 124A US Army, 16 August 1946 in NARA RG 238 (WCR), OCCWC 1933-1949, Chief of Counsel General Records, Correspondence 1945-1949, Correspondence file, box 4, NM70, entry 159, Mr. Ferencz folder. See also USHMM, RG 12.000 Benjamin B. Ferencz Collection, Drawer 11, Biographical Material, File C, Job Related Biographical Material.

industrialists, doctors, military men, and SS officers. It was a demanding task. He had to be familiar with all the analyzed material so he could help buttress further prosecution cases. He also had to assess the researchers findings so that he could make recommendations to Taylor about the “possibility [of] prosecution or further lines of development.”⁹⁷ Perhaps Ferencz’s greatest contributions as a war crimes investigator, however, was his recognition of the significance of the *Einsatzgruppen* Reports which were brought to his attention sometime late in 1946 or early 1947.

Ronald Headland, an authority on the *Einsatzgruppen* Reports, has traced the story of their seizure back to September 3, 1945. He notes that the reports were received as part of a massive collection – two tons – of documents that the Berlin Document Center team, of which Ferencz was the head, had recovered from the fourth floor of the *Gestapo* headquarters in Berlin.⁹⁸ Because of the enormous volume of documents (Ferencz estimated that the Berlin Document Center alone had between eight and nine million documents) and the limited number of investigators in Ferencz’s office, it is not surprising that it took nearly a year before any of his staff “discovered” the reports, especially considering that no one was looking for them – even though Ohlendorf had referred to them during his testimony at the IMT proceedings in January 1946.⁹⁹

⁹⁷ “Standard Job Description Sheet, European Theater,” 9 June 1947 and “Office Memorandum,” undated, USHMM, RG 12.000 Benjamin B. Ferencz Collection, Drawer 11, Biographical Material, box 1, folder Job Related Personal File.

⁹⁸ Ronald Headland, *Messages of Murder: A Study of the Reports of the Einsatzgruppen of the Security Police and the Security Service, 1941-1943* (Toronto, 1992), 13-14.

⁹⁹ Interview with Benjamin B. Ferencz, 24 April 1997, 1; USHMM, RG 50.030*269 Oral History Interview with Benjamin B. Ferencz 3 tapes, 26 August 1994, tape 2; and,

Ferencz does not recall exactly when the *Einsatzgruppen* Reports were brought to his attention, but both he and Headland believe it was sometime in late 1946 or early 1947. There is some OCCWC correspondence referring to the *Einsatzgruppen* Reports as early as January 15, 1947, but there is also correspondence from later in January and early February that seems to indicate that the reports had not yet been discovered, or at least that those responsible for decision-making did not know of their existence or content. Much of the later correspondence is in the form of requests from attorneys in Nuremberg to the Berlin document centre asking researchers to locate more evidence against Ohlendorf and other leaders of the Gestapo and the RSHA which suggests that Taylor still had not decided to limit the scope of the SS trial.¹⁰⁰ Also, the analysis of the *Einsatzgruppen* Reports was not undertaken until March and April 1947.¹⁰¹ At this time it was discovered that certain individuals later indicted in the case against the *Einsatzgruppen* leaders, such as Heinz Schubert, had been released from custody because at that time there was no evidence against

Taylor, *Anatomy*, 258.

¹⁰⁰ For example see memorandum from Ralf Wartenberg, Interrogator to Mr. Henry Sachs, Research Analyst SS-Section, OCCWC, 15 January 1947, who writes: "For the preparation of the case against Einsatzgruppen the following documents are essential..." followed by a list of USSR *Ereignismeldungen* 1-195 (the *Einsatzgruppen* Reports). One can surmise, given the later correspondence, that the OCCWC was merely busy looking for evidence, and had not yet located and analyzed the reports in NARA RG 238 (WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 2, E202, Correspondence 1947, Correspondence January 20, 1947-end folder. See also memorandum from P.W. Walton to all Section Chiefs, 5 February 1947 in *ibid.*, box 3, Correspondence E202, Incoming Correspondence folder; and, memorandum to Section Chiefs, OCCWC from Benjamin Ferencz, 5 February 1947 in *ibid.*

¹⁰¹ The vast majority of the Operational Situation Reports were analyzed between 27 March 1947 and 11 April 1947 in *ibid.*, Evidence Division, Document Center, SS Series 1934-1945, SS 2636-2991, box 11, E211, NM to SS 2717-2726, SEA's only folder.

“them as perpetrators of, or as witnesses to, any alleged War Crime.”¹⁰² Most important perhaps is a memorandum dated March 14, 1947 from Taylor to the Deputy Military Governor outlining his plan for the Subsequent Nuremberg Proceedings. In this memo Taylor explains that, if necessary, the proposed trial of Ohlendorf and “other principal officials of the *Sicherheitsdienst*, the Gestapo, and the Main Security Office (RSHA) of the SS” might not be necessary. Taylor was under time and monetary constraints, and felt that in the event he was forced to reduce the size of his program, three of the eighteen trials proposed were “less necessary” than the others. Taylor believed that these three trials, one of which was Ohlendorf’s, overlapped some of the other SS cases and that if he were forced to cancel some of them he did not think this would compromise the American program of putting on trial a representative sample of Nazis.¹⁰³ This suggests that at this late date Taylor and his office of researchers were not yet aware of the scope of criminality of the mobile security units.

Whether the reports were found in late 1946 or early 1947 remains a matter of speculation. But, Ferencz does recall his excitement when one of the German researchers who worked in his office accidentally discovered twelve “*Leitz Ordners*” (loose-leaf notebooks) filled with top secret daily reports from the eastern front itemizing the carnage of

¹⁰² Memorandum, Commanding Officer, War Crimes Control Suspect and Witness Enclosure, Dachau from Colonel Howard F. Bresee, 18 January 1947 and memorandum from Colonel Howard F. Bresee, 29 January 1947, “Clearance of War Criminals” in *ibid.*, Executive Office, 201 files, box 24, Schubert, Heinz folder.

¹⁰³ Memorandum, Telford Taylor to the Deputy Military Governor, OMGUS, 14 March 1947 in NARA RG 338 (USA-WWII), Judge Advocate Division, War Crimes Branch, General Administration Records, box 1, Organization 1947 folder.

the mobile security and killing units.¹⁰⁴ These reports were a gold-mine of information for the prosecution because they were written by the perpetrators themselves and listed dates, places, times as well as some of the identities of the participants (not individual perpetrators, but certainly the commanders of the groups). Once discovered, they were brought directly to Ferencz's attention.¹⁰⁵ The reports were not the originals, but rather duplicates (the originals had been mimeographed and about one hundred copies had been distributed to various offices of the Third Reich – the copy discovered by Ferencz's researcher was one of these). They are the only known surviving set and have been a tremendous resource for historians of the Holocaust ever since.¹⁰⁶ According to Ferencz he realized their importance immediately and flew to Nuremberg where he showed them to Taylor. Taylor acknowledged their value but informed the young attorney that, unfortunately, there simply was not enough staff, time or money to conduct trials other than those already planned. In response to Ferencz's urging and with plenty of evidence to prove their guilt, however, Taylor reconsidered Ferencz's request and sometime in late March 1947 changed his mind. The case against a catch-all group of SS leaders in which Ohlendorf was to be the main defendant would be transformed. Ohlendorf would now be the principal defendant in a trial against the leaders of these

¹⁰⁴ Interview with Benjamin B. Ferencz, 24 April 1997, 1. See also memorandum, "Request for Original Documents from the Berlin Document Center," from Telford Taylor to the Deputy Military Governor, 11 August 1947 in NARA RG 238 (WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 3, Correspondence 1947, Correspondence January 20, 1947-end folder.

¹⁰⁵ Interview with Benjamin B. Ferencz, 24 April 1997, 1.

¹⁰⁶ Letter from Benjamin B. Ferencz to Henry Lea, 27 November 1989, USHMM, RG 12.000 Benjamin B. Ferencz Collection, Drawer 24, War Crimes Trials, box 2, Nuremberg Supplementary Materials folder.

“mobile killing units.” Taylor appointed Ferencz chief prosecutor of the case.¹⁰⁷ With Ferencz’s new assignment settled, they agreed that a few lawyers could be culled from some of the other cases still pending to assist the newest Nuremberg prosecutor (John Glancy, Peter Walton, James Heath and Arnost Horlik-Hochwald). At twenty-seven, Ferencz was the youngest prosecutor at Nuremberg, and “his first case” appeared to be, as the press later dubbed it, the biggest murder trial in history.¹⁰⁸

4. Planning the *Einsatzgruppen* Trial (Witnesses, Interrogations, and Indictment)

Taylor’s decision to transform the general trial of the SS into a trial of *Einsatzgruppen* leaders, meant there would be delays getting the process started; in fact, it took several months to build the case. The Soviets had to be consulted, the defendants located and the indictment written. As stated in the previous chapter, Control Council Law No. 10 provided for the extradition of prisoners from one zone of occupation to another as well as for the joint prosecution of war criminals by the former Allies. Taylor’s office wanted to ensure that, at the very least, the Soviets would not object to the American prosecution of those *Einsatzgruppen* leaders whose crimes had been perpetrated on Russian

¹⁰⁷ Memorandum to Mr. Henry Sachs, Section Chief Berlin Branch, OCCWC from Peter Walton, Attorney SS Division, 22 March 1947 in NARA RG 238 (WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 3, Correspondence 1947, Correspondence January 20, 1947-end folder.

¹⁰⁸ Letter, Benjamin B. Ferencz to Hilary Earl, 27 February 1997. See also Benjamin B. Ferencz, “Needed: An International Criminal Court,” *Constitution* (Fall, 1993), 79.

soil.¹⁰⁹ To this end, the Soviets were contacted. In his initial memorandum to them, Ferencz explained that he needed their help. Even with the *Einsatzgruppen* Reports in hand, he believed the evidence to convict these men was “inadequate,” certainly not enough to convict them beyond a reasonable doubt. Moreover, he wanted help locating members and leaders of the units, as well as witnesses who might help identify the killers.¹¹⁰ Many years after the trial was over Ferencz would state that the reason no witnesses were called by the prosecution was because of the existence and strength of the *Einsatzgruppen* Reports; this evidence of criminality was so strong that no witnesses were necessary. This may be true. Ferencz’s memorandum to the Soviets might have been entirely perfunctory, designed so as not to offend the Soviet’s right to try war criminals who had perpetrated crimes on their soil. In any event, Frederic S. Burin, a member of the liaison team at the OCCWC and a civilian researcher in Berlin working on the SS case, was sent out in early March 1947 to discuss the issue of evidence gathering and possible witnesses with the Soviet Military Administration in Berlin. Initially the Soviets were intrigued with Burin’s suggestion that the two former Allies cooperate in the prosecution of the *Einsatzgruppen* leaders, particularly since, as the Soviet representative Major Prishchepenko rightly pointed out, the Americans and Soviets had not cooperated on any war crimes issue for quite some time. Toward the end of their

¹⁰⁹ Under the terms of the Moscow Agreement of November 1, 1943, the Big Three had agreed that perpetrators would be returned to the location of their crimes. The Moscow Agreement was codified in Control Council Law No. 10.

¹¹⁰ Memorandum, to Colonel General Serov, Soviet Deputy Commander in Chief, Civil Administration in Germany from Benjamin B. Ferencz, Chief Berlin Branch, OCCWC, 12 March 1947 in NARA RG 238 (WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 3, Correspondence 1947, Correspondence January 20, 1947-end folder.

meeting Major Prishchepenko seemed to have had second thoughts and told Burin that in all likelihood the Soviets would want to prosecute these men without the assistance of the Americans.¹¹¹ As it turned out nothing came of the American suggestion that the *Einsatzgruppen* leaders be prosecuted jointly; in fact, after their initial contact the Soviets never even bothered to respond to the American initiative. Fortunately, quite a number of *Einsatzgruppen* leaders were in American and British custody and a trial could be scheduled without the cooperation of the Soviets or the extradition of war criminals from their zone.¹¹²

After the feelers to the Soviets came to naught, it took only four months to put the case against the *Einsatzgruppen* leaders together. Between March and July 1947, Ferencz's team worked fanatically preparing for the trial. A team of lawyers, researchers and interrogators attempted to uncover more evidence, locate those to be charged, interrogate witnesses and possible defendants, procure judges and finally prepare the indictment. By mid-June, Ferencz and his team had decided that of the two to three thousand *Einsatzgruppen* members they knew of, twenty-four of the highest-ranking leaders, as well as several officers, would be indicted because, as Ferencz noted ironically, that was all the room there was in the dock.¹¹³ (Figure 3.1)

¹¹¹ Memorandum, from Frederic S. Burin, OCCWC to Mr. Henry Sachs, Chief, SS-Section, Berlin Branch OCCWC, 5 March 1947 in *ibid*.

¹¹² Memorandum, to Mr. Henry Sachs, Section Chief Berlin Branch, OCCWC from Peter Walton, Attorney SS Division, 22 March 1947 in NARA RG 238 (WCR), OCCWC, Berlin Branch, General Records, Correspondence 1946-1948, box 3, Correspondence 1947, Correspondence January 20, 1947-end folder.

¹¹³ Memorandum, to Chief of Staff, OMGUS from Telford Taylor, 20 May 1947 amended June 18, 1947 in NARA RG 260 (USOH), Records of Functional Offices and Divisions, OCCWC, box 2, War Crimes Trials Program, General Taylor folder. See also Benjamin Ferencz, "Speech delivered to the McGill Conference on Human Rights," 3-4

Figure 3.1**Commanders and Officers of the *Einsatzgruppen* and *Einsatzkommandos* Indicted by the OCCWC¹¹⁴**

Name	Rank	Unit of Command
Otto Ohlendorf	SS Brigadeführer	Commander of Einsatzgruppe D
Heinz Jost	SS Brigadeführer	Commander of Einsatzgruppe A
Erich Naumann	SS Brigadeführer	Commander of Einsatzgruppe B
Otto Rasch	SS Brigadeführer	Commander of Einsatzgruppe C
Erwin Schulz	SS Brigadeführer	Commander of Einsatzkommando 5
Franz Six	SS Brigadeführer	Commander of Vorkommando Moscow
Paul Blobel	SS Standartenführer	Commander of Sonderkommando 4a
Walter Blume	SS Standartenführer	Commander of Sonderkommando 7a
Martin Sandberger	SS Standartenführer	Commander of Sonderkommando 1a
Willy Seibert	SS Standartenführer	Deputy Chief of Einsatzgruppe D
Eugen Steimle	SS Standartenführer	Commander of Sonderkommando 7a and 4a
Ernst Biberstein	SS Standartenführer	Commander of Einsatzkommando 6
Werner Braune	SS Obersturmbannführer	Commander of Einsatzkommando 11b
Walter Haensch	SS Obersturmbannführer	Commander of Sonderkommando 4b
Gustav Nosske	SS Obersturmbannführer	Commander of Einsatzkommando 12
Adolf Ott	SS Obersturmbannführer	Commander of Einsatzkommando 7b
Eduard Strauch	SS Obersturmbannführer	Commander of Einsatzkommando 2
Emil Hausmann	SS Sturmbannführer	Officer of Einsatzkommando 12
Waldemar Klingelhöfer	SS Sturmbannführer	Officer of Sonderkommando 7b and Commander of Vorkommando Moscow
Waldemar von Radetzky	SS Sturmbannführer	Deputy Chief of Sonderkommando 4a
Lothar Fendler	SS Sturmbannführer	Deputy Chief of Sonderkommando 4b
Felix Rühl	SS Hauptsturmführer	Officer of Sonderkommando 10b
Mathias Graf	Untersturmführer	Officer of Einsatzkommando 6

The way the defendants were selected for the dock depended largely on the contents

November 1987, USHMM, RG 12.000 Benjamin B. Ferencz Collection, Biographical Information, Speeches, Conferences, etc., box 1, File D McGill Conference folder.

¹¹⁴ Indictment, *The United States of America v. Otto Ohlendorf et al.*, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, (Washington, 1949), 13-15. See also John Mendelsohn, *Special List 42, Nuernberg War Crimes Trials Records of Case 9. United States of America v. Otto Ohlendorf et al., September 15, 1947-April 10, 1948* (Washington, 1978), 2.

of the *Einsatzgruppen* Reports themselves. Since these were the primary source of evidence against them (other than their own affidavits) the prosecution team had to dissect the reports in order to ascertain who was responsible and for what crime. Ferencz's team compiled lists of the numbers of murders, by category of victim; the murders of Jews, Gypsies, the mentally ill and partisans; and the regions in which the murders were committed. This method of deduction is precisely how the number of one million people murdered by the *Einsatzgruppen* was determined and recorded in the indictment.¹¹⁵ They then determined who was in charge of the group that had committed the murders. The various officers associated with the crime were also identified. Once Ferencz's team had determined the number of victims, the location of the murder and the person or persons in charge of the *Kommando*, the difficult and time consuming process of locating individuals began.¹¹⁶ If the perpetrator was in US custody it was not difficult to have him transferred to the prison at Nuremberg for further questioning. If, however, the individual was not in US custody, a search had to be undertaken. Once Ferencz and his team had located a reasonable number of potential candidates they interrogated them. Much of the evidence these individuals gave

¹¹⁵ "I counted over a million people deliberately murdered by these special action groups...." Benjamin B. Ferencz, *Less than Slaves: Jewish Forced Labor and the Quest for Compensation* (Cambridge, MA; 1979), xv.

¹¹⁶ For example see "Staff Evidence Analysis" of the Operational Situation Reports of the *Einsatzgruppen* USSR Nos. 1-8, 10-12, 14-15, 17, 19-21, 24-25, 28, 30-32, 34, 36-37, 40, 43, 45, 47-48, 50-51, 54, 56, 58-61, 66-68, 74, 76, 78, 80-81, 85-89, 91-92, 94-97, 101, 105-108, 110-111, 116-117, 119-120, 123-125, 128-132, 135-143, 147-150, 153, 155-157, 163-165, 170, 172-173, 177-178, 180, 182-184, 186-187, 189-191, 193-195 which still contain the original OCCWC markings. These reports were evaluated between 27 March 1947 and 11 April 1947 in NARA RG 238 (WCR), OCCWC 1933-1949, Berlin Branch, Evidence Division, Document Center, SS Series 1939-1945, box 10 SS 2391-SS 2635, SS 2552 folder.

during their interrogations was used against them during the trial and ultimately helped not only to indict, but also to convict them.

This raises some important legal and philosophical questions that the Nuremberg historiography does not address, namely, whether the way evidence was gathered and used against the defendants and the way the interrogations were conducted was consistent with the Allies' canon of justice. The record of Otto Ohlendorf's interrogation suggests a number of shortcomings. As mentioned earlier, during his incarceration by the Americans between 1945 and 1947, Ohlendorf was interrogated on numerous occasions, but it was not until he was indicted in July 1947 that he was provided legal counsel. The record of his interrogation suggests that Ohlendorf was never told that he himself might be charged with crimes against humanity, rather it indicates that he was only to be used as a witness in the original Nuremberg trial.¹¹⁷ Presumably as a consequence, Ohlendorf was quick to offer his version of events and in doing so incriminated himself in a vast array of crimes. Had Ohlendorf been represented by counsel during his detention or had he known that he himself was a possible candidate for trial it is doubtful that he would have been so willing to supply what proved to be self-incriminating evidence. Of course, Ohlendorf's case was not unique, there were hundreds of incidents of voluntary admissions of guilt in the course of assembling evidence for the war crimes trials. These admissions led to the universal defense argument, at least in the case of the *Einsatzgruppen* leaders, that the defendants had not been warned that the information they volunteered might be used against them.

In his Final Report to the Secretary of the Army, Taylor attempted to deflect

¹¹⁷ Taylor, *Final Report*, 60.

criticism of his office's actions regarding the detention and interrogation of war crimes suspects by citing the "extraordinary" nature of the situation. Simply put, it would have been impossible in 1945, Taylor argued, to provide counsel for each and every suspected war criminal. The OCCWC had had a great deal of trouble staffing its own trial teams with qualified American lawyers. Finding enough "impartial" German attorneys to represent the 185 indicted individuals at Nuremberg was an even more formidable task. Given these problems, it was absolutely unthinkable that hundreds of thousands of interned Germans could be supplied with counsel. And, of course, in 1945, the idea of hiring any significant number of German attorneys was totally out of the question given that most of them, the American authorities felt, were of questionable reliability due to their past affiliation with the Nazi Party and because of the corrupt nature of the Nazi judicial system. As Taylor explained, "in an ideal world" no one would have been incarcerated without first being arraigned and that those incarcerated would have had access to counsel. But, as Taylor rightly points out, the situation in 1945 Germany was far from ideal. Taylor does admit that many of those interrogated, at least early in 1945 and 1946, were far more "voluble" than they should have been. In many cases informers were simply attempting to deflect guilt from themselves, by pointing "the finger of suspicion at others if such behaviour seemed advantageous to them."¹¹⁸ In any case, Taylor noted, it would not have occurred to most interrogators to warn an internee that anything "he said might be used against him" because the interrogations were not conducted in the same manner as pre-trial interrogations in American criminal investigations. Instead they were more or less aimed at eliciting

¹¹⁸ Taylor, *Final Report*, 59.

information about the structure and operation of the Third Reich to identify suspects, and in the case of Ohlendorf, to determine if he might make a good witness for the prosecution at the IMT.¹¹⁹ Moreover, in 1945 Miranda rights – that is the right not to incriminate yourself – did not exist in the United States, it was not until 1966 that the Supreme Court of the United States passed its decision on the issue.¹²⁰

Alvin Rockwell, one of Truman's legal advisors, was very concerned about the issue of legal representation for detained war criminals and raised the problem with Taylor in March 1947. Rockwell complained that Taylor was not appointing or even allowing potential defendants legal counsel while they were in detention or during their interrogations. Taylor rationalized his decision arguing that,

I quite agree that in normal circumstances, anyone confined should be promptly given the right of counsel. The difficulty is, of course that information provided by people in custody is a very important source to us in determining what people should be charged with war crimes and what people can be safely released. This entire process is important to the whole body of people confined, because it enables us to select the cases which seem to warrant trial at Nurnberg and to release many others to the German Civilian Internment Enclosures, or to give them complete freedom. This process would be much impaired if all persons in confinement were to be given immediate right to counsel. We are taking all possible steps to insure that no one who is tried by us is in any way prejudiced by having been confined without counsel prior to the time that he is indicted.¹²¹

¹¹⁹ *Ibid.*, 50-59.

¹²⁰ See *Miranda v. Arizona* 384 US 436, Certiorari to the Supreme Court of Arizona, No. 759 and in New York to the Court of Appeal, No. 760, *Vignera v. New York*, argued February 28-March 1, 1966, Decided June 13, 1966. Interestingly, Telford Taylor was the attorney who argued against Miranda rights in the New York Court of Appeal in 1966. See *Findlaw. Laws, Cases, Codes, and Regulations* at <http://laws.findlaw.com/us/384/436.html>.

¹²¹ Letter, Telford Taylor to Alvin Rockwell, 12 March 1947 in NARA RG 466 (HICOG), Security Segregated Records, box 9, War Crimes Trials, Military Tribunals 1947-Erhard Milch, 1946-1947 War Crimes Military Tribunals folder.

In short, Taylor maintained that he had to interrogate people in order to determine who should be tried and who should be released. In any case the IMT had established the precedent when Jackson declared that he was not going to follow the same rules of procedure as in American criminal law, particularly “where defense is a matter of constitutional right.” Jackson loathed the obstructionism practised by criminal attorneys in the US and felt that it was possible to avoid such pitfalls at Nuremberg by simply denying suspects this right.¹²²

Taylor must have realized that suspects might have been less forthcoming if they had had lawyers to advise them not to make incriminating statements. In the absence of legal advice, however, interrogators found it relatively easy to obtain the necessary evidence of criminal responsibility – especially when a suspect had no understanding of the judicial process or intimation that he might be indicted. One of the cornerstones of the American criminal justice system is the right to legal representation during questioning. This was denied to the defendants of the *Einsatzgruppen* case and this made it much easier to convict them. But of course, the Subsequent Nuremberg Proceedings were not based exclusively on American criminal law. Moreover, in the context of the postwar period, the rights of the accused were limited. It was not seen as important to offer legal counsel to a criminal who might or might not be indicted, besides in many instances the only way for the OCCWC to gain knowledge of a crime was through interrogations. Without exception, however, during the course of the trial, every defense attorney raised the issue of fair representation during their defendant’s interrogation, but this was to no avail as the judges in the *Einsatzgruppen*

¹²² Letter, Justice Robert H. Jackson to President Truman, 7 June 1945. Truman Library, Harry S Truman Papers, White House Office File, 324-325 (1945-1949), 3.

trial found no evidence of mistreatment or coercion by the interrogators (unlike the Malmédy trials by the US Army). In any event the judges found the evidence against the defendants so weighty that even without the self-incriminating evidence they would have found certain defendants guilty.

Even though defendants had been denied the right to legal representation during interrogations, important safeguards were established to assure each defendant a fair trial. For instance, defendants had the right to have the indictment presented and explained to them in German. An individual had the right to defend himself with the assistance of counsel of his own choosing, and to cross examine any witness called by the prosecution. Defense counsel was also given the prosecution's evidence thirty days before the trial began and the courtroom was open to the public; in fact, the entire trial was a matter for the public record.¹²³ The shortcomings of one aspect of the war crimes trials, of course, does not render the entire process unfair as some critics would have us believe.¹²⁴ Rather American authorities did everything in their power, under the circumstances, to make the trial of the *Einsatzgruppen* leaders, indeed of all the defendants in all the Subsequent Proceedings, as fair as possible. As Ferencz noted some years later, "If we wanted an injustice we [simply]

¹²³ USHMM, RG 50.030*269 Oral History Interview with Benjamin B. Ferencz, 26 August 1994, tape 5, 51-52. See also Benjamin B. Ferencz, "Nurnberg Trial Procedure and the Rights of the Accused," *Journal of Criminal Law and Criminology* 39 (July-August, 1948), 144-151.

¹²⁴ Michael Marrus has attempted to redress some of the revisionist tendencies found in the most recent Nuremberg historiography concluding that, "Nuremberg was not perfect, by any means, and it is possible to believe that its warts and blemishes—or even its structural faults—may be the most important aspects of it worthy of discussion today. But most would agree that there are other dimensions, too, and that some of these speak to timeless concerns that justice and fairness prevail." Michael R. Marrus, "The Nuremberg Trial Fifty Years After," *International Law* 66 (Autumn, 1997), 563-570.

would have killed them to begin with.”¹²⁵ Even the presiding judge at the trial, Michael Musmanno, thought that the charges against the defendants were so grave that he should bend the rules of evidence in favour of the defense. Because of his willingness to be very flexible about legal procedures, at the conclusion of the trial, the Nuremberg defense attorneys presented him with a three foot bronze statue of a penguin. The statue symbolized their appreciation of his famous “Penguin Rule” which allowed defendants to submit any and all evidence that might establish their innocence including the evidence of the social life of the Antarctic penguin if that would help their case. Naturally, this did not sit well with the prosecutors who objected that such bias resulted in the submission of thousands of questionable affidavits on behalf of the defendants, what they mockingly referred to as “affidavits by the bushel.”¹²⁶ Ferencz, in particular, felt that Musmanno had given the defense too much latitude particularly his rulings on evidence. In the end, as imperfect as some of the Nuremberg procedures may appear to us in hindsight, in the context of the day they were reasonable, even fair.¹²⁷

Once all the interrogations had been conducted and the defendants chosen, Ferencz, the chief prosecutor in the case, wrote the indictment. The indictment in the case against the *Einsatzgruppen*, although including the same charges, differed in both scope and focus from the indictment filed against the first twenty-two defendants at Nuremberg. Under Article 6 of the London Charter of August 8, 1945 (and later Control Council Law No. 10 which

¹²⁵ Interview with Benjamin B. Ferencz, 24 April 1997, 19.

¹²⁶ *Ibid.*, 6.

¹²⁷ USHMM, United States Holocaust Memorial Museum, RG 50.030*269 Oral History Interview with Benjamin B. Ferencz, 26 August 1994, tape 5, 51-52.

governed the Subsequent Proceedings), the Allies had defined three acts as criminal. The first and most straight forward of these was War Crimes, or violations of the laws and customs of war, laid out in agreements such as the Hague Convention, and which included such acts as the unrestrained murder of prisoners of war or the use of excessively violent weapons such as poisonous gas and bacteria. The second and more controversial crime specified in the London Charter was Crimes against Humanity.¹²⁸ These crimes were included in the Charter as a result of concerns that certain stateless persons who had been persecuted by the Nazis, but which did not fall under the charge of war crimes, would not have their crimes vindicated at trial. At the London Conference the American Justice, Robert Jackson introduced the charge which was finally incorporated into the London Charter's Article 6.¹²⁹ Later this charge came to symbolize the mass murder of civilian populations by the Nazis during the war, particularly atrocities committed against racial, religious, political, and ethnic groups. Finally, and most problematic legally, was the charge of Crimes against Peace (literally the act of war-making), which included the planning and preparation for war,

¹²⁸ The notion of crimes against humanity dates back to 1915 when the British, French and Russians declared the massacre of the Armenians by the Turks to be "crimes against humanity and civilization." For a detailed analysis of the development of the concept of crimes against humanity see Roger S. Clark, "Crimes Against Humanity," in George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht, Netherlands; 1990), 177-199 and Iu.A. Reshetov, "Development of Norms of International Law on Crimes against Humanity," in *ibid.*, 199-212. See also Jacob Robinson who discusses the legal implications of crimes against humanity as interpreted by the IMT in, "The International Military Tribunal and the Holocaust: Some Legal Reflections," *Israel Law Review* 1:7 (January 1972), 1-13 and most recently, Robert Wolfe, "Flaws in the Nuremberg Legacy: An Impediment to International War Crimes Tribunals' Prosecution of Crimes Against Humanity" *Holocaust and Genocide Studies* 3:12 (Winter 1998), 434-453.

¹²⁹ Marrus, *The Nuremberg War Crimes Trial, 1945-1946* (New York, 1997), 185-187.

as well as its initiation and waging.¹³⁰ The case the Americans had planned for Nuremberg centred on the idea of conspiracy, especially the conspiracy to wage aggressive war and thus was intimately linked to the charge of “crimes against peace.”¹³¹ This was the most important charge in the original IMT trial because, as the American prosecution argued, the planning, initiation and waging of the war was as Jackson put it, “an illegal attack on the international peace and order.”¹³² Thus for the Americans at least, the consequences of aggressive war extended beyond the belligerent parties to the “whole world.”¹³³

The indictment against the first twenty-two Nazi leaders, filed on October 6, 1945, three months after the London Charter was signed, included the above three crimes as well as an additional charge: “the common plan or conspiracy to commit crimes against peace, war crimes or crimes against humanity.” At Nuremberg in 1945, the notion of conspiracy was at the heart of the American prosecution case against the Nazi leadership.¹³⁴ Jackson had pointed out to President Truman before he left for London in the summer of 1945, that,

our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to

¹³⁰ Taylor, *Final Report*, 64-65.

¹³¹ Marrus, *The Nuremberg War Crimes Trial*, 122-123.

¹³² Jackson quoted in *ibid.*

¹³³ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, 42 vols., vol.22, 427.

¹³⁴ Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York, 1977), 19.

incite and commit aggressions and barbarities which have shocked the world.¹³⁵

The principle of conspiracy (where two or more persons knowingly participate in a plan to commit a recognized crime) was common enough in the American and British legal systems, where criminal law had developed around its usage, but the notion of conspiracy was entirely foreign to continental law and posed numerous problems not only for the French and Russian prosecutors, but also for the defendants and their attorneys who were entirely unfamiliar with the concept.¹³⁶ Conspiracy was central the strategy for prosecuting defendants in the original Nuremberg trial as it was intended “to bring to trial and punish those who were not ‘major’ war criminals yet who had contributed in important ways to the Nazi enterprise.”¹³⁷ In other words, the conspiracy charge was designed to demonstrate that these representatives of the Hitler regime, who were not the individuals who had physically committed the grievous and deliberate acts of destruction, plunder and murder now so familiar to us, were responsible in the sense that these acts had been committed in the context of the planning, initiating and waging of an illegal aggressive war. In the final analysis the charge was designed to prove that the Nazi leadership was culpable for the crimes committed in the name of the regime since it was absurd to charge the actual perpetrators, but not those who formulated the policies they implemented. In the case of the Subsequent Proceedings, only the first three indictments filed included the charge of conspiracy – not for “crimes against peace” as in the original IMT indictment – but the

¹³⁵ Report, Robert H. Jackson to President Truman, 6 June 1945, quoted in Marrus, *The Nuremberg War Crimes Trial*, 42.

¹³⁶ Smith, *Reaching Judgment at Nuremberg*, 18-19.

¹³⁷ Marrus, *The Nuremberg War Crimes Trial*, 122-123.

conspiracy to commit war crimes and crimes against humanity. This created serious problems for the tribunals hearing the cases, and after the judges in all three trials heard simultaneously from the prosecution and defense, the charges were finally thrown out. In the nine other trials that comprised the Subsequent Proceedings, the prosecution accepted the precedent established in the first Nuremberg trial that the charge of conspiracy would only be employed in connection with “crimes against peace;” otherwise the conspiracy charge was left out of the indictment altogether.¹³⁸ Ferencz followed suit in writing the indictment against the leaders of the *Einsatzgruppen*, and omitted the conspiracy charge.

The indictment against the leaders of the *Einsatzgruppen*, initially filed on July 3, 1947, and which was later amended July 29 to include six additional defendants, charged the defendants with three crimes: “crimes against humanity,” “war crimes,” and “membership in criminal organizations.”¹³⁹ As in the IMT indictment, the second count, war crimes, was the most straightforward legally. Specifically, the *Einsatzgruppen* leaders were charged with “willfully and knowingly” violating Articles 43 and 46 of the Hague Convention and No. 4 (the Prisoner of War Agreement) of the 1929 Geneva Convention. Under count two, the defendants were also accused of committing atrocities against persons and property, including the civilian population, in territories controlled by Germany. This included the unrestrained murder of prisoners of war and the theft and destruction of property.¹⁴⁰ The

¹³⁸ Taylor, *Final Report*, 70-71.

¹³⁹ The defendants Eugen Steimle, Werner Braune, Walter Haensch, Eduard Strauch, Waldemar Klingelhöfer, and Waldemar von Radetzky were not included in the original indictment.

¹⁴⁰ Count Two—War Crimes, paragraphs 11-12, Amended Indictment against Otto Ohlendorf et. al, 29 July 1947. *Trials of War Criminals before the Nuernberg Military*

prosecutions' evidence for these crimes came entirely from the *Einsatzgruppen* Reports which detailed the transgressions.

The third count, "membership in criminal organizations" proved to be the least significant of the three charges in the *Einsatzgruppen* case. Article 10 of the London Charter provided that the criminal nature of the organization did not need to be proven repeatedly in subsequent trials; hence, the criminal nature of the SS and SD, to which the defendants belonged, was taken as established fact in the case of the leaders of the mobile security and killing units. However, the tribunal in the IMT trial had ruled that membership in a criminal organization alone was not sufficient grounds to convict an individual of criminal conspiracy, especially if he could demonstrate that he was unaware of the criminal nature of the organization, even though he was a member.¹⁴¹ Moreover, if a defendant could prove that he left the criminal organization before the start of the war (September 1, 1939) he could not be found guilty of the charge of membership. And, even if a defendant were found guilty of membership, the tribunal was instructed to impose a sentence no harsher than the ones imposed by the so-called denazification courts. In some cases there would be no punishment at all. For example, Matthias Graf, the lowest-ranking *Einsatzgruppe* officer to be convicted in the *Einsatzgruppen* trial escaped punishment entirely because he was only convicted of "membership in a criminal organization." The aim of the policy was to preclude disparities

Tribunals under Control Council Law No. 10, vol. 4, 21-22.

¹⁴¹ Matthew Lippman, "The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany," *Indiana International and Comparative Law Review* 1:3 (Fall 1992), 9.

in punishment in membership cases within the American zone.¹⁴² The heart of the *Einsatzgruppen* case, however, was not the issue of membership in criminal organizations or even the war crimes committed, but, as Taylor noted later in his report to the Secretary of the Army in 1949, it was participation in the “final solution of the Jewish question,” that is, the Holocaust.¹⁴³ Thus, it was count one – crimes against humanity – that was the focus of the trial.

In writing the indictment the prosecutors in the *Einsatzgruppen* case hoped to show that the leaders of the mobile killing units were part of another conspiracy—the conspiracy to commit systematic mass murder, or genocide, of particular religious, ethnic and national groups. However, as the trial unfolded it became clear to everyone involved that the trial was really about the mass murder of east European Jewry.¹⁴⁴ While the conspiracy charge was not a formal part of the indictment it was implied in count one – crimes against humanity, paragraphs 1 and 2, which specified that:

between May 1941 and July 1943 all of the defendants herein committed crimes against humanity, as defined in Article II of the Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of

¹⁴² For example, authorities in the British zone believed that it was up to the prosecution to prove that an individual had knowledge of the criminal nature of the group to which he belonged, while the American interpretation was that membership in the criminal organization presumed knowledge. See memorandum to British Liaison Officer, Hamburg from Benjamin B. Ferencz, Director Special Projects Division, OCCWC, 3 June 1947 in NARA RG 260 (USOH), OMGUS, Records of Functional Offices and Divisions, OCCWC, box 101, Organizational Memos, Special Projects Division folder.

¹⁴³ Taylor, *Final Report*, 69.

¹⁴⁴ Count One—Crimes Against Humanity, paragraph 2, Amended Indictment against Otto Ohlendorf et. al, 3 July 1947. *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 15. See also Taylor, *Final Report*, 69.

organizations or groups connected with, atrocities and offenses, including but not limited to, persecutions on political, racial, and religious grounds, murder, extermination, imprisonment, and other inhumane acts committed against civilian populations, including German nationals and nationals of other countries.

Paragraph 2 also stated that,

the acts, conduct, plans, and enterprises charged in paragraph 1 of this count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups by murderous extermination.¹⁴⁵

Simply put, paragraph two of the indictment charged that the *Einsatzgruppen* were formed with the specific intention of “exterminating Jews, gypsies, Soviet officials, and other elements of the civilian population” and that the leadership of these mobile SS units were not only part of the conspiracy to commit genocide, but also helped carry it out.¹⁴⁶

In most of the twelve cases under Control Council Law No. 10, the defendants were not charged with direct participation in atrocities since, more often than not, they held more “important” positions within the Nazi regime and were not required to carry out the actual policy. Instead, these men were charged with the formulation and/or dissemination of orders. In the case against the *Einsatzgruppen* leaders, however, the defendants were held directly responsible for both; they were accused of disseminating the order to kill the Jews as well as

¹⁴⁵ Count One—Crimes Against Humanity, paragraphs 1 and 2, Amended Indictment against Otto Ohlendorf et al., 3 July 1947. *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 15.

¹⁴⁶ *Ibid.* See also the opening statement of the prosecution in the case who stated on 29 September 1947 that, “the defendants were commanders and officers of special SS groups known as *Einsatzgruppen* – established for the specific purpose of massacring human beings because they were Jews, or because they were for some other reason regarded as inferior peoples.” Opening Statement by the Prosecution, in *Trial*, roll 1, 31; and, Taylor, *Final Report*, 69.

taking a “consenting part” in their murder.¹⁴⁷

Paragraphs 6 through 9 of the same charge laid out, in eighty-six separate incidents, the murder of between 723,661 and one million persons between June 1941 and July 1943, a crime of such staggering proportions that even the presiding judge who heard the evidence felt lost, commenting that,¹⁴⁸

one cannot grasp the full cumulative terror of murder one million times repeated. It is only when this grotesque total is broken down into units capable of mental assimilation that one can understand the monstrousness of the things we are in this trial contemplating. One must visualize not one million people but only ten persons, men, women and children, perhaps all of one family – falling before the executioners’ guns. If one million is divided by ten, this scene must happen one hundred thousand times, and as one visualizes the repetitious horror, one begins to understand the meaning of the Prosecution’s words: “It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenseless men, women and children.”¹⁴⁹

That the indictment included eighty-six separate incidents of atrocity meant that the prosecution had to prove not only that a particular defendant was the leader of an *Einsatzgruppe* and gave orders to subordinates to murder, but that he was also present at the particular place and time when the massacres were to have taken place. Thus, the way in which the indictment was laid out often dictated the course the trial would take. On more than one occasion the defense spent days attempting to prove that a particular defendant was “at home or in Berlin, or at his grandmother’s funeral,” in short, anywhere but where the

¹⁴⁷ Taylor, *Final Report*, 73.

¹⁴⁸ Count One—Crimes Against Humanity, paragraph 3, Amended Indictment against Otto Ohlendorf et. al, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 15-21.

¹⁴⁹ Opinion and Judgment, 8 April 1948, *Trial*, roll, 3-4.

indictment indicated he was.¹⁵⁰

A unique feature of the indictment of the *Einsatzgruppen* leaders, was the focus on the unprecedented charge of genocide contained within Count One – Crimes against Humanity – which was treated only incidently in the case brought before the IMT. The term “genocide” was introduced in 1944 by Raphael Lemkin, a Polish-Jewish lawyer, to define the crimes perpetrated against Europe’s Jewish population by the Nazis.¹⁵¹ Although the term was coined in 1944, it was not until much later that the word came into common usage, namely in 1948 when the United Nations adopted a formal definition of genocide.¹⁵² Count One of the indictment against the leaders of the mobile killing units was explicit, the defendants were charged with planning, abetting, and perpetrating the systematic mass murder of civilian populations – particularly the Jews. Further, the opening statement by the prosecution identified genocide as the central issue in the case, thereby equating Crimes against Humanity with genocide. John E. Glancy, Associate Counsel for the prosecution, declared in his opening statement that “the Einsatzgruppen trial deals mainly with the crime of genocide.”¹⁵³ Because the charge of genocide was new to international law, and the prosecution did not have a solid understanding of the crime, they did not pursue a line of

¹⁵⁰ Interview with Benjamin B. Ferencz, 24 April 1997, 18.

¹⁵¹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, 1944), 79-95. Benjamin Ferencz remembers that Raphael Lemkin, the founder of the term genocide, was at Nuremberg during the time in which he was writing the indictment. Interview with Benjamin B. Ferencz, 24 April 1997, 9.

¹⁵² Irving Horowitz, *Genocide: State Power and Mass Murder* (New Brunswick, NJ; 1976), 17-18. Lemkin worked with the United Nations on this definition.

¹⁵³ John Glancy, Opening Statement by the Prosecution, *Trial*, roll 1, 3.

questioning that would lead to a conviction of the greater charge. In fact, the prosecution seemed content to prove that an individual defendant had ordered or participated in a particular murder. Furthermore the prosecutors failed to prove that the defendants were party to, or even knew about Hitler's "Final Solution." In other words, there was no attempt to show that these murders constituted a systematic or European-wide program to murder the Jews. This suggests that while the prosecution was willing to encompass the new concept in theory, they were very circumspect about applying it in practice, or at the very least they did not understand how to formulate the case around the charge and so relied on tried and true methods of criminal prosecution. In the end, even though the concept of genocide did not play much of a role in the *Einsatzgruppen* trial where it was first employed it did help pave the way for the future development of the concept in international law.¹⁵⁴

5. Conclusion

In 1946, during the planning phase for the Subsequent Nuremberg Proceedings the Americans knew they wanted to bring to justice a broad range of the Nazi leadership. Their plan included the trial of a representative sample of the SS, particularly those who had served in the Gestapo and the RSHA, organizations that were viewed as at the heart of Nazi criminality. At this early date, there was no indication that any of the members or leaders of the *Einsatzgruppen* would be brought to justice, although some of the planners of the Subsequent Trials did favour holding Otto Ohlendorf accountable for the crimes he had

¹⁵⁴ Roger S. Clark, "Crimes Against Humanity," in George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht, Netherlands; 1990), 198-199.

confessed to during the IMT proceedings. In 1946, the Office of Chief of Counsel simply did not have an overall understanding of the activities and nature of the crime to which Ohlendorf had been party in the Soviet Union. It would take the discovery and analysis of the *Ereignismeldungen UdSSR* for Taylor and those working for him to grasp the magnitude and significance of the *Einsatzgruppen*. When the meaning of Ohlendorf's admissions were more fully realized, and the evidence against him and other leaders of these units was amassed in the spring of 1947, Taylor, on Ferencz's urging, decided to make Ohlendorf the centerpiece of a trial dealing exclusively with the leadership of the mobile security and killing units.

The story of Ohlendorf's fate from 1945 was the story of his life. In many regards he was the master of his own destiny, having no one to blame for the situation in which he found himself in 1947 but himself. In the chaos of May 1945, instead of turning himself in to British authorities as he did, Ohlendorf could have just as easily attempted to escape as did many of those in similar positions as he. At the very least, even had he been identified as a potential war criminal and been arrested, he could have elected to evade indictment by remaining silent about his crimes. Certainly in the early days after the capitulation those in charge of prosecuting war criminals had only a cursory knowledge of all of the crimes of the Third Reich, and next to no knowledge about the specific crimes of individuals such as Ohlendorf. But Ohlendorf's personality got the best of him. He was so arrogant, indeed, so self-important, that he was compelled to explain his actions to Allied authorities. The evidence suggests that Ohlendorf did so without regard to the consequences, suggesting that he truly believed that what he had done was in no way morally wrong or even illegal. Alternatively, without his confession to American authorities Ohlendorf may very well have

been released to an internment camp to wait for the authorities to find evidence against him or to be tried by a denazification court where the maximum sentence, even for the most heinous crime, was ten years. Even had his crimes been discovered independently and without his confession, nothing prevented him from lying to authorities about his role in them, especially since Allied authorities had very few resources at their disposal to check the veracity of individual confessions. These scenarios were highly unlikely however.

In the end, Ohlendorf's conduct after the war was a testimony to his convictions. Just as he had felt the need to prove himself and his ideology to Himmler and Heydrich in the killing fields of Russia in 1941 and 1942, so too did he feel compelled to justify his actions to the Allied authorities in 1945 and 1946. In both cases he refused to acknowledge that his behaviour or the murderous ideology of National Socialism was in any way illegal or immoral. It was, as Felix Kersten explained, Ohlendorf's personality which compelled him to confess, no matter the consequence, and it was this confession which helped to seal his fate.¹⁵⁵ Ohlendorf's "route to crime" was exactly the same as his route to the courtroom: both were the result of his arrogance and enduring belief that what he had done was both right and necessary.

Ohlendorf's unusual attitude and unsolicited confessions help explain why nearly all accounts of the IMT proceedings at Nuremberg make reference to his admission of responsibility for the lives of 90,000 civilians. In 1945 no one, not even psychologists, could fathom that a charming, well-educated, professional was capable of believing that mass murder, under any circumstance, was ideologically motivated and thus morally right to the

¹⁵⁵ Kersten noted after meeting Ohlendorf for the first time that he was a man "who always spoke the truth regardless of consequences." See Kersten, *Memoirs*, 206-207.

perpetrator.

Given the last minute decision to prosecute the leaders of the *Einsatzgruppen* in one coordinated trial, and the significant evidence they had amassed, the prosecutors of this trial were overconfident and, by necessity, rushed. Four months was not enough time to locate all of the defendants and interrogate them, find at least some witnesses, or adequately scrutinize the evidence let alone to comprehensively plan for a trial that charged the defendants with the unprecedented charge of genocide. The *Einsatzgruppen* trial, like all of the Subsequent Proceedings except the cases against the industrialists and financiers which had been in the works for more than a year, was hastily planned. It relied on significant elements of the indictment filed against the defendants of the IMT proceedings, and gave little thought to how they might prosecute twenty-four individuals for the murder of one million civilians a crime quite different from that charged to the defendants in the first Nuremberg trial. As far as the prosecutors were concerned, the *Einsatzgruppen* Reports, were all they needed to make their case. Indeed, when the trial began, the prosecutors only took two days to present their evidence, but as they were soon to discover, prosecuting individuals for genocide was not the same as trying individuals for singular murders.

Bradley Smith has shown that in the first Nuremberg trial, some defendants were indicted as a result of compromises between the Allies and that outcomes of the IMT trials were influenced by the fact that the Americans, British, French and Soviets had different political agendas and enemy lists. This was not the case in the trial of the *Einsatzgruppen* leaders. In fact, the way in which the defendants were selected for the dock depended largely on the contents of the *Einsatzgruppen* Reports. Once the OCCWC had located a good number of potential candidates they interrogated them. Much of the evidence these

individuals gave during the interrogations was used against them during the trial and ultimately helped not only to indict, but to convict them as well. This raises serious legal questions about the way evidence was obtained and used against the defendants. Alvin Rockwell, one of President Truman's legal advisors, raised the issue of the lack of legal representation for the defendants to Taylor in early 1947. Taylor rationalized his decision to deny potential defendants counsel by arguing that the practice was necessary in order to procure evidence for prosecution. Taylor knew that suspects might not be so forthcoming if they had lawyers to advise them against making incriminating statements, and quite frankly he needed their information to help formulate his plan for the Subsequent Proceedings. That legal representation was denied defendants in the *Einsatzgruppen* case and their statements were subsequently used against them at trial, was certainly a contributing factor in their convictions. Who these individuals were and how they came to their crimes is the subject of the next chapter.

Chapter 4

The Defendants Part I: A Social Profile

Since the twenty-three defendants were charged with one million murders, one would expect to see in the dock a band of coarse, untutored barbarians. Instead, one beheld a group of men with a formidable educational background.

Michael Musmanno¹

1. Introduction

Who were the twenty-four leaders of the *Einsatzgruppen* and *Kommandos* indicted at Nuremberg in 1947? Were they long-standing party members, the so-called old fighters such as Ohlendorf whose career was reviewed in the previous chapter, or were they relative newcomers who joined the party only after the Nazi seizure of power in 1933? Were they lower middle-class Protestants from northern Germany as were so many members of the party, or were they the elite of German society? Did they join the party out of political conviction, for economic advancement, or to protest the failure of Weimar democracy?²

¹ Michael Musmanno, untitled, undated writings on the Einsatzgruppen trial, Loose Documents, Michael Angelo Musmanno Papers, Gumberg Library, Duquesne University, Pittsburgh, Pennsylvania.

² Many historians attempting to explain the nature of Nazism, study the ideology and social composition of the party membership. The earliest interpretations came from scholars such as Hannah Arendt, *The Origins of Totalitarianism* (New York, 1951), George Mosse, *The Crisis of German Ideology: The Intellectual Origins of the Third Reich* (London, 1964) and Fritz Stern, *The Politics of Cultural Despair* (Berkeley, CA; 1961), who emphasize the irrational nature of Nazism, claiming that it was essentially an anti-intellectual, irrational mass movement and as such appealed to marginalized groups during a time of national crisis and social upheaval. Later, others identified class as the defining feature of Nazism.

Were they born after 1899 as were so many members and leaders of the Nazi's para-military organizations?³ In 1957, German historian Gerald Reitlinger, an authority on the Nazi SS, characterized the lives of the leaders of the *Einsatzgruppen* as absolutely "bankrupt," arguing that they joined Heydrich's SD because they had failed utterly in their chosen

Proponents of this view argue that Nazism appealed primarily to the lower middle classes who had suffered tremendously during the period of German modernization and, as a result, distrusted both big business and labour believing neither could solve the problems of German society. Essentially, lower middle class Germans turned to National Socialism as a "third way" between liberal capitalism and communism. This interpretation is best exemplified by Seymour Lipset, *Political Man: The Social Bases of Politics* (New York, 1960). More recently scholars such as Richard Hamilton, *Who Voted for Hitler?* (Princeton, 1982), Michael Kater, *The Nazi Party: A Social Profile of Members and Leaders, 1919-1945* (Cambridge, 1983), Dirk Hänisch, *Sozialstrukturelle Bestimmungsgründe des Wahlverhaltens in der Weimarer Republik. Eine Aggregatdatenanalyse der Ergebnisse der Reichstagswahlen 1924-1933* (Duisburg, 1983), and Thomas Childers, *The Nazi Voter: The Social Foundations of Fascism in Germany, 1918-1933* (Chapel Hill, 1983), while not completely discarding the notion of class, have revised these earlier characterizations of Nazism. Their statistical analyses reveal that National Socialism appealed to a much broader base of Germans than once thought. For example Kater shows the NSDAP attracted members from all social classes including working, lower middle, and upper middle classes or elites and Hamilton and Childers note that the Nazi vote was split along confessional lines, with Protestants living in communities of fewer than 25,000 people far more likely than Catholics to vote for the Nazis. Detlev Mühlberger goes further, arguing that Nazism was a mass movement, supported by all classes in German society, including the working class, during election time. See Mühlberger, "Conclusion to Hitler's Followers," in Christian Leitz (ed.), *The Third Reich* (Oxford, 1999), 13-23. Most recently, William Brustein, *The Social Origins of the Nazi Party, 1925-1933* (London, 1996) isolates economics as the prime factor behind the support the Nazis received. He concludes that the National Socialists succeeded because of their economic program which appealed to many Germans during a time of social and economic crisis. In essence, it was the National Socialist economic program which induced millions of Germans to vote for the Nazis. For more extensive reviews of the literature see Peter Manstein, *Die Mitglieder und Wähler der NSDAP, 1919-1933: Untersuchungen zu ihrer schichtmässigen Zusammensetzung* (Frankfurt, 1988); Peter Stachura (ed.), *The Nazi Machtergreifung* (London, 1983); and, Jane Caplan, "The Rise of National Socialism 1919-1933," in Gordon Martel (ed.), *Modern Germany Reconsidered, 1870-1945* (New York, 1992), 117-139.

³ Jens Banach, *Heydrichs Elite: Das Führerkorps der Sicherheitspolizei und des SD 1936-1945* (Munich, 1998), 325.

professions. After all states Reitlinger rhetorically, “what else could Heydrich’s shifty and muddle headed system have attracted” but failures.⁴ One defendant, he notes, was a second-rate opera singer, another an out of work dentist. This depiction of the twenty-four *Einsatzgruppen* and *Kommandoführer* indicted for murder in 1947 really is however too simplistic. Certainly it is true that a good number of them had had difficulty finding jobs in the depression years (not so unusual during a period when one in three Germans was unemployed), but it is also true that a disproportionate number of them were university trained – specifically in the profession of law – and a number of them even held doctoral degrees.⁵ Of the fifteen *Einsatzgruppenführer* who worked in Russia between 1941 and 1943, six (40 percent) had earned doctoral degrees and an additional three had studied law. And, of the sixty-nine *Einsatzkommandoführer* (leaders of the sub-units of the four main *Einsatzgruppen* – A, B, C, and D which many of the defendants commanded), sixteen (23 percent) held doctoral degrees.⁶ These statistics strongly suggest that the leadership corps of

⁴ Gerald Reitlinger, *The SS: Alibi of a Nation, 1922-1945* (New York, 1957), 41. Reitlinger’s characterization of the *Einsatzgruppen* leaders as “failed” members of society places him in the “Arendtian” school. For instance, Arendt writes, “It was characteristic of the rise of the Nazi movement in Germany and of the Communist movements in Europe after 1930 that they recruited their members from this mass of apparently indifferent people whom all other parties had given up as too apathetic or too stupid for their attention. The result was that the majority of their membership consisted of people who never before had appeared on the political scene.” Arendt, *The Origins of Totalitarianism*, 311-312.

⁵ Karl Dietrich Bracher notes that many of the Nazi leadership corps had led “unstable” lives before the Nazi seizure of power. See Bracher, *The German Dictatorship: The Origins, Structure, and Effects of National Socialism*, trans. Jean Steinberg (New York, 1970), 274.

⁶ Benno Müller-Hill, “The Idea of the Final Solution and the Role of Experts,” in David Cesarani (ed.), *The Final Solution: Origins and Implementation* (New York, 1994), 63. Helmut Krausnick and Hans-Heinrich Wilhelm, in *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942*

the *Einsatzgruppen* and *Kommandos* comprised many men who were neither misfits nor failures.⁷

Some of the defendants' careers and motives loosely paralleled Ohlendorf's in that they joined the Nazi movement in a search for solutions to Germany's political, social and economic problems; to join the SA, SS, SD or Gestapo was a career move at a time – the depths of the great Depression – when society offered them nothing else.⁸ Others joined the

(Stuttgart, 1971), 360-364 and 639-644 state that Humbert Achamer-Pifrader (EG A), Heinz Jost (EG A), Walter Stahlecker (EG A), Erich Ehrlinger (EG B), Wilhelm Fuchs (EG A), Otto Rasch (EG C), and Max Thomas (EG C) held doctoral degrees. Müller-Hill disagrees. Neither Jost nor Ehrlinger held doctoral degrees, but rather had merely studied law. Jost's SS Personnel Record and Curriculum Vitae (NO 2896), in *The United States of America v. Otto Ohlendorf et al.*, National Archives Microfilm Collection M895, roll 9, frames 0626-0631 (from here forward simply Trial, roll, page or frame), make no mention of a doctoral degree, but only parts of the document are legible and During testimony at trial and in his sworn affidavits, Jost never said he had a doctoral degree although he did say he had passed both his junior and senior law examinations. See Eidesstattliche Erklärung of Heinz Jost, 7 June 1947, in *ibid.*, frame 0634.

⁷ This is in agreement with Michael Kater's findings which conclude that "while the [German] elite was consistently overrepresented in the rank and file of the party, this situation was more evident in the cadres: the higher the cadre, the greater the degree of elite overrepresentation." His finding that a high level of education had been attained by many in the leadership corps of the mobile killing units, seriously calls into question the thesis that "social misfits" dominated elite positions in the regime. Kater, *The Nazi Party*, 236. See also, Michael Kater, "The New Nazi Rulers: Who Were They?," in Charles S. Maier, Stanley Hoffmann, and Andrew Gould (eds.), *The Rise of the Nazi Regime: Historical Reassessments* (Boulder, CO; 1986), 41-43.

⁸ See Shlomo Aronson, *Reinhard Heydrich und die Frühgeschichte von Gestapo und SD* (Stuttgart, 1971), 199-217, who follows the careers of various SD men such as Adolf Eichmann who rose from obscurity to prominence essentially by "chance." Aronson notes Eichmann began his career working in his father's mining company, later becoming a traveling salesman. He joined the SD at the beginning of 1934 and made a niche for himself as a so-called "Jewish expert." Also revealing is Dieter Wisliceny's rise from "failed" theology student to Eichmann's deputy during World War II. Aronson concludes that these men came to the offices of the SD for a variety of reasons, Ohlendorf almost on a whim for "opportunistic reasons," or as Eichmann by "chance."

party out of conviction, many having cut their teeth on the activities of the *Freikorps* and other right-wing, nationalist organizations that proliferated after World War I.⁹ Frequently they joined the party as youths – many while still university students – worked their way up through the ranks, eventually finding an occupation or niche where their particular skills were in demand.¹⁰ In fact, like Ohlendorf, many were well-educated, middle class idealists who, abjuring traditional morality, supported the ideas of the NSDAP and later willingly implemented its racial policies. Reitlinger’s assertion then, that these men were nothing but failed professionals, is not supported by recent research. On the contrary as one historian has noted, they were more frequently of “above average intelligence, talent and ambition.”¹¹ The evidence reveals that, in practice, the decision to join the party was reached for any number of reasons. Differences in personality, profession and motivation were critical; the need or desire to escape personal difficulties was more often than not only a marginal consideration. On the other hand, there is little evidence or reason to believe any of them had joined the NSDAP to participate in the work of the mobile security and killing units. For these reasons, Reitlinger’s characterization of the *Einsatzgruppen* leaders has been rejected. In order to provide an alternate explanation, this chapter will use Raul Hilberg’s system for classifying

⁹ On the subject of the *Freikorps* see Robert G.L. Waite, *Vanguard of Nazism: The Free Corps Movement in Postwar Germany, 1918-1923* (Cambridge, 1952). See also Peter D. Stachura, *Nazi Youth in the Weimar Republic* (Santa Barbara, CA; 1975) and Michael Stephen Steinberg, *Sabers and Brown Shirts. The German Students’ Path to National Socialism, 1918-1935* (Chicago, 1973), who discuss the issue of pre-1933 youth involvement in nationalist organizations.

¹⁰ For example see the work of Geoffrey Giles, “National Socialism and the Educated Elite in the Weimar Republic,” in Peter D. Stachura (ed.), *The Nazi Machtergreifung* (London, 1983), 49-67 and *Students and National Socialism in Germany* (Princeton, 1985).

¹¹ Wilhelm, “Die Einsatzgruppe A,” 281-282.

the perpetrators and it will offer a social profile of the leadership corps of the *Einsatzgruppen* and *Kommandos* who were indicted for murder in 1947.¹² It attempts to situate these men in the broader context of party members, particularly the leadership cadres of the SS, and it identifies commonalities within each. The analysis includes an examination of factors such as age, education, profession, religious affiliation and party membership, attributes that historians of National Socialism have identified as significant.¹³ The ultimate

¹² For detailed, empirical studies of the social composition of members and leaders of the NSDAP see Michael Kater's, *The Nazi Party*; Peter D. Stachura, "Who Were the Nazis? A Socio-Political Analysis of the National Socialist Machtübernahme," *European Studies Review* 11 (1981), 293-324; Thomas Childers (ed.), *The Formation of the Nazi Constituency* (London, 1986); Paul Madden, "Generational Aspects of German National Socialism, 1919-1933," *Social Science Quarterly* 63 (1982), 445-464 and Madden, "Some Social Characteristics of Early Nazi Party Members, 1919-1923," in *Central European History* 1:15 (1982), 34-56. For the most comprehensive empirical study of the composition of the SS leadership corps, see Herbert F. Ziegler, *Nazi Germany's New Aristocracy: The SS Leadership, 1925-1939* (Princeton, 1989). For analyses of the social composition of the SA, see Mathilde Jamin's, *Zwischen den Klassen: Zur Sozialstruktur der SA-Führerschaft* (Wuppertal, 1984) and Conan Fischer, "The Occupational Background of the SA's Rank and File Membership During the Depression Years, 1929 to mid-1934," in Peter D. Stachura (ed.), *The Shaping of the Nazi State* (New York, 1978), 131-159 and most recently, Bruce Campbell, *The SA Generals and the Rise of Nazism* (Lexington, 1998). Recently Jens Banach, *Heydrich's Elite: Das Führerkorps der Sicherheitspolizei und des SD 1936-1945* (Munich, 1998) has analyzed and profiled the leadership corps of the Security Police and SD and George Browder, *Hitler's Enforcers: The Gestapo and the SS Security Service in the Nazi Revolution* (New York, 1996) has examined the role of the SD in the Nazi system of terror. Peter Black, *Ernst Kaltenbrunner: Ideological Soldier of the Third Reich* (Princeton, 1984) is also an important contribution to the study of the men who led the para-military organizations of the Third Reich.

¹³ There were four *Einsatzgruppen* A, B, C and D, divided into sixteen sub units or *Kommandos*, totaling approximately 3,000 men. Helmut Krausnick and Hans-Heinrich Wilhelm, *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942* (Stuttgart, 1981), 141-150. This chapter does not claim to offer a comprehensive empirical study of the entire membership or leadership cadre of the *Einsatzgruppen* and *Kommandos*, rather its intention is to provide the reader with a profile of those members of the mobile killing units indicted and tried at Nuremberg in 1947 and 1948. Its purpose is to answer the question "who were the *Einsatzgruppen* leaders tried at Nuremberg in 1947 and 1948?" To this writer's knowledge no complete study has been

purpose of this analysis is to provide an accurate composite of the men in the dock at Nuremberg as well as attempting to understand their “route to crime.”

2. The Common Attributes of “Newcomers” to National Socialism

Hilberg identifies three groups of perpetrators involved in the destruction process.

First are those organizations and ministries that participated indirectly in the mass murder of Europe’s Jews including disparate groups such as the Finance Ministry, the Churches, the Armed Forces and the Foreign Office. He defines these groups as the “establishment.” None of these various agencies on their own could have implemented and carried out the murder process, but taken together, as Hilberg notes, they “congealed into a massive machine” of

done on the social composition of all *Einsatzgruppen* members or leaders. There are however several important studies of various aspects of the activities of the mobile security and killing units, the most important being Krausnick and Wilhelm’s, *Die Truppe des Weltanschauungskrieges* in which Krausnick, in the first half of the book, discusses general issues relating to all four *Einsatzgruppen* while the second portion of the book by Wilhelm is devoted to a detailed analysis of the activities of *Einsatzgruppe A* and Andrej Angrick, “Die Einsatzgruppe D. Struktur und Tätigkeiten einer mobilen Einheit Der Sicherheitspolizei und des SD in der deutsch besetzten Sowjetunion,” (unpublished PhD dissertation, Technical University of Berlin, 1999) who profiles Ohlendorf and Bierkamp. See also Ronald Headland, *Messages of Murder: A Study of the Reports of the Einsatzgruppen of the Security Police and the Security Service, 1941-1943* (Toronto, 1992); Ralf Ogorreck, *Die Einsatzgruppen und die “Genesis der Endlösung”* (Stuttgart, 1997); Yaacov Lozowick, “Rollbahn Mord: The Early Activities of Einsatzgruppe C,” in *Holocaust and Genocide Studies* 2:2 (1987), 221-241; Alfred Streim, “Zur Eröffnung des allgemeinen judenvernichtungsbefehls gegenüber den Einsatzgruppen,” in Eberhard Jäckel and Jürgen Rohwer (eds.), *Der Mord an den Juden im Zweiten Weltkrieg* (Stuttgart, 1985), 107-119; Streim, “Zum Beispiel: Die Verbrechen der Einsatzgruppen in der Sowjetunion,” in Adalbert Rückerl (ed.), *NS-Prozesse Nach 25 Jahren Strafverfolgung: Möglichkeiten-Grenzen-Ergebnisse* (Karlsruhe, 1971), 65-106; and Streim, “The Tasks of the Einsatzgruppen,” *Simon Wiesenthal Center Annual* 4 (1987), 309-328.

destruction.¹⁴ The second group of perpetrators Hilberg identifies is “old functionaries,” which includes individuals who had jobs prior to the Nazi seizure of power, and who maintained their positions throughout the existence of the regime. The vast majority of perpetrators came from this group. They tended to be older than the perpetrators who worked in establishment agencies; they were the civil servants, judges, doctors, lawyers, train operators, and members of the Order Police who participated in the destruction process in the field as well as from their desks.¹⁵ Finally there were “newcomers,” mainly professional men – German nationals as well as new Germans – who had drifted into the party because they had failed in their chosen professions, had been unable to secure employment, or had simply viewed Nazism as an attractive ‘occupational choice’; many, like Ohlendorf, had adopted strong nationalist views in their youth and felt an ideological affinity to Nazism.¹⁶

All twenty-four defendants in the *Einsatzgruppen* trial can be classified “newcomers” to the National Socialist regime, the term Hilberg applies broadly to men such as Ohlendorf who became party stalwarts and major participants in the ‘machinery of destruction,’ but who were neither “old functionaries” nor part of the bureaucratic “establishment.”¹⁷ “Newcomers,” as the title suggests, were relatively young and

¹⁴ Raul Hilberg, *Perpetrators Victims Bystanders: The Jewish Catastrophe, 1933-1945* (New York, 1992), 20-26.

¹⁵ *Ibid.*, 27-35.

¹⁶ *Ibid.*, 36-50.

¹⁷ Twenty four men were indicted to stand trial in the ‘The United States of America v. Otto Ohlendorf et al.’, but one man, Emil Hausmann committed suicide in July 1947 and Dr. Otto Rasch was severed from the case due to an acute case of Parkinson’s disease. For

impressionable, and most were born in the first decade of the twentieth century (see Figure 4.1).¹⁸ When the Nazis came to power in 1933, these men, in their early to mid-twenties, were at loose ends and had not yet made definite career choices. The oldest, Otto Rasch (the leader of *Einsatzgruppe C*) was in his forties, while the youngest, Heinz Schubert, an officer in Ohlendorf's *Einsatzgruppe D*, born just as World War I began in August 1914, was still a teenager when the Nazis seized power.¹⁹

2a. Age

One of the few social attributes historians of National Socialism agree upon is that a disproportionate number of Nazi Party members were young.²⁰ The *Einsatzgruppen* and *Kommandoführer* indicted in 1947 certainly were no exception. As Figure 4.1 illustrates, youth was a salient feature of the leadership corps of the mobile security and killing units.

purposes of this analysis all defendants are examined, except where information and data were not available.

¹⁸ Hilberg, *Perpetrators Victims Bystanders*, 39.

¹⁹ For general information about birthdays, education and party membership see Eidesstattliche Erklärung of each defendant in National Archives Microfilm Collection M1019, Records of the United States Nuernberg War Crimes Trials Interrogations, 1946-1949, rolls 1-3, 5, 8-10, 17, 22-23, 50-51, 55, 61, 67-69, and 71 (from here forward simply M1019, roll).

²⁰ See Paul Madden, "Generational Aspects of German National Socialism, 1919-1933," 452, who concludes that "incoming members of the NSDAP came primarily from the lower age groups. Persons under 30 years old were more than twice as numerous among Nazi recruits as in either Bavarian or German society." While this observation is generally true, historians who have looked at the age of National Socialist members, including Madden, conclude that while a large percentage of new members were under 30, it is also true that older segments of society were also attracted to the party. For instance, Thomas Childers concludes in his study of German voting patterns, that the "Nazi [age] constituency was...broader than traditionally assumed." See Childers, *The Nazi Voter*, 265.

That so many of the *Einsatzgruppen* and *Kommandoführer* were born in the last decade of the nineteenth century or the first decade of the twentieth century is significant; similarity of age ensured common experiences which in turn influenced and helped shape their future political ideas and activities.²¹ Of the twenty-four defendants indicted, eighteen were born between 1900 and 1910. An additional three were born between 1911 and 1914 and one was born in 1899. Only two, Otto Rasch (1891) and Paul Blobel (1894), were adults when World War I began.²² Excluding Rasch and Blobel, twenty-two of the twenty-four defendants (92 percent) of the leadership corps of the *Einsatzgruppen* indicted, were of the same generation and as such were influenced significantly by shared experiences, most notably the privations brought on by World War I and the subsequent upheaval generated by the failed revolution of 1918-1920.²³ These hardships – hunger, disease, separation anxiety from their parents, and political uncertainty – coupled with the perception that Germany had lost the war and

²¹ Paul Madden, “Generational Aspects of German National Socialism, 1919-1933,” and Peter Lowenberg, “The Psychohistorical Origins of the Nazi Youth Cohort,” *American Historical Review* 76 (1971), 1457-1502 stress age and shared experiences as the most important factor for understanding the attraction of National Socialism to German youth.

²² In his study of the SD and Security Police, Banach makes a clear distinction between older and younger members. According to his findings, those born after 1899 tended to be better educated, having graduated from Gymnasia, followed by university training. During the 1920s when most of these young men were in school and university they were subjected to the radicalized teachings of their professors which he believes made them more susceptible to Nazism. See *idem*, *Heydrichs Elite*, 325-236.

²³ Peter Lowenberg sees a direct relationship between date of birth, shared experiences and attraction to the NSDAP. This group constitutes what he calls an “age cohort” which is defined as “the aggregate of individuals within a population who have shared a significant common experience of a personal or historical event at the same time.” See Lowenberg, “The Psychohistorical Origins of the Nazi Youth Cohort,” 1465-1466, whereas Madden refers to similar attributes as a “generation,” Madden, “Generational Aspects of German National Socialism, 1919-1933.”

the harshness of Versailles, as Peter Lowenberg has shown, helped shape the attitudes and future political affiliations of these men.²⁴ It was inevitable that the young men who went to war hoping to change what they considered as a flawed society would be less idealistic when they returned. The brutal nature of trench warfare, the staggering death toll, combined with the unexpected defeat and a harsh peace settlement, disillusioned many young Germans, especially those German youth who returned from the front believing they had not really lost the war, but instead had been betrayed by domestic factions. In particular, they were fully prepared to continue the fight against left-wing enemies they held responsible for the “stab in the back” Germany had suffered.²⁵ While only two of the leaders of the *Einsatzgruppen* actually experienced the war first hand, all of the men in the dock indicated they were effected by it, either through the experiences of their fathers who related their experiences to their sons, or through the repercussions of the war and the effects these had directly on their lives.

This relationship between war and politics is clearly illustrated in the case of defendant Walter Haensch, leader of *Sonderkommando* 4b. Haensch was born March 3, 1904 in Hirschfelde, Saxony. His father Heinrich was a physician and Haensch’s upbringing was

²⁴ Lowenberg, 1457-1502.

²⁵ For example see Robert Wohl, *The Generation of 1914* (Cambridge, 1979), 42-84, who discusses at length the effects of the First World War on German youth. Wohl writes, “the moral attitude with which many German middle-class volunteers went to war contained within it the potential for enormous disillusionment. Confronted with the reality of war, expended like matériel, reduced to the life of a troglodyte, surrounded by images of ugliness, cut off from the world of civilians, deprived of victory, the volunteer could easily turn against the forces that brutalized him and condemned him to what he increasingly suspected was a meaningless sacrifice. Grown accustomed to the use of violence in the name of an ideal, he might conclude that his anger and his bullets should be directed against those responsible for his suffering.” In Wohl, *The Generation of 1914*, 51.

decidedly middle-class.²⁶ He attended elementary school, followed by a classical education at a Gymnasium. He was too young to fight in World War I, but the conflict had nonetheless an immediate and lasting impact on his life. At his trial, Haensch's attorney Dr. Riediger asked him how he became involved in politics. Haensch replied that as a teenager he developed a political "psychosis" which he attributed to the war and resulting industrialization of the agricultural area where he lived. These changes, he argued, led to severe class divisions within his community.²⁷ When the war ended and the revolution broke out, he explained, the communists in his village held "meetings, propaganda speeches, [and] mass demonstrations." The chaos and terror perpetrated by the communists led to the development of a political "psychosis" that aroused in him strong feelings of nationalism that he directed at all leftist groups.²⁸ Subsequently he helped found a nationalist youth organization whose goal it was to counter communism. The youth group merged with another national youth organization in 1919, and Haensch remained a member until 1922-1923, when he joined the *Jungdeutsche Orden* (German Youth Order), but he left this group after only two years because it did not provide the sense of community he longed for.²⁹

²⁶ Banach, *Heydrichs Elite*, 43 finds that the SD, Gestapo, and Security Police had a disproportionate number of personnel from the middle classes.

²⁷ While Haensch may have believed that the pronounced class divisions of his community were the result of the war, undoubtedly they already existed prior to this as they did all across Germany.

²⁸ Haensch's experiences are entirely in line with Wohl's findings. See *idem*, *The Generation of 1914*, 47 and 54.

²⁹ Abbreviated in SS Records as *Jungdo*, the *Jungdeutsche Orden*, originally a Free Corps organization, operated around Kassel and in Upper Silesia. See Waite, *Vanguard of Nazism*, 203 n.73 and 210-211. Testimony of Walter Haensch, 2 December 1947, in *Trial*, roll 4, 3227-3230; and, SS Personnel Record of Walter Haensch, (NO 3261), in *ibid.*, roll 11,

World War I and the revolution that followed provided the impetus for his political activity as a youth, particularly his ardent anti-communist ideology, and helped groom Haensch as a young adult for a role in the radical politics of the National Socialist movement.³⁰

Unlike most of his co-defendants, Haensch openly admitted that joining the NSDAP was a “well-considered” move. He admitted he joined the party in 1931 (membership number 537,265) for ideological reasons, while he was still a student at university, in order to combat the communists who he believed were gaining control of politics in Germany and threatening to destroy the country.³¹ Years later Haensch recanted his earlier confession, claiming that “like many Germans I am guilty of too quickly succumbing to the deceptions of the people in power.”³² The claim that he was deceived by those in power rings hollow however, especially considering that his anti-Marxist political leanings were well-developed some time before he joined the party. His SS record indicates that during the Weimar years he became increasingly more radical, speaking publicly in 1926 and 1929 against Marxism and the Versailles treaty. Far from being a puppet of National Socialism, Haensch was the

frame 0760.

³⁰ Waite, *Vanguard of Nazism*, chapter 10, long ago identified the link between post World War I right-wing movements such as the *Freikorps* and later affiliation with the Nazis.

³¹ *Ibid.*, 3232; and, SS Personnel Record of Walter Haensch, (NO 3261), in *Trial*, roll 11, frame 0757. It should be noted that joining dates and party membership numbers do not necessarily correspond. As Michael Kater has noted, “Party membership numbers were not given out logically, that is sequentially,” but we do know that low party numbers such as Ohlendorf’s correspond to high party standing. Correspondence with Michael Kater, 18 October 2000.

³² Briefe an Bischof Theophil Wurm, 12 May 1948 in NARA RG 238 (Records of World War II War Crimes Trials from here forward simply WCR), Advisory Board on Clemency for War Criminals, HICOG 1947-1950, Correspondence, box 10, Haensch folder.

perfect Nazi recruit; his SS record shows that, from an early age, he “frankly and actively stood up for the National Socialist ‘Weltanschauung’ and movement at any time and at any place.”³³ Haensch was not the only youth affected by the war and revolution which followed.

Waldemar Klingelhöfer’s upbringing again demonstrates how important his formative years were in shaping his future political ideas. Klingelhöfer was born April 4, 1900 in Moscow.³⁴ Between 1908 and 1915 he attended the (German-Protestant) Saint Peter and Paul church school in Russia, but in 1915 his father, a cemetery director, was expelled from the country for being a German national; he had no choice but to move the family back to Kassel, where his son continued his schooling until 1918.³⁵ In June of the final year of the war, at age 18, Klingelhöfer was drafted into the German army as an engineer with the 6th Replacement Company stationed in Silesia.³⁶ When the war ended he returned to Kassel to complete his education which he did in 1919, receiving his *Abitur* from the Wilhelm Classical Gymnasium. After graduating from highschool, Klingelhöfer devoted most of his time and energy to voice training, his passion was to become an opera singer. His schooling took him to Berlin, where he was forced to work in a bank for a time to finance his studies. Finally, in 1924 he embarked on a professional career as an opera singer, touring Germany

³³ SS Personnel Record of Walter Haensch, (NO 3261), in *Trial*, roll 11, frame 0760.

³⁴ Eidesstattliche Erklärung of Waldemar Klingelhöfer, M1019, roll 35.

³⁵ Interrogation of Waldemar Klingelhöfer, 1 July 1947, (NO 5846), in *Trial*, roll 12, frame 233; and, testimony of Waldemar Klingelhöfer, 11 December 1947, in *ibid.*, roll 5, 3800.

³⁶ Waldemar Klingelhöfer, 20.6.1950, in B305/146 deutsche Kriegsverurteilte im Landsberg, Einzelfälle 1949-1950, Bundesarchiv, Koblenz; and, SS Personnel Record of Waldemar Klingelhöfer, (NO 4809), in *Trial*, roll 11, frame 0671.

giving concerts. With a view to supplementing his income from singing, he studied to become a voice teacher and passed the state exam in 1928. Klingelhöfer pursued his singing career until 1934/1935 when an injury to his voice forced him to take a job with the SD in Kassel.³⁷

On the face of it, it may seem odd to find a refined and cultured individual such as Klingelhöfer embracing Nazism, but in fact he had been attracted to extreme right-wing ideology even when quite young. The expulsion of his family from Russia in 1915 and military service in the German army in 1918 made a vehement anti-communist and stalwart nationalist out of the young singer. When he returned from the front in December 1918 he promptly joined a veteran's organization, one used by the Kassel government to put down communist groups during the tumultuous years 1918-1920. He also joined the *Jungdeutsche Orden* as had Haensch, and in the summer of 1920, he joined the *Bewaffneter Bürgerschutz* (Armed Civil Guard) of Upper Silesia.³⁸ Although Klingelhöfer had become thoroughly politicized in his youth, traveling and singing prevented him from taking an active part in the early Nazi movement and it was not until June 1930 that he found time enough from his work to join the party (membership number 250,951).³⁹

Many of Klingelhöfer's co-defendants had joined the party for reasons identical to his, namely, as he stated on the witness stand, "to fight bolshevism." While still singing professionally, Klingelhöfer worked on translations. He put his knowledge of Russian to use

³⁷ Affidavit of Waldemar Klingelhöfer, 2 July 1947, (NO 4235), in *ibid.*, roll 11, frame 0663.

³⁸ SS Personnel Record of Waldemar Klingelhöfer, (NO 4809), in *ibid.*, frame 0671.

³⁹ *Ibid.*

in 1929-1930 translating into German a Russian, antisemitic treatise on the influence of Jews and Freemasons in the political development of Russia. The book was published in 1932 under the title, *Kampf der dunklen Macht* (The Struggle of the Dark Power). All in all, Klingelhöfer's singing career left him little time for party activity, but when in 1934/1935 his health put an abrupt end to his music career, on the advice of a friend who had suggested he could use his language skills to advantage in the information service of the party, he joined the SD full time.⁴⁰ At first Klingelhöfer worked as an office clerk, but in 1937 he was made *Referent* for Culture in *Amt III-C* and in 1939, when war broke out, he was put in charge of a group assigned the task of analyzing the German population's attitude toward the war, the Reich and its propaganda. He did this until May 1941, when he was recruited for duty in the *Einsatzgruppen*.⁴¹

Standartenführer Walter Blume, born in 1906 in Dortmund, was also influenced by the experiences of his youth. After completing his Doctor of Law degree in 1933 at the University of Erlangen Blume expected to practice his profession, but because the economy was still severely depressed he was unable to find a job.⁴² On the recommendation of a friend he joined the party hoping to find legal work in one of the party offices.⁴³ Several years later, while appealing to American authorities for clemency, he filled in some gaps in

⁴⁰ *Ibid.*

⁴¹ Interrogation of Waldemar Klingelhöfer, 1 July 1947, (NO 5846), in *ibid.*, roll 12, frame 0234.

⁴² Testimony of Walter Blume, 31 October 1947, in *ibid.*, roll 3, 1754-1755. See also Eidesstattliche Erklärung, Walter Blume in *ibid.*, (NO 4145), roll 8, frame 0059.

⁴³ *Ibid.*, 1758.

his biography. At his trial he claimed he had no particular political affiliation during his youth, but he later admitted to clemency officials that he had actually been introduced to right-wing extremist ideas at a fairly early age, while growing up in the Ruhr. Once indoctrinated with these ideas, like Klingelhöfer, he joined the so-called *Bewaffneter Bürgerschutz*. During this period he witnessed first hand the armed struggle between the *Freikorps* and local communist groups. Thus at quite an early stage of his career Blume became ideologically driven and a vehement anti-communist. He desperately yearned for German unity and an end to the class struggle and became convinced that the Nazis, and Hitler in particular, sincerely wanted to eradicate “peacefully” the divisiveness that was so destructive. To this end he joined the party May 1, 1933.⁴⁴

Erwin Schulz, the same age as Klingelhöfer but German by birth, is the final example offered of how war and youth affected political choices. He was born in Berlin on November 27, 1900. Between 1906 and 1918 he attended the Kölnische Gymnasium, but his studies were interrupted for a brief time from April 1918 to February 1919 when he served in the German army as a volunteer infantryman during the final days of World War I.⁴⁵ When Schulz returned from the war he continued fighting alongside other German soldiers, only this time the enemy was the *Spartakistbund*. After his discharge from the army he

⁴⁴ Petition for Clemency of Walter Blume, 6 June 1950 in NARA RG 466 (Records of the United States High Commissioner for Germany, from here forward simply HICOG), Prisons Division, Petitions for Clemency, box 3 Blobel-Buberman, Blume folder; testimony of Walter Blume, 31 October 1947, in *Trial*, roll 3, 1759; and, Eidesstattliche Erklärung, Walter Blume, 29 June 1947, (NO 4145), in *ibid.*, roll 8, frame 0060.

⁴⁵ Eidesstattliche Erklärung of Erwin Schulz, 26 May 1947, (NO 3644), in *ibid.*, roll 8, frame 0294; and, SS Personnel Record of Erwin Schulz, (NO 4298), in *ibid.*, roll 11, frame 0771.

finished his last term of school and made his *Abitur* in December 1919.⁴⁶ After completing high school, Schulz proceeded to university in Berlin. Originally he had wanted to study medicine, but was “frustrated by the economic consequences of the war” and for reasons of “expediency,” studied political science and law for two semesters instead.⁴⁷ In the spring and summer of 1921 he helped to put down a Polish insurrection in Upper Silesia while serving in a *Freikorps* unit.⁴⁸ In 1922, he was forced to withdraw from university because of financial difficulties, to support himself he took a job with the Dresdner bank in Berlin. He worked at the bank for nearly a year and then in the spring of 1923 he moved to Hamburg with the intention of completing his studies, but again, financial considerations prevented him from doing so. In the fall of 1923 he heard that the Bremen *Schutzpolizei* were looking to train new police officers; hopeful, he applied and was accepted for training in November.⁴⁹ Between 1924 and 1926 he rose quickly through the ranks of the police, first as a sergeant (1924), then as an officer (1925), and finally became a commissioned lieutenant in 1926.⁵⁰ During his career as a police officer Schulz spent much of his time training other

⁴⁶ “Curriculum Vitae of Erwin Schulz,” in SS Personnel Record of Erwin Schulz, (NO 4298) in *ibid.*, frame 0779.

⁴⁷ Personal Statement for the Pardon Committee, Erwin Schulz, June 1950, in NARA RG 466 (HICOG), Prisons Division, Petitions, box 32, Schulz folder.

⁴⁸ SS Personnel Record of Erwin Schulz, (NO 4298) in *Trial*, roll 9, frame 1187 and roll 11, frame 0770 and 0779.

⁴⁹ Affidavit of Erwin Schulz, 26 May 1947, (NO 3644), in *ibid.*, roll 11, frame 0107; and, testimony of Erwin Schulz, 17 October 1947, *ibid.*, roll 2, 905-907.

⁵⁰ “Trial Brief for the United States of America against Erwin Schulz,” 15 January 1948, in John Mendelsohn (ed.), *The Holocaust. Punishing the Perpetrators of the Holocaust: The Ohlendorf and Von Weizsäcker Cases*, vol. 18 (New York, 1982), 92.

men (by all accounts he was quite personable – he had studied chivalry) and in 1928 was appointed instructor at the Bremen Police academy where he worked until 1930.⁵¹

Schulz's SS record indicates he did not join the party until May 1, 1933 (membership number 2,902,238), the same time as many of his co-defendants.⁵² At trial he told the court he did so because he was caught up in the "frenzy of support" and importantly, in 1933 anyway, he believed the party stood for him.⁵³ While Schulz maintained he had had no political involvement with the Nazis prior to 1933, his record indicates otherwise. Not only had he been politically active in his youth fighting left-wing groups in Germany, but in 1930 he was transferred to the Intelligence Division of the Bremen police which dealt specifically with political counter intelligence. This division eventually developed into the Secret State Police (*Gestapo*) in June 1933, and in November he was made its Deputy Chief. Finally on May 1, 1934, he took command of the organization. Schulz was no innocent bystander.⁵⁴ In fact, since 1931 he had been working secretly with local SS men to assist the Nazis take over of the offices of the Bremen police.⁵⁵ And, as he proudly notes in his SS-CV, "on the Führer's birthday in 1935 I was taken over as an SS man" with membership number

⁵¹ "Curriculum Vitae of Erwin Schulz," in SS Personnel Record of Erwin Schulz, (NO 4298), in *Trial*, roll 11, frame 0775.

⁵² Eidesstattliche Erklärung of Erwin Schulz, 26 May 1947, (NO 3644), in *ibid.*, roll 8, frame 0295; and, SS Personnel Record of Erwin Schulz, in *ibid.*, roll 11, frame 0769.

⁵³ Testimony of Erwin Schulz, 17 October 1947, in *ibid.*, roll 2, 915-916.

⁵⁴ Browder, *Hitler's Enforcers*, 45-46.

⁵⁵ *Ibid.*, 46.

107,484.⁵⁶

Haensch, Klingelhöfer, Blume and Schulz were by no means unique. Most of the leaders of the *Einsatzgruppen* and *Kommandos* tried at Nuremberg in 1947 had similar experiences in the first two decades of the twentieth century when the First World War and the failed revolution had a profound impact on their lives and subsequent political inclinations. As a result, these youth were ready to be mobilized politically, and thus when the German economy crashed in 1929-1930, and the future looked particularly bleak, most had just reached an age when they would need to choose careers, they jumped at the chance to join a political party that promised them social mobility, economic improvements, and an ideology that reinforced their pre-existing right-wing nationalist political leanings.

⁵⁶ "Curriculum Vitae of Erwin Schulz," in SS Personnel Record of Erwin Schulz, (NO 4298), in *Trial*, roll 11, frame 0775 and 0769; and, Eidesstattliche Erklärung of Erwin Schulz, 26 May 1947, (NO 3644), in *ibid.*, roll 8, frame 0295.

Figure 4.1**Age of Einsatzgruppen Leaders Indicted at Nuremberg in 1947⁵⁷**

Name	Birth date	Year	Place of Birth
Ernst Biberstein	15 February	1899	Hilchenbach
Paul Blobel	13 August	1894	Potsdam (Brandenburg)
Walter Blume	23 July	1906	Dortmund (Westphalia)
Werner Braune	11 April	1909	Mehrstadt
Lothar Fendler	13 August	1913	Breslau
Matthias Graf	5 May	1903	Koltern
Walter Haensch	3 March	1904	Hirschfelde (Saxony)
Emil Hausmann	11 October	1910	Württemberg
Heinz Jost	9 July	1904	Holzhausen (Marburg)
Waldemar Klingelhöfer	4 April	1900	Moscow, Russia
Erich Naumann	29 April	1905	Meissen (Saxony)
Gustav Nosske	29 February	1902	Halle
Adolf Ott	29 December	1904	Wardhaus
Otto Ohlendorf	4 February	1907	Hoheneggelsen (Hannover)
Waldemar von Radetzky	8 May	1910	Moscow, Russia/Riga, Latvia
Otto Rasch	7 December	1891	Friedrichsruh
Felix Rühl	12 August	1910	Neheim
Martin Sandberger	17 August	1911	Berlin
Heinz Schubert	27 August	1914	Berlin
Erwin Schulz	27 November	1900	Berlin
Willi Seibert	17 June	1908	Hannover
Franz Six	12 August	1909	Mannheim
Eugen Steimle	8 December	1909	Neubulach
Eduard Strauch	17 August	1906	Essen (Westphalia)

2b. Nationality

Another attribute common to the leadership corps of the mobile killing units was nationality. Hilberg notes that while many “newcomers” were not native born Germans – they were Austrian, Sudeten or Baltic German – most were German by birth. In the case of

⁵⁷ These data can be found in Prisoner Records, NARA RG 238 (WCR), Judge Advocate Division, War Crimes Branch, General Administration Records 1942-1957, box 13, HICOG, Prisoner folders. See also Krausnick and Wilhelm, “Kurzbiographien,” in *Die Truppe des Weltanschauungskrieges*, 639-643; and, SS Personnel Records of all defendants, in *Trial*, rolls 8-11. Compare these dates with those of the SS officer corps especially Table 3.3 and Figure 3.1 in Ziegler, *Nazi Germany's New Aristocracy*, 70-79.

the *Einsatzgruppen* leaders, only two of those indicted were born outside Germany.⁵⁸ Waldemar Klingelhöfer (Commander of *Vorkommando* Moscow) and Waldemar von Radetzky (Deputy Chief of *Sonderkommando* 4a) were born in Moscow, however Radetzky spent his formative years in Riga, Latvia (in fact he lived there until the war broke out), but both men did have German parents. As mentioned above, because of their nationality (the war had begun and the family was German) Klingelhöfer's family had been forced to leave Russia and move to Kassel at the beginning of World War I. Radetzky came to Germany in 1939 to continue work he had begun with the Race and Resettlement office in the east.⁵⁹ Von Radetzky and Klingelhöfer told the tribunal at Nuremberg they had been drafted into the mobile security and killing squads because of their knowledge of Russian; they had been hired, they argued, merely as interpreters.⁶⁰ Even though both were fluent in Russian, this is almost certainly a half-truth. Von Radetzky had become affiliated with the National Socialist movement while still a youth (he joined the Latvian National Socialist movement and much later the NSDAP) and undoubtedly subscribed to its ideals. On the other hand, Klingelhöfer had joined the party three years before the Nazis took power, and in 1929-1930 used his

⁵⁸ For instance, Ernst Kaltenbrunner was Austrian. Hilberg, *Perpetrators Victims Bystanders*, 36-38.

⁵⁹ Erkundung, Waldemar Klingelhöfer, 20.6.1950, in B305/146, Deutsche Kriegsverurteilte im Landsberg, Einzelfälle, 1949-1950, Bundesarchiv, Koblenz; Waldemar von Radetzky, 20.6.50, B305/147 in *ibid.*; and, Affidavit of Waldemar von Radetzky, (NO 4438), in *Trial*, roll 11, frame 0726.

⁶⁰ Summary of Findings of the Advisory Board on Clemency for War Criminals to John McCloy, 1 September 1950, NARA RG 466 (HICOG), Security Segregated Records of Prisons Division, box 6, Report of HICOG Advisory Board on Clemency for War Criminals, part II folder. See also Affidavit of Waldemar von Radetzky, (NO 4438), in *Trial*, roll 11, frame 0726; and, interrogation of Waldemar Radetzky (1607-B), 25.7.46, in M1019, roll 55.

language skills to translate Russian propaganda into German.⁶¹ These facts strongly suggest claims that they were not really perpetrators was, at best, a partial truth.

2c. Religious Affiliation

In 1984, historian William Sheridan Allen observed that “religion [not class] proves to be the most decisive variable as to whether Germans voted Nazi or not.”⁶² Allen was commenting on sociologist Richard Hamilton’s conclusion that generally the Nazis performed far better in Protestant areas than in Catholic, although in the elections of 1932 they did make some inroads into the Catholic community.⁶³ More recently, empirical studies have shown conclusively that confessional division was even more pronounced among leaders of the SS than among German voters overall, where as many as 80 percent of the SS leadership were Protestant by birth.⁶⁴ Did the leaders of the *Einsatzgruppen* and

⁶¹ “Curriculum Vitae of Waldemar Klingelhöfer,” in SS Personnel Record of Waldemar Klingelhöfer, (NO 4809), in *Trial*, roll 11, frame 0671.

⁶² This observation was made in a commentary on Richard Hamilton’s findings on Nazi electoral support. See William Sheridan Allen, “Farewell to Class Analysis in the Rise of Nazism: Comment,” in *Central European History* 17 (1984), 57.

⁶³ Much of the Nazi’s electoral support came from the Protestant countryside, especially in areas where the population was 25,000 or less, whereas predominantly Catholic rural areas, and poorer districts of urban centers tended to vote against the NSDAP (in the countryside they voted for the *Zentrum* party and in cities they tended to vote for the left, either for the SPD or the communists). Hamilton, *Who Voted For Hitler?*, 38-41 and 420-423. Thomas Childers’ findings coincide with Hamilton’s. See Childers, *The Nazi Voter*, 258-261.

⁶⁴ Ziegler, *Nazi Germany’s New Aristocracy*, 89 figure 3.5. As true as this might be, Ziegler notes that once these men joined the SS, most of them officially left their churches as prescribed by SS ideology. For a detailed discussion of confession and the SS see *idem*, *Nazi Germany’s New Aristocracy*, 83-92.

Kommandos, who were similar in age and nationality and part of the SS leadership corps, have similar religious backgrounds? Indeed, the vast majority were Protestant, so many in fact that Catholics were actually under-represented in the leadership cadre of the *Einsatzgruppen* and *Kommandos*, particularly when compared to Nazi electoral support, party membership and, most importantly, to the SS leadership corps. In short, Protestants were over-represented among leaders of the *Einsatzgruppen* and *Kommandos* tried at Nuremberg.⁶⁵

Of the twenty-four indicted *Einsatzgruppen* and *Kommandoführer* only one was Catholic, Heinz Jost. Except for his religious affiliation and the fact that he attained a higher position within the party than many of his fellow defendants, he differed little from his co-defendants. Jost was born July 9, 1904 in Holzhausen (near Marburg). His family was solidly middle-class and nationalistic (Jost's father Heinrich, a pharmacist by profession, was also a party member).⁶⁶ Like most of the other defendants, Jost joined the *Jungdeutsche Orden* while still in university and later became one of the leaders of the right-wing youth movement.⁶⁷ Not long after he became involved in nationalist politics, he made the leap from student activist to a career in the National Socialist movement. He joined the NSDAP in 1928 at the age of 24 and worked his way up through the ranks. Jost's training as a lawyer helped his meteoric rise. He began his career as a legally trained civil servant in Hesse,

⁶⁵ On this subject see Childers, *The Nazi Voter*, 113-115, 188-191, and 258-261; and, Hamilton, *Who Voted for Hitler?*, 371-373, 382-385 and 485.

⁶⁶ Testimony of Heinz Jost, 21 October 1947, in *Trial*, roll 2, 1129; and, Document NO 2896, in *ibid.*, roll 11, frame 0525.

⁶⁷ Wilhelm, "Die Einsatzgruppe A," 282.

where he worked with fellow lawyer Werner Best, who later “drew” him into work with the Gestapo. In 1933 he was made Police Director in Worms and a year later Best recruited him to the offices of the SD where the young lawyer was made responsible for the establishment of an office to monitor Foreign Intelligence. In May 1936, Jost was made head of Department III 2 (Foreign Intelligence Services).⁶⁸ As was typical of most of the defendants, Jost was later recruited from the SD to command an *Einsatzgruppe* (A) after the unit’s original leader, Franz Walter Stahlecker, was killed in March 1942.⁶⁹

The other twenty-three leaders of the mobile killing units came from denominational (mostly Evangelical) and nondenominational Protestant families, a far higher percentage of Protestants than in either the party membership or the German population as a whole. Even though the overwhelming majority of the leadership corps of the mobile security and killing units were Protestants, religious affiliation was really not that important an attribute, mainly because men who joined the SS were encouraged to leave the church of their birth, but remain *gottgläubig* (believers in God); most of them recorded this fact in their SS-CV’s.⁷⁰

Even after the defeat of Germany in World War II, most of the *Einsatzgruppen* leaders tried at Nuremberg remained committed to SS-ideology, even though this meant it might cost them their lives, illustrating just how compelling SS ideology was for these men.

⁶⁸ “Curriculum Vitae of Heinz Jost,” in SS Personnel Record of Heinz Jost, (NO 2896), in *Trial*, roll 11, frame 0525; and, Browder, *Hitler’s Enforcers*, 201.

⁶⁹ Headland, *Messages of Murder*, 153-155.

⁷⁰ Zeigler, 86-87. Evidence of the strength of SS ideology can be found in the case of Adolf Eichmann. Nearly two decades after the defeat of Nazism, Eichmann still proudly highlighted his allegiance to SS ideology. In his final statement, just prior to his execution in Israel, he told the assembled witnesses that “he was a *Gottgläubiger*.” See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, 1963), 252.

At trial, the presiding judge Michael Musmanno, a Roman Catholic himself, interested in the defendants' attitudes toward religion frequently questioned them about their beliefs. When asked about their religious convictions, most responded that they had no "official" church affiliation and subscribed to no theology, but they were still "believers in God."⁷¹ The fact so many willingly gave up their ties to religious institutions – even Ernst Biberstein, a Protestant Pastor by training, left the Church in 1938 – lends support to Ziegler's conclusion that the leaders of the SS were hardly "men of deep religious conviction."⁷²

⁷¹ See the testimony of Ernst Biberstein, 20 November 1947, in *Trial*, roll 4, 2741-2742 and 2700-2703; and, the testimony of Werner Braune, 1 December 1947, in *ibid.*, 3206-3216.

⁷² Zeigler, 86-87.

Figure 4.2**Religious Affiliation of the Defendants Indicted in the *Einsatzgruppen* Trial**⁷³

Name	Family Religion	Denomination	Leaving Date Of Church	Religion after Joining the SS
Biberstein, Ernst	Protestant	Evangelical	1938	Gottgläubig
Blobel, Paul	Protestant	Evangelical	1936	
Blume, Walter	Protestant	Evangelical	1936	Gottgläubig
Braune, Werner	Protestant	Evangelical		Gottgläubig
Fendler, Lothar	Protestant	Non-denominational		Gottgläubig
Graf, Matthias	Protestant	Non-denominational		
Haensch, Walter	Protestant	Non-denominational	1939	Gottgläubig
Hausmann, Emil	Unknown			
Jost, Heinz	Catholic			
Klingelhöfer, Waldemar	Protestant	Non-denominational		
Naumann, Erich	Protestant	Non-denominational	1935	Gottgläubig
Nosske	Protestant	Evangelical		
Ohlendorf, Otto	Protestant	Evangelical		
Ott, Adolf	Protestant	Evangelical	1937	Gottgläubig
Rühl, Felix	Protestant	Evangelical		Gottgläubig
Rasch, Otto	Protestant	Non-denominational	1919	Gottgläubig
Radetzky, Waldemar v.	Protestant	Evangelical	1936	Gottgläubig
Sandberger, Martin	Protestant	Evangelical	1934	Non- denominational
Schubert, Heinz	Protestant	Evangelical	1940	Gottgläubig
Schulz, Erwin	Protestant	Evangelical	1937	Gottgläubig
Seibert, Willy	Protestant	Evangelical		Gottgläubig
Six, Franz	Protestant	Non-denominational		Gottgläubig
Steimle, Eugen	Protestant	Evangelical	1938	Gottgläubig
Strauch, Eduard	Protestant	Non-denominational		Gottgläubig

2d. Education

A fourth commonality of the “newcomers” is education (see Figure 4.3). Not all were intellectuals of the same caliber and degree as Ohlendorf but a good number had graduated

⁷³ These statistics are taken from the SS Personnel Records of all of the defendants except Emil Hausmann, in *Trial*, rolls 9-11, Document NO 2901 (Biberstein), 3197 (Blobel), 3245 (Blume), 3249 (Braune), 4958 (Fendler), 4801 (Graf), 3261 (Haensch), 2896 (Jost), 4809 (Klingelhöfer), 2970 (Naumann), 3505 (Nosske), 3196 (Ohlendorf), 4747 (Ott), 4808 (Rühl), 3253 (Rasch), 4771 (Radetzky), 3246 (Sandberger), 3244 (Schubert), 4298 (Schulz), 2969 (Seibert), 4807 (Six), 3247 (Steimle), 2966 (Strauch).

from local Gymnasias and attended university for at least one semester.⁷⁴ In fact, of the twenty-four men indicted all but four (83 percent) had received their *Abitur* (the main path to university in Weimar Germany) from a classical Gymnasium. Paul Blobel, head of *Sonderkommando* 4a and Waldemar von Radetzky, his Deputy Chief, had received diplomas from technical schools, while Heinz Schubert, an officer in Ohlendorf's *Einsatzgruppe* D and Adolf Ott, Commander of *Sonderkommando* 7b, received leaving certificates from *Realschule*.⁷⁵ After graduating from secondary school, seventeen of these men (71 percent) went on to some form of post secondary education. Twelve of the seventeen (50 percent of the total) completed a university education, a significantly higher percentage than for the total SS officer corps, where only 30 percent of SS officers were graduates of university.⁷⁶ Given the high level of educational attainment of the *Einsatzgruppen* and *Kommandoführer* tried at Nuremberg it is clear they were the elite of an elite group; not only were all better

⁷⁴ Ziegler notes that while education was not a prerequisite of membership in the SS, "there is no denying that a large share of the SS leadership was rooted in the educated bourgeoisie." *Nazi Germany's New Aristocracy*, 114-115.

⁷⁵ For details of education see the SS Personnel Records of all twenty-four men, except Emil Hausmann whose SS Record was not admitted into evidence, NO 4314 (Biberstein), 3197 (Blobel), 3245 (Blume), 3505 (Nosske), 3249 (Braune), 4144 (Fendler), 4801 (Graf), 3261 (Haensch), 2896 (Jost), 4809 (Klingelhöfer), 2970 (Naumann), 3196 (Ohlendorf), 4747 (Ott), 3244 (Rühl), 3253 (Rasch), 4771 (Radetzky), 3246 (Sandberger), 2716 (Schubert), 4298 (Schulz), 2969 (Seibert), 4807 (Six), 4459 (Steimle), and 2966 (Strauch) in *Trial*, rolls 8-12.

⁷⁶ Gunnar C. Boehnert, "The Jurists in the SS-Führerkorps, 1925-1939," in Gerhard Hirschfeld and Lothar Kettenacker (eds.), *Der "Führerstaat": Mythos und Realität. Studien zur Struktur und Politik des Dritten Reiches* (Stuttgart, 1981), 362. Although a significant number of SS leaders had attended university, a much higher proportion than for the German population as a whole, many of them never completed their degrees. See Ziegler, *Nazi Germany's New Aristocracy*, 114-115. Compare Ziegler's statistics in Table 4.2, 115 to those of the defendants at Nuremberg.

educated than the German population as a whole, but significantly more so than SS officers in general, who have been classified as the elite of the Nazi Party.⁷⁷ The most common fields of study for the indictees were law, political science and economics.

Empirical studies have shown that medicine and law had been the professions of choice for an overwhelming proportion of the leaders of the SS.⁷⁸ While there were no medical doctors among the leaders of the *Einsatzgruppen* indicted in 1947 (in every case medical doctors were tried separately), there were a number of lawyers; in fact, law graduates constituted the single largest professional group.⁷⁹ Of the twenty-four men indicted, eleven had studied law at university (46 percent) and nine (38 percent) had completed degrees, having passed at least the junior "Referender" exam by 1933 which allowed them to practice their profession (Lothar Fendler did not complete his law examinations until 1942 and 1943).⁸⁰ Walter Blume, Werner Braune, Walter Haensch, Heinz Jost, Gustav Nosske, Otto Ohlendorf, Otto Rasch, Martin Sandberger, Eduard Strauch, and Lothar Fendler all had degrees in law, while Erwin Schulz had studied the subject, but did

⁷⁷ Ziegler, *Nazi Germany's New Aristocracy*, 113-115.

⁷⁸ Ziegler's findings indicate that doctors constituted the single largest group of professionals within his SS officer sample, whereas Boehnert put law graduates in first place. See Ziegler, *Nazi Germany's New Aristocracy*, 115-116 n.69; and, Boehnert, 262-263.

⁷⁹ Kater suggests that the reason such a large number of men with legal training were attracted to Nazism is because there was a glut of lawyers, especially during the depression, and the NSDAP offered them work. See Kater, *The Nazi Party*, 67-68.

⁸⁰ These findings seem to contradict those of Gunnar Boehnert who states that only seven of the *Einsatzgruppen* leaders indicted in 1947 studied law. Boehnert, "Jurists," 165 n.25.

not complete the degree requirements.⁸¹ Several members of this group had practiced law before the Nazi seizure of power in 1933, but most, because they were so young (five did not complete their law examinations until after the Nazi seizure of power by which time they had already taken jobs with the SA, SS, SD or Gestapo) had not done so, or could not find jobs during the depression, or had not had an opportunity to do so. Like many other “newcomers” who had joined the NSDAP, these men had not engaged in the practice of law.

Not only were a disproportionate number university graduates but six (one quarter) actually held doctoral degrees.⁸² *Standartenführer* Walter Blume, for example, the son of a schoolmaster, had studied law in Bonn, Jena, Münster, Berlin and Erlangen. By 1932, he had successfully completed the second law examination (Assessor), and in 1933, was awarded the Doctor of Law degree from the University of Erlangen.⁸³ His dissertation, submitted to the law school, dealt with property rights in divorce.⁸⁴ Werner Braune, arrested by British forces in Oslo, Norway on June 13, 1945 and an *Einsatzkommando* leader, also held a Doctor of Law degree.⁸⁵ Upon graduation from his local Gymnasium he studied law first in

⁸¹ Schulz studied the subject before he joined the NSDAP and Fendler did so afterwards. Bracher notes that large numbers of the party elite studied at university, but many of them never completed their education. Schulz and Fendler are classic examples. See Bracher, *The German Dictatorship*, 274.

⁸² There are no available statistics to compare this to the officer corps of the SS.

⁸³ Testimony of Walter Blume, 31 October 1947, in *Trial*, roll 3, 1754-1755. See also Eidesstattliche Erklärung, Walter Blume in *ibid.*, (NO 4145), roll 8, frame 0059.

⁸⁴ Blume’s dissertation is titled, *Prozessuale Probleme bei der Beendigung des gesetzlichen Güterstandes während eines Prozesses des Ehemanns über eingebrachtes Gut der Frau*, Benno Müller-Hill, “The Idea of the Final Solution and the Role of Experts,” 64.

⁸⁵ Case Record Werner Braune, 27 April 1948, in NARA RG 338 (Records of the United States Army in World War II from here forward simply USA-WWII), Records of

Bonn, then Munich and finally in Jena where he passed his Referender exam in 1930.

Braune received his Doctor of Juridical Science from the law school at the University of Tübingen in October 1934 upon completion and submission of a dissertation on the legal problems of bankruptcy.⁸⁶ Walter Haensch, the son of a physician held a doctoral degree in Law. Haensch, who hailed from Saxony, completed the requirements for his PhD in 1936 at the University of Leipzig. His graduate work, a study of the organization of the police under the Nazis, was much more political than the studies of Blume and Braune.⁸⁷

Martin Sandberger, one of the youngest defendants in the dock at Nuremberg, was descended from a long line of Lutheran theologians which helps explain why during clemency proceedings after the trial, Theophil Wurm, a prominent Evangelical Bishop from Württemberg took up his cause.⁸⁸ Sandberger had also chosen law as his profession, studying at the Universities of Munich, Freiburg, Bresigau, Cologne and Tübingen, he

War Criminals Prison No. 1 at Landsberg, Records Relating to Executed Prisoners January 2, 1946-June 7, 1951, box 2, Braune folder.

⁸⁶ Testimony of Werner Braune, 25 November 1947, in *Trial*, roll 4, 3006-3007 and 3010. Braune's dissertation was titled, *Gibt es ein Zwangsvollstreckung aus Verurteilungen zur Abgabe einer Willenserklärung*, Müller-Hill, "The Idea of the Final Solution and the Role of Experts," 64.

⁸⁷ Testimony of Walter Haensch, 2 December 1947, in *Trial*, roll 4, 3225-3226; Case Record of Walter Haensch, in NARA RG 466, (HICOG), Prison's Division, Administrative and Medical Records, Landsberg, box 4, Haensch folder; SS Personnel Record of Walter Haensch, (NO 3261), in *Trial*, roll 11, frame 0758; Haensch's dissertation is titled, *Weg zur einheitlichen Reichspolizei*, Müller-Hill, "The Idea of the Final Solution and the Role of Experts," 65.

⁸⁸ Letter from the Sandberger family to General Lucius Clay, June 1948 in NARA RG 153 (Records of the Judge Advocate General-Army, from here forward JAG), War Crimes Branch, Nuremberg Administrative Records 1944-1949, box 11, 86-3-5 folder; and, testimony of Martin Sandberger, 7 November 1947, in *Trial*, roll 3, 2141.

passed his Referender exam in May 1933 and received his Doctor of Law from the University of Tübingen in February 1934. His dissertation is, according to Benno Müller-Hill, a “91-page apology for the social security system in Nazi Germany.”⁸⁹

The other two *Einsatzgruppen* leaders who held doctoral degrees, Franz Six and Otto Rasch, received their degrees from the faculty of arts and science rather than law. Six received his degree from the philosophy department at Ruprecht-Karl University in Heidelberg on May 6, 1934. His dissertation, *Die politische Propaganda der NSDAP im Kampf um die Macht* was an analysis of Goebbels’s use of propaganda.⁹⁰ Finally, Otto Rasch, who Chief Prosecutor Benjamin Ferencz thought suffered from a speech impediment because he was introduced to the former leader of *Einsatzgruppe C* as “Doctor Doctor,” actually held two doctoral degrees.⁹¹ He earned both from the University of Leipzig’s Faculty of Arts and Science. His first dissertation, *Wohnungsmarkt und Wohnungspolitik in England in der Kriegs- und Nachkriegszeit* advanced an argument in favor of a free market economy, but little is known about, *Die verfassungsrechtliche Stellung des Preußischen Landtagspräsidenten*, his second doctoral study.⁹² To sum up, among the leadership corps of the *Einsatzgruppen* tried at Nuremberg in 1947 and 1948, more than four-fifths had received

⁸⁹ Sandberger’s dissertation is titled, *Die Sozialversicherung im nationalsozialistischen Staat*, Müller-Hill, “The Idea of the Final Solution and the Role of Experts,” 65.

⁹⁰ Lutz Hachmeister, *Der Gegnerforscher: Die Karriere des SS Führers Franz Alfred Six* (Munich, 1998), 68-70; Müller-Hill, “The Idea of the Final Solution and the Role of the Experts,” 65; and, Browder, *Hitler’s Enforcers*, 179. On Six’s early career at university see Hachmeister, *Der Gegnerforscher*, 38-76.

⁹¹ Interview with Benjamin Ferencz by Hilary Earl, 24 April, 1997, 31.

⁹² *Ibid.*

their *Abitur*, and 70 percent had some level of post-secondary educational attainment, not too different from that of some of the party leadership, but certainly far above that for the party membership as a whole or for the officer corps of the SS. The evidence presented strongly suggests that the leaders of the *Einsatzgruppen* and *Kommandos* constituted a highly-educated elite group within the cadres of the SS leadership, whereas it was in keeping with educational levels of the Security Police and SD.

Figure 4.3**Education of the Defendants of the Einsatzgruppen Trial⁹³**

Name	Secondary	Post Secondary	Completion Date
Ernst Biberstein	Abitur Neumünster (1917)	Theological Seminary (College)	1921
Paul Blobel	Technical School (1912)	Architecture (Technical College)	1920
Walter Blume	Abitur Dortmund (1919)	Law (University)	1929 & 1932
Werner Braune	Abitur Mehrstadt (1929)	Law (University)	1932 & 1933
Lothar Fendler	Abitur Breslau (1932)	Dentistry (University)	Not completed
		Law (University)	1942 & 1943
Matthias Graf	Abitur Kempten (1920)	None/Merchant Apprentice	N/A
Walter Haensch	Abitur Bautzen (1924)	Law (University)	1930 & 1934
Emil Hausmann	Unknown	Unknown	Unknown
Heinz Jost	Abitur Bensheim (1923)	Law (University)	1927 & 1930
W. Klingelhöfer	Abitur Kassel (1919)	Musical Academy (Professional Training)	1923
Erich Naumann	Abitur Meissen (1921)	None/Merchant Apprentice	N/A
Gustav Nosske	Abitur Halle (1922)	Law (University)	1930 & 1934
Adolf Ott	Realschule (1920)	None/Merchant Apprentice	N/A
Otto Ohlendorf	Abitur Hildesheim (1928)	Law and Economics (University)	1931
W. von Radetzky	Technical School (1929)	None/Merchant Apprentice	N/A
Otto Rasch	Abitur Kiel (1919)	Law and Economics (University)	1933
Felix Rühl	Abitur Neheim (1926)	None/Merchant Apprentice	N/A
Martin Sandberger	Abitur Stuttgart (1929)	Law (University)	1933 & 1936
Heinz Schubert	Technical School (1931)	None/Clerk Apprentice	N/A
Erwin Schulz	Abitur Berlin (1919)	Law and Political Science (University)	Not completed
Willi Seibert	Abitur Hannover (1928)	Economics (University)	1932
Franz Six	Abitur Mannheim (1930)	Political Science and History (University)	1934
Eugen Steimle	Abitur Neubulach (1929)	Education and Languages (University)	1936
Eduard Strauch	Abitur Unknown	Law (University)	1932 & 1935

⁹³ For general details of education see the SS Personnel Records of all twenty-four men, except Emil Hausmann whose SS Record was not admitted into evidence, NO 4314 (Biberstein), 3197 (Blobel), 3245 (Blume), 3505 (Nosske), 3249 (Braune), 4144 (Fendler), 4801 (Graf), 3261 (Haensch), 2896 (Jost), 4809 (Klingelhöfer), 2970 (Naumann), 3196 (Ohlendorf), 4747 (Ott), 3244 (Rühl), 3253 (Rasch), 4771 (Radetzky), 3246 (Sandberger), 2716 (Schubert), 4298 (Schulz), 2969 (Seibert), 4807 (Six), 4459 (Steimle), and 2966 (Strauch) in *Trial*, rolls 8-12. See also Eidesstattliche Erklärung of all defendants except Emil Hausmann, NO 3824 (Blobel), 4145 (Blume), 4234 (Braune), 4144 (Fendler), 4844 (Graf), 4151 (Jost), 4235 (Klingelhöfer), 4150 (Naumann), 4146 (Nosske), 2857 (Ohlendorf), 2993 (Ott), 4749 (Rasch), 4149 (Rühl), 4438 (Radetzky), 2891 (Sandberger), 3055 (Schubert), 3841 (Schulz), 2859 (Seibert), 4546 (Six), and 4459 (Steimle) in *Trial*, rolls 8-12.

2e. Vocation

Certainly an impressive number of the leadership corps of the *Einsatzgruppen* were well educated; the majority were lawyers or legally trained, but what about the remaining men, were they also professionals or were they non-professionals as were two-thirds of the officer corps of the SS?⁹⁴ Of the thirteen remaining defendants, three could be classified “professional” in that they had trained for specific vocations. The career of one of the three, Waldemar Klingelhöfer, has already been reviewed, the other two, Paul Blobel and Ernst Biberstein, have not.

The profile of Ernst Biberstein, who changed his family name from Szymanowsky in June 1941 because he feared he might be mistaken for a “Pole,” is particularly interesting.⁹⁵ Biberstein, born in 1899 in Hilchenbach, Westphalia, was slightly older than his co-defendants, and was also one of the few so-called “old National Socialists” in the dock in 1947 (he had joined the party in 1926, membership number 40, 718).⁹⁶ Like the majority of his co-defendants he graduated from a classical Gymnasium in the spring of 1917, and because he was old enough was drafted into the German army immediately upon graduation, and spent a year and a half as an infantryman.⁹⁷ When Biberstein returned from the front in

⁹⁴ Ziegler, *Nazi Germany's New Aristocracy*, 116.

⁹⁵ Interrogation of Ernst Biberstein, 29 June 1947, (NO 4997), in *Trial*, roll 12, frames 0404-0405; and, SS Personnel Record of Ernst Biberstein, NO 2901, in *ibid.*, roll 11, frame 0776.

⁹⁶ Testimony of Ernst Biberstein, 20 November 1947, in *ibid.*, roll 4, 2694; and, affidavit of Ernst Biberstein, 2 July 1947, in *ibid.*, roll 11, frame 0122.

⁹⁷ *Ibid.*, roll 4, 2690-2691; and, affidavit of Ernst Biberstein, 2 July 1947, (NO 4314), in *ibid.*, roll 11, frame 0122.

1919, he began the study of Protestant theology in Kiel. He did so, he told the court, because “it had been decided by my parents that I should become a clergyman,” not a terribly cogent or inspired reason for his choice of vocation.⁹⁸ In April 1921, he passed his first theological exam and in November 1924 he was ordained a Protestant minister in Kiel, and received his first posting a month later to Kating, Schleswig-Holstein.⁹⁹ Because Biberstein had joined the NSDAP so early, he rose through the ranks quickly when the Nazis assumed power in 1933. He remained a clergyman until 1933 when he was appointed *Kirchenprobst* (Presiding Minister of the Provincial Protestant Church) in Bad Segeberg. In 1935, eleven years after his first appointment as a Church Minister, he left his congregation to take a job as a “theological expert” in the Reich Ministry of Church Affairs, where he worked closely with the Gestapo as a liaison officer.¹⁰⁰ In 1936 he joined the SS and the SD because the “prestige” of this elite organization appealed to him and he relished the idea of becoming the only SS theologian among “all those lawyers” in the Gestapo.¹⁰¹ The final move in his career came in December 1938, when three years of personal struggle about serving the Reich in the Church Ministry, Biberstein officially left the Church, and according to his testimony

⁹⁸ Testimony of Ernst Biberstein, 20 November 1947, in *ibid.*, roll 4, 2689-2690.

⁹⁹ *Ibid.*, 2693; and, Affidavit of Ernst Biberstein, 2 July 1947 (NO 4314), in *ibid.*, roll 11, frame 0122.

¹⁰⁰ *Ibid.*; and, Trial Brief of the Prosecution against Ernst Biberstein, 15 January 1948, in John Mendelsohn (ed.), *The Holocaust. Punishing the Perpetrators of the Holocaust: The Brandt, Pohl and Ohlendorf Cases* vol. 17 (New York, 1982), document 8, 2-3.

¹⁰¹ Testimony of Ernst Biberstein, 20 November 1947, in *Trial*, roll 4, 2740-2741. This supports Boehnert’s findings that “most legal[ly] trained [SS] officers served with the Gestapo/SD, that is in the security apparatus of the Third Reich.” See Boehnert, “Jurists,” 364-365.

never once regretted his decision.¹⁰² Finally, in 1944 Biberstein joined the Gestapo and was appointed head of their Oppeln office.¹⁰³ He was transferred to Russia in the summer of 1942 to command *Einsatzkommando 6* of *Einsatzgruppe C*. He remained in that post for nearly one year.

Michael Musmanno, the presiding judge in the trial, in his usual rhetorical style, overstated the case against Biberstein and his transformation from theologian to murderer, writing in his memoir that Biberstein “went the whole way and accepted office in the dreaded Gestapo which regarded the concentration camp as an ideal substitute for the church, and *Mein Kampf* as an improvement over the Ten Commandments.”¹⁰⁴ While Musmanno’s characterization is a bit of an exaggeration, Biberstein’s transformation from Protestant minister to Gestapo chief certainly raises serious and interesting questions about the nature of his beliefs and what motivated him to take such a radical step. This matter will be developed further in the next chapter. At the very least, Biberstein’s career as a Protestant pastor made him unique among his peers in the leadership corps of the mobile security and killing units.

The profile of the notorious Paul Blobel is no less intriguing than that of Biberstein. In the first place, Blobel, born in 1894 in Potsdam, was almost a generation older than most of the other defendants. His education and experience were also quite different. Unlike the

¹⁰² Testimony of Ernst Biberstein, 20 November 1947, in *Trial*, roll 4, 2741-2742.

¹⁰³ Trial Brief of the Prosecution against Ernst Biberstein, 15 January 1948, in Mendelsohn (ed.), *The Holocaust. Punishing the Perpetrators of the Holocaust* vol. 17, document 8, 3.

¹⁰⁴ Michael Musmanno, *The Eichmann Kommandos* (London, 1961), 192-193.

majority of his co-defendants he had neither completed his *Abitur* nor attended university prior to his work for *Sonderkommando* 4a. Rather, Blobel graduated from a vocational school (*Fortbildungsschule*) and upon receiving his leaving certificate in 1912, spent the years leading up to the war as a carpenter's apprentice.¹⁰⁵ In 1914 he volunteered for the army as an engineer, and survived the four year long ordeal of trench warfare. He was discharged in 1918 with the rank of Staff Sergeant (*Vizefeldwebel*).¹⁰⁶ After the Great War, Blobel resumed training, first as a carpenter, then a building technician and finally as an architect.¹⁰⁷ He found work in his chosen profession a year after earning certification in 1924.¹⁰⁸ Blobel's dream of fashioning a career as a prominent architect "crashed" in 1929 however, when with the onset of the depression he lost his job and had to rely on unemployment relief to survive.¹⁰⁹ He floundered for two years before finally joining the party in July 1931 (membership number 344,662).¹¹⁰ He told American authorities after the

¹⁰⁵ Affidavit of Paul Blobel, 6 June 1947 (NO 3824), in *Trial*, roll 11, 0139.

¹⁰⁶ SS Personnel Record of Paul Blobel, (NO 3197), in *ibid.*, roll 11, frame 0718.

¹⁰⁷ "Trial Brief of the Prosecution Against Paul Blobel," 15 January 1948, in Mendelsohn (ed.), *The Holocaust. Punishing the Perpetrators of the Holocaust*, vol. 17 (New York, 1982), 247.

¹⁰⁸ Testimony of Paul Blobel, October 1947, in *Trial*, roll 3, 1493-1496; and, Eidesstattliche Erklärung, Paul Blobel, 6 June 1947, (NO 3824) in *ibid.*, Prosecution Exhibits, roll 8, frames 0345-0349.

¹⁰⁹ Eidesstattlich Erklärung, Paul Blobel, 6 June 1947, (NO 3824), in *ibid.*, frame 0345.

¹¹⁰ During testimony, Blobel told the Tribunal that he was at the same time a member of the SPD (German Socialist Party) and the SA, a claim that the prosecution found so outrageous that they filed a brief with the Tribunal to refute it. They argued that Blobel's statement, "irrelevant as it may be as to the questions in issue before the tribunal, deserves attention as it characterizes the defendant's boldness in perverting the truth." See "Trial Brief of the Prosecution Against Paul Blobel," 15 January 1948, in Mendelsohn (ed.), *The*

war, that at the time he felt morally isolated and economically helpless; it appears then that he may have decided to join the party more to enhance his economic well-being than because he believed National Socialist ideology.¹¹¹ Once in the party and after formally joining the elite SS organization in January 1932 (membership number 29,100), Blobel quickly forgot his earlier dreams and instead worked his way up the SS ladder, joining the SD in 1935 and eventually becoming head of *Sonderkommando* 4a in May-June 1941.¹¹²

Not all “newcomers” indicted at Nuremberg were academics, lawyers or professionals. The leadership corps of the mobile security and killing units also included several non-professionals and non-intellectuals. Among those tried in 1947 – Matthias Graf, Erich Naumann, Adolf Ott, Waldemar von Radetzky, Felix Rühl and Heinz Schubert – had held non-professional, lower middle-class jobs in civilian life, such as refrigerator merchant and office clerk. Typically, with the exception of Erich Naumann (Commander of *Einsatzgruppe* B) and Adolf Ott (Commander *Sonderkommando* 7b) who had joined the party before the Nazi breakthrough of 1929, the remainder of these men were the lowest-ranking officers in the mobile security and killing units who were tried at Nuremberg in

Holocaust. Punishing the Perpetrators of the Holocaust vol.17, 247-248. Blobel may very well have been telling the truth about his cross-over membership in a leftist party and the National Socialists.

¹¹¹ “Petition for Clemency of Paul Blobel,” 5 June 1950, in NARA RG 466 (HICOG), Prisons Division, Petitions at Nuremberg, box 3, Blobel-Biberstein, Blobel folder. See also testimony of Paul Blobel, 28 October 1947, in *Trial*, roll 3, 1493-1498.

¹¹² Eidesstattliche Erklärung, Paul Blobel 15 June 1946, in NARA RG 338 (USA-WWII), Records of War Criminals Prison No. 1, Landsberg, Records Relating to Executed Prisoners January 2, 1946-June 7, 1951, box 1 AB-BR, Paul Blobel folder; and, testimony of Paul Blobel, 28 October 1941, in *Trial*, roll 3, 1500.

1947.¹¹³

2f. Party Membership and Affiliations

Given the similarities in age, experience, religion and education of so many of the future leaders of the *Einsatzgruppen* it is only natural that many joined the party at approximately the same time (see Figure 4.4). Sixteen of the twenty-four defendants, two thirds, joined the NSDAP before the Nazis assumed power on January 30, 1933, the remaining eight, one third, joined the party later. Of those who joined before 1933, only four (17 percent) did so before the onset of the world depression in 1929: Ernst Biberstein (Commander of *Einsatzkommando* 6), Heinz Jost (Commander of *Einsatzgruppe* A), Adolf Ott (Commander of *Sonderkommando* 7b), and Otto Ohlendorf (Commander of *Einsatzgruppe* D).¹¹⁴ These men averaged just under 26 years of age when they joined the party, five years less than the age of the average new member who was 31 years old.¹¹⁵ The

¹¹³ It is not surprising to find that under-qualified individuals, such as Naumann and Ott, held high-ranking positions. They had achieved these positions because they were long-standing party members. This conforms with the findings of Michael Kater, who concludes, “as a rule, the lower an individual’s NSDAP membership number was, the greater was his peer-group standing in the party and particularly in the leadership cadre. And since party rank correlated, positively with Old Fighter status, the highest party cadres enjoyed not only the greatest authority but also the greatest measure of corporate stability and, in the last analysis, the most stable sense of collective identity.” See Kater, *The Nazi Party*, 230 and “The New Nazi Rulers: Who Were They?,” 42-43. It was also not unusual for highly educated individuals to receive important positions which was the case with Ohlendorf and Six in the RSHA. Robert Koehl, *The Black Corps: The Structure and Power Struggles of the Nazi SS* (Madison, WI, 1983), 127.

¹¹⁴ “Wanted Reports, OMGUS form 249,” 28 May 1947, in NARA RG 238 (WCR), OCCWC 1933-1949, Executive Counsel, Evidence Division, Office File 1945-1947, Entry 180 Nm70 box 1, Spare Copies of Wanted Reports folder.

¹¹⁵ Ziegler, *Nazi Germany’s New Aristocracy*, 60.

oldest, Otto Rasch, was 40 when he joined the party, while Otto Ohlendorf and Adolf Ott (both old fighters) were still teenagers of 18 when they committed to National Socialism. Overall, statistically future *Einsatzgruppen* leaders joined the party much earlier in their lives than did the membership as a whole. Twenty of the twenty-four men indicted at Nuremberg, five-sixths, were thirty or younger when they joined the party, whereas only 50 percent of those who joined between 1922 and 1932 were under 30.¹¹⁶ What induced these young men to do so at such a young age?

¹¹⁶ For detailed statistics of age and membership see Madden, "Generational Aspects of German National Socialism, 1919-1933," 453-454 Table 1 and Figure 1.

Figure 4.4**Party Membership of Defendants Indicted at Nuremberg¹¹⁷**

Name	Membership Date		Membership Number	Age
Biberstein, Ernst	Unknown	1926	40,718	27
Blobel, Paul	1 December	1931	344,662	37
Blume, Walter	1 May	1933	3,282,505	27
Braune, Werner	1 July	1931	581,277	22
Fendler, Lothar	1 May	1937	5,216,392	24
Graf, Matthias	1 May	1933	3,423,504	30
Haensch, Walter	7 June	1931	537,265	27
Hausmann, Emil	Unknown	1932	Unknown	22
Jost, Heinz	1 February	1928	75,946	24
Klingelhöfer, Waldemar	1 June	1930	258,951	30
Naumann, Erich	1 November	1929	170,257	24
Nosske, Gustav	1 May	1933	2,784,256	31
Ohlendorf, Otto	28 May	1925	6,531	18
Ott, Adolf	October	1922	2,433	18
Rasch, Otto	1 October	1931	620,976	40
Radetzky, Waldemar von	1 December	1940	8,047,747	30
Rühl, Felix	9 November	1930	408,468	20
Sandberger, Martin	1 December	1931	774,980	20
Schubert, Heinz	1 May	1934	3,374,350	20
Schulz, Erwin	1 May	1933	2,902,239	33
Seibert, Willy	1 May	1933	1,886,112	25
Six, Franz	1 March	1930	245,670	21
Steimle, Eugen	1 May	1932	1,075,555	23
Strauch, Eduard	1 August	1931	623,392	25

Any attempt to determine precisely why these young men joined the NSDAP is at

¹¹⁷ For these statistics see Affidavit of Ernst Biberstein, 2 July 1947 (NO 4314); SS Personnel Record of Paul Blobel (NO 3197); SS Personnel Record of Walter Blume (NO 3245); SS Personnel Record of Werner Braune (NO 3249); Affidavit of Lothar Fendler, 27 June 1947 (NO 4144); SS Personnel Record of Matthias Graf, (NO 4801); SS Personnel Record of Walter Haensch (NO 3261); SS Personnel Record of Heinz Jost, (NO 2896); Affidavit of Waldemar Klingelhöfer, 2 July 1947 (NO 4235); SS Personnel Record of Erich Naumann, (NO 2970); Affidavit of Gustav Nosske, 29 July 1947; SS Personnel Record of Otto Ohlendorf, (NO 3196); Curriculum Vitae of Adolf Ott, (NO 4747); SS Personnel Record of Otto Rasch, (NO 3253); SS Personnel Record of Waldemar von Radetzky, (NO 4771); SS Personnel Record of Felix Rühl, (NO 4808); SS Personnel Record of Martin Sandberger, (NO 3246); Affidavit of Heinz Schubert, (NO 2716); Affidavit of Erwin Schulz, (NO 3841); SS Personnel Record of Willy Seibert, (2969); SS Personnel Record of Franz Six, (NO 4807); Affidavit of Eugen Steimle, 24 July 1947, (NO 4459); SS Personnel Record of Eduard Strauch, (NO 2966), in *Trial*, rolls 8-12. It is important to note that joining date and party membership numbers do not necessarily correspond. According to Michael Kater, numbers were not given out sequentially. This would account for discrepancies between Felix Rühl's number and that of Paul Blobel's whose number is lower even though he joined the party later.

best a difficult and hazardous task. However, some insights can be gleaned and tentative conclusions drawn by reviewing the defendants' own testimony at Nuremberg in 1947 and 1948 and from information included in their SS records and affidavits. The two most important reasons for joining the party cited by the defendants during trial, were opportunity and ideology. Opportunists such as Paul Blobel had already chosen a career (in Blobel's case architecture), but because of the depression found themselves unemployed in the early 1930s. They joined the party because it provided men like them an opportunity to do what they felt was "meaningful work." Because Blobel had such difficulty finding a job in economically depressed Germany, he eventually gave up looking for work as an architect and joined the party as an alternative career choice. Blobel was not alone, many of the future leaders of the *Einsatzgruppen*, notably the youngest ones, had difficulty finding jobs in the years immediately before the Nazi seizure of power in 1933. As one scholar has aptly noted, "the young very often are the last hired and the first fired," making them particularly defenseless during times of economic hardship and high unemployment.¹¹⁸ The NSDAP – in particular its para-military wings – offered these young men a chance to work when otherwise they would have been unemployed, and at a time when they were most vulnerable and most likely to be taken in by the entreaties and promises of the Nazis.

After 1933 opportunism also played a role in decisions to join the party. Many highly trained professional men, especially newly accredited lawyers, found it difficult to practice their profession without becoming members of party associations. Gustav Nosske, leader of

¹¹⁸ Madden, "Generational Aspects of German National Socialism," 455.

Einsatzkommando 12, was such an opportunist. Nosske was born in 1902 in Halle.¹¹⁹ His parents were civil servants, one a teacher the other a jurist, both self-declared nationalists.¹²⁰ After receiving his *Abitur*, Nosske went to university in 1925 at Halle to study political science and law.¹²¹ He passed his junior law examination (Referender) in 1933, just as the Nazis were taking power in Germany. During his university days he had attended several Nazi Party rallies, he told the court, but apparently they had held no particular allure for him.¹²² Nor did propaganda seem to influence his thinking as he found its contents to be far-fetched.¹²³ Rather, his main reason for joining the party in May 1933, was to advance his professional standing. According to his testimony at Nuremberg he was in a financially precarious position in 1933 and wanted to practice law, but in order to do so he had to join the party, which he did he confessed, “without any particular reluctance [or] enthusiasm.”¹²⁴ Once in the party, Nosske was offered a job with the Ministry of the Interior in Aachen. He worked there for a year at the end of which time he wrote his final Assessor examination and then took a job with the Gestapo which, he told the court at Nuremberg, he had no

¹¹⁹ Eidesstattliche Erklärung, Gustav Nosske, 29 Juni 1947, in M1019, roll 50.

¹²⁰ Petition for Clemency of Gustav Nosske, 26 June 1950, in NARA RG 238 (WCR), Advisory Board on Clemency for War Criminals, HICOG, Correspondence 1947-1950, box 10 (case 9 E212), Nosske folder.

¹²¹ Gustav Nosske, B305/147, Deutsche Kriegsverurteilte im Landsberg, Einzelfälle 1949-1950, Bundesarchiv, Koblenz.

¹²² Testimony of Gustav Nosske, 4 December 1947, in *Trial*, roll 4, 3428.

¹²³ Gustav Adolf Nosske, Statement to Advisory Board on Clemency for War Criminals, 26 June 1950, in NARA RG 238 (WCR), HICOG, Correspondence 1947-1950, box 10 (case E212), Nosske folder.

¹²⁴ Testimony of Gustav Nosske, 4 December 1947, in *Trial*, roll 4, 3425-3429.

“misgivings” about doing.¹²⁵ Walter Blume told a remarkably similar story, stating he joined the party on the advice of a fellow lawyer who assured him that by doing so he would promote his career.¹²⁶

The second most common reason cited by the defendants for joining the party was ideological. Men such as Adolf Ott and Otto Ohlendorf felt a strong affinity for the tenets of Nazism. Ott joined the Nazi movement much earlier than Ohlendorf, virtually at its inception, in 1922. At trial and under intense questioning from the presiding judge, Ott confessed his ideological affinities for Nazism, stating that, “I always was a National Socialist at heart.”¹²⁷ Not surprisingly Ott came from Bavaria, the birth place of National Socialism. When he joined the party in 1922 he was working as a merchant apprentice, he was immediately attracted to the nascent Nazi movement and volunteered for service in the SA. He remained in the SA until 1927 when he and a number of “comrades” resigned because of so-called irregularities within the organization and the resulting “discord” they caused. Between 1927 and 1931, although not active in party politics – he did not belong to any other political movement – he remained, as he said, “faithful to Adolf Hitler’s ideals” the entire time.¹²⁸ Ott was such a committed Nazi that at his trial in 1947-1948 he could not bring himself to lie about his feelings for Hitler or National Socialism, even knowing that it

¹²⁵ *Ibid.*, 3429-3431; and, Eidesstaattliche Erklärung, Gustav Nosske, 29 Juni 1947, in M1019, roll 50.

¹²⁶ Testimony of Walter Blume, 31 October 1947, in *ibid.*, roll 3, 1757-1758.

¹²⁷ Testimony of Adolf Ott, 11 December 1947, in *ibid.*, roll 5, 3797.

¹²⁸ “Curriculum Vitae of Adolf Ott,” in SS Personnel Record of Adolf Ott, (NO 4747), in *ibid.*, roll 11, frames 0677-0678.

might cost him his life. When asked by the judge how he felt about the outcome of the war, he told the court he would have been happier if Germany had won as he was convinced Hitler had wanted only what was “best for his Fatherland.”¹²⁹ Perhaps not all the defendants who rationalized their membership in the party on ideological grounds were as zealous, single-minded and forthright as Ott, but still they joined the party because they believed the promises of the Nazis and supported their political objectives.

Once in the party, most “newcomers” were soon integrated into the Nazi system of power and volunteered for service in party organizations such as the SA, SS, SD, Gestapo, and other police organizations (see Figure 4.5). All the defendants joined the SD with the exception of Waldemar von Radetzky who never officially did so.¹³⁰ Some worked very hard to advance their careers, others were somewhat less ambitious. There were those who gave up their civilian careers entirely to promote Nazi ideology, while others seemed content to perform their part-time SS duties routinely as part of everyday life, displaying no particular zeal for the party, its ideology or their own career advancement. Hilberg identifies these different behavioral patterns, loosely arranging them into three sub-categories of his “newcomer” classification: careerists, party stalwarts, and ideological zealots.

3. Careerists

Careerists were those who had had secure professions in pre-Nazi times, but who, because of all-consuming ambition and circumstances, chose Nazism as a way to advance

¹²⁹ Testimony of Adolf Ott, 11 December 1947, in *ibid.*, roll 5, 3798.

¹³⁰ *Ibid.*

their careers believing they could rise very quickly to positions of authority within the party.¹³¹ Not many of the men tried in 1947 and 1948 could be considered careerists in Hilberg's sense, although Ernst Biberstein, who, as we have seen, eventually abandoned his career as a Protestant pastor to work for party organizations pretty much fills the bill.

4. Party Stalwarts

The second group were the "party stalwarts," men who had frequently made false starts in life, had failed in careers or had not yet decided on a career path. Some, like Ohlendorf and Six, were intellectuals, others such as Matthias Graf, were not. However different, most of these men found a home in the SS and SD. Quite a number of the leaders of the *Einsatzgruppen* indicted in 1947 fall into this category. Once firmly ensconced in the SS or SD they rose quickly to positions of power, particularly if they had joined the party early enough, as had Ohlendorf and Jost. By 1933, many of these men had lost jobs and were at loose ends with no alternative employment prospects and as a result drifted toward Nazism as a career choice. Paul Blobel, for example, an unemployed architect, joined the party because he felt his life in depression era Germany was hopeless. Others had good prospects in life, but actually chose police work instead out of conviction and ideology.¹³² Lothar Fendler, Deputy Chief of *Sonderkommando* 4b is a typical example of a pure "party stalwart" type.

Fendler was one of the youngest defendants at Nuremberg, born August 13, 1913 in

¹³¹ Hilberg, *Perpetrators Victims Bystanders*, 39.

¹³² *Ibid*, 39 and 40-45.

Breslau. He had planned to become a dentist like his father and to this end, completed his *Abitur* in 1932, following which he trained in dentistry for three semesters, even writing his preliminary examination, but because of financial difficulties brought on by his father's illness he had to withdraw from the program. Fendler had to help support his family, but had no way to earn a living, and when a friend offered him work in the SS he accepted immediately and joined the organization in 1933. When his father died in 1936 and he was left to support his mother, his financial situation became even more precarious. On the suggestion of a friend he joined the SD, worked his way up the hierarchy moving from switch-board operator and file clerk, to the offices of Counter-Intelligence and finally into the main office. In 1937, he finally joined the party and was promoted almost immediately.¹³³ Fendler's new position within the SD afforded him the opportunity to complete his studies. In 1940 he began work on a law degree which he hoped would land him a job as a government councillor. In 1943 he completed the final Assessor exam, and the future looked bright.¹³⁴ This account of Fendler's career is fairly typical of a large number of the defendants at Nuremberg. Finding themselves unemployed and desperate and just as they were at their wits end they discovered in the party the promise of security and a career.

¹³³ Letter from Lothar Fendler to the Clemency Board for the Nuremberg War Crimes Cases, 26 June 1950, in NARA RG 466 (HICOG), Prisons Division, Petitions for Clemency of War Criminals, box 7 Felmy-Flick, Fendler folder; testimony of Lothar Fendler, 13 December 1947, in *Trial*, roll 5, 3986-3988; SS Personnel Record of Lothar Fendler, (NO 4958), in *ibid.*, roll 11, frame 0763; and, Affidavit of Lothar Fendler, 27 June 1947, in *ibid.*, 0761.

¹³⁴ Letter from Lothar Fendler to the Clemency Board for the Nuremberg War Crimes Cases, *ibid.*

5. Ideological Zealots

The final group identified by Hilberg were the professionals who had established careers prior to the Nazi seizure of power, but who gave up their careers to further the National Socialist cause. These men, Hilberg states, were the “party zealots,” Eduard Strauch (leader of *Einsatzkommando 2*) and Werner Braune (leader of *Einsatzkommando 11b*) fall into this sub-category.¹³⁵ Braune was born April 11, 1909 in Mehrstadt, Thuringa to a middle-class family. His father was a businessman and his mother a housewife. Braune had been pretty much apolitical during his school years, but was acutely aware of the “weakness” of Germany after World War I. He had prepared for a career in law, completing his studies in October 1934, when he received his doctorate in juridical science from the University of Tübingen.¹³⁶ He was nearly twenty when he was introduced to National Socialist ideology, and this altered his life permanently.

Braune’s introduction to National Socialism occurred in 1930, while studying at the University of Jena, when he accompanied some of his fellow students to a party rally where he heard Hitler speak. So impressed was he that he immediately became actively involved in politics. He joined the NSDAP in May 1931 and, in the opinion of one witness, did so because of his “misplaced idealism,” believing unquestioningly in the ideology of the party, particularly its anti-communist stance.¹³⁷ In November, six months later, he joined the SA,

¹³⁵ *Ibid.*, 39 and 45-47.

¹³⁶ Testimony of Werner Braune, 25 November 1947, in *Trial*, roll 4, 3006-3007 and 3010.

¹³⁷ Dr. V.A. Günther, Braune’s spiritual advisor while imprisoned in Oslo, Norway as well as his advocate between 1948 and 1951, also told American General Lucius Clay that Braune was a “man of sterling qualities, whose personality and character are high above the

distributed leaflets, attended rallies, and advertised and campaigned door to door for the NSDAP at election time.¹³⁸

After receiving his doctoral degree, Braune decided to abandon his civilian career in law and in November 1934, joined both the SD and the SS, quite a bit earlier than many of his colleagues.¹³⁹ While in the SD, Braune worked under Dr. Reinhard Höhn (as had Ohlendorf) in the offices of domestic affairs, in the realm of law and administration.¹⁴⁰ Two years later, in 1936, he joined the ranks of the Gestapo where he worked until 1941. Between 1935 and 1943, Braune received no fewer than five SS promotions – from *Untersturmführer* (Second Lieutenant) to *Obersturmbannführer* (Lieutenant-Colonel) – because, as his SS file notes, he had a “strong character and a firmly established ideology,” the perfect candidate for promotion.¹⁴¹ Braune’s extensive work with the SD prompted his transfer to Russia on October 18, 1941 to head *Einsatzkommando* 11b of Ohlendorf’s

average.” Letter to General Lucius Clay from Dr. V.A. Günther, Clergyman, 9 May 1949, in NARA RG 238 (WCR), Advisory Board on Clemency for War Criminals, HICOG 1947-1950, Correspondence, box 9 (Case 9 E212), Werner Braune folder.

¹³⁸ Testimony of Werner Braune, 25 November 1947, in *Trial*, roll 4, 3008-3009.

¹³⁹ SS Personnel Record of Werner Braune, (NO 3249), in *Trial*, roll 111, frames 0860-0863.

¹⁴⁰ Testimony of Werner Braune, 25 November 1947, in *Trial*, roll 4, 3011 and 3018. See also “Summary of Findings of Advisory Board on Clemency” to John McCloy, 1 September 1950, in NARA RG 466 (HICOG), Security Segregated Records of the Prisons Division, box 6, Report of the HICOG Advisory Board on Clemency for War Criminals, part II folder; and, “Information Sheets,” Peck Panel, July 1950, in NARA RG 338 (USA-WWII), JAD, War Crimes Branch, Records Relating to Positional Activities, box 1, Active Impac folder.

¹⁴¹ SS Personnel Record of Werner Braune, (NO 3249), in *Trial*, roll 11, frames 0862-0863.

Einsatzgruppe D.¹⁴² As part of Ohlendorf's group D, Braune's unit operated in the Crimea until the end of July 1942, when he was released from his duties, returned to Germany and resumed his work in the Gestapo offices at Halle.¹⁴³ A year later, because of "his industry and comradely behavior," and no doubt because of his earlier work as a student, he was made head of the *Deutscher Akademischer Austauschdienst* (German Academic Exchange Service) in Berlin and in December 1944, was appointed Commander of the Security Police and SD in Oslo, Norway where he stayed until the end of the war when he was arrested by Allied forces.¹⁴⁴

Eduard Strauch, another one of the *Einsatzkommando* leaders tried at Nuremberg and one of the most brutal and sadistic of all the defendants, was a lawyer who had also studied theology at university.¹⁴⁵ Even though he was well-educated and a lawyer by training, he does not fit entirely into the second Hilberg subcategory of "party stalwart." Rather, he was without doubt a true party zealot who abandoned his career in law to work for the party and advance its ideals, no matter the cost. Not once during the eight month trial did Strauch express even an iota of remorse for his actions; in fact, until the very end he maintained that

¹⁴² Testimony of Werner Braune, 25 November 1947, in *Trial*, roll 4, 3031-3033.

¹⁴³ Closing Brief for the United States of America Against Werner Braune, January 1948, in Mendelsohn (ed.), *The Holocaust. Punishing the Perpetrators of the Holocaust, The Ohlendorf and Von Weizsäcker Cases*, vol. 18 (New York, 1982), 4-5.

¹⁴⁴ Affidavit of Werner Braune, 8 July 1947, in *Trial*, roll 11, frame 0850; SS Personnel Record of Werner Braune, (NO 3249), in *ibid.*, frame 0863; Testimony of Werner Braune, 1 December 1947, in *ibid.*, roll 4, 3125-3127; and, Case Record of Werner Braune, 27 April 1948, NARA RG 466 (HICOG), Prisons Division, Petitions for Clemency, box 3 Blobel-Buberman, Blume folder.

¹⁴⁵ Wilhelm, "Die Einsatzgruppe A," 282.

National Socialist racial policy “had” to be carried out.

Strauch was born August 17, 1906 in Essen. After World War I his parents (his father was a plant foreman) were hit particularly hard by the inflation that swept Germany and for years he and his brother had to work to help supplement the family income so they could attend school.¹⁴⁶ After graduating from the local Gymnasium in 1926, Strauch became politicized, joining the *Jungdeutsche Orden* to fight communists. He remained a member of the youth organization for two years, until the end of 1927.¹⁴⁷ During this period he also attended the University of Erlangen where he studied theology and law and received his degree from the faculty of Jurisprudence in 1930.¹⁴⁸ In 1931, Strauch joined the NSDAP and SA.¹⁴⁹ He told the court that he had done so because he wanted to protect Germany from collapse; joining the Nazis and the SA, he believed, was one practical way to prevent this from happening and, in his opinion, the Nazis were a “respectable” party. In December 1931, he left the SA and joined the SS because he felt it was a “better organization.”¹⁵⁰ During the Nazi struggle for power Strauch was also in training for the law profession. In 1932 he passed his junior law examination (Referender) and in 1934 he was appointed *Abschnittsführer* (Section Leader) of the SD in Dortmund; later he was transferred to

¹⁴⁶ Testimony of Eduard Strauch, 13 January 1948, in *Trial*, roll 6, 4908-4909.

¹⁴⁷ *Ibid.*, 4913-4914.

¹⁴⁸ Interrogation Nr. 1643-A, Vernehmung des Eduard Strauch, 4.8.1947, in M1019, roll 72.

¹⁴⁹ SS Personnel Record of Eduard Strauch, (NO 2966), in *Trial*, roll 11, frame 0538.

¹⁵⁰ Testimony of Eduard Strauch, 13 January 1948, in *ibid.*, roll 6, 4914-4915.

Königsberg in the same position.¹⁵¹ In 1935 he passed his senior (Assessor) examination, but remained at work in the Dortmund SD office. When war came in 1939 Strauch performed front-line duty in an anti-aircraft unit in Poland from September 1 to December 15. When he returned to Germany in December 1939 he was appointed *Regierungsrat* (Government Councillor) and later was made *Oberregierungsrat* (High Government Councillor) for the Regional State Police in Königsberg.¹⁵²

On November 4, 1941, Strauch received a teletype message from Heydrich reassigning him to Riga, Latvia where he was put in charge of *Einsatzkommando 2* of *Einsatzgruppe A* under (Franz) Walter Stahlecker and later Heinz Jost.¹⁵³ In February 1942 he was made commander of the Security Police and the SD in Minsk, White Ruthenia (White Russia), and it was there he made a name for himself. Strauch's SS record notes that his work in White Ruthenia was "outstanding," primarily because he was able to overcome "the most varied obstacles" and carry out the difficult task of "security."¹⁵⁴ This commendation came after fifty-five thousand Jews were murdered in ten weeks in white Russia; all the murders were carried out under Strauch's command.¹⁵⁵ Strauch remained in

¹⁵¹ *Ibid.*, 4921.

¹⁵² SS Personnel Record of Eduard Strauch, (NO 2966), in *ibid.*, roll 11, frames 0538-0539.

¹⁵³ *Ibid.*; and, testimony of Eduard Strauch, 13 January 1948, in *ibid.*, roll 6, 4930-4934.

¹⁵⁴ *Ibid.*

¹⁵⁵ Letter to the Generalkommissar Reichskommissar for the Ostland from Generalkommissar for White Ruthenia, Gauleiter Wilhelm Kube, 10 August 1942, (PS 3428), roll 11, frames 0550-0551.

Minsk until 1943 when he was made an intelligence officer and transferred to Belgium as a leader of the Higher SS and Police.¹⁵⁶ Strauch passed his senior law exam in 1935, which in the normal course of events would secure him a position in government, but by 1935, he had already fashioned a career within the SD, and in any event, he was so zealous in his new career that he gave up any idea of putting his legal training to use.

¹⁵⁶ Interrogation of Eduard Strauch, (1643-A), 4.8.1947, in M1019, roll 72.

Figure 4.5**Dates of Membership in SA, SS, SD and Gestapo of the Defendants¹⁵⁷**

Name	Joined SA	Joined SS	SS #	Joined SD	Joined Gestapo
Biberstein, Ernst	Not a Member	09.1936	272, 962	1940	1935
Blobel, Paul	05.1931-01.1932	12.1931	29, 100	1935	
Blume, Walter	06.1933-11.1936	04.1935	267, 224	1935	1934
Braune, Werner	11.1931-11.1934	11.1934	107, 364	1934	1936
Fendler, Lothar	Not a Member	04.1933	272, 603	1939	
Graf, Matthias	Not a Member	03.1933	77, 431	1940	
Haensch, Walter	11.1933-09.1935	08.1935	272, 573	1935	
Hausmann, Emil	Unknown	Unknown	Unknown	Unknown	
Jost, Heinz	03.1929-07.1934	07.1934	36, 243	1934	1933
Klingelhöfer, Waldemar	Not a Member	02.1933	52, 744	1934	
Naumann, Erich	02.1930-06.1935	07.1935	107, 496	1935	
Nosske, Gustav	06.1933-06.1936	07.1936	290, 213	1936	1935
Ohlendorf, Otto	1925-1927	1926/27	880	1936	
Ott, Adolf	1922-1927	09.1931	13, 294	1934	
Rasch, Otto	Not a Member	03.1933	107, 100	1933	1938
Radetzky, Waldemar von	Not a Member	12.1939	351, 254	Not a Member	
Rühl, Felix	11.1930-09.1932	10.1932	51, 305	1935	1933
Sandberger, Martin	12.1931-04.1935	05.1935	272, 495	1935-1936	
Schubert, Heinz	Hitler Youth 1932-34	11.1934	107, 326	1934	
Schulz, Erwin	Not a Member	04.1935	107, 484	1935	1933
Seibert, Willy	Not a Member	11.1935	272, 375	1936	
Six, Franz	11.1932-04.1935	04.1935	107, 480	1935	
Steimle, Eugen	10.1932-04.1936	04.1936	272, 575	1936	
Strauch, Eduard	08.1931-12.1931	12.1931	19, 312	1934	

¹⁵⁷ These statistics come from SS personnel records, affidavits and interrogations of the defendants. See NO 4997 (Biberstein); NO 4314 (Biberstein); NO 3197 (Blobel); NO 3245 (Blume); NO 4145 (Blume); NO 3249 (Braune); NO 4234 (Braune); NO 4958 (Fendler); NO 4801 (Graf); NO 4855 (Graf); NO 3261 (Haensch); NO 2896 (Jost); NO 4235 (Klingelhöfer); NO 4809 (Klingelhöfer); NO 5846 (Klingelhöfer); NO 2970 (Naumann); NO 4150 (Naumann); NO 3505 (Nosske); NO 2857 (Ohlendorf); NO 4747 (Ott); NO 4749 (Rasch); NO 4771 (Radetzky); NO 4771 (Radetzky); NO 4808 (Rühl); NO 2891 (Sandberger); NO 3244 (Schubert); NO 3055 (Schubert); NO 4298 (Schulz); NO 2858 (Seibert); NO 4807 (Six); NO 3247 (Steimle); NO 2966 (Strauch) in *Trial*, rolls 8-12. And also Gesuch Felix Rühl, 12.06.1950 in NARA RG 238 (WCR), Advisory Board on Clemency for War Criminals, (HICOG 1947-1950), box 11 case 9 E212, Felix Rühl folder; Interrogation of Willi Seibert, 11.03.1947, in M1019, roll 68; and Browder, *Hitler's Enforcers*, 46, 179, 201 and 222. Some of the SS membership numbers do not seem to make sense. For example compare Naumann's statistics with those of Haensch. Both joined the SS at about the same time, yet Naumann's SS membership number is significantly smaller than Haensch's. Kater explains that SS numbers were not necessarily sequential, but that low numbers corresponded with status. Correspondence with Michael Kater, 18 October 2000.

6. Conclusion

What conclusions can be drawn about the social composition of the leadership corps of the *Einsatzgruppen* and *Kommandos* tried at Nuremberg in 1947 and 1948? What immediately strikes the reader is that the defendants, on trial for War Crimes and Crimes against Humanity, were a remarkably homogeneous group, much more so than the officer corps of the SS, a considerably more heterogeneous group than once thought, and far more diverse than the party membership as a whole. The defining features of the *Einsatzgruppen* leaders were their youth, shared experiences in their formative years, high level of educational attainment, shared confession, and the remarkable similarity of their career paths.

Of the twenty-four men indicted, twenty-two were born between 1899 and 1914. Because of their similar age cohort, most spent their formative years in Germany during a time of extreme uncertainty and social upheaval, and this had a significant impact on their lives. More than 90 percent of them grew up in the period immediately preceding the First World War, those who were old enough served their country on the battle field, the remainder stayed on the home front. Given their similar backgrounds (most came from solidly middle-class families) and age it was inevitable they would share common experiences. Undoubtedly the war, but especially the period immediately following it with its accompanying economic chaos and national humiliation, helped politicize these youth. As we have seen, a good number were active politically very early in life; many had joined right-wing, nationalist organizations after the First World War to combat left-wing forces they believed were endangering Germany's future. All referred to their anti-communism and

nationalism as important political beliefs they had acquired before they joined the NSDAP. Undoubtedly the war and their youthful political activities primed them for their future roles within National Socialism especially since it was frequently cited as an important reason why so many joined the party. The vast majority of defendants at Nuremberg joined the party when they were young men, some even teenagers. Many were also university students when they first became involved in the political activities of the right. This is a significant factor, given that the vast majority of *Einsatzgruppen* leaders had a classic Weimar education, indicating that perhaps their “route to crime” was through their educational experiences. These facts seem to suggest that World War I had a lasting and important impact on the political beliefs and behaviour of these German youth; in short, it made them highly susceptible to the entreaties of the Nazis even though some later admitted they joined the party for essentially opportunistic reasons.

Similar factors and considerations led these twenty-four young German men to Nazism and, once in the party, all joined party organizations such as the SA, SS, and SD. Only Waldemar von Radetzky never joined the SD. Once in the party it was not long before these highly educated and ambitious young men made names for themselves in the SS and SD. Perhaps because of their high educational achievements these men were selected for leadership roles in the mobile security and killing units in the east. Importantly, none refused the assignment, although some initially had reservations about the nature of their tasks. Despite their commonalities, the leadership of the *Einsatzgruppen* consisted of an array of personality types, from intellectuals and non-intellectuals, professionals and non-

professionals, careerists, party stalwarts and zealots.¹⁵⁸ The fact that so many of the leaders of the *Einsatzgruppen* and *Kommandos* were well-educated elites is significant to our understanding of how genocide was perpetrated, as Benno Müller-Hill has recently highlighted.¹⁵⁹ While there is no evidence that any of the *Einsatzgruppen* or *Kommandoführer* actually executed people personally, they did give the orders to do so; they held power over life and death in Russia. Thus, they were not only high-ranking SS leaders, but more importantly in some ways, they were the leadership, the elite of the new German society. Specifically, ten of the twenty-four men indicted in 1947 had studied law at some point in their careers, and six of them held doctoral degrees. Ohlendorf never completed his doctoral dissertation, but can be considered an intellectual nonetheless, since he held research and teaching posts in economics at universities and institutes. One defendant, Franz Six, was even a university professor and another, Ernst Biberstein, was a Protestant pastor. These men held more than one kind of authority in a society that used new party offices as well as traditional positions of authority to perpetrate genocide. As Müller-Hill aptly concludes, when a university professor, an economist, a priest, a doctor, or a lawyer order executions, “they cannot be wrong,” even more so in a society that was loathe to question authority, but instead embrace it.¹⁶⁰

¹⁵⁸ Wilhelm, “Die Einsatzgruppe A,” 281-282, Aronson, *Reinhard Heydrich und die Frühgeschichte von Gestapo und SD*, 199-217 and Heinz Höhne, *The Order of the Death's Head: The Story of Hitler's SS*, trans. Richard Barry (New York, 1969), 221-254.

¹⁵⁹ For an analysis of the relationship between German elites and the perpetration of genocide see Müller-Hill, in *ibid.*, “The Idea of the Final Solution and the Role of the Experts,” 62-70.

¹⁶⁰ *Ibid.*, 67-68.

In the end, what is significant and distinctive about the leaders of the *Einsatzgruppen* and *Kommandos* is that they were a highly educated, elite group given the mammoth task of leading the ideological war in the east. Perhaps it is not a coincidence that such a large percentage of the leaders of the mobile killing units were exceptional, after all, they were charged with one of the most important tasks of National Socialism – the war against the Jews. In any society, Nazi or otherwise, people with proven track records are frequently selected to carry out important tasks. In the case of the *Einsatzgruppen* leaders almost certainly they would have attained important jobs even if the Nazis had never seized power. In the next chapter we will see how these men reacted to the charges leveled against them, and we will review the justifications they put forward for their actions in Russia.

Chapter 5

The Defendants Part II: Motivations for Murder and Compartment at Nuremberg

Despite all of the efforts of the prosecution, everybody could see that this man was not a “monster.”

Hannah Arendt¹

Anyone who judges history solely by the standards of morality, even the history of the Third Reich, who categorises the leaders of National Socialism...simply as an “incarnation of evil” is putting barriers in the way of his/her access to an understanding of their career and of historical events as a whole.

Ron Smelser and Rainer Zitelmann²

1. Introduction

When I began researching this topic, I asked Benjamin Ferencz, chief prosecutor at the *Einsatzgruppen* trial, if he might consent to an interview. I asked him specifically if we could talk about Otto Ohlendorf. His immediate reaction was to ask if I thought Ohlendorf had “horns and a tail;” simply put, did I think Ohlendorf was evil incarnate? Ferencz’s question highlights a common tendency by scholars and the public: to characterize the perpetrators of genocide, particularly Nazis, as “beasts,” “devils,” “monsters” or simply

¹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, 1963), 54.

² Ronald Smelser and Rainer Zitelmann, “Introduction,” in *idem* (eds.), *The Nazi Elite*, trans. Mary Fischer (New York, 1993), 5.

“madmen.”³ Certainly it is tempting, even fitting to do so when describing the unspeakable acts of men such as Ohlendorf. But these simplistic descriptions offer little in the way of explanation for the behaviour of the perpetrators of genocide.⁴ Indeed, in the end we are left

³ Since the publication of Hannah Arendt’s controversial, *Eichmann in Jerusalem*, many scholars have tried to explain the mentality of the perpetrators and the nature of the Nazi personality. Raul Hilberg’s *Destruction of the European Jews*, 3 vols. (New York, 1985) is in line with Arendt’s analysis of the Nazi bureaucrat although he views the perpetrators as part of a larger whole. Acting alone, these functionaries could never have organized the comprehensive “machinery of destruction” that they were able to create acting together. Interpretations opposed to the Arendtian notion of the “ordinariness” of the perpetrator, have come from psychiatrists, psychologists and social-psychologists. These scholars argue that the Nazi perpetrators were far from ordinary; in fact, most conformed to a definite “personality type.” For instance, Gustav M Gilbert, one of the court appointed prison psychologists at the IMT proceedings, examined the defendants at length and concluded that the SS organization took normal individuals and turned them into “murderous robots.” He sees the SS men as machines, devoid of conscience, programmed to be obedient. He states that for them, “there was no conflict of conscience because conscience had been obliterated.” See *idem*, “The Mentality of SS Murderous Robots,” *Yad Vashem Studies on the European Jewish Catastrophe and Resistance* 5 (1963), 35-41. Alongside the view of the SS perpetrators as automatons, is the social-psychological view that like their leader, the SS perpetrators possessed “authoritarian personalities.” The nature of this personality type is twofold in that the individual has both the desire to hold power over others as well as to submit to a higher authority. The classic statement on the authoritarian personality is Erich Fromm’s *Escape from Freedom* (New York, 1965). On the issue of obedience to authority see Stanley Milgram, *Obedience to Authority* (New York, 1974) and Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York, 1992), who combines sociological, psychological and historical methodology to analyze the situational factors which conditioned the behavior of the men of Police Battalion 101.

⁴ Social scientists once believed that the Nazi perpetrators displayed abnormal personalities. Proponents of this view analyzed psychological data collected while the Nazi leaders were waiting trial at Nuremberg and concluded they were pathological, unhealthy individuals. Of course under the circumstance of incarceration and fighting for one’s life, it should not be surprising that these men displayed signs of stress and abnormal behaviour. See Florence R. Miale and Michael Selzer, *The Nuremberg Mind: The Psychology of the Nazi Leaders* (New York, 1975). Recently, certain social scientists have challenged this orthodoxy, arguing that there was no such thing as an homogenous Nazi personality type. A group of American psychologists and psychiatrists reexamined the existing evidence on Nazi war criminals and reviewed the hypotheses put forward by some of their colleagues. In *The*

wondering what induced these men to participate willingly in the most brutal mass murder of the twentieth century. Were they predators, racists, psychopaths, or otherwise morally and intellectually depraved? A satisfying answer to this question is almost certainly unattainable, human nature being so inscrutable.⁵ Still, as the recent debate on “ordinary men” versus “ordinary Germans” has shown, it is important for us to attempt to understand what motivated these men to act as they did.

Unable actually to question the defendants renders the task of determining what motivated them difficult, doubly so because their testimony was given in the context of a criminal trial, where few admitted outright that they had committed shocking crimes; instead, they tried to exculpate themselves, often by lying during testimony or, at the very

Quest for the Nazi Personality: A Psychological Investigation of Nazi War Criminals (Hillsdale, NJ; 1995) Eric A. Zillmer, Molly Harrower, Barry A. Ritzler and Robert P. Archer, provide a fascinating and compelling account of the history of the search for the Nazi personality in which they caution, “to bluntly suggest that all Nazis had a homogeneous personality and to reduce the behavior of many individuals to global and common descriptors using one or two adjectives, is an obvious oversimplification, one that has, however, been engaged in repeatedly in describing the developments of the Third Reich,” Zillmer et al., *The Quest for the Nazi Personality*, 14. James E. Waller convincingly argues that it is social and situational forces that fundamentally alter the personalities of ordinary men turning them into murderers, *idem*, “Perpetrators of the Holocaust: Divided and Unitary Self Conceptions of Evildoing,” *Holocaust and Genocide Studies* 1:10 (Spring, 1996), 11-33. Finally, for a solid attempt to sort through the extensive body of literature on the subject of the SS personality see George Browder, *Hitler's Enforcers: The Gestapo and the SS Security Service in the Nazi Revolution* (New York, 1996), chapter 7.

⁵ Recently social-scientist Henri Zukier has argued persuasively that sociological, psychological and historical methodology must be combined if perpetrator mentality and motivation are to be understood. See Zukier, “The ‘Mindless Years’?: A Reconsideration of the Psychological Dimensions of the Holocaust, 1938-1945,” *Holocaust and Genocide Studies* 2:11 (Fall, 1997), 190-212.

least, by omitting evidence or testimony that could be used against them.⁶ Moreover, when I asked Ferencz why the prosecution did not avail itself of the opportunity to discover what motivated these men, he pointed out that in 1947, “I didn’t want to know these defendants as human beings. I didn’t want to know their personal family history, their foibles, their ideology. I had evidence that they were mass murderers, they were going to answer for that.”⁷ In essence, the Nuremberg prosecutors did not want to know what motivated the actions of the *Einsatzgruppen* personnel; to do so would have humanized them. Rather, they were interested in proving only that they had committed atrocious crimes. As a consequence, discovering what motivated these men is a formidable, but not impossible task. If the prosecution was not interested in motivation, the presiding judge in the trial, Michael Musmanno, certainly was. Indeed, during the testimony of each defendant, Musmanno asked probing questions about their motives, their religious beliefs, and he especially challenged their legal arguments. The answers to these questions, in many cases, reveal much about the defendants, their personalities and motivation. This, along with an examination of

⁶ Recently, Hilberg has stressed the importance of post-war testimony to our understanding and reconstruction of events between 1933 and 1945, but he issues a caveat for historians, “the use of recalled events for the reconstruction of a history is important but limited. The accounts may be unreliable. Some of the witnesses, particularly if they were actual or potential defendants, withheld or plainly lied about the facts....we are all aware of these pitfalls. But what if we are interested in the witnesses themselves, their own experiences, what is it that they remember, and the structure or style of thier testimony? If we are going to study the lives or personalities of all these contemporaries, our problems will be different, but not easier. First and foremost, we must recognize that notwithstanding the existence of tens of thousands of statements, not everyone has spoken.” See Hilberg, “Sources and Their Usage,” in Michael Berenbaum and Abraham J. Peck (eds.), *The Holocaust and History: The Known, the Unknown, the Disputed, and the Reexamined* (Bloomington, 1998), 6-7.

⁷ Interview with Benjamin Ferencz by Hilary Earl, 24 May 1997, 2.

interrogation records and affidavits, can provide much pertinent information about the motivation and behaviour of the leaders of the *Einsatzgruppen*. Even defense testimony is helpful. A careful analysis of this information should enable us to construct reasonably complete profiles of the personalities of the men in the dock, opening promising avenues of investigation into why these twenty-two men, most of them the elite of German society, acted as they did, and how they were able to reconcile their roles as mass murderers with any moral inhibitions they may have harboured.⁸

The uniform and stereotypical portrayal of SS personnel as monstrous ideological warriors was first challenged in the 1960s with the publication of Hannah Arendt's controversial, *Eichmann in Jerusalem*.⁹ After observing Adolf Eichmann's trial in Israel, Arendt put forward the idea of the "banal desk murderer." She depicted Eichmann as a relatively ambitious man who openly admitted he was neither a hater of Jews nor a first-hand killer, yet whose conscientious bureaucratic activities helped facilitate the murder of hundreds of thousands of innocent people. Because of these personality traits, Arendt concluded that Eichmann was neither "mad" nor a "monster," but rather an ordinary albeit

⁸ Numerous social, psychological or psycho-historical theories explain the "Nazi personality," but the approach here is to employ the methodology of the historian to construct profiles of the defendants. For a guide to the literature on psycho-historical approaches to the study of personality see Terry G. Mensch, "Psychohistory of the Third Reich: A Library Pathfinder and Topical Bibliography of English Language Publications," *Journal of Psychohistory* 7 (1979-1980), 331-354; George M. Kren, "Psychohistory, Psychobiography and the Holocaust," *Psychohistory Review* 2 (1982), 68-87; and, Michael Selzer, "Psychohistorical Approaches to the Study of Nazism," *Journal of Psychohistory*, 4 (Fall 1976), 215-224.

⁹ Early challenges to the notion of a monolithic SS monster include Gerald Reitlinger, *The SS: Alibi of a Nation, 1922-1945* (London, 1957) and Robert Koehl, *The Black Corps: The Structure and Power Struggles of the Nazi SS* (Madison, WI; 1983).

ambitious man, who committed extraordinary acts of evil.¹⁰ Arendt's thesis, of course, is inapplicable in the context of shootings on the eastern front where the men of the *Einsatzgruppen* directed the killings, in fact it was not until the publication of Browning's *Ordinary Men*, which presented a more nuanced picture than earlier depictions of these types of "first hand" killers, that our understanding of the motivations and behaviour of the men in the field was challenged. Now, however, based on the work of Klaus-Michael Mallmann, Ulrich Herbert and others, we can see that a more complicated depiction of the SS men in the field is emerging.¹¹ This picture, unfortunately, does not allow for easy characterizations. Instead, it yields a myriad of personality types and variable factors that more accurately recreate the complex human reality of events on the eastern front and the issues that motivated them.

It is in this spirit, and in an effort to answer the question of motivation that the following analysis of the comments and statements of the *Einsatzgruppe* and *Kommando* leaders indicted at Nuremberg in 1947, as well as other documentary evidence, is offered. These sources, when considered with information about their backgrounds, can cast some light on the character traits, personalities, and even motives of the *Einsatzgruppen* leaders

¹⁰ Arendt, *Eichmann in Jerusalem*, 247-248.

¹¹ For example see Gerhard Paul and Klaus-Michael Mallmann (eds.), *Die Gestapo im Zweiten Weltkrieg: 'Heimfront' und besetztes Europa* (Darmstadt, 2000); *idem* (eds.), *Die Gestapo: Mythos und Realität* (Darmstadt, 1995); Ulrich Herbert, *Best: biographische studien uber Radikalismus* (Bonn, 1996) and *idem* (ed.), *National Socialist Extermination Policies: Contemporary German Perspectives and Controversies* (New York, 2000); Michael Mann, "Were the Perpetrators of Genocide 'Ordinary Men' or 'Real Nazis'? Results from Fifteen Hundred Biographies," *Holocaust and Genocide Studies* 3:14 (Winter 2000), 331-366; and Isabel Heinemann, "'Another Type of Perpetrator': The SS Racial Experts and Forced Population Movements in the Occupied Regions," *Holocaust and Genocide Studies* 3:12 (Winter, 2001), 387-411.

who directed the mass murder of Jews on the eastern front. This, coupled with an examination of their behaviour at Nuremberg, particularly how they responded to the charge of mass murder, should further help us to understand what motivated these men to kill when ordered to do so.¹² Thus, this chapter explores the comportment, personality and motives of the *Einsatzgruppen* defendants indicted at Nuremberg in 1947.

As noted in Chapter 3, Otto Ohlendorf, leader of *Einsatzgruppe D*, oversaw the murder of some 90,000 innocent people, but was at the same time a loving husband and father, and an intellectual with a mind and will of his own. In essence, Ohlendorf, a very complex personality, was motivated to direct these mass murders, as will be shown, largely because of personal conviction. However, in his testimony at Nuremberg he justified his actions in the Soviet Union using the legal argument military necessity, because of a putative threat from such “undesirables” as Jews and Gypsies, including children who, according to Nazi thinking, posed a military threat to the Third Reich.¹³ The truth is, that Ohlendorf, a man of conviction, would not have carried out murder so willingly unless he

¹² Some time ago, Alfred Streim, the former director of the *Zentrale Stelle der Landesjustizverwaltungen* in Ludwigsburg, called for a more complete history of the *Einsatzgruppen*, their role in the destruction of European Jewry, and their behaviour during postwar judicial proceedings. In particular, he noted, a study of this kind should “describe...the pitiful way the perpetrators tried to justify and excuse their crimes.” See Streim, “The Tasks of the *Einsatzgruppen*,” in *Simon Wiesenthal Center Annual 4* (New York, 1987), 320-321.

¹³ On the issue of SS officers’ defense strategies at Nuremberg, in particular the response of obedience to orders, see former Nuremberg prosecutor Robert Kempner, *SS im Kreuzverhör* (Munich, 1964). Helge Grabitz, *NS-Prozesse. Psychogramme der Beteiligten* (Heidelberg, 1985) provides profiles of the Nuremberg defendants and their cases. An excellent and comprehensive analysis of Ohlendorf’s defense strategy is Robert Wolfe, “Putative Threat to National Security as a Nuremberg Defense for Genocide,” *Annals of the American Academy of Political and Social Science* 450 (1980), 257-285.

believed it was right. In other words, he chose to murder for ideological reasons, not in the sense that he was “brainwashed,” but rather because he implicitly believed in the Nazi racial program.¹⁴ There were twenty-one additional defendants in the dock at Nuremberg. Were they cut from the same cloth as Ohlendorf? If not, why and how did they act differently, what motivated them and how did they respond to the charge of mass murder?¹⁵

The names of the other twenty-one defendants, save for a handful, are rarely heard today, even amongst students of modern German history. Few have likely heard of Matthias Graf, a former officer of *Einsatzkommando* 6, or Lothar Fendler the former Deputy Chief of *Sonderkommando* 4b, or even Waldemar Klingelhöfer a part-time opera singer and former commander of *Vorkommando* Moscow. These functionaries do not rank very high on the scale of Nazi perpetrators, certainly not on the same plane as Hitler, Himmler, Göring, Heydrich or even Ernst Kaltenbrunner. Yet, they were responsible, in large part, for implementing policies that resulted in the murder of nearly one million Jewish men, women and children in Soviet Russia between June 1941 and July 1943, approximately one-sixth of all the Jews who perished as a result of Nazi racial policy.¹⁶ Were these men also fathers and

¹⁴ For an interesting discussion of this issue see Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany* (The Hague, 1996), 4-12.

¹⁵ Twenty-four men were actually indicted, but Emil Hausmann committed suicide before the trial began and Otto Rasch was severed from the case due to illness. Their histories will not be addressed here.

¹⁶ The exact number of Jews killed by units of the *Einsatzgruppen* has not been determined conclusively. Estimates range from as few as half a million to as many as two million. The most reliable figures still come from Hilberg, who estimates that of 5.1 million Jews murdered 1.3 million were shot by the *Kommandos* of the *Einsatzgruppen* and other police units (both German and auxiliary) and the German army, approximately twenty-five percent of the total number of Jews killed. Of the 1.3 million Jews killed by these units, the

husbands, party stalwarts, young intellectuals, and ideologues like Ohlendorf, or were they simply cold-hearted murderers, even sadists? “Ordinary men,” such as those described by Christopher Browning in his landmark book on Reserve Police Battalion 101, the *Einsatzgruppen* leaders certainly were not. But neither were they all eager executioners as Daniel Goldhagen contends in his controversial analysis of perpetrator motives.¹⁷

Einsatzgruppen are responsible for approximately half. The figure of 750,000 is accepted here. For a breakdown of these figures see Hilberg, *The Destruction of the European Jews*, 1215-1219.

¹⁷ Two broad classifications of killers are identified by historians in the historiography on the motivation of the Nazi perpetrators: desk and first hand murderers. In his study of the origins and perpetration of the Nazi Holocaust, Raul Hilberg explains that the mass murder of Europe’s Jews was made possible by fastidious administrators. “Desk murderers” tended to be removed from the killing process and their actions were governed by the bureaucratic process. While their behavior was unquestionably amoral, many did not comprehend the ramifications of their actions since they were either unable to grasp the scope of Hitler’s “Final Solution” or because they simply chose to rationalize their behavior and ignore the consequences. First hand murderers, such as members of the *Wehrmacht*, the *Einsatzgruppen* and the *Ordnungspolizei* knew exactly what their task was. Their job was to kill the enemies of the Reich. Their motives, however, differed. According to Browning, three classifications of murderer can be identified among men of the *Ordnungspolizei* – particularly the men of Reserve Police Battalion 101 – who tended to be older than the leaders of the *Einsatzgruppen* and far less Nazified. Among these ordinary men were those who refused to kill, those who enjoyed killing and those who killed for a variety of reasons such as coercion, obedience to orders and group pressure. Their actions, argues Browning, were conditioned by the situations in which they found themselves. On the other hand, Daniel Goldhagen argues that the perpetrators were far from ordinary men turned killers, rather they were ordinary Germans who were so indoctrinated, “brainwashed,” with an eliminationist type of antisemitism that when the time came they were willing, even eager to assume the role of murders. For accounts of the behavior and motivation of the perpetrators of the Holocaust as described above see Hilberg, *Destruction*, 1985; Browning, *Ordinary Men*, 1992; and Daniel Goldhagen, *Hitler’s Willing Executioners* (New York, 1996). For further contributions on the “ordinary men versus ordinary Germans” debate see Julius H. Schoeps (ed.), *Ein Volk von Mördern? Die Dokumentation zur Goldhagen-Kontroverse um die Rolle der Deutschen im Holocaust* (Hamburg, 1996) and Robert R. Shandley (ed.), *Unwilling Germans? The Goldhagen Debate* (Minneapolis, 1998). On the subject of perpetrator motivation see also Yaacov Lozowick, “Rollbahn Mord: The Early Activities of Einsatzgruppe C,” *Holocaust and Genocide Studies* 2:2 (1987), 221-241; Ruth Bettina Birn, “Guilty Conscience, Antisemitism and the Personal Development of some SS Leaders,”

For convenience, the chapter is organized into three sections. Each section represents one of three types of Nuremberg defendants: ideological soldiers, deniers, and conflicted murderers. The first group, ideological soldiers, comprises a majority of the defendants, men like Ohlendorf, who were able to overcome any psychological problems that might surface as they performed their duties. Apparently these men had no regrets about the role they played in implementing Nazi racial policy; they were able to reconcile the role of murderer and a sense of right and wrong. None showed any outward sign of mental turmoil, either during the actual killing process, or later at trial. This group of defendants tended to justify their actions during the war on ideological grounds, military necessity, or some other equally egregious rationalization. During trial they demonstrated absolutely no remorse, instead they spent all their time in court trying to prove that what they had done was not only justifiable, but necessary, even “right.”

Remembering for the Future: Working Papers and Addenda Volume 2. The Impact of the Holocaust on the Contemporary World (New York, 1989), 2083-2092; and Edward B. Westermann, “Ordinary Men or Ideological Soldiers? Police Battalion 310 in Russia, 1942,” *German Studies Review* 1:21 (February, 1998), 41-68 who all emphasize the role of ideology in motivating the perpetrators. On the issue of the motivation of members of the *Wehrmacht* and the role of ideology see Omer Bartov, “Soldiers, Nazis and War in the Third Reich,” in Christian Leitz (ed.), *The Third Reich: The Essential Readings* (Oxford, 1999), 131-150; Bartov, “Daily Life and Motivation in War: The *Wehrmacht* in the Soviet Union,” *Journal of Strategic Studies* 12 (1989), 200-214; Christian Streit, *Keine Kameraden: Die Wehrmacht und die sowjetischen Kriegsgefangenen 1941-1945* (Bonn, 1997) and Alfred Streim, *Die Behandlung sowjetischer Kriegsgefangener im ‘Fall Barbarossa.’ Ein Dokumentation* (Heidelberg, 1981) who look at the treatment of Soviet prisoners of war by the *Wehrmacht*; and especially the mammoth and important collection of essays on the activities, crimes, motivation and postwar trials of *Wehrmacht* officials, Hannes Heer and Klaus Naumann (eds.), *Vernichtungskrieg. Verbrechen der Wehrmacht 1941-1944* (Hamburg, 1995). For a first hand look at how the perpetrators viewed their crimes see the chilling collection of documents compiled by Ernst Klee, Willi Dreßen and Volker Riess in ‘*Schöne Zeiten.*’ *Judenmord aus der Sicht der Täter und Gaffer* (Frankfurt, 1988) trans. Deborah Burnstone, ‘*The Good Old Days.*’ *The Holocaust as Seen by Its Perpetrators and Bystanders* (New York, 1991).

The second group, deniers, comprises individuals whose defense strategy at Nuremberg was to admit to nothing at all.¹⁸ Even under intense questioning by the prosecution and in the face of mountains of evidence, they never once conceded that prosecution charges had merit; instead, they maintained throughout the trial that they had done no wrong. Some went so far as to claim they knew nothing of the murder of the Jews until they were told about it by interrogators just before the trials began in 1947.¹⁹ Because these individuals were unwilling to admit to any crimes whatsoever, it is difficult to determine motives for their behaviour. They nonetheless merit some discussion, especially since their defense strategy was successful in the sense that none of these “deniers” were sentenced to death by the tribunal, whose presiding judge insisted on a defendant’s admission to at least one execution before sentencing him to death.

The third and final group, conflicted murderers, are the most complex of all the Nuremberg defendants. Conflicted murderers comprise two types of men: those who showed remorse for their actions after the fact, that is at trial, and those who exhibited signs of moral conflict during the murder process. First are those such as Waldemar Klingelhöfer and Erwin Schulz who, at least in 1947, appeared to be somewhat contrite about the part they played in

¹⁸ Adalbert Rückerl, the former head of the Central Office for the Investigation of Nazi Crimes in Ludwigsburg, has noted that defendants were far more likely to confess to their crimes immediately following the war than they were years later when they were prosecuted by German authorities. See Rückerl, *Die Strafverfolgung von NS-Verbrechen 1945-1978* (Heidelberg, 1979), 85-86.

¹⁹ Hermann Göring was the first of a long line of Nuremberg defendants to claim he knew nothing of the mass murder of the Jews. See testimony of Hermann Göring, in International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol. 9 (Nuremberg, 1947), 628.

Soviet Russia during the war. The second type includes men like Paul Blobel who in outward appearance at least seemed to have had no qualms about carrying out the murderous tasks they were asked to perform, but who in reality harboured serious misgivings and struggled personally to reconcile duty and morality. In practice individuals such as Blobel carried out the racial policy of the Third Reich but often turned to alcohol or some other form of escape to dull the negative feelings that developed. As Hilberg notes, these conflicted types struggled with “psychological difficulties” continuously. Frequently their emotions “were held in check but never” completely suppressed.²⁰ The men who showed remorse after the fact as well as those who demonstrated signs of mental instability or who succumbed to alcoholism comprise the final group of defendants.

Explaining differences in defendant responses to mass murder helps us better understand what motivated the behavior of these perpetrators and also, as we shall see later, helped guide the presiding judge, Michael Musmanno, in determining the nature of the sentences. Their defense strategies and testimony also tell us something about each defendant’s personality, and why and how these well educated men, were willing to carry-out the genocidal orders of their superiors. Below are two figures which provide the reader with a reference guide to the groups and sub-groups that each defendant commanded.

²⁰ Raul Hilberg, “The Nature of the Process,” 16.

Figure 5.1**Dates of Service on the Eastern Front of the *Einsatzgruppen* Commanders and the *Sub-Kommandos* of each Group ²¹**

Group	Commander(s)	Date of Command	Sub-Kommandos of Einsatzgruppe
EGN A	(Franz) Walter Stahlecker	22 June/41-23 March/42	Sonderkommando 1a
	Heinz Jost	29 March/42-2 September/42	Sonderkommando 1b
	Humbert Achamer-Pifrader	10 September/42-4 September/43	Einsatzkommando 2
	Friedrich Panzinger	5 September/43-May/44	Einsatzkommando 3
	Wilhelm Fuchs	May 1944-October 1944	
EGN B	Arthur Nebe	June 1941-November 1941	Sonderkommando 7a
	Erich Naumann	November 1941-March 1943	Sonderkommando 7b
	Horst Böhme	12 March/43-28 August/43	Einsatzkommando 8
	Erich Ehrlinger	28 August 1943-1944	Einsatzkommando 9
	Heinz Seetzen	28 April 1944-August 1944	Vorkommando Moscow
EGN C	Emil Otto Rasch	June 1941-October 1941	Sonderkommando 4a
	Max Thomas	October 1941-28 August 1943	Sonderkommando 4b
	Horst Böhme	6 September 1943-March 1944	Einsatzkommando 5
	Lothar Fendler (Deputy Chief)	May 1941-2 October 1941 March 1942-July 1942	Einsatzkommando 6
	Matthias Graf (Deputy Chief)	June 1941-October 1942	
EGN D	Otto Ohlendorf	June 1941-June 1942	Sonderkommando 10a
	Walter Bierkamp	30 June 1942-15 June 1943	Sonderkommando 10b
	Willy Seibert (Deputy Chief)	15 May 1941-15 August 1942	Einsatzkommando 11a Einsatzkommando 11b Einsatzkommando 12

²¹ These figures come from a variety of sources including, Helmut Krausnick and Hans-Heinrich Wilhelm, *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942* (Stuttgart, 1981), 644-646, 290-291; and, French L. MacLean, *The Field Men. The SS Officers Who Led the Einsatzkommandos – the Nazi Mobile Killing Units* (Atglen, PA; 1999), 36-130.

Figure 5.2**Sub-Kommandos, their Leaders and Dates of Service in the Soviet Union**²²

Parent Group	Kommando	Commander(s)	Date of Command
EGN A	Sonderkommando 1a	Martin Sandberger	May/June 1941-Autumn 1943
	Sonderkommando 1b	Bernhard Baatz	1 August 1943-15 October 1944
		Eduard Strauch	3 December 1941-June 1943
	Einsatzkommando 2	Erich Ehrlinger	May 1941-December 1941
		Erich Isselhorst	30 June 1943-October 1943
		Eduard Strauch	4 November 1941- 2 December 1941
		Rudolf Batz	1 June 1941-4 November 1941
		Rudolf Lange	3 December 1941-1944
	Einsatzkommando 3	Manfred Pechau	October 1942-unknown
		Reinhard Breder	26 March 1941-July 1943
Hans Joachim Böhme		11 May 1944-1 January 1945	
Karl Jäger		June 1941-June 1943	
		Wilhelm Fuchs	15 September 1943-6 May 1944
EGN B	Sonderkommando 7a	Erich Naumann	November 1941-February/March 1943
	Sonderkommando 7b	Walter Blume	May/June 1941-September 1941
		Eugene Steimle	September 1941-15 January 1941
	Einsatzkommando 8	Adolf Ott	15 February 1942- January 1943
		Gunther Rausch	June 1941-January 1943
		Karl Rabe	January 1943-October 1944
	Einsatzkommando 9	Otto Bradfisch	June 1941-April 1942
Vorkommando Moscow	Heinz Richter	1 April 1942-September 1942	
	Oswald Schäfer	October 1941-February 1942	
	Alfred Six	May/June 1941-20 August 1941	
	Waldemar Klingelhöfer	August 1941-December 1941	
EGN C	Sonderkommando 4a	Paul Blobel	May/June 1941-January 1942
	Sonderkommando 4b	Eugene Steimle	August 1942-January 1943
		Erwin Weinmann	January 1942-July 1942
		Theodor Christensen	January 1943-unknown
		Walter Haensch	March 1942-July 1942
		Günther Hermann	Unknown-September 1941
	Einsatzkommando 5	Fritz Braune	1 October 1941-21 March 1942
		August Meier	July 1942-November 1942
		Friedrich Suhr	November 1942-August 1943
		Waldemar Krause	August 1943-January 1944
Erwin Schulz		May/June 1941-end September 1941	
Einsatzkommando 6	August Meier	September 1941-January 1942	
	Ernst Biberstein	September 1942-May 1943	
	Erhard Kröger	June 1941-November 1941	
	Robert Mohr	November 1941-September 1942	
	Friedrich Suhr	August 1943-November 1943	
EGN D	Sonderkommando 10a	Heinz Seetzen	Unknown-July 1942
	Sonderkommando 10b	Kurt Christmann	1 August 1942-July 1943
		Felix Rühl (Officer)	May/June 1941-1 October 1941
	Einsatzkommando 11	Alois Persterer	May 1941-February 1943
	Einsatzkommando 11a	Gerhard Best	Unknown
	Einsatzkommando 11b	Paul Zapp	June 1941-July 1942
	Einsatzkommando 12	Werner Braune	October 1941-September 1942
Bruno Müller		February 1942-October 1942	
	Gustav Nosske	May/June 1941-February 1942	

²² *Ibid.*

2. Ideological Soldiers

With few exceptions the defendants at Nuremberg refused to acknowledge they had done anything wrong. To do so would have been to betray Hitler, the Party, the SS, Germany and most especially themselves. Instead, five basic arguments were introduced in court by the defendants to explain their criminal behavior.²³ First, there were those such as Otto Ohlendorf and Erich Naumann who maintained that they murdered because they were ordered to do so – the so-called superior orders defense.²⁴ This was one of the most common defense strategies and it was closely linked and frequently cited in connection with the second argument, military necessity or, as it was also referred to, putative justification. Those who claimed necessity or putative justification said they were legally justified in their actions because they were carried out in presumed self-defense on behalf of a third party, the German Reich, during a state of emergency. This is to say, murder was presumed to be necessary. Some defendants maintained that if all Jews were not killed, they would likely retaliate. Even children had to be “liquidated” because one day they would grow-up to be adults and seek revenge against those who had killed their parents.

²³ Jürgen Matthäus, “What About the ‘Ordinary Men’?: The German Order Police and the Holocaust in the Occupied Soviet Union,” *Holocaust and Genocide Studies* 2:10 (Fall, 1996), 134-150, attempts to explain how the men of the *Ordnungspolizei* became murderers. He believes antisemitism is not enough to explain the behavior of these men, rather circumstances as well as the tradition of obedience to orders must also be taken into consideration. He looks at special groups of order police operating in White Russia between 1941 and 1943 and concludes that situational as well as long-term factors (ideology) played a role in transforming supposedly ordinary men into evildoers, and like the defendants at Nuremberg these men used rationalizations to justify their behavior after the fact.

²⁴ On the defense of superior orders by Ohlendorf, Naumann, Ott, Blume and Braune see Benjamin B. Ferencz, Brief for the Prosecution: Analysis of the Defenses Presented on Behalf of the Accused, February 1948, in *Trial*, roll 29, frames 0012-0018.

The third argument put forward by the defendants were a different type of necessity – personal. That is, if they did not carry out their orders they themselves would be punished, perhaps even executed.²⁵ The fourth defense argument was that their actions were in no way criminal, rather they were legal. This defense was based on the idea that the victims were guilty of such crimes as sabotage, partisanship, theft, or conspiracy. Many of the defendants who took this line claimed that those who were murdered had been found guilty of crimes, most commonly the victims were cited as partisans or thieves. Some defendants even maintained they had held their own investigations into the criminality of their victims, those found innocent were allowed to live and those found guilty through investigation were executed. The fifth and final argument put forward at trial was futility and powerlessness, by which the defendants meant that although they did not want to kill civilians, they did so anyway. To say no to their orders was futile since they were otherwise powerless to stop it. Several defendants who used this defense told the court “if I did not do it, someone else would.” They claimed they felt helpless to halt the process and therefore joined in it.²⁶

²⁵ Ruckerl notes that necessity was also a common defense in subsequent German trials. The Zentrale Stelle which investigated the many claims of necessity found it could not substantiate even one case where refusing to carry out an order resulted in bodily harm to an individual. See *idem*, *Die Strafverfolgung von NS-Verbrechen*, 81. Grabitz also notes that even with the assistance of pro-Nazi organizations such as *Stille Hilfe*, no defendant before a German court has succeeded in providing evidence that would support their claim of “imminent bodily harm.” See *idem*, *NS-Prozesse. Psychogramme der Beteiligten*, 135-144 and Grabitz, “Problems of Nazi Trials in the Federal Republic of Germany,” *Holocaust and Genocide Studies* 2:3 (Spring, 1988), 202-222. Also on this subject see David H. Kitterman, “Those who Said ‘No!’: Germans who Refused to Execute Civilians During World War II,” *German Studies Review* 2 (May 1988), 241-254.

²⁶ Prosecution Notes, undated, in United States Holocaust Memorial Museum, RG 12.000 Benjamin B. Ferencz Collection 1919-1994, Drawer 24, War Crimes Trials, box 2, Nuremberg Supplementary Materials; and, “Einsatzgruppen Case IX,” in National Archives Records and Administration Record Group 260 (Records of the United States Occupation

That so many different explanations were put forward to explain the behavior of these perpetrators is significant, and indicates that there was less coordination in defense strategies than some historians have maintained. On the surface, legal strategies differed from defendant to defendant, but those who argued these five defenses all proved to be hiding their true motives for their actions. Through intense cross-examination by Musmanno, these defendants proved to be motivated by a similar National Socialist ideology – especially the National Socialist view of Bolshevism and the reason for eradicating it. Hence, on the surface it may have appeared that these defendants were soldiers carrying out their duty, the reality was that they were motivated to kill because they were “ideological soldiers.”

Otto Ohlendorf was the quintessential ideological soldier, yet in many ways his case was unique. He was the first of the *Einsatzgruppen* leaders to take the stand at Nuremberg in 1947 and was the only defendant to take full responsibility for his actions as well as those of his men. One scholar, noting Ohlendorf’s so-called honesty, has concluded that he displayed “a certain warped devotion to principle,” that he was an idealist – a character trait that did not escape the attention of both the presiding judge and the chief prosecutor.²⁷ As we saw in

Headquarters, World War II, from here forward simply USOH), OMGUS, Records of Functional Offices and Divisions, OCCWC, publication of Proceedings of US Military Tribunals at Nuremberg 1948-1949, box 104, Publication Information folder (from here forward, NARA RG, file, box, folder).

²⁷ On Ohlendorf’s defense strategy see Wolfe, “Putative Threat to National Security as a Nuremberg Defense for Genocide.” throughout the trial whenever a defendant attempted to evade a question, Musmanno stated that he wished they would be as “forthcoming” as Ohlendorf. For instance see Musmanno’s comments to prosecuting attorney James Heath on 14 October 1947, in *Trial*, roll 2, 628-629. Ferencz believes Ohlendorf was an idealist, in the sense that he believed in his convictions. Interview with Benjamin Ferencz, 24 April 1997, 10.

Chapter 3, Ohlendorf was not the least bit reluctant to tell American officials about his role in the National Socialist machinery of destruction.²⁸ Two years before he was indicted, he had freely confessed that *Einsatzgruppe D* (see Figure 5.1), under his command, was responsible for the murder of approximately 90,000 people, and on forty-two different occasions he voluntarily gave prosecutors further details about the inner workings of the regime and the persons most deeply involved in its crimes. These early statements coupled with the discovery of the *Einsatzgruppen* reports, limited Ohlendorf's ability to put together a convincing defense when the time came, and it certainly precluded the use of denial as a defense strategy. Nonetheless Ohlendorf had chosen to plead not guilty to the charges leveled against him. He was on trial for his life, and so it is not surprising that he would defend himself any way he could. More importantly, as we shall see, Ohlendorf believed he had done nothing wrong and thus hoped to prove his innocence by convincing the court that his actions in Russia were governed entirely by superior orders which were themselves dictated by military necessity.²⁹ Ohlendorf sought to show he held no personal animus toward his victims; in fact, killing went against his inner convictions he told the court. He carried out his orders because it was his duty.³⁰ However, as we shall see, Ohlendorf carried out the orders not because he felt it was his duty, or because the orders came from superiors,

²⁸ Some historians have suggested that Ohlendorf's admission was prompted by his anger at German army officials who were trying to deflect responsibility for their murderous actions in the Russian campaign onto the SS. For example, see Robert Wolfe, "Putative Threat," 47-48.

²⁹ Testimony of Otto Ohlendorf, 8-15 October 1947, in *Trial*, roll 2, 477-770.

³⁰ *Ibid.*, 755. Ohlendorf told the presiding judge on several occasions that he did not hate his victims, not even the Bolsheviks.

or even because it was militarily necessary. Rather, he did so because, in the National Socialist world view, he believed the orders to be correct, even essential for the new German and world order that the Nazis were planning.

At trial Ohlendorf maintained that he had been reluctant to accept a position of leadership in the *Einsatzgruppen*, but after twice refusing a request by Heydrich, he claimed that he accepted the job of *Gruppenchef* of *Einsatzgruppe D* which operated in the southern Ukraine and the Crimean Peninsula beginning in June 1941.³¹ Given his ideological commitment to Nazism, however, Ohlendorf's contention rings hollow. It seems more likely that he did not want to incriminate himself and wanted the court to believe that he initially refused the assignment in the east. In several affidavits, entered into evidence by the prosecution, Ohlendorf explained the purpose of the *Einsatzgruppen* which was,

responsible for all political security tasks within the operational area of the army units and of the rear areas.... In addition they had the task of clearing the area of Jews, Communist (sic) officials and agents. The last named task was to be accomplished by killing all racially and politically undesirable elements seized, who were considered dangerous to the security.³²

When the German army invaded Russia, I was leader of *Einsatzgruppe D* in the southern sector, and in the course of the year, during which I was leader...it liquidated approximately 90,000 men, women and children. The majority of those liquidated were Jews, but there were among them some Communist functionaries too.³³

³¹ Benjamin B. Ferencz, Closing Brief for the United States of America against Otto Ohlendorf, January 1948, in *ibid.*, roll 29, 3; and, testimony of Otto Ohlendorf, 8 October 1947, in *ibid.*, roll 2, 513.

³² Affidavit of Otto Ohlendorf, 24 April 1947 (NO 2890), in *ibid.*, roll 11, frames 0030-0033.

³³ Affidavit of Otto Ohlendorf, 5 November 1945 (PS 26200, in *ibid.*, roll 11, frames 0044-0045.

The order to carry out these so-called liquidations (frequently referred to by the defendants as the *Führerbefehl* or *Führer-order*), he told the court, was given by Bruno Streckenbach (head of Office I in the RSHA) at the time the groups were being formed in Pretzsch in May and June 1941, but the authority to issue the order came directly from Hitler himself.³⁴

The nature and the timing of the *Führerbefehl* are contentious matters among historians. While no longer is Ohlendorf's version of how, when and by whom the order to murder all Soviet Jews was given, still accepted, very little documentary evidence has emerged to settle the issue of timing. Given the central importance of the *Führerbefehl* to the trial, and the complex issues surrounding its existence, the issue will be more fully addressed in a separate chapter. In terms of establishing the motivation of the defendants, however, it is important to note that the court accepted Ohlendorf's version of the *Führerbefehl* and its timing as fact. The court understood that there was a Hitler order to liquidate civilians given to the leadership of the *Einsatzgruppen* before the invasion of the Soviet Union in the summer of 1941. Importantly, the court and the prosecution also saw this order as the motivation behind the defendants' actions in the Soviet Union. In other words, the *Führerbefehl* was the reason why these men were on trial for the mass murder, genocide, of Soviet Jewry.

When asked how he felt about carrying out the *Führer-order*, Ohlendorf said that naturally he was opposed to it, that he even protested to Streckenbach, but to no avail.³⁵ He was informed that it was a direct order from Hitler and as such had to be carried out.

³⁴ Testimony of Otto Ohlendorf, 9 October 1947, in *ibid.*, roll 2, 515 and 631-633.

³⁵ *Ibid.*, 631-633.

Furthermore, on the prosecution's charge of genocide, he did not believe the underlying purpose of Hitler's order was to murder Jews because they were racially or religiously inferior, rather the purpose was to destroy Bolshevism in Russia where Jews "played a disproportionately important role," and by doing so, hopefully Germany would win the war.³⁶ In other words, according to Ohlendorf, killing Jews was an act of war. Killing children was militarily necessary, he claimed, because they posed a possible security risk, especially when they reached adulthood and could avenge the death of their parents.³⁷ He told the court that he believed he had no choice but to obey the order because, as he stated emphatically, "no subordinate can take it upon himself to examine the authority of the supreme commander and chief of state," and in any event, anyone who dared refuse the order risked "immediate death."³⁸ Although he maintained he disagreed with the order to murder, Ohlendorf admitted he carried it out anyway, but he did so "as humanely" as possible. He also assured the court that his men did not engage in "excess," by which he meant he forbade them from humiliating the victims unnecessarily by stripping them of their clothes before they were executed, and he ensured that the victims were shot in military fashion and not by men who derived pleasure from doing it.³⁹

Ohlendorf was the first defendant to take the stand; he was also the only defendant the prosecution questioned at length about the morality of the Hitler order to murder Soviet

³⁶ *Ibid.*, 517-522.

³⁷ *Ibid.*, 528 and 662-665.

³⁸ *Ibid.*, 519 and 523.

³⁹ *Ibid.*, 523-524.

Jews. On this issue Ohlendorf remained adamant. The order was wrong, he explained, but it was nonetheless an order and as such he had to obey it. As to its morality, he never considered the matter one way or the other, he told the court, because it was not his place, as a soldier, to judge the *Führer* or his decisions.⁴⁰ Musmanno, the presiding judge in the trial, totally unsatisfied with Ohlendorf's answer, took him to task. In particular he wanted to learn more about Ohlendorf's views on the morality of murder. He posed a hypothetical scenario: if Ohlendorf had been given the order to murder his sister, would he not have considered "whether it was right or wrong - morally - not politically or militarily, but as a matter of humanity, conscience, and justice between man and man?"⁴¹ Ohlendorf refused the bait and did not answer the question. After all, he said, it was like comparing apples and oranges, "it brings a completely private matter into a military one; that is, it deals with two events which have nothing to do with one another."⁴² Enraged and frustrated, Musmanno insisted that Ohlendorf answer. Since his entire defense rested on the idea of obedience to orders it is not surprising that Ohlendorf eventually responded in the affirmative. As a soldier he would have executed his sister had he been ordered to do so, he claimed – if not entirely convincingly.⁴³

⁴⁰ *Ibid.*, 740-752.

⁴¹ Cross examination of Otto Ohlendorf by Michael Musmanno, 15 October 1947, in *ibid.*, roll 2, 750. Rudolf Aschenauer, Ohlendorf's attorney, strenuously objected to the hypothetical question. Musmanno acknowledged that under different circumstances such a question would not be allowed to be asked, but given that this trial was "dealing with a charge of [genocide]...that has never been presented in history of the human race," the question was allowed.

⁴² Testimony of Otto Ohlendorf, 15 October 1947, in *ibid.*, roll 2, 752.

⁴³ *Ibid.*

Ohlendorf was an intelligent and articulate man; he was also part maverick and a contrarian who rarely kept his opinions to himself. His need to express his views forcefully often got him into trouble and at his trial he only succeeded in backing himself into a corner. During his testimony he tried to portray himself as fundamentally opposed to Hitler's order to murder Soviet Jewry, while maintaining that he carried it out because it was militarily necessary and it was his duty, a claim that is at best contradictory and at worst an outright lie. On the basis of what is known about Ohlendorf and his personality, it seems most unlikely that this independent-minded individual, who frequently voiced his opposition to National Socialist policies with which he disagreed (indeed, fashioned a career out of doing so), would carry out an order he disagreed with so fundamentally. As noted earlier, Ohlendorf was willful and opinionated. He was not afraid to voice dissident opinions, even when they threatened to short circuit his career prospects, or land him in jail. On other matters, he did not follow orders blindly. In fact, his oft stated views on those aspects of National Socialism with which he disagreed earned him a reputation as an independent thinker rather than a passive follower. For instance, during trial he told the court that twice he had refused Heydrich's order to command an *Einsatzgruppe* and had suffered no adverse consequences. He also admitted that while he was leader of *Einsatzgruppe D*, he did not kill mentally ill persons, despite having been ordered to do so, because he did not agree with the order.⁴⁴ Even if this is untrue and his unit did kill the mentally ill, the fact remains that he painted a contradictory picture of himself to the court. He wanted the court to believe that he was, at once a man who made a career out of criticizing the weaknesses and foibles of the

⁴⁴ *Ibid.*, 552.

regime, hence an opponent of National Socialism, yet he was also an obedient soldier, who should not be held legally accountable for the crimes of the regime because he had no choice but to obey.

Ohlendorf's life is peppered with incidents in which he did not conform to established policy, all of which cast doubt on the validity of his defense. Early in his career, while working as Assistant Director at the Institute of World Economics in Kiel, he had landed in jail for teaching economic ideas contrary to National Socialist ideology and policy.⁴⁵ While working in the offices of the SD, he had several disagreements with Himmler, Ley, Goebbels, and Bormann, about the nature of Nazi policy, and as head of *Amt III* (Inland Intelligence) he became a sort of devil's advocate, developing a reputation as the voice of opposition within high-ranking party circles.⁴⁶ In short, throughout his career as a National Socialist, Ohlendorf had been a maverick. To argue as he did in court that he could not disobey an order he disagreed with was entirely inconsistent with his previous record and totally out of character. Certainly, Ohlendorf was a committed National Socialist, but only when the commitment was to ideas that conformed to his personal beliefs. Ohlendorf did not blindly carry out orders; his actions, as always, were motivated by conviction. In the final analysis, any attempt to portray Ohlendorf as an "obedient soldier" fails. He was the exact opposite, an "independent player" who was, in essence, driven to kill for essentially ideological reasons.

⁴⁵ Lawrence D. Stokes, "Otto Ohlendorf, the Sicherheitsdienst and Public Opinion in Nazi Germany," in George Mosse (ed.), *Police Forces in History* (Beverly Hills, 1977), 234.

⁴⁶ *Ibid.*, 237 and 257; and, testimony of Otto Ohlendorf, 15 October 1947, in *Trial*, roll 2, 565.

Ohlendorf was not the only defendant to claim he acted because of superior orders but who, in reality, agreed fully with Nazi racial policy. Four other defendants offered the same defense. Walter Blume, Werner Braune, Erich Naumann, and Adolf Ott all conceded they murdered thousands of Jews, but they did so because they were ordered to. Space precludes a full discussion of all four men, but the case of *Standartenführer* Walter Blume, the son of a schoolmaster, born in 1906 in Dortmund is telling and is examined in some detail here.

Blume, a good example of the many *Einsatzgruppen* commanders who rose rapidly within the Party, joined the SS in 1935 as an *Untersturmführer* and by 1941 had been made a *Standartenführer*.⁴⁷ Prior to joining the *Einsatzgruppen* in the spring of 1941, he held positions with the Dortmund police, the state police in Hannover, and Prussian Secret State Police. In the late spring of 1941, while working in *Amt I* of the RSHA, Blume was notified he should proceed to Pretzsch, a border town on the Elbe River, for police work. It was here that the *Einsatzgruppen* men assembled to prepare for operation Barbarossa, and where Blume first learned of his assignment to head *Sonderkommando 7a* of *Einsatzgruppe B* under the authority of Arthur Nebe and later fellow defendant Erich Naumann.⁴⁸

When Blume found-out the true nature of his assignment just days before the invasion of the Soviet Union on June 22, 1941, he claimed he recalled having had mixed feelings. On the one hand, he agreed “in principle” with Nazi racial policy, that a solution to the “Jewish problem” was necessary, but on the other he did not “desire” a solution that

⁴⁷ SS Personnel File of Dr. Walter Blume (NO 3245), in *ibid.*, roll 11, frame 0629.

⁴⁸ Affidavit of Walter Blume, 29 June 1947 (NO 4145), in *ibid.*, roll 11, frames 0046-0047; and, testimony of Walter Blume, 31 October 1947, in *ibid.*, roll 3, 1762-1763.

included murder; rather he hoped a program of forced emigration would suffice. Nonetheless, he conceded in testimony, that despite his misgivings, but certain that Hitler had considered the options carefully, his only “ethical” option, as a soldier who had pledged himself to the *Führer*, was to carry out the order. Besides, he reasoned, the true enemy was Bolshevism and the “Jews of Soviet Russia were...the intellectual bearers of” that hated ideology.⁴⁹ Even though he considered his task in Russia odious, apparently it never occurred to Blume that he might try to circumvent the order or to ask to be relieved of his commission; instead, he attempted to justify his actions on military grounds.⁵⁰

Blume, like Ohlendorf, argued at trial that he was not criminally responsible for his acts or those of his *Kommando* since he was merely following orders. The truth is, however, that he genuinely admired Hitler for his “personal and courageous character,” and was of the opinion that “Hitler had a great mission for the German people.” Evidently he would have done anything his *Führer* ordered.⁵¹ As Musmanno noted in the judgment of the tribunal, “let it be said once and for all that Hitler with all his cunning and unmitigated evil would have remained as innocuous as a rambling crank if he did not have the Blumes, the Blobels, the Braunes and Bibersteins to do his bidding, – to mention only the B’s.”⁵²

During cross examination Blume told the tribunal he found the work of the

⁴⁹ Testimony of Walter Blume, 31 October 1947, in *ibid.*, roll 3, 1768-1770 and 1761.

⁵⁰ *Ibid.*, 1772-1773.

⁵¹ *Ibid.*, 1760 and Opinion and Judgment of the Tribunal, 8 April 1948, in *ibid.*, roll 29, 158.

⁵² *Ibid.*, 159.

Einsatzgruppen distasteful, something Germans should not have to do. To this Musmanno responded that if he found the job so repugnant, perhaps he should have falsified reports and lied to his superior. Blume's moral compass was so off-kilter he believed it more nefarious to falsify records to his superiors than to shoot innocent people. Blume may have been able to live with the moral dilemma he faced, but he feared the job might be too much psychologically for his men. To alleviate their anxieties and take their minds off their daily routine, on the advice of Himmler, he organized regular excursions to the country for his men who were, he noted, "particularly grateful" for the opportunity to play sports and sing songs.⁵³

Like Ohlendorf's testimony however, Blume's also rings hollow. It seems doubtful that he ever fully confronted the moral choices he had made by accepting a position of responsibility with the *Einsatzgruppen*. Rather, it appears that even with his life in the balance in a court of law, he was unable to mask his true beliefs. He supported Nazism and its ideology and admired his *Führer*, for whom he would do anything. It would seem that the only aspect of his job that he felt any reservations about at all was the brutalizing effects mass-murder had on his men. In the end, it seems likely that Blume never confronted his own guilt, believing until the very end that his wartime actions were not criminal. What is certain, however, is that like many SS men, at war's end, he fled to Austria to avoid arrest

⁵³ Michael Musmanno, *The Eichmann Kommandos* (London, 1961), 164. Christian Streit notes that on 12 December 1941 Himmler issued an order to the *Einsatzkommando* leaders to take care that their men did not become brutalized by their jobs. In it, he suggested ways to prevent this from happening, including organizing "comradely get-togethers." See Streit, "Wehrmacht, Einsatzgruppen, Soviet POWs and Anti-Bolshevism in the Emergence of the Final Solution," in David Cesarani (ed.), *The Final Solution: Origins and Implementation* (New York, 1994), n. 27, 116.

indicating some awareness that he might be held accountable for his actions. Indeed, he was captured in August 1945, but less than a year later, for unspecified reasons, was released from Allied custody. He was rearrested in June 1947 while working as a farmhand and charged with war crimes.⁵⁴

Werner Braune was one of several *Einsatzkommando* leaders who held a Doctor of Law degree. He too was a youthful ideological soldier.⁵⁵ Born in Thuringa, Braune became involved in politics in 1930, while studying law at the University of Jena. He had attended a Party rally where Hitler spoke and was so completely taken with what he heard that he immediately became a committed National Socialist. He joined the NSDAP in May 1931, believing wholeheartedly in the ideology of the Party, particularly its anti-Communism.⁵⁶ In 1934, he joined both the SD and the SS, and in 1936 he entered the ranks of the Gestapo where he worked until 1941.⁵⁷ Between 1935 and 1943, Braune received no less than five SS

⁵⁴ Petition for Clemency of Walter Blume, 6 June 1950 in NARA RG 466 (Records of the United States High Commissioner for Germany, from here forward simply HICOG), Prisons Division, Petitions for Clemency, box 3, Blume folder.

⁵⁵ Case Record Werner Braune, 27 April 1948 in NARA RG 338 (Records of the United States Army in World War II from here forward simply USA-WWII), Records of War Criminals Prison No. 1 at Landsberg, Records Relating to Executed Prisoners January 2, 1946-June 7, 1951, box 2, Braune folder.

⁵⁶ Dr. Günther, Braune's spiritual advisor while imprisoned in Oslo as well as his advocate between 1948 and 1951, also told Clay that Braune was a "man of sterling qualities, whose personality and character are high above the average." Letter to General Lucius Clay from Dr. V.A. Günther, Clergyman, 9 May 1949 in NARA RG 238 (Records of World War II War Crimes Trials from here forward simply WCR), Advisory Board on Clemency for War Criminals, HICOG 1947-1950, Correspondence, box 9 (case 9 E212), Werner Braune folder.

⁵⁷ SS Personnel Record of Werner Braune (NO 3249), in *Trial*, roll 11, frames 0860-0863.

promotions – from *Untersturmführer* to *Obersturmbannführer* – because, as his SS record notes, he had a “strong character and a firmly established ideology,” a perfect candidate for promotion.⁵⁸ Braune’s extensive work with the SD and Gestapo prompted his transfer to Russia on October 18, 1941 to head *Einsatzkommando* 11b in Ohlendorf’s *Einsatzgruppe* D. As he soon discovered, his job included the “difficult task” of murder.⁵⁹

Braune followed Ohlendorf’s lead at trial, admitting his *Kommando* murdered thousands of people. Speaking of the so-called Christmas massacre at Simferopol in December 1941 where thousands of innocent people were murdered, Braune was asked by his own counsel if he supervised the executions. He unhesitatingly stated:

Yes, I did. It took place under my responsibility. Once I was at the place of execution with ... Ohlendorf and there we convinced ourselves that the execution took place according to the directives laid down by Ohlendorf at the beginning of the assignment. I personally was there several times more and I supervised Furthermore, my sub-Kommando leader Sturmbannführer Schulz was always present, the company commander of the police company and, I think, another Captain.⁶⁰

Using a wall map, Musmanno recalled, Braune “obligingly and courteously” described the activities and areas of operation of the various *Kommando* units, “with the ease and detachment of a college professor lecturing to a class of students.”⁶¹ Like his superior Ohlendorf, Braune justified his actions on the grounds of superior orders, stating that he

⁵⁸ *Ibid.*, frame 0862-0863.

⁵⁹ Testimony of Werner Braune, 25 November 1947, in *ibid.*, roll 4, 3033-3034.

⁶⁰ *Ibid.*, 3094.

⁶¹ Musmanno, *Eichmann Kommandos*, 135.

considered himself a “small wheel in a large machinery,” and had no choice but to obey.⁶² At Nuremberg Braune displayed no personal responsibility or remorse for his actions. Instead, he placed all blame for his actions on his superiors, Hitler and Himmler, who had told the leaders of the *Kommandos* they would be absolved of all personal responsibility for their actions.⁶³ For Braune, mass executions posed neither moral nor ethical questions, they were committed out of necessity; that is, since Hitler deemed it necessary to murder Russian Jewry, it was incumbent on him to carry out the order. Besides, Braune argued on the witness stand, the war in the east was against Bolshevism and he too was “convinced” that Jews and Bolsheviks were identical.⁶⁴ Braune had no qualms about admitting openly that he supervised executions because, like Ohlendorf, he agreed with National Socialist racial policy. That both Braune and Ohlendorf elected to explain their actions along military lines and show no signs whatsoever of remorse for their actions, had tremendous repercussions. As we shall see later, their courtroom strategy cost them their lives.

Erich Naumann, a deceitful individual whose defense strategy was blatantly evasive, was arrested in Bavaria by American forces in May 1945, while in hiding under the assumed name Rudolf Beegen. Less than two months later in July 1945 American authorities released him; it was two years before his true identity was uncovered (his former secretary Marga Perl identified him) he was promptly re-arrested. As was common during this period, Naumann had been working as a farm labourer in a desperate attempt to evade Allied

⁶² Testimony of Werner Braune, 25 November 1947, in *Trial*, roll 4, 3035 and 3047-3048.

⁶³ *Ibid.*, 3035.

⁶⁴ *Ibid.*, 3049.

authorities.⁶⁵ Reports indicate that he even went so far as to murder his personal driver, who had worked for him for a number of years, in order to avoid detection.⁶⁶

From 1933 to November 1941, before his appointment to the *Einsatzgruppen*, Naumann had served the SS in a number of capacities. He had been head of department III/2 of the SD Main Office and worked under the authority of Heinz Jost (leader of *Einsatzgruppe A*). In 1936, he had been made Section Chief (*Abschnittsführer*) in Nuremberg, and was promoted to *Oberabschnittsführer* in Stettin the following year. In 1938, he had held the same position in Austria until he was transferred back to Berlin and made an inspector of the Security Police and SD. Between September 2 and November 1939 he served as head of *Einsatzgruppe VI* in Poland and was awarded the Iron Cross Second Class.⁶⁷ Naumann received several other promotions within the SS ending his career as a *Brigadeführer* and was awarded the Iron Cross First Class after returning from Russia.⁶⁸ He was made head of *Einsatzgruppe B*, replacing Arthur Nebe, in November 1941, on orders from Heydrich. His contention at Nuremberg that he had to obey this order or be shot, was

⁶⁵ Identification of Prisoner, Dachau Detachment 7708 War Crimes Group, Case No: 12-3192-B, 29 April 1947 in NARA RG 238 (WCR), OCCWC, Executive Office, Nuremberg Military Post, 201 Files 1945-1948, box 21, Naumann folder. An illustration of how common aliases were can be found in Rückerl, *Die Strafverfolgung von NS-Verbrechen 1945-1978*, 143-144 n.4.

⁶⁶ Investigation of Erich Naumann by Lt. Bohn of the CIC, Detachment 334, Unter-Traunstein, undated in NARA RG 238 (WCR), OCCWC, Office File, Office File Materials, box 2, SS General folder.

⁶⁷ Krausnick, *Die Truppe des Weltanschauungskreiges*, 34; testimony of Erich Naumann, 16 October 1947, in *Trial*, roll 2, 806-808; Eidesstattliche Erklärung of Erich Naumann, 27 June 1947 (NO 4150), in *ibid.*, roll 9, frame 0812; and, SS Personnel Record of Erich Naumann (NO 2970), in *ibid.*, frame 0817-1919.

⁶⁸ SS Personnel Record of Erich Naumann (NO 2970), in *ibid.*, 0817-0920.

somewhat less than convincing.⁶⁹

Naumann served as head of *Einsatzgruppe B* (its headquarters was in Smolensk) until February-March 1943. The documentary evidence shows that Naumann's *Kommando* killed tens of thousands of people. In the absence of any exculpatory evidence, his attorney, Dr. Hans Gawlik (the future head of the Zentrale Rechtsschutzstelle), mounted a defense designed to prove that the *Führerbefehl* to murder Jews, was issued before Naumann arrived in Russia.⁷⁰ According to this line of argument, Naumann was not responsible for the murders his *Kommando* carried out because he did not issue the order himself. Dr. Gawlik's defense of Naumann rested on the precedent set in a previous trial, the Milch case, where the judges ruled that knowledge alone was not sufficient to find one guilty of "crimes against humanity," rather one must have actually committed murder or at least have given the order to do so. By his own admission, Naumann had not personally killed anyone, therefore Gawlik's goal at trial was to demonstrate that Naumann had never issued orders to kill.⁷¹ Naumann did admit that his units killed people, but he maintained this was done as a security measure and not because the victims were Jews. As proof he told about the loss of thirty-one of his men to partisan activity. Undoubtedly Naumann was convinced that this line of defense was valid, perhaps even foolproof; after all, an important element of the

⁶⁹ Testimony of Erich Naumann, 16 October 1947, in *ibid.*, roll 2, 806.

⁷⁰ This was a defense organization for German war criminals tried before foreign courts. The central office was located in Bonn. It was founded and funded by the German Government in 1949 as part of the Basic Law, but was administered by the Ministry of Justice and later the Foreign Ministry. See Ernst Klee, *Persilscheine und falsche Pässe* (Frankfurt, 1991), 131.

⁷¹ Defense argument by Dr. Hans Gawlik, Attorney for Erich Naumann, 16 October 1947, in *Trial*, roll 2, 821.

indoctrination of the *Kommandos* on the eastern front was to be told repeatedly that all Jews were partisans and all partisans were Jews.⁷² One historian has contended that it would be a serious error to underestimate the significance of this type of indoctrination, for whether or not it was believed, it offered the men of the *Einsatzgruppen* a “legitimate” military reason to commit murder, and thus helped them overcome any inhibitions they still might harbour about murdering Soviet Jewry.⁷³ It also offered them a seemingly legal defense after the war.

Even though Naumann and his defense attorney tried their best to downplay his responsibility, the court knew perfectly well he was concealing something. This is made clear in a letter Naumann secretly gave to co-defendant Waldemar Klingelhöfer the night the latter had attempted suicide in July 1947. The letter, which was confiscated by American authorities, was entered into evidence against Naumann. It is worth quoting at length as it illustrates knowledge of criminality:

Do not be bluffed during interrogations! Always be careful, even with the friendliest face! My statements until now: ... The beginning of my tour of duty; end of November 1941. At that time there were no ghettos left in my area. The large scale executions of the first period fell into Nebe's time....Troop Smolensk was led by some small *Sturmscharführer* or *Unsturführer*, whose name I do not know any more. Troop Smolensk belonged first to EK 9. The number of persons executed by *Einsatzgruppe B* was not registered in the Group Staff. I therefore cannot make any statements about this. I gave no more execution orders because these were already given by Heydrich and Nebe to the SK and EK B received 2 or 3 gas vans from Berlin which were not used by B and therefore, under directions of the RSHA, were given to C. Written reports went to Berlin about every three weeks. There was also no total of executions contained therein. They contained mainly a description of the

⁷² Testimony of Erich Naumann, 16 October 1947, in *ibid.*, 828-830. According to Streit, participants of ideological training were taught that Jews, Bolsheviks and partisans were indistinguishable. See *idem*, *Keine Kameraden. Die Wehrmacht und die sowjetischen Kriegsgefangenen 1941-1945*, 121-122.

⁷³ Streit, “*Wehrmacht, Einsatzgruppen, Soviet POWs and Anti-Bolshevism in the emergence of the Final Solution*,” 111.

situation from a Security Police point of view and a voluminous SD report. Beginning in spring 1942, the main activity of the Einsatzgruppe B changed to partisan reconnaissance and to the formation of police forces of indigenous persons (OD). This court has NO [his emphasis] original reports of Einsatzgruppe B and also no files; just information reports issued by the RSHA and these are incomplete. These reports were first issued in 1942. About your activity in Gahaisk and Smolensk this court has no records.⁷⁴

This letter is an obvious attempt to influence Klingelhöfer's testimony, and makes clear that Naumann was really attempting to keep the tribunal in the dark about his activities. After reading the letter, the prosecution concluded that Naumann was attempting to conceal the truth from the tribunal and had not been, as he maintained, offering "friendly" advice to his colleague after all.⁷⁵ Clearly, the court had ample reason to treat Naumann's testimony as suspect, both as to accuracy and completeness.

Naumann's testimony did not mask his guilt and nor did it disguise the dark side of his character. During cross examination Ferencz asked Naumann whether or not as leader of *Einsatzgruppe B* he felt any "guilt or remorse." Initially Naumann evaded the question, stating that everyone connected with the *Führer* order experienced "considerable moral difficulties," but guilt or remorse, he thought for a moment and then astonishingly stated, "no," he could only feel remorse for "crimes I personally commit. If I myself had carried out killings and cruelties then I would have to feel guilt and remorse. If I have carried out an

⁷⁴ Letter from Erich Naumann to Waldemar Klingelhöfer, 3 July 1947 (NO 5450), in *Trial*, roll 12, frames 0380-0381.

⁷⁵ Testimony of Erich Naumann, 17 October 1947, in *ibid.*, roll 2, 885 and Trial Brief for the United States of America against Erich Naumann, January 1948, in John Mendelsohn (ed.), *The Holocaust: Punishing the Perpetrators of the Holocaust. The Ohlendorf and Von Weizsäcker Cases*, vol. 18 (New York, 1982), 70.

order then I have no guilt at all, and therefore, no remorse.”⁷⁶ He revealed a great deal more of himself when questioned by Musmanno. When asked if he agreed with the *Führer* order or had any misgivings about it, he admitted that, in fact, he did agree with the order to murder Jews “because it was part of our aim of the war and therefore it was necessary.” Musmanno recalled that he was stunned by Naumann’s response as he had expected the defendant to respond as many others had, to state that inwardly at least, they disagreed with it. As Naumann took his seat, the presiding judge “imagined he [Naumann] was doing so to the Wagnerian strains of *Götterdämmerung*.”⁷⁷ Naumann’s testimony, coupled with the documentary evidence against him, sealed his fate.

Heinz Jost, another unscrupulous individual, did not rely exclusively on the defense of superior orders, instead he presented a baffling array of defenses. For the most part he tried to avoid responsibility for his actions simply by denying that he did anything wrong, but he also told the court that while he disagreed with the so-called Hitler order, he had to carry it out because it was an order issued by his superior, and besides he might be punished if he failed to do so. At the same time he attempted, not very convincingly, to prove that he was emotionally conflicted by his actions in Russia. Because he relied on this strange amalgam of defenses, Jost’s motivation is difficult to discern. It is clear however, that he was determined to prove his innocence by showing that when he did act – something he was reticent to admit – he did so only under duress. His defense strategy, if one can call it that, appears to have come out of desperation. He said whatever appeared strategic at the moment,

⁷⁶ Testimony of Erich Naumann, 17 October 1947, in *Trial*, roll 2, 886.

⁷⁷ Musmanno, *Eichmann Kommandos*, 158-161.

hoping this would help him win an acquittal.

Jost, like so many of his co-defendants was a lawyer by training. However, he had joined the NSDAP much earlier than most of the others, in 1928 to be precise, and by 1934, had worked his way up to police chief in the Gestapo. Once Jost had proved he was capable of police work, Heydrich promoted him to *Amtschef*, first in the office of the *SD-Ausland*, and after the reorganization of the SD, to the top spot of *Amt VI* (Foreign Intelligence) of the RSHA.⁷⁸

As head of *Amt VI* of the RSHA and a *Brigadeführer* Jost was a logical choice to command an *Einsatzgruppe*, but he somehow managed to avoid the assignment for nearly a year. In fact, it was not until the death of (Franz) Walter Stahlecker, in the spring of 1942, that Heydrich appointed him *Gruppenchef* of *Einsatzgruppe A*, which was attached to Army Group North whose area of operation was the Baltic region (Estonia, Latvia and Lithuania) and White Ruthenia.⁷⁹ Jost testified that Heydrich catapulted him into the position as punishment for his “soft” disposition and persistent and extreme reluctance to supervise the gruesome tasks of the killing squads. Jost also claimed that Heydrich had promised him his

⁷⁸ Testimony of Heinz Jost, 21 October 1947, in *Trial*, roll 2, 1133 and 1143; and, Information Sheet, Heinz Jost, 20.6.1950, B305/146, Deutsche Kriegsverurteilte im Landsberg, Einzelfälle, 1949-1950, Bundesarchiv, Koblenz (from here forward simply, Band, file number and name, BA). See also Heinz Höhne, *The Order of the Death's Head* (New York, 1966 and 1985), 101 and 243-244.

⁷⁹ Testimony of Heinz Jost, 21 October 1947, in *Trial*, roll 2, 1155 and 1199; Wilhelm, *Die Truppe des Weltanschauungskrieges*, 285 and Interrogation Summary No. 2066, Heinz Jost, 2 May 1947, National Archives Microfilm Publication M1019 (Records of the United States Nuremberg War Crimes Trials Interrogations), roll 32 (from here forward, Interrogation name, M1019, roll).

only tasks would be “administrative” and that he would not have to supervise executions.⁸⁰

While this last claim is clearly untrue, it is possible that Jost was given the assignment as punishment, but it is also possible that Heydrich was attempting to help him rehabilitate his SS career. By taking on a leadership position in the *Einsatzgruppen* he could restore his prestige by doing “good work” for the regime, especially after being fired for incompetence in August 1941 as head of *Amt VI*.

Appearing frail at his trial, Jost claimed that his thyroid disease and rheumatism were direct consequences of the stress of his job and the inner conflict he experienced while carrying out his orders in the east.⁸¹ His defense hinged in part at least on this argument.⁸² He told the court he believed murdering eastern Jewry was “unnecessary” and he had done everything in his power to have the order revoked (he presented no evidence to support his claim), but he had no choice but to obey because Heydrich threatened him with death if he refused.⁸³ This argument completely contradicted his earlier claim that Heydrich had promised him he would not have to carry out any “executive” actions.⁸⁴

⁸⁰ Jost’s assertion that he was being punished might very well be correct, since Heydrich had fired him from his position of Office Chief because of his incompetence. See Peter Black, *Ernst Kaltenbrunner: Ideological soldier of the Third Reich* (Princeton, 1984), 177. Testimony of Heinz Jost, 21 October 1947, in *Trial*, roll 2, 1143-1144 and 22 October 1947, roll 2, 1149-1152; and, Trial Brief of the Prosecution against Heinz Jost, in *ibid.*, roll 29, 2.

⁸¹ Musmanno, *Eichmann Kommandos*, 186-187.

⁸² Testimony of Heinz Jost, 22 October 1947, in *Trial*, roll 2, 1164.

⁸³ *Ibid.*, 23 October 1947, 1257 and 1262-1263.

⁸⁴ The defendants frequently distinguished between “executive” actions and other actions. The former meaning murder and the latter administrative duties.

Jost, like the majority of defendants, offered a bevy of arguments. The defendants did so out of desperation, hoping that the court would believe one of them. Because he was unable to convince the court of his claim of superior orders under duress, Jost argued that he suffered from a severe case of inner conflict. Nearly all the affidavits entered into evidence in his behalf made the same case: he was a decent man devoted to National Socialist ideas, but he disagreed fundamentally with Nazi Jewish policy – at least in his “heart.”⁸⁵ Werner Best, legal adviser to Reinhard Heydrich and later Reich Plenipotentiary in Denmark, testified in his affidavit that Heydrich disliked Jost because he was weak, “a jurist burdened with inhibitions.” According to Best, Jost was dismissed as head of *Amt VI* after his return from the east.⁸⁶ Even though he was officially stationed in the east for nearly seven months, there is some evidence to suggest he did try to avoid the onerous tasks of commander, leaving his group after only a few weeks and returning only later.⁸⁷ In a last effort to prove his innocence, Jost’s lawyer solicited an affidavit from his personal physician, Dr. Wolfgang Wohlgemuth, stating that in his opinion Jost suffered from a nervous disorder that resulted from the “discrepancy between [Jost’s] inner views and the demands of his office [that]

⁸⁵ For example see affidavit of Arthur Deeken, 29 September 1947, in *Trial*, roll 26, frames 0713-0714; affidavit of Heinrich Eissfeller, 4 October 1947, in *ibid.*, frames 0715-0718; and, affidavit of Edgar Thomashausen, 4 October 1947, in *ibid.*, frames 0719-0728.

⁸⁶ Affidavit of Werner Best, 16 October 1947, in *ibid.*, frame 0751. Best’s affidavit contradicts Walter Schellenberg’s who claimed Jost had been the subject of an internal investigation over illegal money-lending practices with a large banking house in Prague. When Heydrich found out about this he was infuriated and the only thing that saved Jost from severe punishment, according to Schellenberg, was that he was an old Party member and Heydrich and Frau Jost were close friends. See Report on the case of Walter Friedrich Schellenberg, undated in NARA RG 238 (WCR), CCPAC, Schellenberg, box 50 E160, Schellenberg Report folder.

⁸⁷ Höhne, *The Order of the Death’s Head*, 404.

resulted in the mental tensions” and led to the “illness which I observed in Jost in 1941/1942 and later.”⁸⁸ Neither Musmanno nor the civilian psychiatrist who examined him after the trial accepted this diagnosis. Dr. Spradley, the American psychiatrist assigned to assess the mental health of the Nuremberg defendants, went so far as to suggest that he was a “cold, calculating type of individual” who displayed “sadistic” tendencies, and whose emotional world was bankrupt.⁸⁹ The tribunal concurred. In their judgment, Jost’s credibility was compromised because “the evidence is irrefutable that he was a principal in and an accessory to the extermination program in his territory.”⁹⁰

Doctor of Laws, Martin Sandberger, one of the younger defendants in the dock at Nuremberg, was another *Einsatzgruppe* leader with a solid education in law who became an ideological soldier of the Third Reich. He was born August 17, 1911 in Berlin, but grew-up in south-western Germany and attended school in Stuttgart and Frankfurt from 1919 to 1929.⁹¹ He completed his Ph.D. in 1935 and his final Assessor exam one year later in November 1936.⁹² In 1933, after he successfully passed his Referender exam, Sandberger went to work for the Ministry of Justice where he remained until 1936 when he took a job as

⁸⁸ Affidavit of Dr. Wolfgang Wohlgemuth, 15 January 1948, in *Trial*, roll 26, frame 0854.

⁸⁹ Neuro-Psychiatric examination of Heinz Jost by Dr. Spradley, 26 June 1950, in NARA RG 466 (HICOG), Prisons Division, Petitions for Clemency, box 13, Jost folder.

⁹⁰ Opinion and Judgment, 8 April 1948, in *Trial*, roll 29, 137.

⁹¹ Eidesstattliche Erklärung of Martin Sandberger, 23 April 1947, in M1019, roll 61; testimony of Martin Sandberger, 7 November 1947, in *Trial*, roll 3, 2141; and affidavit of Martin Sandberger (NO 2891), in *ibid.*, roll 11, frame 0591.

⁹² Testimony of Martin Sandberger, 7 November 1947, in *ibid.*, roll 3, 2141.

Regierungsrat (Government councillor) in the Ministry of the Interior in Württemberg. At this time he joined the SD and served as head of the Reich Student Leaders, contributing to prominent journals in order to promote the virtues of National Socialism.⁹³ He stayed with the Ministry until October 1939, was then named Chief of the Immigration Center, a post he held until May/June 1941 when he was transferred into the *Einsatzgruppen*.⁹⁴ Along with many of his co-defendants he claimed he was ordered by Heydrich to proceed to Pretzsch in May 1941 where he was made leader of *Sonderkommando* 1a of *Einsatzgruppe* A headed by Franz Stahlecker and later Heinz Jost (see Figures 1 and 2).⁹⁵ On June 23, he and his *Sonderkommando* proceeded to Riga, Latvia, and in August to Reval, Estonia where he and his unit remained for the next two years.⁹⁶

It was while in Pretzsch, Sandberger claimed, that he first heard of the so-called *Führerbefehl*. While he did not deny knowledge of the order to murder the Jews, as did some of his co-defendants, he was extremely evasive and his responses were so convoluted, that the tribunal often had difficulty making sense of them. He told the court he knew about the so-called *Führerbefehl* to murder Jews, Gypsies and communists, but he "objected" to it and asked his superior, SS *Brigadeführer* Bruno Streckenbach, if he could join the *Wehrmacht* instead of heading a *Sonderkommando*. Apparently Streckenbach refused on the

⁹³ Browder, *Hitler's Enforcers*, 222.

⁹⁴ Affidavit of Martin Sandberger (NO 2891), in *Trial*, roll 11, frame 0591.

⁹⁵ For a discussion of the composition and organization of *Einsatzgruppe* A see Wilhelm, "Die *Einsatzgruppe* A der Sicherheitspolizei und des SD 1941-1942," in Krausnick and Wilhelm, *Die Truppe des Weltanschauungskrieges*, 281-293.

⁹⁶ Testimony of Martin Sandberger, 12 November 1947, in *Trial*, roll 3, 2161-2166.

grounds of personnel shortages.⁹⁷ Throughout the trial Sandberger, whom Musmanno described as “round-faced and juvenile-looking” maintained his innocence, claiming that on at least seven separate occasions he asked to be released from his job in Russia.⁹⁸ This defense is suspect however, since none of his co-defendants were forced to stay in the east for longer than a few months (Sandberger stayed for twenty-six months), and those who did stay for extended periods, such as Ohlendorf, did so by choice. Had Sandberger really desired to be relieved of his duties as commander of *Sonderkommando* 1a, he could have asked for a release after a few months and very likely his request would have been granted.

Sandberger, like so many of his co-defendants, denied he was responsible for any illegal executions (the implication is that there is such a thing as a “legal” execution). He told the tribunal he never openly protested the *Führerbefehl*, even though he sincerely objected to it, because he feared disobedience or dissent would lead to his own “martyrdom.” The truth is Sandberger never gave the order a second thought, believing it “legal” since it came directly from Hitler, who was, in his opinion, the “supreme legislator.”⁹⁹ Even in the face of numerous documents pointing to his culpability, he denied any wrong-doing whatsoever. He blamed the Estonian police and Home Guard for all “illegal executions,” for they hated the Jews for the role they allegedly played in the communist takeover of their country.¹⁰⁰ The few executions his group carried out followed

⁹⁷ Testimony of Martin Sandberger, 7 November 1947, in *ibid.*, 2152.

⁹⁸ Musmanno, *Eichmann Kommandos*, 174.

⁹⁹ Testimony of Martin Sandberger, 7 November 1947, in *Trial*, roll 3, 2154 and 2157 and 13 November 1947, 2310.

¹⁰⁰ *Ibid.*, 2184 and 13 November 1947, 2249-2253.

fair trials, the same procedure offered all suspected criminals, including Jews. They were executed, not because they were Jews, Sandberger insisted, but because after exhaustive investigations it was determined they were communist functionaries, and therefore a security risk.¹⁰¹

Sandberger's SS Personnel record cites the "better than average intensity in his work" in the east as well as his "irreproachable politics" as reason for promotions he received when he returned from Estonia.¹⁰² This strongly suggests that his account of the activities of his group was in large measure fictitious. Musmanno recalled in his memoir that Sandberger "conveyed the impression of someone telling tall stories at a crowded bar," many of which he [Musmanno] found preposterous, especially [Sandberger's] claim that each individual slated for execution was entitled to, and indeed had his case reviewed. If those interned by his *Kommando* were found guilty, Sandberger maintained, they could appeal!¹⁰³ In the final analysis Sandberger's refusal to acknowledge that his actions were in any way wrong or immoral can be explained in two ways. First, he could have constructed this story in an attempt to convince the court that he was not guilty and thereby they would have to find him innocent. And second, he might have sincerely believed that he had acted legally. Under the incredibly skewed morality of the Third Reich and his adherence to its belief system, this is certainly possible, even likely. To have admitted anything else would have been tantamount to questioning the convictions he had nurtured since his youth.

¹⁰¹ *Ibid.*; and, 12-13 November 1947, 2245-2265.

¹⁰² Memorandum from SS Standartenführer Ehrlinger, 20 July 1944 (NO 5045), in *ibid.*, roll 12, frames 0402-0403.

¹⁰³ Musmanno, *Eichmann Kommandos*, 174.

3. Deniers

In the early part of the trial, the majority of defendants restricted their responses to standard defenses such as duty, superior orders and so on, and were absolutely unwilling to offer alternative reasons for their actions. Only after the presentation of copious amounts of damning prosecution evidence and relentless questioning by the tenacious presiding judge, did any of the defendants admit that indeed they had participated in at least some executions. As we have seen, however, explanations for their behavior varied. Some claimed they were doing their duty while others said they were merely following orders. Still others claimed what they did was not illegal. Not all were opposed to their tasks, and some contended that killing Soviet Jewry was the solution to Germany's racial problems. But there were also a number of defendants who, no matter how intense the questioning or how much evidence the prosecution marshaled, absolutely refused to admit they had done anything, let alone anything illegal. This group of defendants are referred to as deniers, and one such example was Gustav Nosske, commander of *Einsatzkommando* 12 (see Figure 5.2).

Nosske was born in 1902 in Halle and like many of his fellow defendants, became head of an *Einsatzkommando* in May 1941.¹⁰⁴ According to the evidence presented in court he remained in this position until late February or early March of the following year. Nosske's *Einsatzkommando* 12 was attached to *Einsatzgruppe* D under Ohlendorf, but unlike his superior, he consistently denied any involvement in murder. He told American authorities on more than one occasion that "no executions of Jews, Gypsies or other members of 'racially inferior' minority groups were carried out" by his *Kommando* even

¹⁰⁴ Eidesstattliche Erklärung, Gustav Nosske, 29 June 1947 in M1019, roll 50.

though the court had already been told by Ohlendorf that they had.¹⁰⁵ While Nosske's *Kommando* may not have killed the large number of Jews that Paul Blobel's or Eduard Strauch's groups had, at least one *Einsatzgruppen* report (No. 178) stated otherwise, recording the murder of 1,500 civilians between February 16 and 28, 1942. All were shot by Nosske's men.¹⁰⁶ Despite this damning evidence, throughout the trial and during testimony and cross examination Nosske maintained his innocence until December 9, the last day of the cross examination, when he begrudgingly succumbed to Musmanno's questioning and admitted that his unit "might be" responsible for the murder of as many as 244 people.¹⁰⁷ This is as far as he would go however, and he never admitted that he participated in the murders and refused to be pinned down as to exactly how many persons were killed.

While in prison at Nuremberg, Nosske's fellow inmates, who clearly detested him, nicknamed him the "SD swine." This characterization was seconded by American interrogators who felt he would do or say anything to shift the blame to others. He frequently cast aspersions on others while proclaiming his own behavior was beyond reproach. After interviewing Nosske on several occasions, one interrogator summed up his findings as follows:

[The] prisoner is a thoroughly bad type, arrogant, unscrupulous, and hard; altogether he makes the impression of a man capable of anything and one who has thoroughly enjoyed his work in the Gestapo....He is intelligent and shrewd and has done his best

¹⁰⁵ Interrogation Nr. 1500-B, Vernehmung des Gustav Adolf Nosske Obersturmbannfuehrer durch Mr. Wartenberg am 29.6.47; and, Interrogation Summary No. 2608, Gustav Nosske, 28 June 1947 in *ibid.*, roll 50. See also, testimony of Gustav Nosske, 4-9 December 1947, in *Trial*, roll 4, 3481-3685.

¹⁰⁶ Opinion and Judgment, 8 April 1948, in *Trial*, roll 29, 189-190.

¹⁰⁷ Testimony of Gustav Nosske, 9 December 1947, in *ibid.*, roll 4, 3637-3667.

to withhold information which might in anyway show him or the Gestapo in a bad light.¹⁰⁸

In the end, as might have been expected, Nosske refused to accept any personal responsibility for his *Kommando*'s actions and indeed blamed the victims for their own fate. He did acknowledge that executions were carried out by men under his command, but insisted they were entirely legal, because the individuals involved were saboteurs, who allegedly destroyed crops and farm equipment.¹⁰⁹ In his mind, he was innocent of all crimes, especially the crime of genocide.

Another defendant who denied he had done anything illegal or immoral was the lawyer Walter Haensch, who had joined the Party in 1931 and the SS and SD four years later, after he had been fired from his job as an Assessor for the Doebln Municipal Administration in Saxony. He stayed with the SD until November 1, 1936 when he was transferred to *Amt* I of the RSHA where he worked until the beginning of 1942. He was then sent to Russia by Heydrich to take command of *Sonderkommando* 4b of *Einsatzgruppe* C under the leadership of Max Thomas (see Figures 1 and 2).¹¹⁰

Haensch's stay in Russia was relatively short, lasting only about six months, from mid-January to mid-June 1942 (during trial he claimed he did not arrive in Russia until mid-March, but the evidence indicates otherwise). During cross examination Haensch was relatively open about his affiliation with National Socialism, admitting he had been a

¹⁰⁸ Secret Final Report on SS Übersturmbannführer Gustav Adolf Nosske, 11 May 1946 in NARA RG 238 (WCR), OCCPAC, Reports and Interrogations 57-61, box 13 (NM 70), folder 57.

¹⁰⁹ Testimony of Gustav Nosske, 8 December 1947, in *Trial*, roll 4, 3519.

¹¹⁰ *Ibid.*, frames 0757-0760.

member of the party and that he was in full agreement with National Socialist ideology. However, when questions were raised about his activities with the *Einsatzgruppen* his memory conveniently failed him. Musmanno noted in his memoir that Haensch's defense was to "deny, deny, deny."¹¹¹ His strategy was to be deliberately evasive. He claimed he knew nothing of the murder of Jews and denied any criminal wrong-doing by his *Kommando* while he was its leader. He told the tribunal that he "felt inwardly free and innocent" of all crimes which allowed him to "mentally detach" himself "from the visual details of the war;" that is, to forget.¹¹² Haensch maintained his wall of silence throughout the trial and was one of the few defendants who did not succumb to Musmanno's persistent questioning, even going so far as to claim that he knew nothing of the murder of Jews until July 1947 when he was brought to Nuremberg for interrogation and trial, and even then it was his interrogator who told him of the "Final Solution."¹¹³ Haensch's silence could not prevent the evidence from speaking for itself. At least three reports entered into evidence by the prosecution (NO 3405, NO 3340, and NO 3240 – all Operational Situation Reports) referred to Haensch as the *Führer* of *Sonderkommando* 4b. According to the three reports,

¹¹¹ Musmanno, *Eichmann Kommandos*, 182. See also Grabitz, *NS-Prozesse*, 109-119 who discusses the problem of denial among defendants in later German trials.

¹¹² Affidavit of Walter Haensch (NO 4567), in *Trial*, roll 11, frame 0741. James Waller's study of how ordinary people can commit extraordinary acts of evil suggests that Haensch's reaction was not uncommon among perpetrators who had difficulty reconciling their moral perception of themselves with their immoral behavior. Forgetting was a defense mechanism employed to distance themselves from their actions. Some perpetrators, argues Waller, even succeeded in permanently altering their inner selves. In this way they were able to avoid self-hatred and preserve their moral integrity. See Waller, "Perpetrators of the Holocaust; Divided and Unitary Self Conceptions of Evildoing," 11-33.

¹¹³ Testimony of Walter Haensch, 2 December 1947, in *Trial*, roll 4, 3262.

3,401 persons were executed by *Sonderkommando* 4b between January 16 and February 14, 1942.¹¹⁴ Despite this compelling evidence placing him in Russia, Haensch continued his attempts to deflect guilt by claiming that during the period of these executions he was in Berlin attending a birthday party, having his photograph taken, and visiting his dentist. His defense rested on the argument that the reports were inaccurate. He could not be held responsible for executions in January and February as he was not in Russia at this time and knew absolutely nothing about the murders. In a word he was, he maintained simply – innocent.¹¹⁵ Whether or not Haensch actually believed his denial would ensure a judgment of not guilty is a matter for debate. What is certain is that, like Ohlendorf, he believed in the rightness of his course and in the task he was assigned in Russia. When questioned about the execution of Soviet Jews, he said simply “they were necessary.”¹¹⁶

After the trial, Haensch became obsessed with proving his innocence, so much so that he thought of little else. The prison warden at Landsberg recorded in 1954 that his health had “deteriorated somewhat mentally and physically because of his constant brooding over his innocence.”¹¹⁷ Even when given the opportunity to apply for parole he refused to do so, hoping that one day American officials would see their error and grant him the clemency

¹¹⁴ *Ibid.*, 3255-3275.

¹¹⁵ *Ibid.*, 3254-3255.

¹¹⁶ *Ibid.*, 4 December 1947, 3406-3409.

¹¹⁷ Institutional Record of Walter Haensch, War Criminal Prison No. 1, Landsberg, 10 June 1954, in NARA RG 466 (HICOG), Prisons Division, Petitions for Clemency for War Criminals at Nuremberg, box 9, Haensch folder.

he believed he deserved.¹¹⁸ Despite Haensch's defense of denial, he was nonetheless a true party zealot and anti-communist.¹¹⁹

4. Conflicted Murderers

Only four of the defendants tried at Nuremberg can be considered "conflicted murderers." Two, Waldemar Klingelhöfer and Erwin Schulz, demonstrated some form of remorse in 1947 and 1948 for their earlier actions in Russia. Two others, Paul Blobel and Eduard Strauch, showed no remorse after the fact, but they exhibited signs of psychological imbalance during the perpetration of mass murder which was the result of the inner conflict they experienced trying to reconcile their moral beliefs with their immoral actions. Paul Blobel is a classic example of the second type of conflicted murderer. As we saw in the previous chapter, Blobel was an architect by training who came to National Socialism during a time of economic stagnation in Germany, in order to advance his career. He led a rather mundane existence prior to being drafted into the *Einsatzgruppen* in 1941. In no time at all, he had earned a reputation and notoriety as an efficient killer of Jews, even by National Socialist standards. According to Musmanno, after Ohlendorf, Blobel was the most memorable personality in the dock. This was certainly not because of his charisma or good looks. Photographs of Blobel taken during the trial show an unkempt, unhealthy individual, who appears much older than his 53 years. As Musmanno recalls, Blobel "sat in the front

¹¹⁸ Attachment to institutional Report: Director's Personal Observations, 10 June 1954, in *ibid.*

¹¹⁹ As late as 1950, Haensch blamed everything, including the death of his father, the "broken heart" of his mother and the poverty of his wife on the Russians. Letter to the US High Commissioner from Walter Haensch, 26 June 1950, in *ibid.*

row in the defendant's dock [with] his square red beard jutt[ing] out ahead like the prow of a piratical ship commanded by himself. His blood-shot eyes glared with the penetrating intensity of a wild animal at bay."¹²⁰ In his usual flamboyant style, Musmanno also found it "hard to believe that this ferocious-looking creature [Blobel] was once an architect handling weapons no more lethal than a slide-rule and colored pencils."¹²¹

As leader of *Sonderkommando* 4a, Blobel's unit was assigned to *Einsatzgruppe C*, which was commanded by Dr. Otto Rasch, and operated in the southern Ukraine, the jurisdiction of the German Sixth Army under *Fieldmarshall* von Reichenau (see Figures 1 and 2).¹²² Overall Blobel's *Kommando* killed tens of thousands of innocent men, women and children, and he was soon recognized for the efficiency of his operations. His most notorious massacre was at Babi Yar in September 1941.¹²³ On the outskirts of Kiev, at the site of a large ravine, on 29 and 30 September 1941, Blobel's *Kommando*, together with the assistance of other police battalions and Ukrainian auxiliaries, massacred 33,771 Ukrainian Jews.¹²⁴ According to one witness, Blobel, overseeing the mass shootings from atop the ravine, lost patience with the pace of the operation and frequently yelled at his men to speed

¹²⁰ Musmanno, *Eichmann Kommandos*, 145.

¹²¹ *Ibid.*

¹²² Eidesstattliche Erklärung, Paul Blobel, (NO 3824), in *Trial*, roll 8, frame 0346.

¹²³ On this subject see Ernst Klee and Willi Dreßen (eds.), "*Gott mit uns:*" *Der deutsche Vernichtungskrieg im Osten 1939-1945* (Frankfurt, 1989), 117-136; Yaacov Lozowick, "Rollbahn Mored: the Early Activities of Einsatzgruppe C," 221-225; Krausnick and Wilhelm, *Die Truppe des Weltanschauungskrieges*, 235, 237-238; and Leni Yahil, *The Holocaust: The Fate of European Jewry* (Oxford, 1990), 257 and 271.

¹²⁴ Benjamin Ferencz, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation* (Cambridge, 1979), 14.

it up. To ensure the operation ran smoothly, Blobel worked his men in shifts and made certain they were always kept well supplied with liquor to dull their senses and with the ammunition needed to kill “undesirables.”¹²⁵ Years later Kurt Werner, a member of *Sonderkommando* 4a reminiscing about Babi Yar said, “I still recall today the complete terror of the Jews when they first caught sight of the bodies as they reached the top edge of the ravine. Many Jews cried out in terror. It’s almost impossible to imagine what nerves of steel it took to carry out that dirty work down there. It was horrible.”¹²⁶ After the war Albert Hartl, an employee of the RSHA, but who refused an order to take over leadership of a *Kommando*, vividly recalled witnessing the Babi Yar massacre and recounted to American authorities how bizarre Blobel’s behavior had been.¹²⁷ A year after the massacre while touring Russia with Blobel he remembered passing the ravine when he “noticed strange movements of the earth. Clumps of earth rose into the air as if by their own propulsion and there was smoke; it was like a low-tower volcano; as if there was burning lava just beneath the earth. Blobel laughed, made a gesture with his arm pointing back along the road and ahead, all along the ravine – the ravine of Babi Yar and said, ‘Here live my thirty thousand Jews.’”¹²⁸

¹²⁵ Richard Breitman, *The Architect of Genocide: Himmler and the Final Solution* (Hanover, MA, 1991), 211-212.

¹²⁶ “Statement of Kurt Werner, a member of Sonderkommando 4a,” in Ernst Klee, Willi Dressen, and Volker Riess (eds.), *“The Good Old Days”: The Holocaust as Seen by Its Perpetrators and Bystanders*, trans., Deborah Burnstone (New York, 1991), 66-67.

¹²⁷ Hilberg, “The Nature of the Process,” 30.

¹²⁸ Gitta Sereny, *Albert Speer: His Battle with Truth* (New York: Vintage Books, 1995), 272 and affidavit of Albert Hartl (NO 5384), in *Trial*, Prosecution Document Book, roll 12, frame 0398. While in all likelihood so many corpses would emit gasses while

Blobel's role in the Babi Yar massacre earned him a nomination by Heydrich for the War Service Cross Second Class.¹²⁹ It also enhanced his reputation as a most "efficient killer of Jews" as well as a "drunk and a monster" (apparently Blobel ended up in hospital as a result of excessive alcohol consumption following the killing spree at Babi Yar).¹³⁰ Two of his colleagues at Nuremberg, Eugen Steimle (Commander of *Sonderkommando 7a*) and Erwin Schulz (Commander of *Einsatzkommando 5*) told American authorities during interrogations that Blobel was a "bloodhound, brutal, without any inhibition, and not very well liked."¹³¹ Indeed Blobel was so reviled that he was one of the few defendants who had difficulty securing affidavits from fellow SS and SD men attesting to his strength of character. The best defense he could mount at his trial was that the number of murders he was charged with was exaggerated, the actual number being in the range of ten to fifteen thousand, not the sixty thousand the prosecution claimed. This was a defense, Musmanno noted in the judgment, that "would anywhere be regarded as a massacre of some proportions, except in the annals of the *Einsatzgruppen*."¹³² Fearing that the court might not accept his main argument, Blobel prepared a second line of defense: he claimed he spent much of the

decomposing, it seems unlikely that decomposition would still be taking place.

¹²⁹ Christian Gerlach, "The Wannsee Conference, the Fate of German Jews, and Hitler's Decision in Principle to Exterminate All European Jews," in Omer Bartov (ed.), *The Holocaust: Origins, Implementation, Aftermath* (New York, 2000), 130.

¹³⁰ Sereney, *Albert Speer*, 270 and Lozowick, "Rollbahn Mord," 224-225.

¹³¹ Affidavit of Eugen Steimle, 29 October 1947, in *Trial*, roll 3, 1617 and Interrogation Summary No. 2429, Erwin Schulz, 12 June 1947 in NARA RG 238 (WCR), OCCWC, Executive Counsel, Evidence Division, Interrogation Branch, Interrogation Summaries, box 7, folder 2251-2325.

¹³² Opinion and Judgment of the Tribunal, 8 April 1948, in *Trial*, roll 29, 152.

time he was in Russia in the hospital due to chronic illnesses, particularly Volhynian fever (dysentery), a condition undoubtedly exacerbated by heavy drinking.¹³³

Even though Blobel probably suffered from a severe and prolonged case of dysentery in 1941, perhaps the true source of his health problems was the difficulty he had coping with his job. During cross-examination in October 1947, he admitted, after much prodding by Musmanno, that his chronic illnesses resulted from, at least in part, the tasks he had to carry out. As he explained, it was not easy to murder for a living.¹³⁴ Blobel was not exaggerating. Murder was a gruesome business, particularly the use of the gas vans which had been allocated to the *Einsatzgruppen* by Himmler to alleviate some of psychological stresses placed on the executioners when they had to shoot their victims. In reality however, the use of the gas van was even more psychologically taxing. Julius Bauer, Blobel's driver in *Sonderkommando 4a*, described the horror of the gas vans and just how Blobel used alcohol to cope with stressful and troubling situations.

The use of the gas vans was the most horrible thing I have ever seen. I saw people being led into the vans and the doors closed. Then the van drove off. I had to drive Blobel to the place where the gas van was unloaded. The back doors of the van were opened, and the bodies that had not fallen out when the doors were opened were unloaded by Jews who were still alive. The bodies were covered with vomit and excrement. It was a terrible sight. Blobel looked, then looked away, and we drove off. On such occasions Blobel always drank schnapps, sometimes even in the car.¹³⁵

¹³³ I could find no trace of a disease by this name. Given additional testimony, it seems that Volhynian fever was actually acute dysentery. Testimony of Paul Blobel. Testimony of Paul Blobel, 30 October 1947, in *ibid.*, roll 3, 1649-1650.

¹³⁴ *Ibid.*

¹³⁵ Julius Bauer quoted in Eugen Kogon, Hermann Langbein and Adalbert Rückerl (eds.), *Nazi Mass Murder: A Documentary History of the Use of Poison Gas*, trans. by Mary Scott and Caroline Lloyd-Morris (New Haven, 1993), 61.

At trial Blobel's claims of psychological trauma were confirmed by his adjutant and frequent prosecution witness at Nuremberg, *Obersturmführer* August Häfner. He stated that as early as July 1941, after the massacre of three thousand Jewish civilians (women and children included), Blobel displayed early signs of mental breakdown.¹³⁶ Häfner affirmed that,

Blobel had had a nervous breakdown and was in bed in his room.... He was talking confusedly. He was saying that it was not possible to shoot so many Jews and that what was needed was a plough to plough them into the ground. He had completely lost his mind. He was threatening to shoot Wehrmacht officers with his pistol. It was clear to me that he had cracked up....¹³⁷

When Blobel testified that he found his job mentally taxing Musmanno became enraged, and repeated a point he had made several times before to other defendants, that they could have done something, anything to help even one of the poor souls slated for murder. As Musmanno noted caustically, Blobel had chosen alcohol as a way to assuage his feelings of guilt, that had he instead embraced a moral position this might have deterred him from carrying out the mass murder of Soviet Jewry.¹³⁸ In his judgment, Musmanno also noted that Blobel's attitude toward murder was so skewed that he actually believed it was militarily justifiable to kill "1,160 Jews in...retaliation for the killing of 10 German soldiers."¹³⁹ There

¹³⁶ Affidavit of August Häfner, 10 November 1947. Document Book 2, Paul Blobel, Document No. 5, in *Trial*, roll 26, frames 0024-0032.

¹³⁷ SS-Obersturmführer August Häfner, Sonderkommando 4a, in Ernst Klee et al. (eds.), *The Good Old Days*, 111-112. During his testimony Blobel admitted that in July 1941 he was admitted to hospital in Lublin for a nervous breakdown. Testimony of Paul Blobel, 28 October 1947, in *Trial*, roll 3, 1524. See also Affidavit of August Häfner, 10 November 1947 in *ibid*.

¹³⁸ On the issue of disobedience to orders see Kitterman, "Those who Said 'No!'," 241-254.

¹³⁹ Opinion and Judgment of the Tribunal, 8 April 1948, in *Trial*, 2011 29, 154.

can be no doubt that Blobel knew his actions in Russia were wrong. He was not only unable to rationalize his crimes on ideological or military grounds, he could not even bring himself to deny his horrible deeds at trial. The unavailability of coping mechanisms caused him such physical and mental torment that he had to find some way to cope and did so by drinking heavily.¹⁴⁰ In the end, Blobel should have listened to his conscience and heeded his own warning. In 1950, he told a panel of American judges that “by taking a decision, a man makes of himself what he is: he creates or destroys his own moral personality.”¹⁴¹ Indeed. Only in April 1945, as the war was drawing to a close, did he realize that Allied authorities were closing in and he might be punished for his crimes. To avoid capture he obtained false papers under the name of Hermann Altenpohl (his wife’s maiden name) and went to Salzburg to take direction from the head of the RSHA, Ernst Kaltenbrunner.¹⁴² Despite these efforts to conceal his identity, he was apprehended May 8 in Rastatt, Austria, indicted and

¹⁴⁰ Blobel’s reaction is in line with Ruth Bettina Birn’s findings, “It should be stressed here that SS leaders did not really feel they were innocent, while committing their crimes and that they had no reason to feel they acted under binding orders (*Befehlnotstand*). The German penal code was in force all the time during the Nazi era. On the contrary, they seem to have been well aware of the criminal nature of their deeds and to have hoped to get away with it.” See Birn, “Guilty Conscience, Antisemitism and the Personal Development of some SS Leaders,” 2086.

¹⁴¹ Petition for clemency of Paul Blobel, 12 September 1950 in NARA RG 466 (HICOG), Prisons Division, Petitions for Clemency, box 3, Blobel folder.

¹⁴² Case Record of Paul Blobel, 27 April 1948 in NARA RG 338 (USA-WWII), Records of War Criminals Prison No. 1 Landsberg, Records Relating to Executed Prisoners January 2, 1946-June 7, 1951, box 1, Blobel folder. Ruckerl notes that the SS furnished many such false papers to its members as the war neared its end. Ruckerl, *Die Strafverfolgung von NS-Verbrechen 1945-1978*, 77-78.

charged with mass murder in July 1947.¹⁴³

Few of the *Einsatzgruppen* attained the same level of notoriety as Blobel, but there was one other which was equally as ruthless and just as conflicted. Eduard Strauch, one of the most ruthless and sadistic of the *Einsatzkommando* leaders also had alcohol abuse problems and early on in his career demonstrated clear signs of mental imbalance. Like Blobel, his ailments were the obvious result of his inability to overcome the mental strain of his work in Russia. During trial, Strauch, a well-educated and zealous National Socialist, never expressed an iota of remorse for his actions; in fact, he maintained throughout that National Socialist racial policy was justified even though emotionally it took a heavy toll on him.¹⁴⁴ To admit his actions were in any way wrong proved to be too heavy a psychological burden for this committed National Socialist to bear.

As we saw in the previous chapter, Strauch was a stereotypical member of the *Einsatzgruppen* leadership corps. He was born in the first decade of the twentieth century, was a vehement anti-communist and was politicized as a youth. He was well educated (a lawyer by training), and like Blobel had joined the Party at a time of great economic

¹⁴³ Eidesstattliche Erklärung, Paul Blobel, 15 June 1947, in NARA RG 238 (WCR), Records of War Criminals Prison No. 1, Landsberg, Records Relating to Executed Prisoners January 2, 1946-June 7, 1951, box 1 Ab-Br, Paul Blobel folder.

¹⁴⁴ Wilhelm, *Die Truppe des Weltanschauungskrieges*, 282 and George Browder notes that Strauch possessed the typical characteristics of an “authoritarian personality.” He was capable of overcoming the most difficult obstacles, yet he was unable to empathize with others and was excessively judgmental. He had attained a high level of formal education but his “ethical maturity” was underdeveloped and, as a result, he became one of the most sadistic of the *Kommando* leaders. Like Blobel however, even his “cold bloodedness” could not protect him “from the resultant psychic strain [of killing].” For a more in-depth discussion of the authoritarian personality and social theory See Browder, *Hitler’s Enforcers*, 158-170.

instability because he believed it was the one way to protect Germany from both domestic and foreign enemies.¹⁴⁵ Also typical was the fact Strauch had been recruited to lead an *Kommando* while working as a Government councillor in the RSHA. On November 4, 1941, he received a message from Heydrich concerning his reassignment. He was sent to Riga, Latvia where he was put in charge of *Einsatzkommando 2* of *Einsatzgruppe A* under Franz Stahlecker and later Heinz Jost. In February 1942, he was made Commander of the Security Police and SD in Minsk, White Ruthenia (White Russia).¹⁴⁶ While Strauch's leadership abilities earned him high praise with his superiors, his efforts were not as well received by his colleagues in Russia. One incident in particular, involving the *Gauleiter* of White Russia, Wilhelm Kube, stands out.¹⁴⁷

In 1942, when the killing in Russia was at its peak, Kube accused Strauch and his men of especially barbaric behavior.¹⁴⁸ Apparently Kube himself had had no moral compunctions about murdering Russian Jews, but he was opposed fundamentally to the murder of German Jews, at least in his area of authority.¹⁴⁹ Because of Strauch's attitude

¹⁴⁵ On these subjects see *ibid.*; Testimony of Eduard Strauch, 13 January 1948, in *Trial*, roll 6, 4908-4909 and 4913-4914; Interrogation Nr. 1643-A, Vernehmung des Strauch Eduard, 4.8.47, M1019, roll 72; and, SS Personnel Record of Walter Strauch, (NO 2966), in *Trial*, roll 11, frame 0538.

¹⁴⁶ Testimony of Eduard Strauch, 13 January 1948, in *ibid.*, roll 6, 4930-4934 and SS Personnel Record of Eduard Strauch, (NO 2966), in *ibid.*, roll 11, frame 0538..

¹⁴⁷ SS Personnel Record of Eduard Strauch, (NO 2966) in *ibid.*, roll 11, frame 0539.

¹⁴⁸ Wilhelm, *Die Truppe des Weltanschauungskrieges*, 554-557.

¹⁴⁹ Hilberg notes that Kube's moral barometer, unlike many of the perpetrators, was not flexible. He writes, "one reason why the person of *Generalkommissar* Kube is so important is that he had a firm line beyond which he could not pass. The line was arbitrary, and very advanced. He sacrificed Russian Jews and fought desperately only for the German

toward the murder of German Jews, Kube confronted him and accused his *Kommandos* of conducting a “fanatical campaign of liquidation,” behavior that “was unworthy of a German.”¹⁵⁰ Strauch was dumbfounded by Kube’s attitude, declaring that, “it was incomprehensible [to him] ...why Germans should fall out over a few Jews [even if they were German].” After all, he rationalized in a letter to his superiors, “all I was doing was my duty.”¹⁵¹ Strauch’s relationship with Kube deteriorated even further after the latter decided to launch an official complaint against Strauch and his men. This infuriated Strauch so much that he responded with a letter to the *Reichsführer-SS* outlining his dispute with Kube. In the letter Strauch complained that Kube was an inept administrator, that he was hostile to the SS, SD and police in the area and in practice, Strauch argued Kube’s approach to the Jewish problem was at best ambiguous. Strauch was outraged that Kube once thanked a Jewish man for rescuing his car from a burning garage, and on another occasion had given candy to Jewish children and, worst of all, Strauch reported, Kube had used his knowledge as Gauleiter to help rescue some Jews! In Strauch’s opinion Kube’s behavior was “traitorous;” that Kube was “from the bottom of his heart, an opponent of our Jewish actions.” Because Strauch was in the front line, so to speak, criticism from behind the line was interpreted as a personal betrayal.¹⁵² As one scholar has noted, “there was nothing so irksome [for a

Jews in his area. But the line was fixed. It was not moveable, it was not imaginary, it was not self-deceptive.” Hilberg, “The Nature of the Process,” 33.

¹⁵⁰ Wilhelm, *Die Truppe des Weltanschauungskrieges*, 556.

¹⁵¹ Eduard Strauch quoted in *ibid.*, 421.

¹⁵² Letter from Eduard Strauch to the Reichsführer-SS and Chief of the German Police, 25 July 1943, in *Trial*, roll 12, frames 0053-0067.

perpetrator] as the realization that someone was watching over one's shoulder, that someone would be free to talk and accuse because he was not himself involved [in the murder process]."¹⁵³

Strauch's brutish actions in White Ruthenia (his *Kommando* was responsible for the murder of approximately 60,000 people) precisely the kind of excesses Ohlendorf had forbidden his men to engage in the Crimea, probably drew attention away from early signs that he was a seriously disturbed man. He was the only defendant at Nuremberg who exhibited genuine evidence of mental collapse. Emil Hausmann had committed suicide in July 1947 before the trial began, and Waldemar Klingelhöfer had attempted suicide the same month, but survived. It was widely recognized, as his SS record clearly indicates, that even before his run-in with Kube, Strauch had had difficulties with his colleagues. At trial, his mental capacities appeared diminished. He had great difficulty responding to the simplest questions from his defense attorney, and when he did respond his answers were frequently repetitive and confused, and made little sense.¹⁵⁴ The court knew he suffered from epilepsy, as the day of his arraignment he created "drama" in the courtroom. Musmanno recalled the episode:

As Judge Dixon asked him: 'Eduard Strauch, are you represented by counsel before this Tribunal?' he uttered a shriek and toppled to the floor in an epileptic seizure. He was taken out by court attendants.¹⁵⁵

¹⁵³ Hilberg, "The Nature of the Process," 19-24.

¹⁵⁴ For example see Strauch's testimony on January 13, 1948, in which he had great difficulty responding to his attorney's questions concerning his education. In *Trial*, roll 6, 4907-4953. See also Wilhelm, *Die Truppe des Weltanschauungskriegs*, 282.

¹⁵⁵ Musmanno, *Eichmann Kommandos*, 141.

According to testimony, Strauch's seizures had been in abeyance during his youth, but returned with increasing frequency during stressful periods later in his life particularly, during his incarceration after the war (interestingly, he did not indicate that he suffered from seizures while serving with his *Einsatzkommando*). After the episode in court Musmanno sent Strauch to military doctors for a physical and psychological evaluation to determine if he could physically survive a trial and, if he could, whether he was capable of understanding the grave charges he faced. The medical board determined that "except for brief periods preceding, during and succeeding epileptic seizures" Strauch was perfectly capable of understanding the proceedings and was sufficiently lucid to participate in his own defense.¹⁵⁶ On the basis of this report Musmanno concluded that Strauch was "feigning" insanity to avoid responsibility for his crimes. In all likelihood Musmanno's assessment of Strauch's behavior at trial was correct. The evidence suggests he genuinely suffered from some form of mental imbalance but epilepsy was not the root cause. According to his SS Personnel record, he showed signs of diminished mental capacity, paranoia and aggression as early as March 1941. According to one evaluation, Strauch's

emotional perception was not particularly developed. He finds it hard to imagine himself in other people's positions and, is rarely able to judge them conscientiously and correctly. This may well account for his mistrust towards his staff, an attitude which, in turn, renders him susceptible to tale-telling (sic). His actions are predominantly instinctive and often scarcely influenced by reason. His reactions are impulsive and explosive. All that results in a decidedly unbalanced quality of his character, unfairness in managing men as well as discrepancy between his basic attitude and his actions. This also explains the fact that his decisions are often too

¹⁵⁶ "Physical and Mental Condition of Defendant, Eduard Strauch," in Opinion and Judgment of the Tribunal, 8 April 1948, in *Trial*, roll, 201-202. See also Musmanno, *Eichmann Kommandos*, 141 and ruling by Musmanno, 13 January 1948, in *Trial*, roll 6, 4944-4945.

hasty and ill-considered.¹⁵⁷

Strauch's poor judgment, the evaluation continued, was exacerbated by the use of alcohol, particularly when he drank to excess, which by all accounts, was frequently.¹⁵⁸ It should be noted that the evaluators of Strauch's personality and mental state were not doctors, but they did have ample opportunity to witness his behavior and it was well known that he acted impulsively and had difficulty getting along with fellow SS men and other party officials. His relationship with Kube illustrates this quite effectively.

Strauch's answers while on the witness stand were garbled, but they did suggest his attitude and approach to his job were genuine and conscientiously applied, and this is what he was indicted for in 1947. This comes across clearly in the letters he had written during the period of his assignment in the east that were entered into evidence. They make clear that he was a vehement antisemite, a nationalist, and a man so imbued with National Socialist ideals – Hilberg would call him a party zealot – that any display of humanity was to him a sign of weakness and betrayal. In one letter, written July 20, 1943 to the Commander of the Security Police and SD–White Ruthenia, he expressed resentment over criticism he had received concerning the removal of gold fillings from the teeth of seventy Jews by his group. This in itself was not such an unusual action; in fact, it was pretty much official practice. What was so unusual was that the gold had been removed from people's teeth before they were executed, not afterward; an action gruesome even by Nazi standards. Strauch reasoned that this action was neither sadistic nor barbaric since it had been carried out by “expert

¹⁵⁷ SS Personnel Record of Eduard Strauch, (NO 2966), in *ibid.*, roll 11, frames 0539-0540.

¹⁵⁸ *Ibid.*

physicians.”¹⁵⁹ Strauch was so determined to carry out his orders and do his duty that on one occasion, as the affiant Adolf Rube recalled, Strauch, discovering that a group of Jews from Sluzk (near Minsk) were forewarned that the promise of resettlement was a hoax, created a ruse to pacify them, thus ensuring the executions would be carried out without incident.¹⁶⁰ Strauch’s cleverness resulted in the “efficient” murder of two thousand innocent people that February day in 1943.¹⁶¹ There is no doubt in Strauch’s mind that the *Führerbefehl* “had to be carried out” at all costs.¹⁶² As he told a group assembled in Minsk in 1943, “sometimes we must fulfil hard and unpleasant tasks,” but he was proud to say that he and his men, “acted from conviction and loyalty for their leader.”¹⁶³

Whether or not Strauch’s mental instability was feigned to avoid responsibility is questionable, but Waldemar Klingelhöfer’s suicide attempt in 1947 was real. As noted previously, Klingelhöfer was born April 4, 1900 in Moscow, but after the expulsion of his family from Russia, he returned to Germany where he spent his formative years.¹⁶⁴ Between the end of the First World War and the Nazi seizure of power in 1933, Klingelhöfer straddled two worlds: one the world of high culture (furthering his career as an opera singer), the other the politics of the far right. Of course this is not to suggest that these two worlds

¹⁵⁹ Letter from Eduard Strauch to Commander of the Security Police and the SD–White Ruthenia, 20 July 1943, (NO 4317), in *ibid.*, roll 12, frames 0069-0071.

¹⁶⁰ An affiant is the legal term given to a person who gives a written or oral affidavit.

¹⁶¹ Affidavit of Adolf Rube, 23 October 1947, (NO 5498), in *Trial*, roll 12, frames 0072-0073.

¹⁶² Testimony of Eduard Strauch, 19 January 1948, in *ibid.*, roll 6, 5244.

¹⁶³ Strauch quoted in Wilhelm, *Die Truppe des Weltanschauungskrieges*, 557.

¹⁶⁴ Eidesstattliche Erklärung of Waldemar Klingelhöfer, M1019, roll 35.

were incompatible, but the evidence seems to suggest that Klingelhöfer did not conflate them, preferring to be either a professional opera singer, or a politically active and professional Nazi. He joined the Party in 1930 and the SS two years later, and once his singing career came to an end, he joined the SD, where he worked full time beginning in 1934.¹⁶⁵ While working in the offices of the SD he was drafted into the mobile killing units.

One of the reasons Klingelhöfer was conscripted for a job with the *Einsatzgruppen* was that he had mastered the Russian language. At the end of May 1941 (when the *Kommandos* were being formed) he was sent to Pretzsch, where the *Einsatzgruppen* men assembled for their assignment, and was given the job of interpreter for *Sonderkommando* 7b of *Einsatzgruppe* B under the leadership of Arthur Nebe (see Figures 1 and 2). While with the *Sonderkommando*, he participated in the advance on Minsk. Once the city was occupied he was reassigned to the *Vorkommando* Moscow, at the time headed by co-defendant Franz Six. At some point after August 1941 when Six had left Russia (the exact particulars are unclear), Klingelhöfer was put in charge of *Vorkommando* Moscow. He headed the killing unit until December 1941 when he was reassigned, but stayed in the east an additional two years.¹⁶⁶ Between December 1941 and September 1943, he worked at *Kommando* headquarters in Smolensk, drawing up plans for the capture and control of Moscow. In addition to these duties, during his lengthy stay in Russia, Klingelhöfer also headed an “anti-partisan hunt” (May-June 1942), witnessed numerous executions, and at one point (in the autumn of 1941) was put in charge of “requisitioning” winter clothing for the

¹⁶⁵ *Ibid.*, and testimony of Waldemar Klingelhöfer, 11 December 1947, in *Trial*, roll 5, 3801.

¹⁶⁶ *Vernehmung des Waldemar Klingelhöfer*, 1 July 1947, M1019, roll 35.

men of *Einsatzgruppe B*.¹⁶⁷ In September 1943 he was transferred back to Minsk and then sent to Berlin in December.¹⁶⁸

After Klingelhöfer was arrested (he turned himself in to British authorities October 20, 1945) he was incarcerated in Bielefeld where he stayed until the end of June 1947 when he was transferred to the war criminals prison in Nuremberg for questioning by the American authorities planning Ohlendorf's trial.¹⁶⁹ Upon his arrival at Nuremberg he was interrogated immediately. During his interrogation, but before he knew he was to be indicted, he confessed to many crimes.¹⁷⁰ He admitted to his American interrogator that he was head of *Vorkommando* Moscow and that he had participated in a number of crimes, including the murder of Jews. Once the Americans had enough evidence against Klingelhöfer (including his sworn affidavit) they indicted him on July 1, 1947 for "Crimes against Humanity," "War Crimes" and "Membership in Organizations declared criminal by the IMT."¹⁷¹ Five days later, in the early morning of July 6, his cell-mate found him lying in a pool of blood. He was immediately taken to the 385th Post Army Hospital where he was treated for heavy blood loss. According to the on-duty physician's report, Klingelhöfer had

¹⁶⁷ *Ibid.*

¹⁶⁸ Testimony of Waldemar Klingelhöfer, 11 December 1947, in *Trial*, roll 5, 3819-3830 and interrogation of Waldemar Klingelhöfer, 1 July 1947, in *ibid.*, roll 12, 0233-0236.

¹⁶⁹ Detention Report of Waldemar Klingelhöfer, undated, in NARA RG 238 (WCR), OCCWC, Executive Office, Nuremberg Military Post, 201 Files 1945-1948, box 16 Keip-Koenig, Klingelhöfer folder.

¹⁷⁰ As noted in Chapter 2, this was one of the main ways the prosecution collected evidence from the perpetrators.

¹⁷¹ Testimony of Waldemar Klingelhöfer, 12 December 1947, in *Trial*, roll 5, 3917-3918.

spent several hours the night before cutting a deep hole in the artery of his left wrist. Somehow he had obtained a rather large safety pin which he used for this purpose (the National Archives in Washington, DC still has the pin attached to the physician's report). Even though he lost a good deal of blood, his cell-mate found him in time for medical treatment to be successful.¹⁷² The obvious question is why Klingelhöfer attempted suicide.

Benjamin Ferencz, the chief prosecutor in the case, believes that Klingelhöfer's suicide attempt was an expression of remorse for the role he had played in carrying out Nazi racial policy. Indeed, Ferencz maintains that Klingelhöfer was the only defendant tried at Nuremberg in 1947 who demonstrated any feelings of remorse whatsoever.¹⁷³ The evidence tends to support Ferencz's conclusion about the former leader of the *Vorkommando* Moscow. In his suicide note Klingelhöfer explained his motives:

Too late, unfortunately, after the collapse, I gained complete insight into the whole extent of the horrible blasphemy which was carried out here. Nevertheless, I ask that this step of mine [suicide attempt] not be interpreted as an attempt to excuse myself in any way.... I am fully conscious of the fact that I must bear the consequences completely for my personal attitude and my acts. Still I will not burden my conscience with acts which are in complete opposition to the attitude I have again achieved.¹⁷⁴

Seemingly, Klingelhöfer both accepted responsibility for his actions and expressed genuine contrition. Further corroboration of Klingelhöfer's change of heart has been provided by prison officials who noted on his application for parole in 1955 and 1956 that "the applicant

¹⁷² Medical Report of Dr. Pflücker on Waldemar Klingelhöfer, 6 July 1947, Nuernberg in *ibid.*

¹⁷³ Interview with Benjamin Ferencz, 24 April 1997, 11-12.

¹⁷⁴ Suicide note of Waldemar Klingelhöfer, 4 July 1947, (NO 5451), in *Trial*, roll 12, frame 0445.

has shown genuine remorse for many of his actions” and has “realized that he was involved in a crime.”¹⁷⁵ On the other hand, Klingelhöfer, also a heavy drinker, actually made only one public admission of guilt, announcing in a suicide note one night in July 1947 that he was ashamed of the role he played in Russia.¹⁷⁶ But his contrition was short-lived. By the time his trial began (two months after his suicide attempt) and he was allowed to testify, he repeated none of the misgivings he had expressed during his earlier period of emotional upset. In fact, during cross examination he denied everything he had said previously. He testified that he had known nothing about the murder of Jews, that he had never been head of *Vorkommando* Moscow, only its deputy, and that he certainly did not supervise any executions – all matters he had confessed to in his pre-trial interrogation. When asked by Ferencz why he was recanting his earlier affidavit, Klingelhöfer stated that he was “mixed up” and did not have “all my logical thinking in order.”¹⁷⁷

There was another matter, however, about which Klingelhöfer appears to have harbored strong feelings of guilt, and this may explain in part why his behaviour was so inconsistent. Klingelhöfer’s suicide note also made reference to a letter which co-defendant Erich Naumann had given him secretly, two days after he was interrogated July 1, 1947. In the note Naumann instructed Klingelhöfer what to say and not to say to his American

¹⁷⁵ Institutional Record of Waldemar Klingelhöfer, 27 January 1955 and 29 August 1956, in NARA RG 238 (WCR), OCCWC, Executive Office, Nuremberg Military Post, 201 Files 1945-1948, box 16 Keip-Koenig, Klingelhöfer folder.

¹⁷⁶ Letter Erich Naumann to Waldemar Klingelhöfer, July 3, 1947, (NO 5450), in *Trial*, roll 12, frames 0380-0381. Naumann wrote that he told American authorities that he brought Klingelhöfer into his group B because of his language skills, but also because of “your inclination to drink deemed it necessary (I had to be frank here).”

¹⁷⁷ Testimony of Waldemar Klingelhöfer, 12 December 1947, in *ibid.*, roll 5, 3917.

interrogators. Rather than dispose of the note, Klingelhöfer decided, in a moment of guilt, to hand it over to American authorities.¹⁷⁸ This betrayal of a fellow SS officer and his former superior caused Klingelhöfer great anxiety, and may have been the main reason for his attempted suicide. When asked how he felt about the incident involving his attempted suicide and the note from Naumann, he responded at trial,

Klingelhöfer: It was the general impression I had of the entire assignment that depressed me so much.

Ferencz: Were you depressed when you were here in Nuremberg in the jail and you had plenty of time to think about it?

Klingelhöfer: I was depressed, of course, but not only about my work in the East, and about the whole atmosphere there, but in general I was depressed about the collapse of the German Reich and about the things that I heard later on which I did not know anything about before. Those were the things that depressed me particularly.

Ferencz: Did you attempt to commit suicide while you were...in jail?

Klingelhöfer: Yes. That was as a result of sending [Naumann's] letter to Mr. Wartenberg [interrogator]. I had such an inner conflict that I no longer realized whether I had acted in the right manner. On the one hand, I was trying to say the truth as far as possible, knowing the catastrophe which had happened and my responsibility for the development of things; on the other hand, I felt that I had to give away ... a comrade, a former superior. In this state of excitement and in this conflict I found no way out, and my nerves were in such a bad state that I tried to commit suicide. I thought I could not live honestly this way. it upset me so much I did not know what [else] to do.¹⁷⁹

The truth seems to be that Klingelhöfer did feel some guilt (at least temporarily) about what he had done to carry out Nazi racial policy, but he felt similarly about the secret letter from Naumann and his belief that he had betrayed him by giving the letter to the Americans. Even though Klingelhöfer never read the contents of Naumann's letter, he knew Naumann would

¹⁷⁸ Naumann's letter is part of the official record of the trial.

¹⁷⁹ Testimony of Waldemar Klingelhöfer, 12 December 1947, in *Trial*, roll 5, 3955-3956.

have wanted him to perjure himself.¹⁸⁰ On the night of July 5, 1947, Klingelhöfer was willing to put his SS loyalties behind him, and express remorse for what he had done.¹⁸¹

The only other defendant at Nuremberg to appear at all troubled by his actions in Russia was Erwin Schulz, but the emotional turmoil he suffered had to do exclusively with the fact that women and children had been murdered. Musmanno remembered him as “dignified” in appearance and “courteous in speech” and as such, he felt Schulz was somewhat out of place in the dock.¹⁸² Schulz was the only *Einsatzgruppe* or *Kommando* leader indicted in 1947 who had been a policeman by profession before the Nazis seized power in 1933, and by many accounts he had been loathe to blindly implement Nazi racial policy, at least until he was sent to Russia in 1941.¹⁸³ Despite his reluctance to act against his conscience, he received a total of six promotions between April 1935 and November 1942, beginning as a *Hauptsturmführer* in 1935, and ending as a *Brigadeführer* in 1942.¹⁸⁴ Before he was drafted into the *Einsatzgruppen* in May 1941, Schulz had performed various security

¹⁸⁰ Naumann’s letter was a warning to Klingelhöfer not to tell too much to the American authorities. It began, “Do not be bluffed during interrogations! Always be careful, even with the friendliest face!” The letter went on to explain to Klingelhöfer what Naumann had told authorities, the implication being that Klingelhöfer should stick to Naumann’s version of events. See secret letter from Erich Naumann to Waldemar Klingelhöfer, 3 July 1947 (NO 5450), in *ibid.*, roll 12, frames 0380-0381.

¹⁸¹ *Ibid.*, 3957.

¹⁸² Musmanno, *Eichmann Kommandos*, 176-177.

¹⁸³ For example, see Schulz defense document numbers: 5, 7, 16, 21, 37, 49, 64, 65, 70, 88, 91, 92 and 93 in *ibid.*, roll 27. All these affidavits speak of Schulz as a fair and, in some cases, generous, police official who frequently challenged and even arrested individuals for excesses committed against Jews.

¹⁸⁴ Memorandum for SS Personnel Record of Erwin Schulz from Heinrich Himmler, 9 November 1941 (NO 4957), in *ibid.*, roll 12, frame 0382.

tasks. He was in charge of security in Graz, Usti (Aussig), and Olmütz, in Austria during the *Anschluss*, and later in the Sudetenland. His work in Austria and Czechoslovakia continued until 1940 when he was transferred to Hamburg and made Inspector of the Security Police and the SD. The following year he was sent to Berlin to work as head of Group IB of the RSHA (Training and Education).¹⁸⁵ Given his training as a police official and his work in the RSHA, Schulz was a logical choice for assignment to the east. Indeed, in May 1941, while working in Berlin, Bruno Streckenbach gave him the order to proceed to Pretzsch to train personnel for the *Einsatzgruppen* and to assume command of an *Einsatzkommando* himself. Schulz recalled that at the time, the role of the *Einsatzgruppen* had not been made known to him, and he speciously claimed he had mistakenly assumed their task would be to attack England, not Russia.¹⁸⁶

When he arrived in Pretzsch, Schulz was immediately put in charge of *Einsatzkommando 5* of *Einsatzgruppe C* commanded by Dr. Otto Rasch (see Figure 5.1). Schulz officially remained head of the *Kommando* from May until early September 1941, a relatively short period compared to the time served by some of his co-defendants. During his testimony he told the court that his *Kommando* had executed only eighteen people – as opposed to the 15,000 he was charged with murdering – all of whom were communists and partisans, and not specifically Jews. Schulz explained that for him the last straw came in August 1941, while he was stationed in Zhitomir. At that time his unit his unit had received

¹⁸⁵ Affidavit of Erwin Schulz, 20 December 1945, (NO 3841), in *Trial*, roll 11, frames 0766-0767 and “Trial Brief for the United States of America against Erwin Schulz,” 15 January 1948, in Mendelsohn (ed.), *The Holocaust. Punishing the Perpetrators of the Holocaust: The Ohlendorf and Von Weizsäcker Cases*, vol. 18, 94-95.

¹⁸⁶ Testimony of Erwin Schulz, 17 October 1947, in *Trial*, roll 2, 930.

a particularly disturbing order from Himmler which directed that women and children were to be executed. Himmler justified the order on preventative grounds, arguing the new actions were designed to prevent aggrieved parties from “avenging” the murder of their loved ones. Schulz recalled that he had been horrified by the suggestion that women and children were to be killed. He told the court that this was the first time he realized the true extent of the “dictatorial power” of Himmler and that he immediately wrote to Bruno Streckenbach, who was in charge of staffing for the SD and a person with whom he had a good relationship, asking to be transferred back to Germany as soon as possible.¹⁸⁷ Schulz’s request for transfer was approved very quickly and without repercussions, but it did not sit well with Rasch, his superior, who viewed Schulz’s request as a sign of weakness.¹⁸⁸ He left the east on August 24 and was back in Berlin safely by the end of September 1941.¹⁸⁹ It is tempting to question the veracity of Schulz’s testimony, for after all he was trying to prove his innocence and save his life. But there is corroborating evidence to suggest that he was genuinely appalled by the order to murder women and children.

In 1945, after he surrendered voluntarily to American authorities, Schulz was interrogated concerning his activities during the war.¹⁹⁰ At this point he had no idea he might

¹⁸⁷ Testimony of Erwin Schulz, 18 October 1947, in *Trial*, roll 2, 954-955. George Browder discusses the concept of the transformation of values in individuals, or transvaluation. In Schulz’s case he sees this as having occurred during his stint in Russia. See Browder, *Hitler’s Enforcers*, 42-43.

¹⁸⁸ Personal Statement of Erwin Schulz to the Pardon Committee, June 1950, in NARA RG 466 (HICOG), Prisons Division, Petitions for Clemency, box 32, Schulz folder.

¹⁸⁹ Testimony of Erwin Schulz, 18 October 1947, in *Trial*, roll 2, 958-964.

¹⁹⁰ Personal Statement for the Clemency Committee of Erwin Schulz, Case Nr. 9, Ohlendorf u.a., Landsberg, June 1950 in NARA RG 238 (WCR), Advisory Board on

be indicted at some future date, thus giving his statement to authorities far more credibility than those he made later in 1947 when he knew he would have to defend himself and his actions in court. During the earliest interrogations, in 1945, he told his examiner that he had asked to be released from his duties as commander of *Einsatzkommando* 5 in the fall of 1941 because he was distraught at the prospect of having to obey the “intensified orders for the ruthless extermination of the entire Jewish population.” Furthermore, Schulz claimed he was bothered greatly by the prospect of having to shoot people himself. Apparently Dr. Rasch, his supervisor and a man with whom he did not get along, was particularly “ruthless” and was demanding that *Kommando* leaders “participate personally in the shootings” in conformity with the policy of *Blutkitt* (essentially a murderous pact in which the blood of the victims unites the perpetrators) which the Nazis employed so effectively.¹⁹¹ Ten years later he repeated this earlier statement before a German court. He said that,

at the beginning of August 1941 the Einsatzkommandoführer of Einsatzgruppe C were ordered to report to Dr. Rasch ...in Zhitomir. There Dr. Rasch revealed to us that Gruppenführer Jeckeln had delivered an order from Reichsführer-SS Himmler that from then on all Jews not engaged in work were to be shot along with their families. I was shattered when I heard this piece of news and I had absolutely no doubt that I could never carry out such an order. For this reason I wrote immediately to Gruppenführer Streckenbach, who was at that time head of personnel at RSHA, and asked him if I could come and see him in Berlin...Once in Berlin I described to Streckenbach what was going on in Russia....I also asked Streckenbach to have me

Clemency for War Criminals, HICOG 1947-1950, Correspondence, case 9, box 12 E212, E. Schulz folder.

¹⁹¹ Affidavit of Erwin Schulz, 20 December 1945 (NO 3841), in *Trial*, roll 11, frame 0767. Schulz’s contention concerning Rasch is corroborated by the affiant Karl Henniecke who also told American officials that Schulz had fallen out of favour with Rasch because he was viewed as “soft as an egg” on the Jewish question. See Affidavit of Karl Henniecke, 26 September 1947 (Schulz Document No. 21), in *ibid.*, roll 27, frames 0807-0811.

released from my post.¹⁹²

Schulz was released from his duties in the east and, as he admitted in his statement, he suffered no adverse consequences.¹⁹³

It is not possible to know definitively if Schulz really asked to be relieved from his post because he opposed the murder of women and children, although given the overwhelming number of affidavits testifying to his acts of kindness and his sense of generosity (unusual in the case of these defendants), it seems likely he did oppose such actions. The presiding judge, at least, partially believed him, noting in his judgment that in Schulz's favour it can be said that, "confronted with an intolerable situation he did attempt to do something about it."¹⁹⁴ Even his parole supervisor in 1955 noted that he "believed [in this man's sincerity and admired] him for his honest and frank statements."¹⁹⁵ Moreover, Schulz did confess that he was fully aware of the emotional impact murder had on his men. He said he could see it in their faces, that they hated doing their job. Like himself, many were simply unable to reconcile their inner feelings of disgust with their sense of duty.¹⁹⁶ When asked why his men continued to murder innocent people when it troubled them so, he

¹⁹² Erwin Schulz quoted in Klee et al. (eds.), *"The Good Old Days,"* 85-86. On the issue of disobedience to orders see Kittermann, "Those Who Said 'No!': Germans who Refused to execute Civilians during world War II."

¹⁹³ Klee, *"The Good Old Days,"* 86.

¹⁹⁴ Opinion and Judgment of the Tribunal, 8 April 1948, in *Trial*, roll 29, 145.

¹⁹⁵ Memorandum of US Parole Officer, Control Visits of Erwin Schulz, 1 July 1955 in NARA RG 338 (USA-WWII), Judge Advocate, War Crimes Branch, Records of Post-Trial Activities 1945-1957, box 6 US Parole Officer-Summarized Activity Reports, September 1954-June 1955 folder.

¹⁹⁶ Testimony of Erwin Schulz, 18 October 1947, in *Trial*, roll 2, 967.

told the court that it was, most likely, out of a sense of duty, something he himself knew well.

Schulz was never able to rid himself of the belief that obedience and duty were cardinal virtues; even during his incarceration he clung to these beliefs. In 1953, in a report by prison officials to the Clemency Board for War Criminals, the prison director noted that Schulz was “cooperative....and extremely dependable.” More telling was the last recorded comment, that Schulz was “willing to do whatever we want,” an attribute the prison official seemed to regard as positive, but one which, as we have seen, prompted him to carry out orders, even orders that were personally repugnant to him.¹⁹⁷ Even though Schulz refused to participate wholly in the “war against the Jews,” irrefutable documentary evidence proves he was willing to supervise at least some executions even if for only a relatively short period of time (two months). In the end, men like Erwin Schulz and Waldemar Klingelhöfer, although acknowledging, albeit fleetingly, the monstrousness of the “Final Solution” they had participated in and the conflicted emotions they felt, neither were willing nor able to accept full responsibility for their actions.

5. Conclusion

The perpetrators have now been identified and their careers described and as it turns out only three of the defendants were at all conflicted about their roles in mass murder. Another three completely denied they had done anything wrong and thus it is next to impossible to determine their motivation, while the remaining sixteen defendants were what

¹⁹⁷ Institutional Record of Erwin Schulz, 31 October 1953 in NARA RG 466 (HICOG), Prisons Division, Petitions, box 32, Schulz folder.

has been described as “ideological soldiers.” What can we conclude about their motives and personalities from their comportment at Nuremberg? Why were these men – members of elite German society – willing to carry out Nazi racial policy and how did they account for their actions later when they were brought to trial in a court of law? Motivation is inherently difficult to determine since it goes to an individual’s state of mind and anything said is necessarily speculative.¹⁹⁸ On the other hand, some important and revealing personality traits of the men of the *Einsatzgruppen* can be discerned from their behavior and testimony at Nuremberg which casts light on their motivation. First and most important is that the defendants were not all ideological soldiers, holding the same degree of conviction as Ohlendorf, who was unwavering in his certainty of the virtues of Nazi racial policy. Some of the Nuremberg defendants, in fact, did suffer from psychological turmoil as a consequence of the role they played in the mass murder of Soviet Jewry and other “undesirables.”

There were men like Blobel (albeit very few) who were obviously emotionally conflicted by their assignments. In his case at least, ideology does not appear to be a sustainable explanation of his behavior; other factors were at work. According to the evidence, it seems Blobel was probably drawn into the killing process in spite of his inner convictions. Because of his weak nature and his need for acceptance he was unable to resist the pressures and do what was morally right. Rather he ended-up overcompensating for his moral weakness by killing far more innocent people, and with more vigor, than men who were more ideologically motivated. Even though some defendants did exhibit emotional

¹⁹⁸ Westermann has recently argued that “this question [of motivation] does not lend itself to a facile answer at the macro-level of German society, despite Daniel Goldhagen’s claim to the contrary.” Westermann, “‘Ordinary Men’ or ‘Ideological Soldiers’? Police Battalion 310 in Russia, 1942,” 41-42.

conflict like Blobel, their moral barometer was not sufficient to prevent them from carrying out their murderous tasks, nor to allow them to admit to their crimes in court. To be sure, the men like Ohlendorf far outnumbered the men like Blobel in the leadership corps of the *Einsatzgruppen*. Even so, more research into this subject is needed, which should include a broader sample of men from all levels and ranks of the *Einsatzgruppen*, and not just the officer corps in order to determine more fully the motivations of this group of perpetrators. Like most of the defendants, even the conflicted murderers attempted to justify, rationalize or otherwise explain their behavior when they appeared in court to answer for their crimes.¹⁹⁹

This is not surprising according to psychologist James Waller. He contends that rationalization is by far the most common response of perpetrators to the charge that they had committed heinous crimes. Psychologists have shown that human beings are incapable of living with severe internal moral conflicts without suffering some type of mental breakdown. Because of the need to reconcile one's actions with one's moral barometer, it is typically necessary for wrong-doers to integrate or resolve their inner conflicts, most often by changes in attitude that conform to behavior, or, in some cases, by blaming the victims themselves for their own demise.²⁰⁰ This certainly describes the behavior of the majority of the former *Einsatzgruppen* leaders, especially the ideologically motivated men tried at

¹⁹⁹ On the various defense arguments see Benjamin B. Ferencz, Brief for the Prosecution: Analysis of the Defenses Presented on Behalf of the Accused, February 1948, in *Trial*, roll 29, frames 0001-0017.

²⁰⁰ Waller, "Perpetrates of the Holocaust," 16-18. Lozowick agrees, writing of the behavior of the men of *Einsatzgruppe C*, "reality was reinterpreted to fit preconceived rationalizations to justify a mass murder that had been decided upon independently of any 'reasons' or 'causes.'" *Idem*, *Rollbahn Mord*, 232.

Nuremberg.²⁰¹

Quite telling of the ideological soldiers, was their demonstrable portrayal of the righteousness of their cause as well as their own infallibility. In this group, defendant after defendant affirmed that he had done nothing wrong. This display of certainty, even under intense cross examination, was undoubtedly the result of their ideological commitment to Nazism and especially its anti-Bolshevik, antisemitic world-view, which helps to explain why they had undertaken their tasks on the eastern front with such intensity. This group of defendants had managed to convince themselves that what they had done (for those who admitted carrying out executions) was right. There can be no doubt for these men, National Socialist ideology shaped their world view and contributed significantly to their aberrant behavior as leaders of the mobile killing units. What else could explain the behavior of a man like Ohlendorf, an academic by training and sensibility, and one who had neither police training nor a proclivity to militarism. How else can his conscience-clear willingness to participate in the activities of the mobile killing units be explained?

Also telling was that even though ideology seems to have been an important motivator, none of these men, with the exception of Ohlendorf, took any responsibility for his actions. This seems out of character for ideologically motivated individuals, but can

²⁰¹ This corresponds with Westermann's findings regarding Police Battalion 310 which also operated in the east during the Russian campaign. He found that unlike Browning's Reserve Police Battalion 101, the murders carried out by the men of Battalion 310 were motivated largely by ideology. He concludes, "The historical evidence indicates that many among Himmler's 'knights,' whether in the black of the SS or the green uniforms of the police, fit the description far better of 'ideological soldiers' than that of 'ordinary men.' in fact, the nature of warfare on the Eastern Front left little room for either ordinary men or ordinary life." Westermann, "'Ordinary Men' or 'Ideological Soldiers'?" *Police Battalion 310 in Russia, 1942*, 62-63.

probably be explained by the fact that they were in a court, fighting for their lives. What is most surprising is that none was willing to tell the court, however mendaciously, that they were sorry for what they had done. Surely they must have known that the prosecution was looking for an apology or indeed for any sign of remorse. Even today, fifty years later, the chief prosecutor laments this fact. Not long ago he said, “the one thing I missed most in Germany all the time I was there...was somebody to say, ‘I made a mistake, I’m sorry...we shouldn’t have done it.’”²⁰² Perhaps the judge would have been more lenient had these men offered some type of apology; Albert Speer had done this in an earlier trial and it had saved his life. These men knew they were fighting for their lives at Nuremberg, but their respect for and allegiance to the SS and Nazism was stronger.

Finally, while all of the defendants pleaded not guilty to the charges, their defenses and motivations were varied. There were those who admitted they found their work distasteful but stomached their assignment anyway; one defendant, Eduard Strauch, even seemed to derive pleasure from his work. Some, such as university professor Franz Six and the lawyer Walter Haensch, chose to defend themselves by denying they had participated at all in the genocidal slaughter in the Soviet Union and thus it is virtually impossible to determine what motivated their behaviour. Others admitted limited participation in murder, but could not bring themselves to full admissions of guilt. One defendant admitted to murdering men, but said he drew the line when it came to women and children. Only two demonstrated even a modicum of shame and even then, it was qualified, and later recanted. Just as defendant motivation differed, so too did their defense strategies. As we shall see in

²⁰² Interview with Benjamin Ferencz, 24 April 1997, 11.

the next chapter, a fractured defense would prove fatal for these men.

Chapter 6

The *Einsatzgruppen* Trial, the “*Führerbefehl*” and Genocide

In my opinion, the records and judgments in these...trials constitute a landmark in the development of international law, as well as a vital source of information upon the basis of which history can be written far more truthfully and fully than would otherwise have been possible. Their great importance will become more manifest as time goes on.

Telford Taylor¹

1. Introduction

Most historians agree that the mass killing of Soviet Jewry by units of the SS-*Einsatzgruppen* in the summer of 1941 marks a watershed in Nazi racial policy toward Europe’s Jews. Some even view their murderous activities as the beginning of Hitler’s plan for the “Final Solution to the Jewish Question.” But when exactly did the leaders of the *Einsatzgruppen* receive the order to murder all Soviet Jews – men, women and children – an order the defendants, the prosecution and the judges in the *Einsatzgruppen* trial all referred to as the *Führerbefehl*?² Was the order given before the units were deployed June 22, 1941 as Otto Ohlendorf, the principal defendant in the trial, testified? Or was it given later, in the late summer or early fall of 1941, some weeks or months after the SS-Security Police units

¹ Telford Taylor, “Press Release. Department of the Army, Public Information Division,” 17 May 1948, in *idem Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No.10*, appendix A (Washington, 1949), 115.

² At the trial of the *Einsatzgruppen* leaders, the order to murder Soviet Jewry was at various times referred to as the “Hitler-order,” the “Hitler-befehl,” the *Führer*-order, and the “*Führerbefehl*.” In this chapter these forms are used interchangeably.

departed from their assembly point in the border town of Pretzsch on the Elbe river, northeast of Leipzig, in Saxony? The question of the timing of the murderous order, seemingly extraneous to a basic understanding of the larger issue of the Nazi destruction of Europe's Jews, is in fact at the very heart of a fierce debate amongst scholars of the "Final Solution," in which the men of the *Einsatzgruppen* unquestionably played such a vital role implementing. Indeed, the issue of timing is actually part of the much broader intentionalist-functional debate that arose mainly because documentary evidence of an order by Hitler to murder Europe's Jews has not been uncovered.³

³ Initially there were two schools of thought concerning the origins of the "Final Solution." Intentionalists such as Lucy Dawidowicz, *The War Against the Jews* (New York, 1975) and Gerald Fleming, *Hitler und die Endlösung: "Es ist des Führers Wunsch..."* (Munich, 1982), strongly believe that there is a clear link between Hitler's early antisemitic ideology and his later antisemitic practice; in other words they see a straight path from Hitler's hatred of the Jews to his policy of "extermination." Proponents of this view support their argument by referring to Hitler's writings and speeches which highlight his early commitment to "annihilate" the Jews. Hitler hated the Jews, he repeated over and over again in his speeches and writings. Since most Jews were in fact killed, these writers contend, Hitler's intentions had been clear from the beginning, that every Jew had to be eliminated. These writers highlight the important role of Hitler in initiating the murder of European Jewry. More moderate intentionalists such as Karl Dietrich Bracher, *The German Dictatorship* (New York, 1966) and Eberhard Jäckel, *Hitlers Weltanschauung: Entwurf einer Herrschaft* (Stuttgart, 1971) however, do not focus so much on the idea of a "blueprint" for murder as they do on the centrality of antisemitism in Hitler's world view. They see the murder of the Jews as part of Hitler's long-range goals; each policy he implemented, from the 1933 boycott to the invasion of the Soviet Union in 1941, was part of his overall goal to achieve a Europe free of Jews. Functionalists, on the other hand, de-emphasize the role of Hitler while emphasizing the function of other organizations in the decision to murder European Jewry. Adherents to this view argue the policy of "extermination" developed piecemeal and in stages. Gradually, as the Nazis consolidated their power, Jewish policy became increasingly radicalized, until 1941 and the invasion of the Soviet Union, when it was decided the best way to solve the "Jewish problem" was through mass murder. For classic statements on the functionalist position see Karl Schleunes, *The Twisted Road to Auschwitz. Nazi Policy toward German Jews 1933-1939* (Urbana; IL, 1990) and Uwe Dietrich Adam, *Judenpolitik im Dritten Reich* (Düsseldorf, 1972). In recent years the debate has become less polarized, tempered by such nuanced interpretations as those by, for instance, Christopher Browning, who classifies himself as a

The intentionalist-functionalist debate centers on the question of whether or not Hitler had a plan, a blueprint, to murder Europe's Jews. The question arose largely because there was (and still is) a lack of clear documentary evidence to support a conclusion as to when and by whom the decision for the "Final Solution" was made. This absence of a clear record of the decision-making process has given rise to a surfeit of interpretations of the origins of the "Final Solution."⁴ The documentary void has also led many postwar historians to search for alternate evidence that might help pinpoint the timing of Hitler's decision to murder Soviet Jewry. Some historians found that evidence in the postwar testimony of Otto Ohlendorf, leader of group D, who testified that the brutal and murderous order was given to

"moderate functionalist" and Philippe Burrin who calls his approach "conditional intentionalism." For elaboration and explanation of the terms initially coined by Tim Mason, see *idem*, "Intention and Explanation: A Current Controversy about the Interpretation of National Socialism," in Gerhard Hirschfeld and Lothar Kettenacker (eds.), *Der Führerstaat: Mythos und Realität. Studien zur Struktur und Politik des Dritten Reiches* (Stuttgart, 1981), 23-40. See also Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation*, (New York, 1993), 80-107; Christopher Browning, "Beyond 'Intentionalism' and 'Functionalism': The Decision for the Final Solution Reconsidered," in *idem*, *The Path to Genocide: Essays on Launching the Final Solution* (New York, 1992), 86-121 and "The Decision Concerning the Final Solution," in Browning, *Fateful Months*, 8-38; and Michael R. Marrus, *The Holocaust in History* (Toronto, 1987), 31-54.

⁴ For overviews of the various interpretations concerning timing see Christopher Browning, *Nazi Policy, Jewish Workers, German Killers* (Cambridge, 2000), 26-57 and *idem*, *Fateful Months*, 8-38. For specific positions on timing see Christian Gerlach, *Krieg, Ernährung, Völkermord: Forschungen zur deutschen Vernichtungspolitik im Zweiten Weltkrieg* (Hamburg, 1998), 56-81; Ralf Ogorreck, *Die Einsatzgruppen und die Genesis der Endlösung* (Berlin, 1996); Peter Longerich, "Vom Massenmord zur 'Endlösung'. Die Erschießungen von jüdischen Zivilisten in den ersten Monaten des Ostfeldzuges im Kontext des nationalsozialistischen Judenmords," in Bernd Wegner (ed.), *Zwei Wege nach Moskau. Vom Hitler-Stalin-Pakt zum 'Unternehmen Barbarossa'* (Munich, 1991), 251-254; Philippe Burrin, *Hitler and the Jews: The Genesis of the Holocaust* (London, 1989), 93-113; Ronald Headland, "The Einsatzgruppen: The Question of their Initial Operations," *Holocaust and Genocide Studies* 4:4 (1989), 401-412; and Yaacov Lozowick, "Rollbahn Mord: The Early Activities of Einsatzgruppe C," *Holocaust and Genocide Studies* 2:2 (1987), 221-241.

the leaders of the *Einsatzgruppen* by Bruno Streckenbach, head of Office I (Personnel) of the RSHA, before the invasion of the Soviet Union in the summer of 1941. Ohlendorf's testimony about the nature and timing of the *Führerbefehl* suggested to some historians that the order was more than Hitler's "wish" or "desire," and was instead part of a well thought-out and concrete plan of genocide. Of course Ohlendorf's testimony on this issue was not the only contributing factor to such a view. The minutes from the Wannsee Conference and other evidence has lent credence to the intentionalist argument as well, but certainly Ohlendorf's statements on this issue had an impact on the subsequent development of this school of thought.

The historical controversy about the timing and nature of the order to destroy Soviet Jewry developed in the 1980s, when Alfred Streim, former chief prosecutor at the *Zentrale Stelle der Landesjustizverwaltungen* (the Central Office for the Investigation of National Socialist Crimes) in Ludwigsburg, Germany, detected discrepancies in Ohlendorf's testimony. After reviewing a number of affidavits given by former members of the *Einsatzgruppen* tried at Nuremberg and later in Germany, Streim concluded that the Hitler-order to murder all Jews had not been issued prior to the invasion of the Soviet Union in June 1941. Rather it most probably had been given some weeks later, between early August and September 1941, or a date that cannot be determined without further documentary evidence. What is known with a high degree of certainty is that killing by the *Einsatzgruppen* escalated sometime in the period between June and September 1941. Prior to that time the *Einsatzgruppen* had been engaged in the selective murder of Jews, thereafter it became genocide. It also seems fairly clear that the decision to speed up the killings had not been decided upon in the advance planning of Operation Barbarossa as Ohlendorf had

testified in 1947. From the evidence available, Streim concluded that Ohlendorf's testimony had been perjured; he had lied as part of a defense strategy to escape a death sentence by arguing the mitigating circumstance of "superior orders." Since Streim first highlighted the issue of timing in the 1980s, it has become a point of contention in the historiography on the origins of the "Final Solution." Further research has helped clarify the issue of timing, but a definitive date for the order to annihilate all Soviet Jews has not been established.⁵

Accepting Ohlendorf's testimony as "fact" has resulted in the current historical debate – what one historian has recently referred to as the beginning of the "myth" of the *Führer-order*.⁶ That is, the testimony given at Nuremberg perpetuated the "myth" that the

⁵ For a full account of the early debate about timing see in particular Alfred Streim, "The Tasks of the SS Einsatzgruppen," in *Simon Wiesenthal Center Annual* 4 (1987), 309-328 and Helmut Krausnick and Alfred Streim, "Correspondence," in *ibid.* 6 (1989), 311-346. See also, Krausnick et al., *Anatomy of the SS State* (Frogmore, England, 1973), 59-75; Streim, *Die Behandlung sowjetischer Kriegsgefangener im 'Fall Barbarossa': Eine Dokumentation* (Karlsruhe, 1981), 74-93; and Streim, "Zur Eröffnung des allgemeinen Judenvernichtungsbefehl gegenüber den Einsatzgruppen," in Eberhard Jäckel and Jürgen Rohwer (eds.), *Der Mord an den Juden im Zweiten Weltkrieg. Entschlußbildung und Verwirklichung* (Stuttgart, 1985), 107-119. For various positions on the issue of timing and the role of the *Einsatzgruppen* in the "Final Solution" see Browning, *Fateful Months*, 8-38; Helmut Krausnick and Hans-Heinrich Wilhelm, *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942* (Stuttgart, 1981), 150-172 and 622-637; Longerich, "Vom Massenmord zur 'Endlösung,'" 251-254; Burrin, *Hitler and the Jews*, 93-113; Headland, "The Einsatzgruppen," 401-412; Lozowick, "Rollbahn Mord," 221-241; and most recently Ralf Ogorreck, *Die Einsatzgruppen und die 'Genesis der Endlösung'* (Berlin, 1996) whose entire book addresses this issue.

⁶ Jürgen Matthäus, "A Case of Myth-Making: The 'Führer Order' During the Einsatzgruppen Trial, 1947-1948," unpublished article, United States Holocaust Memorial Museum, 1-20. I would like to thank Dr. Matthäus for kindly allowing me access to his findings on this subject. Two examples of what Matthäus is referring to can be found in Krausnick, who wrote in 1965 that "when the Einsatzgruppen were being formed in May 1941, their leaders...were...told about the *secret decree on shooting by word of mouth*," in *idem*, *Anatomy of the SS State*, 79; and, Robert Wolfe writing in 1980, "of all the Fuehrer's orders, written and unwritten, signed and unsigned, this one ordering the "final solution of the Jewish question" is known as *the Fuehrer Order*," in *idem*, "Putative Threat to National

“Final Solution” began in earnest before the invasion of the Soviet Union on June 22, 1941 and in doing this, has “distorted the historical understanding of the Holocaust.”⁷ Why were historians so ready to accept Ohlendorf’s assertions at face value? The answer appears to be that his testimony on the issue of the *Führerbefehl* was believed because it came from a major, self-proclaimed participant in the “Final Solution,” one who seemed to be more honest and straightforward than most of the accused on trial. Even though Ohlendorf was a self-confessed mass murderer, his personality was such that perjury appeared to be beneath him. Simply put, as a witness he seemed credible and thus a good source of historical evidence.⁸ Significantly, historians were not alone in accepting Ohlendorf’s testimony as fact. Indeed, even the prosecutors and presiding judge of the *Einsatzgruppen* trial believed that “Ohlendorf was the very personification of correctness...and truth.”⁹ As a consequence they too accepted his assertions as fact and thus failed to challenge the veracity or consistency of his testimony on the issue of the *Führerbefehl*.¹⁰ Why? Partly for the same

Security as a Nuremberg Defense of Genocide,” *American Academy of Political and Social Science* 450 (July, 1980), n.52, 55.

⁷ Matthäus, “A Case of Myth-Making,” 3.

⁸ On the issue of the historian and use of trial documents to reconstruct historical narratives see Christopher Browning, “German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony,” in Saul Friedlander (ed.), *Probing the Limits of Representation: Nazism and the “Final Solution”* (Cambridge; MA, 1992), 22-36.

⁹ Michael A. Musmanno, Review of Film, *Judgment at Nuremberg*, 1961, in Nuremberg Correspondence file 1445, in Personal Papers of Michael Angelo Musmanno, Gumberg Library, Duquesne University, Pittsburgh, Pennsylvania (from here forward document, file, MMP).

¹⁰ For example, Ohlendorf’s attorney and the presiding judge in the trial both referred to the order as fact. See Eidesstattliche Versicherung des Rudolf Aschenauer, 11.11.1949,

reasons that postwar historians accepted it, but also because in Anglo-American jurisprudence, when documentary evidence is lacking, facts are established through the direct testimony of witnesses.¹¹ In other words, judicial procedure places a great amount of “faith in the veracity of the spoken word,” and given the lack of documentary evidence available to the prosecution in 1947, Ohlendorf seemed a more credible witness than most others.¹²

But this was not the only reason Ohlendorf’s testimony went unchallenged. The timing of the order, whether promulgated in late June, July or August 1941 was not germane to the case the prosecution was preparing.¹³ Mass murders had been committed and the *Einsatzgruppen* leaders had been indicted. The task of the prosecution was to prove that the accused had committed these crimes, and of the court to determine if they had understood the illegal nature of the order. In other words, the timing of the order had little or no significant legal relevance for the prosecution’s case. The latter would be satisfied if they proved to the court that the men on trial had committed the crimes with which they were charged. Hence, a vigorous cross-examination, the one method the court has to test witness

N642 (Aschenauer), box 62, Bundesarchiv-Militärarchiv, Freiburg, (BA/MA from here forward). See also discussion between Michael Musmanno and James Heath, 14 October 1947, in the *United States of America v Otto Ohlendorf et al*, National Archives Microfilm Publication M895, roll 2, 636-637 (from here forward simply *Trial*, roll, page number or frame).

¹¹ On this issue see Lawrence Douglas, “Wartime Lies. Securing the Holocaust in Law and Literature,” in F.C.Decoste and Bernard Schwartz (eds.), *The Holocaust’s Ghost. Writings on Art, Politics, Law and Education* (Edmonton, Alberta, 2000), 17-18.

¹² *Ibid.*

¹³ This short, six to eight week time frame is at the heart of the issue of timing.

testimony, was not employed.¹⁴ That Ohlendorf's testimony was not subjected to scrutiny directly contributed to the ambiguity of the historical record, especially to our current understanding of the events that led to the murder of Soviet Jewry in the summer of 1941. More importantly for the outcome of the trial, Ohlendorf's testimony also led the prosecution and tribunal to conclude that the defendants had committed what they called genocide, the planned and systematic mass murder of an identifiable ethnic or religious group, as ordered by Hitler.

It is ironic but not surprising that the legal planners of the *Einsatzgruppen* trial identified historical truth as one of the explicit goals of the trial. Not only did they want to punish the perpetrators, but as important they wanted to expose the criminality of Nazism and the Third Reich.¹⁵ In the early postwar years it was believed the trials of Nazi war criminals would establish beyond a reasonable doubt what these men did, how they did it, and why. This was not an unrealistic expectation given that in law, "the trial serves as the primary tool for securing a truthful picture of an historical event."¹⁶ As Telford Taylor, the American Chief of Counsel for War Crimes and the individual responsible for prosecuting war criminals, expressed it, "many of these [trial] documents now have a gloss on them in the form of supplementary testimony by the men who wrote them or who were mentioned in them, thus creating an immense overlay of additional information and comment that in many

¹⁴ Douglas, "Wartime Lies," 17-18.

¹⁵ For example, Telford Taylor, Chief of Council for War Crimes, wrote that one of the purposes for publishing the records of the 12 Subsequent Nuremberg Trials was, "[t]o promote the interest of historical truth...." See Taylor, *Final Report*, 101.

¹⁶ Douglas, "Wartime Lies," 27-28.

settings is of great historical importance.”¹⁷ But, for the historian, this “overlay of additional information” as Taylor called it, can be extremely disconcerting, especially when it is found that the additional information is uncorroborated and some of it even untrue. When plans were being drawn up for the trial Taylor and the other planners probably did not realize that the dual goals of punishment and historical truth could not be achieved in the context of a legal proceeding.¹⁸ After all, criminal trials are adversarial, and testimony is most frequently

¹⁷ Telford Taylor quoted in Ronald Headland, *Messages of Murder. A Study of the Reports of the Einsatzgruppen of the Security Police and the Security Service, 1941-1943* (London and Toronto, 1992), 177. In his opening remarks to Tribunal II hearing the Einsatzgruppen case, chief prosecutor Benjamin Ferencz stated, “Most Germans are still unaware of the detailed events we shall account. They must realize that these things did occur in order to understand somewhat the causes of their present plight....As we here record the massacre of thousands of helpless children, the German people may reflect on it to assess the merits of the system they so enthusiastically acclaimed.” *Idem*, opening statement by the prosecution, 29 September 1947, *Trial*, roll, 1, 32-33.

¹⁸ Michael R. Marrus argues that “trials cannot and should not be expected ...to teach history.” In *idem*, “History and the Holocaust in the Courtroom,” in Gary Smith and Florent Brayard (eds.), *Vom Prozeß zur Geschichte: Die juristische und historische Aufarbeitung der Shoa in Frankreich und Deutschland* (Berlin, 2001), 1-35 (forthcoming). Compare with Douglas who argues that war crimes trials can serve a didactic end and that they can inform historical narratives, *idem*, *The Memory of Judgment. Making Law and History in the Trials of the Holocaust* (New Haven, 2001), 1-7. The literature on war crimes trials and their didactic value is a focus of current scholarly attention. Examples include, Christopher Browning, “German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony,” in Saul Friedlander (ed.), *Probing the Limits of Representation: Nazism and the “Final Solution”* (Cambridge, MA; 1992), 22-36; Douglas, “Wartime Lies,” 16-36 and Mark Osiel, “Constructing Memory with Legal Blueprints,” 411-430, both in F.C. Decoste and Bernard Schwartz (eds.), *The Holocaust’s Ghost. Writings on Art, Politics, Law and Education* (Edmonton, 2000); Leora Y. Bilsky, “When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt’s Concept of Judgment,” *History and Memory. Studies in Representation of the Past* 2:8 (Fall/Winter, 1996), 137-174; Jared Stark, “The Task of Testimony. On “No common Place: The Holocaust Testimony of Alina Bacall-Zwirn,” *History and Memory. Studies in Representation of the Past* (1999), 37-61; Carlo Ginzburg, *The Judge and the Historian* (London, 1999); and most recently, Donald Bloxham, *Genocide on Trial. War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford, 2001).

given in an attempt to establish legal exculpation, and not to document historical truth. By their very nature criminal trials may be impediments to the attainment of historical truth, when by excluding or altering historical facts a defendant can demonstrate innocence or a prosecutor, guilt. Of course, the corrective to false or perjured testimony is a rigorous cross-examination, which is meant to detect discrepancies.¹⁹ But, given the youth and inexperience of the prosecution, coupled with a general lack of knowledge of events, it was almost inevitable that some elements of the defendants' account would not be historically accurate. This is exactly what happened at the *Einsatzgruppen* trial in 1947 and 1948, and it is this distortion of fact that is at the very heart of the current historical controversy.²⁰ Thus it is important to return to the context in which these factual errors were made and to determine if possible the nature of the distortions and why they remained unchallenged at the trial.²¹

The issue of the so-called Hitler-order is of extreme historical importance. However, it is not the purpose of this chapter to investigate when or even if an actual order had been given to the leaders of the *Einsatzgruppen*; this can be safely left to those who study and

¹⁹ Douglas writes that "Despite the elaborate evidentiary norms associated with this [legal] process, the trial in Anglo-American jurisprudence is governed by a relatively simple proposition: that facts be proved by firsthand testimony and that knowledge be produced by direct observation. This privileging of testimony, however, does not indicate a juridical faith in the veracity of the spoken word; quite to the contrary, Anglo-American jurisprudence attempts to control the spectre of mendacious or mistaken testimony through the rigors of adversarial confrontation." In, *idem*, "Wartime Lies," 27-28

²⁰ Whereas the existence and nature of the order were substantive issues at Nuremberg, today the controversy resides on the matter of *when* – before or after June 22, 1941 – and by *whom* – Heydrich, Himmler or Bruno Streckenbach – the order was given.

²¹ Helge Grabitz long ago called for the continuation of trials against Nazi war criminals not only to punish those responsible, but also to better understand the historical facts brought out in the trials. See *idem*, "Problems of Nazi Trials in the Federal Republic of Germany," *Holocaust and Genocide Studies* 2:3 (1988), 209.

write about the origins of the “Final Solution.”²² But the issue of the *Führerbefehl* is important in the context of the trial, partly because so many defense lawyers cited the so-called order to justify and excuse the behaviour of their clients in occupied Russia, and also because the judge and prosecution viewed the order as *the directive* that was at the heart of Hitler’s racial war against the Jews. In other words, legally the order could prove either the defendants innocent or guilty. The issue is significant in still another sense. In this historically important war crimes trial the issues of history and testimony are of paramount importance, challenging the historian to examine the very nature of war crimes trial testimony and the standards by which today we assess testimony and use it for historical purposes.²³

The aim of the chapter is threefold. First, to trace the development of Otto Ohlendorf’s testimony on the issue of the *Führerbefehl* and to determine how and why American authorities never challenged its authenticity. Second, to place the issue of the *Führerbefehl* in the context of the *Einsatzgruppen* trial, to relate how the order was used as a defense strategy and how this strategy backfired. Finally, the chapter examines why and how

²² Saul Friedländer has observed that not until all of the evidence has been considered (including German, Jewish and Soviet sources) “will it be possible for a more or less complete picture [of the emergence of the “Final Solution”] to appear.” Friedländer, “Introduction,” in Burrin, *Hitler and the Jews*, 5-6.

²³ Not long ago Christopher Browning warned that (subjective) trial testimony is particularly problematic for the scholar who wants to reconstruct historical events. He believes that the use of trial testimony and interrogation records can produce, at best, a “minimum...narrative of events.” Furthermore, he noted that if different historical questions were asked when examining trial testimony, different aspects of that testimony would be emphasized, which would ultimately result in a different historical interpretation. See Browning, “Daniel Goldhagen’s Willing Executioners,” in *History and Memory: Studies in Representation of the Past* 1:8 (Spring/Summer, 1996), 88.

the court came to view the order to murder Soviet Jews, the so-called *Führerbefehl*, as a singular policy, conceived of by the highest-ranking Nazi officials, directed against a distinctive “racial” group, but not part of the otherwise general destruction that resulted from the policies and actions of the Third Reich during the war. The material presented leads to the conclusion that the *Führerbefehl* was an important, even critical factor in determining the outcome of the trial. Whereas the defense intended to use the existence of the *Führerbefehl* to demonstrate a lack of criminal intent on the part of the defendants, the prosecution sought to use the order to prove that the accused had perpetrated a genocide as specifically ordered by Hitler. That the court came to view the existence of the order as fact, despite evidence to the contrary, can be directly attributed to the credibility and assertiveness of Ohlendorf as a witness and it is his testimony that led to the current historical controversy about the origins of the “Final Solution.”

2. Otto Ohlendorf, Early Interrogations and the Question of Orders

The existence of a *Führerbefehl* to murder Soviet Jewry was first alluded to, albeit vaguely, by the main defendant in the *Einsatzgruppen* trial, Otto Ohlendorf, when he was first interrogated by Allied authorities on October 24, 1945 in preparation for his testimony at the original Nuremberg trial.²⁴ During this day-long interrogation Ohlendorf described in detail the organizational structure of the *Einsatzgruppen*, including their composition, relationship to the army, and the purpose of their activities. He also told his interrogators

²⁴ Letter from Lieutenant Colonel Smith Brookhart, Jr. to Colonel Amen, 24 October 1945 in National Archives Microfilm Publication M1270 (Interrogation Records Prepared for War Crimes Proceedings at Nuremberg, 1945-1947, OCCPAC Interrogations), roll 13, 1-2 (from here forward simply M1270, roll, page).

that the four units of the *Einsatzgruppen* received orders to murder Soviet Jews on two separate occasions. The first time he received the order, he informed his interrogator, Lieutenant Colonel Smith Brookhart, was in early May 1941, just days before the *Einsatzgruppen* units crossed into Soviet territory at the beginning of Operation Barbarossa. On this occasion the order was given verbally to the four leaders of the mobile killing units – Ohlendorf himself as head of *Einsatzgruppe* D, Arthur Nebe head of group B, Max Thomas head of group C and Walter Stahlecker head of group A.²⁵ At this time Ohlendorf did not say who gave the order nor did Brookhart ask. A month later he told his interrogator that the order had come from Himmler.²⁶ The second time the order was delivered it was by Himmler personally, during the *Reichsführer's* visit to the eastern front in September 1941. Both orders, Ohlendorf stressed, while delivered by Himmler, had emanated from Hitler; hence, they were *Führer*-orders.²⁷ It is important to bear in mind that during this early interrogation, Ohlendorf never explicitly revealed the contents of the first order, whereas he did tell Brookhart that the second order from Himmler called for the “extermination” of *all*

²⁵ Ohlendorf's recollection of the leaders of the four groups was incorrect. He initially identified Max Thomas as the leader of group C when the units were first formed in Pretzsch, but in fact Otto Rasch led *Einsatzgruppe* C in June 1941. In all likelihood Thomas had not been present during the leaders' initial briefing. Ohlendorf later corrected this error in an affidavit. See Affidavit of Otto Ohlendorf, 5 November 1945 (PS 2620), in *Trial*, Prosecution Documents, roll 11, frames 0044-0045.

²⁶ Vernehmung des Otto Ohlendorf by Lieutenant Colonel Smith W. Brookhart, Jr. and Colonel John H. Amen, 26 November 1945 in M1270, roll 13, 13.

²⁷ Vernehmung des Otto Ohlendorf by Lieutenant Colonel Smith W. Brookhart, Jr., 24 October 1945 in *ibid.*, 1-28. See also Interrogation Summary of Otto Ohlendorf, 24 October 1945, in *ibid.*, roll 13, 3.

Jews, without exception, in the Russian theater of war.²⁸ The following day Ohlendorf was interrogated a second time. Before Brookhart could begin questioning him however, Ohlendorf spent some time correcting “facts” he had given the previous day. He had, he told Brookhart, mistakenly believed that Operation Barbarossa had begun in May, but after reconstructing the events he now realized he had been wrong and thus corrected himself.²⁹ He also repeated his earlier statement: that the directive to “liquidate” Soviet Jews was Hitler’s, but that Himmler only informed him of the *Führer*’s decision and the role of the *Einsatzgruppen* approximately four weeks before the killing units were deployed.³⁰ Presumably here he was referring to the general assignment of the *Einsatzgruppen* in the east and not specifically to the *Führerbefehl*.³¹ In any case, during this second interview he did not elaborate or reveal any further details of this matter, nor did his interrogator ask him to elaborate.

²⁸ Interrogation Summary, 24 October 1945, in *ibid.*, 3.

²⁹ Vernehmung des Otto Ohlendorf by Lieutenant Colonel Smith W. Brookhart, Jr., 25 October 1945, in *ibid.*, roll 13, 1-2.

³⁰ *Ibid.*, 8 and Affidavit of Otto Ohlendorf (PS 2620), 5 November 1945 in *Trial*, roll 8, frame 0054 in which Ohlendorf stated: “Im Juni 1941 wurde ich von Himmler bestimmt, eine der Einsatzgruppen zu fuhren, die damals gebildet wurden, um den deutschen Armeen in russischen Feldzug zu folgen. Ich war der Chef der Einsatzgruppe D...Himmler erklarte, dass ein wichtiger Teil (sic) unserer Aufgabe in der Beseitigung von Juden, Frauen, Maennern und Kindern, und kommunistischen Funktionaeren bestuende. Ich wurde etwa vier Wochen (sic) vorher ueber den Angriff auf Russland benachrichtigt.”

³¹ Richard Breitman argues that information concerning the murder of the Jews in the USSR was given on a “need to know basis” only, and then it was only given orally. Given Ohlendorf’s high position it is possible that he met with Himmler some weeks prior to the invasion. See *idem*, “Himmler and the ‘Terrible Secret’ among the Executioners,” in Jehuda Reinharz and George L. Mosse (eds.), *The Impact of Western Nationalisms* (London, 1991), 77-97.

During these early interrogations Brookhart mainly sought to obtain specific details about the activities of the *Einsatzgruppen*, such as the precise manner in which the victims were killed and the bodies disposed of. Ohlendorf's claim that Hitler had given the order to murder did not seem out of the ordinary to Brookhart which is hardly surprising considering Allied presumptions about the hierarchy in the totalitarian Reich and the power Hitler wielded in it.³² That Brookhart failed to question Ohlendorf about such an historically important issue is also not remarkable given that at this early date the Allies had few details of what transpired on the eastern front, and thus were not aware of how important the issue would later become. Besides, before anyone could make a judgment about these events or assess their accuracy, the prosecuting authorities needed to gather information about what had happened. Specifics of the genocidal campaign in the east were not well-known, and the uncovering of each new detail simply horrified American authorities. As one American attorney recalled years later, first hearing the details of the mass murder of Soviet Jewry from a major participant (Ohlendorf) so shocked him that it had a lasting impact on him for life.³³ In any event, the case the Americans were preparing at Nuremberg was based on the assumption that criminal decisions were conceived at the highest levels of the party and thus Ohlendorf's claims merely confirmed their preconceived view that Hitler was at the centre

³² For example see Arne Trankell who explains that, "the examiner – whether he wishes or not – will base his questions on his own assumptions regarding the events he has to clarify. Even a skillful (sic) examiner's interrogations are therefore biased to a certain extent." In *idem, Reliability of Evidence. Methods for Analyzing and Assessing Witness Statements* (Stockholm, 1972), 25-26.

³³ Whitney Harris quoted in Hilary Gaskin (ed.), *Eyewitness at Nuremberg* (New York, 1990), 177.

of the decision-making process with respect to mass murder.³⁴ In this context it makes sense that Brookhart would not have questioned Ohlendorf on the issue of timing. Instead, he listened intently while the former leader of *Einsatzgruppe D* willingly and dispassionately offered information about atrocities, always making certain that the interrogator was aware of how “humane” his method of execution had been compared to the practices of his colleagues who commanded the other three units.³⁵ But again, Brookhart did not question how or even if it was possible for the SS units to take independent action, he merely accepted Ohlendorf’s assertions at face value.³⁶

In these early interrogations Ohlendorf’s memory was not especially sharp. His mistake about the date of the beginning of Operation Barbarossa is but one example of his inability to recall specific dates, names and locations.³⁷ He peppered his testimony with such

³⁴ This idea is supported by Michael Marrus who writes, “‘Intentionalism,’ it may be supposed, was born in Nuremberg in 1945 when American prosecutors first presented Nazi war crimes as a carefully orchestrated conspiracy, launched together with the war itself. American legal experts hoped to prove that there had been a deliberate *plan* to commit horrendous atrocities as well as other breaches of international law....” in *idem*, “The History of the Holocaust: A Survey of Recent Literature,” *Journal of Modern History* 59 (1987), 120.

³⁵ For example see Interrogation of Otto Ohlendorf by Lieutenant Colonel Smith W. Brookhart, Jr., 24 October 1945 in M1270, roll 13, 14-16. See also Interrogation Summary of Otto Ohlendorf, 24 October 1945, in *ibid.*, roll 13, 3. in which Ohlendorf claims his job was to “prevent cruelties” one example of which was safeguarding the possessions of the victims until after they were executed or ensuring that the victims did not have to wait an excessive amount of time before they were shot. This, he assured Brookhart, was done to prevent them from dwelling on their fate.

³⁶ Vernehmung des Otto Ohlendorf by Lieutenant Colonel Smith W. Brookhart, Jr., 27 October 1945 and Brief of Interrogation of Otto Ohlendorf by Lieutenant Colonel S.W. Brookhart, 29 October 1945 in *ibid.*

³⁷ For a good discussion about human memory, reconstruction of events and the law see Trankell, *Reliability of Evidence*, 20-23.

qualifications as “if I remember rightly” or “contrary to my assumption of yesterday” or “I cannot remember” or “it must have been” or “I don’t know any more.”³⁸ A careful reading of the interrogation records clearly suggests that Ohlendorf’s responses were not intended to be evasive or untruthful. We know already that Ohlendorf had been unusually, perhaps even naively, cooperative with his captors (albeit for selfish reasons), revealing much about the inner workings of the Nazi regime to the American authorities. What soon became apparent is that his responses during these early interrogations suggest that his recall, like most people’s, suffered from the effects of time, remembering some details more clearly than others, and some not at all. To be sure, nearly six years had passed since the *Einsatzgruppen* had embarked on their fateful journey into Soviet Russia and Ohlendorf had not had the advantage of reviewing the vast array of documents the Allies had seized before he responded to questions during these interviews.³⁹ Moreover, psychological studies have shown that time can seriously alter the memory of an event by allowing other events or influences to distort a witness’ perception of what transpired. In some cases time has been

³⁸ Vernehmung des Otto Ohlendorf by Lieutenant Colonel Smith W. Brookhart, Jr., 27 October 1945 and Brief of Interrogation of Otto Ohlendorf by Lieutenant Colonel S.W. Brookhart, 29 October 1945 in M1270, roll 13; and, Interrogation of Otto Ohlendorf by Lieutenant Colonel Tupikov (USSR), 14 November 1945 in *ibid.*, 1-7.

³⁹ In the summary of Ohlendorf’s first interrogation, the author writes, “Ohlendorf says that his statements in the questionnaire he filled out (Exhibit A–Ohlendorf) are correct to the best of his knowledge, although he was given little time and no documents.” See Interrogation Division Summary, 24 October 1945 in M1270, roll 13, 1. On the issue of the problem of memory, time lapse and trial testimony see for example, Brian A. Grosman, “Testing Witness Reliability,” *The Criminal Law Quarterly* 5 (1962-1963), 318-327; Arne Trankell, *Reliability of Evidence*, and Sally M.A. Lloyd-Bostock and Brian R. Clifford (eds.), *Evaluating Witness Evidence. Recent Psychological Research and New Perspectives* (Toronto, 1983).

shown to “create an entirely new memory” altogether.⁴⁰ But to suggest as some have, at this early date, that Ohlendorf was deliberately lying to his interrogators is not only a distortion of the evidence, it also ignores psychological research that has shown conclusively that human memory is frail and subjective.⁴¹ And indeed, there was no reason for Ohlendorf to be untruthful at this early date.⁴² He was neither under indictment for war crimes himself nor was there any evidence of coercion (physical or otherwise) by American authorities during these early interrogations. In any event he had already confessed to the murder of 90,000 people and thus there was little more he could disclose that would be more damaging should a legal procedure be mounted against him. Of course, all of this is not to suggest that Ohlendorf did not perjure himself in later testimony, but the evidence seems to suggest that in 1945 at least, he had little reason to lie about the nature, timing, and delivery of the *Einsatzgruppen*'s orders.

Over the course of the next few months, Ohlendorf's description of the events surrounding the *Führerbefehl* did not change substantially. In fact, he remained rather vague about the details of the *Einsatzgruppen*'s initial orders at Pretzsch. He was more forthcoming when it came to discussing the German army and its relationship to the *Einsatzgruppen*, providing American prosecutors with damning and detailed information

⁴⁰ Grosman, “Testing Witness Reliability,” 322-323.

⁴¹ For example, Alfred Streim believes that “Ohlendorf lied when deception was useful, and he spoke the truth when honesty was profitable.” See Streim, “Reply to Helmut Krausnick,” *Simon Wiesenthal Center Annual* 6 (1989), 338-339.

⁴² On this issue, see for example, Elizabeth F. Loftus and Katherine E. Ketcham, “The Malleability of Eyewitness Accounts,” in Lloyd-Bostock and Clifford (eds.), *Evaluating Witness Evidence*, 159-171.

about the agreement between the German High Command and the RSHA concerning the formation of the killing units in the spring of 1941.⁴³ In criminal proceedings, generally speaking, the more time that elapses between a criminal act and witness testimony about it, the less clear and reliable that testimony is judged to be by the court.⁴⁴ Ironically, this was not the case with Ohlendorf. In fact, the opposite is true. The more he spoke about the *Führerbefehl* and its contents, and the more assertive and confident he became about it, the more willing the Americans appear to have been to accept his version of events as “truthful.”⁴⁵ As we shall see after being interviewed dozens of times by American authorities, Ohlendorf’s description of events became ever more specific. Forgotten details were remembered, names recalled and new facts were added until his “story” became “the truth” not only to himself, but most significantly to the American authorities as well. But it was not until he was called as a prosecution witness at the original Nuremberg trial in January 1946 that he articulated what he claimed to be the full contents of the groups’ initial orders and even then his statement, while legally compelling, was far from being unambiguous as historical fact.

⁴³ Testimony of Otto Ohlendorf, 3 January 1946, in *Trial of Major War Criminals before the International Military Tribunal*, vol. 4 (Nuremberg, 1947), 313.

⁴⁴ Grosman, “Testing Witness Reliability,” 321.

⁴⁵ Grosman notes that “[j]uries may regard the assertiveness of the witness as a relevant test of his truthfulness,” but that assertiveness is not always the best gauge of truth. Undoubtedly Ohlendorf’s confidence during trial influenced the court’s perception of the veracity of his testimony. See Grosman, “Testing Witness Reliability,” 324-325. On the issue of how individual’s judge the accuracy of testimony see Gary L. Wells and R.C.L. Lindsay, “How do People Infer the Accuracy of Eyewitness Memory? Studies of Performance and a Metamemory Analysis,” in Lloyd-Bostock and Clifford (eds.), *Evaluating Witness Evidence*, 41-55.

3. Otto Ohlendorf, the '*Führerbefehl*' and Testimony at the IMT

On January 3, 1946 Otto Ohlendorf was brought to the Palace of Justice in Nuremberg to serve as a witness for the prosecution in the trial of members of the German High Command, as well as against Ernst Kaltenbrunner, the only representative of the SS on trial. The interrogations of the previous year formed the basis of Ohlendorf's testimony. Colonel John Harlan Amen, who had personally conducted several of the interviews with Ohlendorf, acted as examiner when Ohlendorf took the stand. He had Ohlendorf explain to the tribunal how negotiations with the army and the RSHA resulted in the formation of the *Einsatzgruppen*, as well as outline the composition of the killing units and their relationship to the army. Ohlendorf was next asked to explain how the *Einsatzgruppen* were expected to deal with Soviet Jews and communist functionaries. He told the court that "before their mission" the *Einsatz* and *Kommandoführer* were "orally instructed" to murder Jews and Soviet political functionaries.⁴⁶ It is important to note here that Ohlendorf did not state explicitly that the *Kommandos*' instructions were to kill *all* Jews, although this could certainly be inferred from his testimony; rather, he merely stated that the leaders of the *Kommandos* were told, before their assignment, that Jews were to be "liquidated."⁴⁷ It was also during this testimony that Ohlendorf first linked Bruno Streckenbach (who at the time was presumed to be dead) to the *Einsatzgruppen*'s initial orders.⁴⁸ He did so tangentially

⁴⁶ *Ibid.*, 316-317.

⁴⁷ *Ibid.*, 316. Compare with Ogorreck's assessment of Ohlendorf's testimony, in *idem*, *Die Einsatzgruppen und die 'Genesis der Endlösung'*, 48.

⁴⁸ Both Ogorreck and Streim note that at the time of the IMT everyone thought Streckenbach was dead when in fact he was being secretly held in captivity by the Soviets. Upon returning to Germany in 1955 Streckenbach apparently denied to his friends and

stating that it was Streckenbach who had “transmitted the [murderous] orders of Heydrich and Himmler” to the leaders of the *Einsatzgruppen* three or four days before the invasion of the Soviet Union.⁴⁹ Although Ohlendorf did not expressly state that Streckenbach’s instructions were *the* Hitler-order to murder *all* Soviet Jews, this too is a reasonable inference to draw from his statement.⁵⁰ In any event, Amen did not question Ohlendorf

colleagues that he had delivered the Hitler-order. Allegedly he did not tell German prosecutors this, and instead remained silent because he did not want to betray colleagues who had recently secured clemency or parole. See Ogorreck, *Die Einsatzgruppen und die ‘Genesis der Endlösung’*, 51; Streim, “Tasks of the SS Einsatzgruppen,” 313; and, Longerich, *Politik der Vernichtung. Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung*, 310-320. On this subject see the affidavits of Erwin Schulz, Walter Blume, Rudolf Aschenauer, and Martin Sandberger, 201 AR- \backslash Z 76/59, vols. 6, 8, 16 and 18, Zentrale Stelle, Ludwigsburg.

⁴⁹ Testimony of Otto Ohlendorf, 3 January 1946, in *Trial of Major War Criminals before the International Military Tribunal*, vol. 4, 316, 340 and 353.

⁵⁰ Even though it was Ohlendorf who first linked Streckenbach to the *Einsatzgruppen*’s earliest orders in Pretzsch, it was Dr. Martin Sandberger leader of *Sonderkommando* 1a of *Einsatzgruppe* A, who told American authorities that he had heard a speech by Streckenbach, in which the latter told of the impending invasion of the Soviet Union as well as the abominable task assigned to the *Einsatzgruppen* and *Kommandos*. This was in reality a total fabrication. Interrogation Summary No.2403, 23 May 1947 and Interrogation Summary No.2519 in National Archives and Record Administration Record Group 238 (Records of World War II War Crimes from here forward simply WCR), OCCWC 1933-1949, Executive Counsel, Evidence Division, Interrogation Branch, Interrogation Summaries, box 7 2 April 1947-23 June 1947, Summary 2401-2475 folder (from here forward simply NARA RG, file, folder). Asked later why he made this (false) claim about Streckenbach, Sandberger did not offer a coherent or meaningful response. See Ogorreck, *Die Einsatzgruppen und die ‘Genesis der Endlösung’*, 52-53. Whether or not Sandberger’s statement was influenced by Ohlendorf’s testimony at Nuremberg is difficult to determine. Streim suggests it was, noting that years later Erwin Schulz leader of *Einsatzkommando* 5 related the following about Sandberger, the Hitler-order and Streckenbach: “I met Dr. Sandberger frequently in the Zuffenhausen [internment] camp. There we were able to listen to reports about the Nuremberg trials on the radio. One day Sandberger came to me and declared with great excitement that he had just heard on the radio that Ohlendorf testified at the Nuremberg trial of the major war criminals that Streckenbach had passed on the Führer order. But that cannot be true (Das stimme doch nicht),” Schulz claimed. “I also commented that I could not understand how Ohlendorf could

further about either claim. That the men who were to lead these groups would be informed of their task before they were deployed is certainly not an unreasonable legal assumption to make, especially when a major (self-proclaimed) participant of the mass murder had offered this information as fact.⁵¹ Unfortunately, Amen's failure to question Ohlendorf left unanswered questions about the events of June 1941, a matter of extreme importance for historians. But, of course, Ohlendorf was a witness for the prosecution, not the defense. His testimony was meant to corroborate prosecution charges that the German Army had cooperated with the *Einsatzgruppen* in their brutal activities and that Kaltenbrunner personally had known of their criminal actions in Soviet Russia.

The prosecution could not have asked for a more credible witness than Ohlendorf, who was not only able and willing to divulge much information about the criminal workings of the regime, but did so in a convincing manner.⁵² Undoubtedly Ohlendorf's confidence during trial influenced the court's perception of the veracity of his testimony. As one judicial

make such a statement. I can no longer remember whether I also inquired at the time where and by whom he had been notified about the Führer order. Later, in Nuremberg, Sandberger asked to speak to me: he had meanwhile been enlightened (he did not say by whom) that Streckenbach had after all passed on the Führer order. Lapses of memory are certainly possible; perhaps even I could now remember that Streckenbach had passed on the Führer order. To assure that all members would march in step at Nuremberg, Sandberger obviously wanted to persuade me to give false evidence."Erwin Schulz quoted in Streim, "The Tasks of the SS Einsatzgruppen," n.31, 325-326.

⁵¹ On this issue see Headland, "The *Einsatzgruppen*: The Question of their Initial Operations," 401-412, who argues that even if the so-called *Führerbefehl* was not given before Operation Barbarossa, at the very least the leaders of the *Einsatzgruppen* generally knew in June 1941 that their task in the Soviet Union was to murder Jews. Breitman's interpretation agrees with this conclusion, "Himmler and the 'Terrible Secret' among the Executioners," 80-81.

⁵² Taylor, *Final Report*, 60.

figure later remarked, “whatever offenses Ohlendorf may have to answer for, he will never need to plead guilty to evasiveness on the witness stand [...] With a forth-rightness which one could well wish were in another field of activity, Otto Ohlendorf related how he received the Fuehrer-order (sic) and how he executed it.”⁵³ From an “evidentiary standpoint,” Taylor recalled in his memoir of the IMT proceedings, Ohlendorf’s testimony was compelling; a “a real blockbuster,” he claimed.⁵⁴ Even the defendants against whom Ohlendorf was testifying believed he was stating the truth. Göring thought the former leader of *Einsatzgruppe D* had sold “his soul to the enemy,” whereas Hans Frank and Walther Funk admired Ohlendorf for his honesty.⁵⁵ Whether or not Ohlendorf was seen as traitorous or a star-witness, in 1946, there was no doubt in anyone’s mind, this self-confessed murderer was speaking the truth.

Ohlendorf’s testimony about the existence, timing and delivery of the *Führerbefehl* at the IMT became his mantra. He would repeat this testimony in substance one year later in affidavits entered into evidence at his own trial and during direct testimony.⁵⁶ This evidence

⁵³ Opinion and Judgment of the Tribunal, 8 April 1948, in *Trial*, roll 7, 132.

⁵⁴ Telford Taylor, *The Anatomy of the Nuremberg Trails. A Personal Memoir* (Toronto, 1992), 246.

⁵⁵ G.M.Gilbert, “The Anglo-American Prosecution Concludes, 3 January 1946,” in *Nuremberg Diary* (New York, 1947), 101. See also Taylor, *Anatomy*, 248.

⁵⁶ For example see his interrogation of November 15, 1946. Vernehmung von Otto Ohlendorf durch Mr. Wartenberg, 15 November 1946 in National Archives Microfilm Publication M1019 (Records of the United States Nuernberg War Crimes Trials Interrogations, 1946-1949), roll 50, 20-21 (from here forward simply M1019, roll, page); and, his affidavit of April 1947 in which he asserted, “On the basis of orders which were given by former Brigadefuehrer Streckenbach, Chief of Amt I of the RSHA, by order of the head of the RSHA, to the Chiefs of the Einsatzgruppen and the Kommandofuehrers at the time of the formation of the Einsatzgruppen in Pretzsch (sic) (in Saxony) and which were

was so compelling and his testimony so assertive that those directly involved in his prosecution accepted his statements at face value. From that point onward the existence of the *Führerbefehl* became a given and no further efforts were made to determine if it really existed, thus again leaving this important historical question unexplored. Later historians were to make the same mistake as the prosecutors at Nuremberg, and in doing so indirectly contributed to the current controversy about the timing of Hitler's decision to murder the Jews.

4. Defense Arguments, the '*Führerbefehl*' and Testimony at the *Einsatzgruppen* Trial

The trial of the *Einsatzgruppen* leaders began with their arraignment on September 15, 1947, at which time each defendant entered a plea of "not guilty, in the sense of the indictment."⁵⁷ What the accused meant by this became clear two weeks later when the trial began in earnest. The prosecution's case took only two days to present since the evidentiary basis of their case against the defendants was entirely documentary, mainly the

given by the Reichsfuehrer SS to the leaders and men of the *Einsatzgruppen* and *Einsatzkommandos* who were assembled in Nikolajew in September 1941 a number of undesirable elements composed of Russians, Gypsies, and Jews and others, were executed in the area detailed to me." See Affidavit of Otto Ohlendorf, 2 April 1947 (NO 2856), in *Trial*, Prosecution Documents, roll 11, frames 0797-0798. See also Testimony of Otto Ohlendorf, 14 October 1947, in *ibid.*, roll 2, 631-637.

⁵⁷ See Arraignment, 15 and 22 September 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 23-29. This became the standard response of war criminals to charges of mass murder. As Hannah Arendt aptly observed at the trial of Adolf Eichmann in Israel when he pled the same, "In what sense then did he [Eichmann] think he was guilty? In the long cross-examination of the accused...neither the defense nor the prosecution nor, finally, any of the three judges ever bothered to ask him this obvious question." The same can be said of the *Einsatzgruppen* trial. See *idem*, *Eichmann in Jerusalem*, 21.

Einsatzgruppen's own reports, but also the affidavits of the accused and other sundry documents.⁵⁸ Given the overwhelmingly incriminating nature of the evidence, coupled with Ohlendorf's earlier confession to the crime, the defense attorneys were forced to use very imaginative arguments to demonstrate their clients' innocence.⁵⁹ This strategy proved to be of dubious value for the defense in general. Their difficulty was compounded by the fact that there were twenty-two defendants on trial, not just one. Some historians have suggested that the defense put on a common line of defense – or as the prosecution called it, “organized hypocrisy” – that was applicable to all accused regardless of their position in the *Einsatzgruppen*.⁶⁰ While there is some evidence that suggests that Ohlendorf and his attorney Dr. Rudolf Aschenauer did attempt to coordinate defense strategy, the trial record indicates that the strategy was not adhered to by all defendants and their counsel.⁶¹ Certainly

⁵⁸ The decision to call no witnesses was Ferencz's. He reasoned that because very few individuals survived the murderous actions of the *Einsatzgruppen* it might be difficult to locate those who did. Moreover, he felt witnesses were “unreliable...those who would testify against any Nazi defendant would be blinded by rage and pain. Besides,” he emphasized, “I didn't need them. I was going to hang the murderous gang by their own documents.” Letter from Benjamin Ferencz to Hilary Earl, 27 February 1997. On the issue of the use of the *Einsatzgruppen* reports as legal evidence at the trial see Headland, *Messages of Murder*, 159-176.

⁵⁹ *Ibid.*, 165.

⁶⁰ Brief for the Prosecution. Analysis of the Defense Presented on Behalf of the Accused, February 1948, in *Trial*, roll 29, frame 0014. On the issue of a common defense, see Ogorreck, *Die Einsatzgruppen und die 'Genesis der Endlösung'*, 53-55, who points to evidence that strongly suggests Ohlendorf did pressure the other defendants to plead a common defense of “superior orders” and “putative necessity.”

⁶¹ Among Musmanno's papers are a number of short essays he had written while in Nuremberg. One of these corroborates the charge that Ohlendorf did attempt to direct the other defendants in the trial. Musmanno overstates the case when he writes, “By raising his right eyebrow he directs his co-defendants when they are on the stand. They follow his signals without exception, as though they were hypnotized. Without question he is their

many argued superior orders, but a variety of other strategies and creative applications of the law were employed in an attempt to prove their clients were not responsible for the crimes with which they were charged. In the end, while this “shot-gun” approach was probably necessary under the circumstances, rather than helping their clients, it created a sense of incredulity and desperation, ultimately weakening the presentation of their case.

Dr. Rudolf Aschenauer, the attorney for Ohlendorf, made the opening statement for the defense on October 6 when he laid out his client’s case. To everyone’s surprise Aschenauer, whose dramatic appearance at trial (he was dressed entirely in black) reminded the presiding judge of a “Shakespearean actor,” acknowledged that “executions” had occurred in the Soviet Union.⁶² While most of the accused would not deny they had committed the acts with which they were charged, he insisted that these executions were legally justified because they were carried out in *presumed* self-defense on behalf of a third party – the German Reich – during a *presumed* state of emergency; that is, they were presumed to be necessary.⁶³ In American law this argument is referred to as putative justification or putative self-defense, which suggests that an individual’s criminal action was

uncontested chief. – His name is Otto Ohlendorf.” See, excerpt from Michael Musmanno, “Family Father and Mass Murderer,” circa 1948, Capital Punishment file 1477, MMP.

⁶² Michael Musmanno, *The Eichmann Kommandos* (Philadelphia, 1961), 119. For a summary of the legal issues involved in all of the Subsequent Nuremberg trials see Matthew Lippman, “The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany,” *Indiana International and Comparative Law Review* 1:3 (1992), 1-100.

⁶³ It was impossible for Aschenauer to argue otherwise given the existence of the reports and the Tribunal’s ruling that they were authentic.

predicated on “the reasonable belief that a feared aggressor is about to attack.”⁶⁴ More importantly, the putative justification defense assumes that the crime committed “outweighs the harm of the offense – either because a greater harm is avoided or because a greater social interest is furthered.”⁶⁵ Significantly for the defense, putative justification is a little-understood and infrequently used legal argument in American law, but it is commonly used in western and eastern European legal proceedings.⁶⁶ As Aschenauer interpreted it, a defendant’s actions were legally justified if he could prove that he believed he had acted in self-defense to protect Germany, even if his presumption of a threat was mistaken.⁶⁷ The

⁶⁴ George P. Fletcher, *Basic Concepts of Criminal Law* (New York, 1998), 88. Legally, justification pertains to the permissibility of an act that violates the law. If the act is illegal, but was carried out for self-defense, the act is justifiable and must prevail legally. On the other hand, the legal concept of “excuse” speaks to the culpability of the perpetrator of the criminal act. For example, if the perpetrator acted under duress in carrying out a criminal act, he cannot be considered personally responsible for his act. On this issue of justification versus excuse see also George P. Fletcher, “The Right and the Reasonable,” in Albin Eser, George P. Fletcher, et al. (eds.), *Justification and Excuse: Comparative Perspectives I* (Freiburg, 1987), 76-81 for German perspectives see Winfried Hassemer, “Rechtfertigung und Entschuldigung im Strafrecht. Thesen und Kommentare,” in *ibid.*, 175-227 and Claus Roxin, “Rechtfertigungs- und Entschuldigungsgründe in Abgrenzung von sonstigen Strafausschließungsgründen,” in *ibid.*, 230-262.

⁶⁵ Paul H. Robinson, “Causing the Conditions of One’s Own Defense. Defense: A Study in the Limits of Theory in Criminal Law Doctrine,” in *Justification and Excuse*, 660 n.3.

⁶⁶ On the issue of the development and usage of this defense see *Ibid.*, 103-109.

⁶⁷ Rudolf Aschenauer, Opening Statement for the Defendant Ohlendorf, 6 October 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 60. German law has long recognized that a perpetrator may not be punished if his actions were committed because of “confusion, fear or fright.” This does not alter the wrongfulness of the act, but legally it does erase personal blame. On this issue see Albin Eser, “Justification and Excuse: A Key Issue in the Concept of Crime,” in *Justification and Excuse*, 31 n.19 and 51-56.

accused had killed innocent civilians, he told the court, but they did so believing their actions were for the greater good of the German Reich, not only to save Germany from Bolshevism (the Jews), but also to ensure the continued existence of Germany which was under threat from the Soviet Union.⁶⁸

As a second line of defense, Aschenauer and the other attorneys sought to prove that the leaders of the *Einsatzgruppen* took their orders from the military commanders of the German army to which their units were attached and that the so-called *Führerbefehl* compelled them, under duress, to obey. In law, this argument is exculpatory when it can be confirmed that an “excusing condition” existed in connection with the criminal act. In this case, it would have to be shown that either the accused did not know their conduct was wrong at the time of the crime or that their criminal actions were the result of coercion; that is, they did not have control over their own behaviour.⁶⁹ Under Control Council Law No. 10, neither putative justification nor superior orders were admissible as defenses, but Aschenauer hoped the tribunal would consider them since both had long pedigrees in German legal theory and law.⁷⁰ With the putative self-defense argument Aschenauer aimed to show, in a complicated and in some ways confusing argument, that while the defendants’

⁶⁸ The legal basis for “necessity” comes from the notion that in doing so the action benefits society as a whole. For an explanation of the history of “legal necessity” see Fletcher, *Basic Concepts of Criminal Law*, 138-142.

⁶⁹ Robinson, “Causing the Conditions of One’s Own Defense,” 661 n.5.

⁷⁰ Rudolf Aschenauer, Opening Statement for the Defendant Ohlendorf, 6 October 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 54-55. On the issue of putative self-defense in law see Fletcher, *Basic Concepts of Criminal Law* (New York, 1998), 88-91. Given the gravity of the charges, Musmanno believed that he had an obligation to consider all lines of defense.

acts were criminal they were nonetheless legally justified. If the court did not find this defense compelling, he hoped they would excuse the defendants legally on the grounds that they were acting under duress on the orders of their superiors. Ostensibly, the defense attorneys hoped that, at the very least, the tribunal would consider obedience to orders proof of a lack of criminal intent and thus a mitigating factor. At best, they hoped the defendants would be found legally not responsible for their criminal actions.⁷¹ By making these arguments defense counsel explicitly acknowledged the criminal actions of those accused and from this point onward the burden of proof was placed squarely on their shoulders.

The defense now had to demonstrate that Ohlendorf and his co-defendants were soldiers, carrying out the most difficult of soldierly tasks – protecting their state – in a military, but humane fashion during the war.⁷² Under any other circumstances, Aschenauer wanted the court to understand, the actions of the *Einsatzgruppen* would be considered criminal, but because of their presumption of a threat and state of emergency, their actions, while illegal, were believed by the defendants to be both necessary and justified.⁷³ To demonstrate the validity of putative justification, Aschenauer introduced expert testimony

⁷¹ As Dr. Willi Heim, attorney for Blobel, contended in his opening statement, had these men disobeyed their orders, they would have been subjected to military court martial and in all likelihood lost their own lives, and hence they had no choice but to follow orders. See Willi Heim, Opening Statement for the Defendant Blobel, 6 October 1947, in *Trial*, 85.

⁷² On the issue of the legal defense of superior orders see Aubrey M. Daniel, “The Defense of Superior Orders,” *University of Richmond Law Review* 3:7 (Spring 1973), 477-509 who examines the case of the American Lieutenant William L. Calley, Jr. for his role in the My Lai Massacre in 1968.

⁷³ Rudolf Aschenauer, Opening Statement for the Defendant Ohlendorf, 6 October 1947, in *Trial*, 54-70. For an alternate analysis of the defense see Robert Wolfe, “Putative Threat to National Security as a Nuremberg Defense for Genocide,” *American Academy of Political and Social Science* 450 (July 1980), 46-67.

and entered into evidence the transcript of a July 3, 1941 radio broadcast by Stalin, in which the Soviet leader called for the most extreme measures against the German Reich, including partisan warfare and the total destruction of the German fascist state.⁷⁴ At the heart of the defense case was the argument that the defendants murdered Jews because they believed it to be necessary. In Aschenauer's words,

[the] solution of the problem "Bolshevism versus Europe" could only be brought about by a "solution" of the Jewish problem and in ... [the Einsatzgruppen's] particular sphere, (sic) only by unreserved execution of the Fuehrer-Order,

that is, the mass murder of Soviet Jewry.⁷⁵ Thus, Aschenauer concluded, the murder of Soviet Jewry could not be considered "part of a systematic program of genocide" as the prosecution contended, but rather it was the result of the defendant's belief that Bolshevism as embodied in the Jews, posed a grave and immediate threat to the security and very survival of Germany.⁷⁶ But Aschenauer's argument was both misleading and inherently flawed. While these men undoubtedly took their orders from their superiors, they could hardly be considered soldiers, given their lack of military training and the political and ideological nature of their task. As Musmanno asked, "If the job [of] the *Einsatzgruppen* was strictly military, why did the High Command not send military men to do it?"⁷⁷ Moreover, the defense claim that the *Einsatzgruppen* murdered Soviet Jews to protect

⁷⁴ Ohlendorf Document 39, Transcription of Radio Broadcast of Joseph Stalin, 3 July 1941, in *Trial*, roll 26.

⁷⁵ Rudolf Aschenauer quoted in Opinion and Judgment of the Tribunal, 8 April 1948, in *Trial*, roll 7, 69.

⁷⁶ Testimony of Otto Ohlendorf, 8 October 1947, in *Trial*, roll 2, 521.

⁷⁷ Opinion and Judgment of the Tribunal, 10 April 1948, in *Trial*, roll 7, 102.

Germany from Soviet aggression (as articulated in Stalin's July 1941 radio speech) was implausible since Germany was the aggressor and not the other way around. Thus, if any nation could argue putative self-defense it was the Soviet Union and certainly not the Third Reich. Given the paucity of alternate strategies available to them, the defense attorneys adopted this line of argument despite the inherent flaws.

On the witness stand most of the men assisted in their own defense by claiming they believed that Bolshevism and Jews were synonymous. For instance, Ohlendorf, clearly "annoyed" by questions on this issue, stated that he believed the Jews "played a disproportionately important role" in the Soviet state.⁷⁸ He even made the disingenuous claim that "Jews who were executed went to their death singing *The Internationale* and hailing Stalin." As if singing confirmed that the Jews posed an imminent and grave threat to the Reich.⁷⁹ The tribunal concluded that the putative self-defense argument was unconvincing, particularly after Ohlendorf admitted he opposed the order to murder Soviet Jews for moral reasons.⁸⁰ The presiding judge Musmanno pointed out to the inexperienced defense attorney, Aschenauer, that he could defend Hitler's order as legally justifiable under the circumstance of total war, or he could defend his client Ohlendorf who had testified that he carried out the order under duress because he objected to it on moral grounds.⁸¹ But he should not argue both positions at the same time. Still, Musmanno did not set limits on the

⁷⁸ Musmanno, *Eichmann Kommandos*, 111.

⁷⁹ Testimony of Otto Ohlendorf, 8 October 1947, in *Trial*, roll 2, 522.

⁸⁰ Discussion between Judge Michael Musmanno and Dr. Rudolf Aschenauer, 15 October 1947, in *ibid.*, roll 2, 759-765.

⁸¹ *Ibid.*, 760.

scope of the defense counsel's representation, and in fact acknowledged their right to put forth mutually exclusive defenses, but he did emphasize that in doing so both defenses were undermined.⁸² As he stated in the judgment, "one either justifies the Fuehrer-Order or one does not. One supports the killing of the Jews or denounces it," but by arguing them simultaneously both are "inevitably weaken[ed]."⁸³

Like Ohlendorf, Werner Braune, head of *Einsatzkommando* 11b of *Einsatzgruppe* D, could not deny murdering Jews, especially after hearing his former superior's testimony. He too attempted to argue putative self-defense by linking Bolshevism and the Jews, but his testimony was even less effective than Ohlendorf's. He told the tribunal that as he understood it, Hitler gave the order to murder the Jews in an attempt to save Germany, because "the Jews in the East were the decisive bearers of Communism and its illegal manner of fighting."⁸⁴ The weakness in this argument was further exposed when it was subjected to close scrutiny by the court. Braune had earlier told the tribunal he believed "the vast majority of Jews supported Bolshevism," but Musmanno, found this unconvincing. Logically, the presiding judge replied, if the majority of Jews supported Bolshevism, of necessity a minority did not. Braune had to agree, but the number was small he said, perhaps as low as "ten, twenty, or thirty percent." Musmanno demanded to know why, if this were the case, all Jews were killed, even the minority who did not support Bolshevism. Musmanno's argument left Braune completely flummoxed, able only to offer the lame

⁸² Opinion and Judgment of the Tribunal, 10 April 1948, in *ibid.*, roll 7, 60.

⁸³ *Ibid.*, 75.

⁸⁴ Testimony of Werner Braune, 25 November 1947, in *ibid.*, roll 4, 3051.

excuse that “the possibility [to save them] did not exist.”⁸⁵ Musmanno concluded that the putative self-defense claim was demonstrably fraudulent, that Jews were not murdered to protect Germany, but rather to further Hitler’s dream of creating a master race. In the judgment Musmanno stated that, “[t]he record shows...that when it came to a Jew, it did not matter whether he was a member of the Communist Party or not,” but even if all the Jews in the Soviet Union had been shown to be Bolsheviks, killing them for holding divergent political opinions was still murder.⁸⁶

The defense in any criminal trial has a duty to advance all possible supporting arguments. When the putative justification defense failed to persuade the court, the defense counsel were compelled to argue their back-up defense, namely superior orders. Technically superior orders was not a permissible argument since Control Council Law No. 10 stipulated that it could only be considered in mitigation, but Musmanno allowed defense attorneys to argue it because he believed they should have every opportunity to defend their clients. Thus he ruled that legally, if a defendant did not know that carrying out the *Führerbefehl* (to murder innocent civilians) was illegal, immoral and against all tenets of international law, or if they had been physically coerced, they could not be convicted of a crime. According to Tribunal II’s interpretation of the law, if a defendant carried out an order, even an illegal one, because not to do so brought about physical repercussions, than the defense of superior orders must be a mitigating factor. All of the defendants believed or hoped the tribunal would find that they were unaware of the illegality of their actions and hence, most of them

⁸⁵ *Ibid.*, 3069-3072.

⁸⁶ Opinion and Judgment of the Tribunal, 8 April 1948, in *ibid.*, roll 7, 70 and 75.

raised the issue in direct testimony. Ohlendorf, as the lead defendant in the case, took the stand first. Under direct examination by his attorney he told the court of the involuntary nature of his assignment. He then testified about the existence, timing and nature of the *Einsatzgruppen*'s orders in words that were nearly the same as his testimony at the original Nuremberg trial in 1946.⁸⁷ Aschenauer next tried to establish that the "mission" of the *Einsatzgruppen* was security. As Ohlendorf put it, his job was "to protect the rear of the troops by killing the Jews, Gypsies, Communist functionaries, active Communists, and all persons who would endanger...security," and as far as he knew, the goal was national survival not "racial extermination."⁸⁸ Moreover, he stated emphatically, his task had been a military operation, and anyone who disobeyed the *Führer's* orders "would have met immediate death."⁸⁹ Hitler's orders were so compelling, he claimed without hesitation, that he would have murdered his sister had he been ordered to do so.⁹⁰ Oddly perhaps, no one on the prosecution team confronted Ohlendorf on this issue. Later other defendants supported Ohlendorf's claim that refusal to obey Hitler's order would have resulted in very harsh

⁸⁷ For example, see testimony of Otto Ohlendorf, 8 October 1947, in *ibid.*, roll 2, 515, 521 and 526-527.

⁸⁸ Testimony of Otto Ohlendorf, 8 October 1947, in *ibid.*, roll 2, 515-516 and 516-517.

⁸⁹ Later he contradicted himself, testifying that he forbade executions by men who were emotionally unable to cope with the task of murder. Some became so traumatized by their job, he said, that he sent them back to Berlin for reassignment. Importantly, no one questioned Ohlendorf on this issue. Testimony of Otto Ohlendorf, 8 October 1947, in *ibid.*, and 14 October 1947, roll 2, 592. Since there is neither documentary evidence nor cross-examination testimony on this matter, it is impossible to know for certain whether the men of the *Einsatzgruppen* found themselves in the same or similar positions as the men of Police Battalion 101.

⁹⁰ Testimony of Otto Ohlendorf, 15 October 1947, in *ibid.*, roll 2, 740-752.

punishment, even death in some cases.

But was Ohlendorf's testimony credible? To determine this, American prosecutor James Heath, whom Chief Prosecutor Benjamin Ferencz characterized as "a fine southern gentleman," questioned Ohlendorf about the morality of the *Führer*-order.⁹¹ Initially Ohlendorf was non-responsive. Eventually however, he admitted that personally he disagreed with the order. He was a soldier, he stated tersely, and had to carry it out. Like all good soldiers, he had just been following orders. As far as he was concerned, he had done nothing wrong.⁹² Ohlendorf refused to give in to Heath's questioning on this subject and as hard as Heath tried he could not force Ohlendorf, who presented himself on the witness stand as entirely credible, to recant his testimony. Even when Ohlendorf's "story" began to show signs of inconsistency, Heath did not seem to notice, missing an excellent opportunity to cross examine Ohlendorf. For instance, after a rather heated exchange between the two, Ohlendorf revised his testimony about the transmission of the *Einsatzgruppen*'s orders. He claimed that the *Führerbefehl*, ordering the murder of women and children, was transmitted only once during the entire period of operational activity of the *Einsatzgruppen*. It was given before the units had departed from Pretzsch and remained in effect throughout the campaign against the Soviets.⁹³ This assertion was a significant departure from his earlier testimony

⁹¹ As Musmanno saw it, the true test of the credibility of the superior orders defense was not "the existence of the order, but whether moral choice was in fact possible." Musmanno, *Eichmann Kommandos*, 135. Ferencz, who is Jewish, believed it would be more effective if a Christian such as James Heath cross-examine Ohlendorf. Interview with Benjamin B. Ferencz by Hilary Earl, 24 April 1997, 3-4.

⁹² Cross-examination of Otto Ohlendorf, 15 October 1947, in *Trial*, roll 2, 740-752.

⁹³ Testimony of Otto Ohlendorf, 14 and 15 October 1947, in *ibid.*, roll 2, 650 and 682-684.

when he told of a second instance when the *Führer*-order was delivered by Himmler in September 1941. This was an inconsistency that none of the prosecutors or the judges of the tribunal questioned at the time.

The purpose of cross-examination is to challenge the credibility of a witness' testimony; a good cross-examiner should be able to detect inconsistencies in that testimony. This might not seem of great importance historically, but the fact is that in criminal proceedings generally, but especially in Anglo-American trials, the act of cross-examination is what the court uses to "separate truth from lies, responsible memory from self-conscious or unwitting invention."⁹⁴ In essence, testimony is what the court uses as its "window on historical fact."⁹⁵ Why, it must be asked, did none of the prosecution team notice the glaring contradictions in Ohlendorf's testimony, and why did none seem to entertain the idea that he may not have been telling the truth? The answer is complicated. Part of the reason seems to have been that the prosecution team assigned to the *Einsatzgruppen* case, while hard and earnest workers, were woefully inexperienced. Chief of the prosecution team, Benjamin Ferencz had graduated from Harvard Law School and worked with the renowned war crimes expert Sheldon Glueck, he had enlisted in the army immediately after graduation, and had served the final two years of the war in a combat unit not in a court room. After the war he worked in the field gathering evidence of war crimes for the army, but at age twenty-seven he had never had the opportunity to try even a single criminal case, let alone a trial against

⁹⁴ Douglas, "Wartime Lies," 29.

⁹⁵ *Ibid.*

major war criminals.⁹⁶ James Heath, another member of the prosecution team, assigned by Ferencz to cross-examine the main defendant in the trial, was on the verge of being fired as a prosecuting attorney because of a drinking problem which compromised his ability to do his job effectively. Two other attorneys, Peter Walton and John Glancy, were “cast-offs,” unwanted by the prosecution teams in other trials and were picked-up by Ferencz when, at the eleventh hour, Telford Taylor gave his blessing to indict the leaders of the mobile killing units.⁹⁷ As Ferencz recalled later, Horlik Hochwald was the “only good” lawyer assigned to the case. As a result, he believes, “some of the defendants received easy sentences because the case was not properly prepared.”⁹⁸

In Ohlendorf the novice prosecutors faced a formidable opponent. Many people came to court just to catch a glimpse of this “mass murderer” whose story had been reported in newspapers. His presence also led spectators to whisper and point fingers at him. Musmanno recalled that like the allure of certain serial killers, some women even “sought to pass him notes offering encouragement and endearment.”⁹⁹ Perhaps if these lawyers had had more

⁹⁶ Despite the fact that the *Einsatzgruppen* trial was Ferencz’ first case he told me that he was not nervous, but incredibly confident of his abilities. See Interview with Benjamin Ferencz, 24 April 1997, 2-3.

⁹⁷ Ferencz states that Heath was a good lawyer, but was unable to “get down to the task” because of a drinking problem. Ferencz also recalled that while Glancy and Walton were decent people they “were not competent lawyers.” See *ibid.*, 3-5. When the transcript of the trial was published in 1951, Heath was not listed as part of the prosecution team in the *Einsatzgruppen* case, but was instead referred to as “consultant.” See Prosecution Counsel in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol.4, 11.

⁹⁸ Letter from Benjamin B. Ferencz, 27 February 1997, 1 and interview with Ferencz, 24 April 1997, 4-5.

⁹⁹ Musmanno, *Eichmann Kommandos*, 106-107.

experience, and the lead defendant had been less charismatic, they might have caught the discrepancies in his testimony. As unfortunate historically as this “missed opportunity” to question Ohlendorf is, legally it did not hurt the prosecution because Musmanno had ruled that Ohlendorf’s testimony at the original Nuremberg trial was admissible, and since he had already admitted to mass murder, there was little else the court needed to convict him.¹⁰⁰ The prosecutors certainly did not need to show that Ohlendorf was untruthful about when the *Einsatzgruppen* received the order to murder all Soviet Jews and from whom that order had emanated because these issues were not entirely germane to the determination of guilt or innocence. Ohlendorf was confident, consistent and insistent, and as hard as the prosecution tried they could not break his resolve. On the witness stand he presented himself as assured, credible and, above all, truthful. The fact is Ohlendorf’s audaciousness, coupled with a weak cross-examination, did very little to discredit the defense of obedience to orders.

Fortunately not all defendants who took the stand came across as effectively as Ohlendorf. As far as the tribunal was concerned only one defendant needed to demonstrate the weakness of the “superior orders” defense for the entire argument to collapse. This occurred when Willy Seibert, Ohlendorf’s former Deputy Chief in *Einsatzgruppe D*, was on the stand. Under direct examination by his attorney Dr. Hans Gawlik, Seibert explained that he was not responsible for what took place in Soviet Russia because he was merely

¹⁰⁰ The *Einsatzgruppen* trial was not the only war crimes trial that could have served history better. For example, Michael R. Marrus, has argued that the prosecutors and judges in the so-called Doctor’s Trial also “missed an opportunity” to present an “historic assessment of medicine in the Third Reich.” See Marrus, “The ‘Doctors’ Trial’ in Historical Context,” Paper prepared for the conference, “The Nuremberg Code and Human Rights: Fifty Years after the Judgment of the Nazi Doctors,” United States Holocaust Memorial Museum, 8-9 December 1996, 1-4.

following orders.¹⁰¹ After all he said, he was a soldier and a soldier's first duty is obedience. During questioning by the presiding judge, he was asked if he understood that killing unarmed civilians in occupied areas, without trial, is murder under the recognized laws of war, and humanity. Seibert quickly responded that he "simply didn't know anymore" what was and was not murder during wartime.¹⁰² After some thought he concluded that killing because one was ordered to do so was not the same as murder.¹⁰³ Musmanno, stunned by Seibert's answer, wondered if perhaps the SS man had become so hardened and brutalized by his activities in the east that he could no longer distinguish between right and wrong, between killing during armed conflict and killing unarmed civilians without provocation.¹⁰⁴

Seibert was, in fact, not brutalized and hardened and was able to distinguish between right and wrong. Musmanno, clearly dissatisfied with Seibert's response, probed further. He asked the defendant a hypothetical question, which in a criminal trial in the United States would have been disallowed, but given the unusual combination of American and Continental law employed at Nuremberg he was well within his rights to do.¹⁰⁵ He asked

¹⁰¹ Gawlik was to become the *Koordinierungsstelle zur Förderung der Rechtsschutzstelle für die deutschen Gefangenen im Ausland* (Coordinator of the Office for Legal Protection of German Prisoners Tried in Foreign Courts) an organization that was founded in 1949 with the establishment of the German Basic Law to help so-called prisoners of foreign governments.

¹⁰² Testimony of Willy Seibert, 18 November 1947, in *Trial*, roll 4, 2552.

¹⁰³ Musmanno, *Eichmann Kommandos*, 128.

¹⁰⁴ Testimony of Willy Seibert, 19 November 1947, in *Trial*, roll 4, 2664-2665. See also, Musmanno, *Eichmann Kommandos*, 127-128.

¹⁰⁵ Musmanno took every available opportunity to directly question witnesses during the trial. In his memoirs he notes that he served as both judge and jury, *idem*, *Eichmann Kommandos*, 128.

Seibert whether he would shoot his parents if he were ordered.¹⁰⁶ Seibert stumbled. He could not or would not respond to the question. As Musmanno recalled later, “the faces of the other defendants in the dock dropped. ‘Why, you idiot,’ they seemed to say, ‘*that* is our whole case.’”¹⁰⁷ Since Seibert refused to answer the question and Musmanno refused to continue the trial until he did, the court was held in recess until the following day, at which time Seibert was instructed that he must answer the question.¹⁰⁸ The next day Seibert, looking exhausted from a night of no sleep, took the stand.¹⁰⁹ Musmanno repeated the question, “if...the military situation made it necessary for you, after receiving an order...from a superior officer, to shoot your own parents, would you do so?” Averting his eyes from the other defendants, and in what can only be described as an agonizing moment, Seibert responded, “Mr. President, I would not do so...it is inhuman to ask a son to shoot his parents.”¹¹⁰ In one sentence Seibert, unwilling to lie, had destroyed the defense’s case. Obedience to orders is not blind but has limits. As Musmanno phrased it in the judgment, a German soldier is not “a fettered slave,” rather he is a “reasoning agent,” and as such he does have some latitude for his actions. Some orders, particularly inhuman ones, he noted, may be disobeyed, and because they could be disobeyed. The only reasonable conclusion

¹⁰⁶ Cross-examination of Willy Seibert by Michael Musmanno, 19 November 1947, in *Trial*, roll 4, 2671-2673.

¹⁰⁷ Musmanno, *Eichmann Kommandos*, 129.

¹⁰⁸ Cross-examination of Willy Seibert by Michael Musmanno, 19 November 1947, in *Trial*, roll 4, 2674.

¹⁰⁹ Musmanno, *Eichmann Kommandos*, 132.

¹¹⁰ Testimony of Willy Seibert, 20 November 1947, in *Trial*, roll 4, 2676. See also Opinion and Judgment of the Tribunal, 8 April 1948, in *ibid.*, roll 7, 79-81.

Musmanno could draw was that the defendants had freely engaged in mass murder.¹¹¹

Willy Seibert's was not the only testimony to contradict Ohlendorf's on the issue of superior orders. In fact, most historians of the "Final Solution," when discussing the subject of timing point to the testimony of Erwin Schulz, head of *Einsatzkommando 5* of *Einsatzgruppe C*, as proof that Ohlendorf was lying about the nature and timing of the Hitler-order.¹¹² Of all the defendants to take the stand, only Schulz refused to confirm Ohlendorf's version of the existence and timing of the *Führerbefehl*. This provided the prosecution an unexpected opportunity to probe into the obvious factual inconsistency in Ohlendorf's testimony. But they did not do so even though one of their stated objectives of the trial was to provide an accurate account of events. Why they did not, is another matter. Simply put, by the time Schulz took the stand the prosecution had already concluded that there was an order and Hitler had issued it. Since Schulz was the only accused to make such a contradictory claim, the preponderance of evidence clearly supported Ohlendorf, who appeared a far more credible witness than Schulz to begin with.

On the stand, Schulz refused to acknowledge that he had committed any illegal

¹¹¹ Opinion and Judgment of the Tribunal, 8 April 1948, in *ibid.*, roll 7, 77 and Musmanno to defendant Seibert, 20 November 1947 in *ibid.*, roll 4, 2676.

¹¹² For example, see Ogorreck, *Die Einsatzgruppen und die 'Genesis die Endlösung'*, 52; Streim, "Tasks of the SS Einsatzgruppen," 214; Browning, *Fateful Months*, 17 & 19; and Burrin, *Hitler and the Jews*, 101-104. Interestingly, historians have overlooked the testimony of Adolf Ott who tried in vain to make the distinction between the Hitler-order to murder Soviet Jews and the Hitler-order to murder all European Jews. See Testimony of Adolf Ott, 10 December 1947, in *Trial*, roll 5, 3716-3762. Even Telford Taylor, the Chief of Counsel for War Crimes, did not understand the difference between partial and total genocide, reporting that, "The notorious 'final solution of the Jewish question,' the objective of which was nothing less than the extermination of European Jewry, was the basis of the 'Einsatz case'." See *idem*, *Final Report*, 69.

killings (all were legal he argued, because they were preceded by thorough investigations and trials). More important, he disputed the timing, delivery and nature of the *Führer*-order. When asked by his attorney about the so-called Hitler-order, Schulz explained that the first time he had heard of it was during his interrogation on Good Friday in 1947, and it was Ralph Wartenberg, the prosecution's chief interrogator, who told him about it.¹¹³ It was not until August 1941, he stated, that he was given the order to murder *all* Soviet Jews including women and children, and then the order was given to him by Otto Rasch, commander of *Einsatzgruppe C*, not head of Office I of the RHSA Bruno Streckenbach, as Ohlendorf had maintained.¹¹⁴ Moreover, there was no mention of "extermination" or "final solution" when he was first assigned the task of *Kommandoführer*. Had he known beforehand that his task would be to kill innocent human beings, he maintained, he would not have taken the job in the first place.¹¹⁵ Everything Schulz said on the issue of orders was at odds with Ohlendorf's testimony, which should have raised a red flag for the prosecutors. But the truth was, as Arnost Horlik Hochwald's cross-examination of Schulz demonstrates, that the prosecution was reluctant to accept Schulz's version of events, preferring instead Ohlendorf's testimony on the existence and timing of a Hitler-order.

Horlik Hochwald: You made here a differentiation between the Hitler-order (sic) as testified to by the defendants Ohlendorf and Naumann and the order of Jeckeln which was handed down to you by Rasch?

Schulz: That is right.

¹¹³ Testimony of Erwin Schulz, 17 October 1947, in *Trial*, roll 2, 933.

¹¹⁴ *Ibid.*, 21 October 1947, 1073.

¹¹⁵ *Ibid.*, 17 October 1947, 935.

Horlik Hochwald: ...will you tell the Tribunal where you see this *colossal difference* between these two orders?¹¹⁶

Schulz's inability to respond with any authority undoubtedly suggested to the prosecution that he was lying. Clearly, the prosecutors had made up their minds: the *Einsatz* and *Kommandoführer* knew about their tasks before they were deployed in the summer of 1941. In any event, it made little difference when determining their guilt or innocence, as Horlik Hochwald pointed out, whether the order was given in Pretzsch by Streckenbach or a month later by Rasch in the Soviet Union. In either case, it was still Hitler's order and innocent people had still lost their lives at the hands of the *Einsatzgruppen*.¹¹⁷ In essence, even had the prosecution been willing to entertain Schulz's account of events it is unlikely that these would have affected the outcome of the trial, the point of which as far as they were concerned, was to prove the defendants had committed murder, and not when they had been ordered to do so. While historians may lament this lost opportunity to explore a matter crucial to historical understanding, the truth is that the court found Schulz's testimony unconvincing, which should not be surprising given that his testimony appeared quite self-serving, and this ultimately helped the judges decide his and the other defendants' fate. Thus, the court was not entirely remiss when they failed to pursue the matter further.

Following Ohlendorf's lead, one by one, the defendants testified that they were not legally responsible for the mass murder of Soviet Jewry, because they were soldiers, following orders, and as such had no choice but to obey. Thus, it seems that Ohlendorf's

¹¹⁶ Emphasis supplied, *ibid.*, 21 October 1947, 1077.

¹¹⁷ *Ibid.*, 1073.

detractors are correct in at least one sense after all.¹¹⁸ Obedience to orders was a defense strategy, used in a desperate attempt to save the lives of mass murderers who otherwise had not a legal leg to stand on.

To be sure, putative self-defense and superior orders were not the only arguments put forward by a defense team desperate to prove that their clients were not guilty of the charges against them. In fact, dozens of different arguments were advanced during the trial, many of which contradicted these two principal defenses. For instance, Franz Six, the leader of *Vorkommando* Moscow of *Einsatzgruppe* B, maintained that because he was only a professor he knew nothing of the murder of the Jews. He claimed he had actually tried his best to be released from duty as head of a *Kommando*.¹¹⁹ Moreover, he stated that his group was not a killing unit at all, but rather an “archival-Kommando,” and that under his leadership documents were collected, but no “people” were killed.¹²⁰ Waldemar Klingelhöfer, Six’s replacement as head of *Vorkommando* Moscow of *Einsatzgruppe* B, when asked why he did not request to be released from his duties, claimed it would have been futile and therefore he had not even tried.¹²¹ Werner Braune, head of *Einsatzkommando* 11b of *Einsatzgruppe* D, agreed with Klingelhöfer that it would have been pointless to evade one’s duty. He also claimed that his actions had been no worse than those of the Allies, who

¹¹⁸ Streim, “Tasks of the SS Einsatzgruppen,” 313.

¹¹⁹ Testimony of Franz Six, 24 October 1947, in *Trial*, roll 3, 1325-1335.

¹²⁰ *Ibid.*, 1345-1352.

¹²¹ Testimony of Waldemar Klingelhöfer, 11 December 1947, in *ibid.*, roll 5, 3811-1812.

he argued had indiscriminately killed thousands of German civilians during the war.¹²² Therefore, he reasoned, the Americans were just as guilty of murder as the Germans.¹²³ Then there were those defendants who claimed they had not killed innocent persons, only partisans, and then only after thorough investigations. Adolf Ott claimed that he had not killed any Jews because there were none left when he arrived in Russia in January 1942.¹²⁴ Still others said the reason they had not tried to avoid their murderous task was because had they not done the killing someone else certainly would have.¹²⁵ Taken together, these arguments constituted what can only be considered a “shot-gun” defense, advanced with only little expectation of success, but with the hope that, taken together, they might have some impact on the tribunal. Overall however, they gave the impression of desperation among the defendants, and ultimately the strategy led the tribunal to conclude that the defendants were guilty.

Failing to coordinate their strategy, the defense attorneys may have actually helped the prosecution.¹²⁶ There is irony in the fact that the entire defense strategy, intended to save

¹²² Testimony of Werner Braune, 25 November 1947, in *ibid.*, roll 4, 3053.

¹²³ *Ibid.*, 3042-3044.

¹²⁴ Testimony of Adolf Ott, 11 December 1947, in *ibid.*, roll 5, 3782.

¹²⁵ The tribunal found this argument particularly outrageous, noting in the judgment that, “The defendants are accused here for their own individual guilt. No defendant knows what his successor would have done.” Opinion and Judgment of the Tribunal, 10 April 1948, in *ibid.*, roll 7, 96.

¹²⁶ On the issue of defense strategies and coordination see for example, Ogorreck, *Die Einsatzgruppen und die ‘Genesis der Endlösung,’* 54-55 and Streim, “Tasks of the SS-Einsatzgruppen,” 313 who both argue that Ohlendorf tried to persuade his co-defendants to testify as he did. See also Peter Longerich, *Politik der Vernichtung. Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung* (Munich, 1998), 310-320.

the lives of the accused, did little if anything to help them win their case. Rather, testimony by the defendants on the existence of the *Führerbefehl* confirmed in the minds of the prosecutors and judges that these men had committed genocide on orders from the most powerful man in Germany. As Musmanno reminded the court during the cross-examination of Ohlendorf, “there is no doubt [that] the order [to murder the Jews] was issued by the Head of the State,” and as such proved that Jews were killed not because they were communists or even because they were a threat to the Reich, they “were killed simply because [they were] Jews.”¹²⁷ In other words, the crimes of the accused were part of a plan to perpetrate genocide and the *Führerbefehl* was their instruction to do so.

5. The Prosecution, the *Führerbefehl* and Genocide

The defense believed or at least argued that the existence of the *Führerbefehl* proved that their clients were not responsible for their actions. How did the prosecution view the existence of the order? Some indication is found in the indictment filed against Ohlendorf and his colleagues in the summer of 1947. Under count one of the indictment the defendants were charged with “crimes against humanity” which, under paragraph one, was defined as:

atrocities and offenses, including but not limited to, persecutions on political, racial, and religious grounds, murder, extermination, imprisonment, and other inhumane acts committed against civilian populations, including German nationals and nationals of other countries.¹²⁸

Unlike the indictment filed against the defendants at the IMT proceedings, crimes against

¹²⁷ Discussion between Musmanno and Heath, 14 October 1947, in *Trial*, roll 2, 636-637 and Opinion and Judgment of the Tribunal, 8 April 1948, in *ibid.*, roll 7, 70.

¹²⁸ Amended Indictment, 25 July 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 15.

humanity were not linked to crimes against peace or war crimes.¹²⁹ Under paragraph two of this count of the indictment, the prosecution also included the novel charge of genocide, which they understood as the planned and systematic “extermination” of an identifiable ethnic or religious group.¹³⁰ These groups were named specifically by the prosecution as Jews, Gypsies and Soviet officials, elements of the civilian population, the prosecution maintained, who the Nazis “regarded as racially ‘inferior’ or ‘politically undesirable.’”¹³¹ In other words, genocide was a crime planned and ordered by the highest levels of government – Hitler and the *Führerbefehl* – in order to eliminate completely one’s racial or political enemies.

It should be noted that the indictment against the *Einsatzgruppen* leadership was modeled after the one filed against the defendants tried before the IMT. The charge of genocide, while a newly defined crime with arguably little precedent in international law, was briefly mentioned in article 6(c) of the IMT indictment.¹³² Here the prosecution charged

¹²⁹ Indictment, International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (Nuremberg, 1947), 27-73.

¹³⁰ For an excellent discussion of the development of the crime of genocide in international law see William A. Schabas, *Genocide in International Law. The Crimes of Crimes* (Cambridge, 2000), 1-101.

¹³¹ Amended Indictment, 25 July 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 15-21.

¹³² Crimes against humanity was count four of the IMT indictment. The charge differed in the Subsequent Nuremberg Proceedings in that the crime was not linked to the common plan or conspiracy to commit a war crime as it was in the original indictment. See “Count Four – Crimes against Humanity: Indictment of the International Military Tribunal,” in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (Nuremberg, 1947), 65-67.

In terms of precedent, the charge of genocide was also included in the indictment against Ulrich Griefelt, et al. (Case 8 or the RuSHA trial) which ran simultaneous to the

that the defendants had committed “deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies.”¹³³ Despite the inclusion of genocide in the indictment, the prosecution did not address the charge during the trial nor did the IMT mention the crime in its judgment.¹³⁴ This should not be surprising given that the term was little understood at the time. After all it was only introduced in 1944, by Raphael Lemkin, a Polish lawyer and international human rights advocate who had escaped Nazi persecution in 1939. Lemkin had coined the word to describe the murder of Europe’s Jewish people at the hands of the Nazis, what he called, “an old practice in its modern development.”¹³⁵

By 1947 the term genocide had gained wider currency and it was subsequently included in the indictment filed against the *Einsatzgruppen* leadership, to “characterize [their] activities...in Poland and the Soviet Union.”¹³⁶ This was, undoubtedly the result of a variety of factors. Certainly the IMT indictment influenced the prosecutors of the

Einsatzgruppen trial. The defendants in this case were indicted in July 1947 (as were those in Case 9), the trial began in October (the *Einsatzgruppen* trial began in late September), and concluded March 10, 1948, one month before the end of the *Einsatzgruppen* trial. See the “RuSHA Case,” in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 599-1173 and vol. 5, 1-177.

¹³³ Quoted in Schabas, *Genocide and International Law*, 37-38.

¹³⁴ *Ibid.*, 38.

¹³⁵ Lemkin quoted in *ibid.*, 27 & 24-25.

¹³⁶ Schabas, 47-48.

Subsequent Proceedings, but the inclusion of the charge also may have been the result of Lemkin himself, who was present at Nuremberg in 1947 when the indictment against the *Einsatzgruppen* leadership was being written.¹³⁷ Moreover, Ohlendorf's pre-trial sworn statements about the *Führerbefehl* probably provided impetus to include the charge of genocide in the indictment. The existence of the order to murder Soviet Jewry, the prosecution believed, was proof that the murder of the Jews was not an accident, but premeditated in nature and, if successfully carried out, was intended to eradicate the entire Jewish population of Soviet Russia. The proof of the crime was contained within the so-called *Einsatzgruppen* Reports, which the prosecution not only entered as evidence, but which also formed the basis of count one of the indictment – crimes against humanity. Paragraphs six through nine of count one detailed the exact number of murders, approximately one million, according to the prosecution's calculations of the *Einsatzgruppen* Reports.¹³⁸

From Ohlendorf's earliest statements the prosecution concluded that the mass murders committed by the units of the *Einsatzgruppen* were part of a systematic plan to kill specific groups of the Soviet civilian population, and that the units had been formed for this purpose. As Ferencz made clear in his opening remarks, "[t]he actions of the *Einsatzgruppen* in the conquered territories will demonstrate the purpose for which they were organized,"

¹³⁷ Interview with Benjamin Ferencz, April 24, 1997, 9 and Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, 1944), 79. Schabas does not explain why or how the charge was included in the indictment against the *Einsatzgruppen* leadership, only that it was included.

¹³⁸ Amended Indictment, 25 July 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 16-21.

namely the genocidal mass murder of “undesirable” groups.¹³⁹ In short, even before the trial began, the prosecution had accepted as fact Ohlendorf’s sworn testimony concerning the timing and nature of the *Einsatzgruppen*’s orders and had incorporated his testimony from the IMT trial into the indictment they filed against him. In the final reckoning, the prosecution turned his statements against him to prove that these murders were part of a master plan, hatched in the spring of 1941, to systematically destroy the Jews. In sum, the *Einsatzgruppen*’s genocidal actions, taken in conjunction with the Hitler-order, tended to confirm, rather than mitigate, the guilt of the accused in the minds of the prosecution team.

Before the trial had started, the prosecutors had already made up their minds about the *Einsatzgruppen* and the historic beginning of the “final solution” in the early summer of 1941. This notion was highlighted in the indictment, and it was frequently repeated throughout the trial. For instance, during Ohlendorf’s direct testimony, Musmanno asked him whether or not it was true that the task of the *Einsatzgruppen* was to execute groups of people because they were “racially inferior.” Ohlendorf appeared incredulous at the suggestion. Jews were killed, he conceded, not because they were Jews, but because they were enemies of the Reich. Their murder, in effect, was an act of war. The task of the *Einsatzgruppen* was murder for security, not murder because of race.¹⁴⁰

To this point Ohlendorf’s defense had consisted of arguing that even though he personally disagreed with the *Führer*-order he carried out his murderous instructions in Russia, and this was legal because he had simply been following orders. Furthermore, the

¹³⁹ Opening Statement by the Prosecution, Benjamin B. Ferencz, in *ibid.*, 37.

¹⁴⁰ Testimony of Otto Ohlendorf, 8 October 1947, in *Trial*, roll 2, 516-517, 528 and 559.

order, issued in response to an apparent emergency, was a murderous self-defense measure against an enemy who posed a grave security risk to the German Reich during the war.¹⁴¹ In his cross-examination Heath attempted to discredit this line of defense by demonstrating that the murder of Soviet Jews and Gypsies was done for no other reason than, as he put it, “blood.”¹⁴² Ohlendorf argued that the Jews were killed because they were Bolsheviks, and as Bolsheviks they posed a security risk to the Reich. His credibility on this issue was seriously challenged when it came to explaining the murder of Gypsies. Heath asked him directly on what basis Gypsies were killed. Ohlendorf had no answer. However, in an effort to sustain his basic defense he repeatedly returned to his argument about the Jews until eventually the court declared that he was being non-responsive. Realizing the futility of the situation, he claimed that during wartime Gypsies, like the Jews, were involved in espionage, partisan warfare and sabotage and that is why they were killed.¹⁴³ Ohlendorf’s vulnerability on this matter led Heath to conclude that, like the Jews, the “Gypsies” were murdered simply “because they were Gypsies.”¹⁴⁴

While Ohlendorf desperately tried to maintain the fiction of murder out of necessity, some defendants were unable to sustain this argument under cross-examination. For example, SS-Lieutenant Adolf Ott, head of *Sonderkommando 7b* of *Einsatzgruppe B* and an “Old Fighter” like Ohlendorf, claimed his *Kommando* only shot Jews who were found to be

¹⁴¹ *Ibid.*, 8-16 October 1947, roll 2, 487-752.

¹⁴² Cross-examination of Otto Ohlendorf by James Heath, 14 October 1947, in *ibid.*, roll 2, 658-659.

¹⁴³ *Ibid.*, 658-660.

¹⁴⁴ *Ibid.*, 558-559.

partisans and saboteurs. Under further cross-examination he actually admitted that Jews were murdered for racial reasons. When asked by Musmanno whether some Jews were shot simply because they were Jews, he responded, “every Jew who was apprehended had to be shot. Never mind whether he was a perpetrator or not.” This was the case, he told the court, because the *Führer*-order dictated it.¹⁴⁵ Ott was also the only defendant to attempt to distinguish between partial and complete genocide; that is, between a Hitler-order to murder Soviet Jews and a Hitler-order to murder all European Jewry. But his efforts to explain this to the court proved futile, only serving to further discredit the defense while reinforcing the prosecution’s charge of genocide. Because the prosecution made no distinctions between the idea of a partial and complete genocide, Ott’s testimony on this subject appeared to be fabricated. Even after confessing to the killing of Jews in Russia, Ott claimed that, “the *Fuehrer*-Order concerning the elimination of Jews was a complete surprise to me....this *Fuehrer*-Order I first learned about here in Nuremberg.”¹⁴⁶ While an outrageous claim, one might infer here that Ott was attempting to distinguish between *the Führerbefehl* to murder *all* European Jews, and not just Soviet Jewry. Unfortunately we will never know, because the prosecution lacked knowledge about the way the ‘Final Solution’ developed, they simply ignored this testimony rather than explore more fully the process by which Europe’s Jews were murdered.

After nearly seven months of trial, the prosecution concluded that the mass murders by the *Einsatzgruppen* leaders were committed not for security reasons, but because the very

¹⁴⁵ Ott quoted in Opinion and Judgment of the Tribunal, 10 April 1948, in *ibid.*, roll 7, 196.

¹⁴⁶ Testimony of Adolf Ott, 10 December 1947, in *ibid.*, roll 5, 3718 and 3762.

existence of these groups of “undesirables” jeopardized the attainment of the Reich’s ideological goals. Their closing statement makes it perfectly clear that they linked the so-called Hitler-order to the *Einsatzgruppen*’s acts of genocide in the Soviet Union. It was here that the prosecution presented their case most succinctly, by means of what can only be described as an “intentionalist” argument. They contended that antisemitism was at the core of Nazi ideology. Between 1933 and 1939 Nazi racial policy was radicalized and the Jews increasingly persecuted. The outbreak of war in 1939 presented the Nazis with the perfect opportunity to bring their antisemitic doctrine to “its logical conclusion – the extermination of all Jews.” But murdering an entire “racial” group was a mammoth undertaking and required much planning; thus, it was not until the invasion of the Soviet Union in the summer of 1941, that the plan was “systematized” and operational. Part of the organization of the plan was, “at the outset of the Russian campaign,” to form killing units. The *Einsatzgruppen* Reports not only chronicled the part the defendants played in this barbaric plan but, as far as the prosecution was concerned it also proved that the genocide had been carried out.¹⁴⁷ As the prosecution phrased it, “the documents make it clear beyond the slightest doubt where the truth lies – the order for the mass executions of Jews and political officials was given, and it was carried out.”¹⁴⁸ Furthermore the prosecution concluded,

the evidence is compelling that a German [military] victory would have enormously widened the scope of operations of the *Einsatzgruppen* and the holocaust would have been even more staggering...the crimes of the *Einsatzgruppen* were not, fundamentally, military crimes at all. They were not committed in order to make military victory possible. On the contrary, military victory was sought in order to put

¹⁴⁷ Closing Statement for the United States of America, Case 9, The United States of America against Ohlendorf, et al., 13 February 1948, 1-2.

¹⁴⁸ *Ibid.*, 9.

the victors in a position where these crimes could be committed. These crimes were a war objective, not a military means.¹⁴⁹

Musmanno concurred. The murder of the Jews, he believed, was unrelated to the security of Germany. Rather, their murder was part of a planned “program of genocide.”¹⁵⁰

Defense testimony regarding the *Führerbefehl* may or may not have been an attempt at self-exculpation. However, it is perfectly obvious that as a line of defense it was a total failure, and served mainly to demonstrate for the court that the mass murder of Soviet Jews was both planned and systematic.

6. Conclusion

What conclusions can be drawn from the role of Ohlendorf in the *Einsatzgruppen* trial, and the key issues of the *Führerbefehl* and genocide? First, witness testimony in this case, most especially that of Ohlendorf, has helped shape our historical understanding of the origins of the “Final Solution,” what several historians have referred to as the “Nuremberg historiography.”¹⁵¹ Because historians have never been able to locate convincing documentary evidence of Hitler’s order to murder Soviet Jews, they sought alternative evidence on the timing and provenance of that order. Following the war they found that evidence in Ohlendorf’s testimony on the *Führerbefehl* at Nuremberg. But why did they accept his assertions on the subject so uncritically? Ohlendorf’s testimony was believed

¹⁴⁹ *Ibid.*, 16-17.

¹⁵⁰ Opinion and Judgment of the Tribunal, 10 April 1948, in *ibid.*, roll 7, 6 and 76.

¹⁵¹ For example see Bloxham, *Genocide on Trial*, 1-13 and Browning, “German Memory, Judicial Interrogation, Historical Reconstruction,” 26.

because it was the statement of a major participant in the murder of the Jews who seemed to be more truthful and straightforward than most of the other accused. Years later when newly discovered historical evidence called into question the veracity of his testimony, historians began to rethink their conclusions about the origins of the “Final Solution.” Subsequently, opinions on the issue of the timing of the *Führerbefehl* to murder Soviet Jews became polarized. Historians who disputed Ohlendorf’s claim about the timing of the order accused him of deliberately lying to avoid a death sentence. Other historians have drawn different inferences. From this example it is plain to see that war crimes trials, while interesting as history, do not always provide accurate or complete accounts of the past. And, in this case, the trial actually complicated historical understanding.

One reason for this is that judicial proceedings are adversarial, designed to establish the guilt or innocence of particular individuals and only incidentally to promote historical truth – despite contentions to the contrary. By their very nature criminal trials can act as major barriers to the attainment of the historical record. Defendants who are guilty have a vested interest in excluding or distorting the truth and are likely to do so if they believe this could lead to an acquittal. Clearly this is what the defense attempted to do by arguing superior orders at Nuremberg. But of course this is not the only reason why this legal process complicated our historical understanding of “the war against the Jews.” Another has to do with the nature of the trial process, especially the rules of procedure. Under Anglo-American law, when documentary evidence is not available, witness testimony is used to establish fact. The only method the court has to test the veracity of the testimony is by cross-examination. If the witness appears credible and his testimony holds-up under cross-examination, that is no contradictions or inconsistencies emerge, then the testimony is

deemed factual. Given Ohlendorf's charisma and his appearance of truthfulness, the prosecution and the tribunal both accepted his testimony as correct, and subsequently so too did historians.

Finally, while due process and historical accuracy are not necessarily mutually exclusive, the fact is that prosecutors and historians seldom ask the same questions, nor are they concerned with the same level of detail. As we have seen, it simply did not matter to the overall culpability of the accused whether or not they were given their orders in June, July, August or September 1941. On the other hand, the issue of timing is important historically; knowing when and by whom the order was given would help us better understand the overall way in which the Holocaust developed. This detail of timing is of even greater importance when one considers the ever growing examination of the Holocaust, where minutiae are important. What resulted at the *Einsatzgruppen* trial was only an approximation of historical accuracy, with much left obfuscated or unexamined.

Ohlendorf and several of his co-defendants were ready to admit that they had played a key role in mass murders, because their defense hinged on the contention that they had acted legally, as soldiers, under direct orders from their superiors. Under Article 2 of Control Council Law No. 10, the Allies precluded "superior orders" as a defense, although it could be "considered in mitigation" when sentencing.¹⁵² Thus, the order to murder Soviet Jewry

¹⁵² In fact the tribunal did consider the issue of superior orders in its judgment, but it found that the defendants were not compelled to act and therefore had a measure of independence in their actions. Control Council Law No. 10, 20 December 1945, quoted in *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No.10*, vol. 4, xvi-xix. To a degree, Control Council Law No.10 was based on established principles of international law which held that individuals and not abstract states, were responsible for criminal acts, especially murder. In this sense the defense of following superior orders was ruled inadmissible by the judges of the IMT and subsequently by

was legally important for the defense, since the existence of such an order could be ruled exculpatory. But, as we saw in the last chapter, in 1947 the prosecution never seriously addressed the issue of motivation and therefore whether the defendants were following orders or acting on individual initiative was never considered, despite the availability of a legal framework for such a defense. In the end, the court never did take up this important matter, disappointing the hopes of defense counsel and, one might add, historians.

Of course, this is not to suggest that trial testimony is unworthy of historical consideration, but the experience of this and other trials of historic importance serve as a warning for historians. Testimony should be evaluated carefully, in the context of the trial it comes from, and historians should clearly distinguish between legal process, especially what is and is not considered “fact” under the law, and historical accuracy. In the case under review, the issue of the timing of the order is highly significant. The discovery of a precise date would settle an extremely contentious issue, the origins of the “Final Solution” and Hitler’s role in it. But legally the judges could only consider the evidence which was revealed in court, not what actually happened. Because of the paucity of documented facts available to the prosecution and the tribunal, when Ohlendorf told about the existence of the *Führerbefehl*, the tribunal was unable to gauge his level of truthfulness. In any case they knew from other evidence (mainly the reports of the *Einsatzgruppen*) that these men had ordered, witnessed and participated in the mass slaughter of about one million innocent people and therefore were guilty of crimes against humanity. When it came right down to it, because Ohlendorf came across as such a credible witness, no one felt it necessary to

Tribunal Ila (later renamed Tribunal II) in the *Einsatzgruppen* case.

challenge him on the veracity of this aspect of his testimony. Thus, the only reasonable and legal inference that the tribunal could draw was that as a result of an order by Hitler given prior to the deployment of the mobile security and killing units, the Jews were murdered in the spring or early summer of 1941. So, while it is often tempting to accept trial testimony as accurate, for the historian to do so is dangerous without considering the context in which that testimony was given. This is certainly true in the case of Ohlendorf's testimony.

A second conclusion can be drawn from the documentary evidence discussed above. It seems certain that Ohlendorf's detractors are correct in one sense. The issue of superior orders, that is the *Führerbefehl* to murder Soviet Jewry, was used as a defense strategy at Nuremberg to establish mitigating circumstances and thereby lessen the defendant's responsibility for their criminal actions. But does this mean that Ohlendorf and the other defendants gave false testimony on the subject of the *Führerbefehl*? Richard Breitman has argued persuasively that the decision to murder Soviet Jews was so sensitive and 'terrible' it was given orally and then, only on a need to know basis. In practice this meant that the several leaders of the mobile security and killing units received their orders at different times and from different people; that is, the timing of the order was variable. Yet the only testimony that tends to support Breitman's assertion came from Erwin Schulz, and then he had a vested interest in lying to the court to save himself.

Schulz testified that he received the order from Himmler via Otto Rasch on August 10, 1941, and then he believed the order was only for *Einsatzgruppe C*.¹⁵³ If we accept Breitman's argument, then it is conceivable that Ohlendorf, an "Old Fighter" with status,

¹⁵³ Testimony of Erwin Schulz, 21 October 1947, in *Trial*, roll 2, 1096-1098.

knew about the decision before many of his co-defendants, especially those who held positions of lesser importance and status in the Reich.¹⁵⁴ This would also explain the contradictory and often confused testimony given on this issue during the trial. If this is correct, it means that Ohlendorf probably did encourage those defendants who were not privy to this early information to perjure themselves. It would also help explain why he felt he had to lie about who gave the murderous and criminal order. Besides, had the defendants admitted that the order had been given at different times and by different people, and that they were given some latitude regarding murder, the defense would have been unable to forge a united strategy and argue superior orders.

But why the contention that Streckenbach gave the order? In retrospect the answer seems obvious. Ohlendorf could not say Heydrich or Himmler gave the order because Nazi documents captured by the Allies would undoubtedly show that neither was present in Pretzsch when the killing squads were formed. On the other hand several defendants testified that Streckenbach was there during the training and assembly of the groups and in all likelihood, he did address the assembled units. What he said to them however, is a matter for speculation. To suggest however, as some have, that the men of the *Einsatzgruppen* did not know about the general nature of their assignment before they departed for the Soviet Union, is implausible and goes against all logical notions. After all, these were not soldiers by any classical definition of the term. None of them had had military training, or at least very little, as they themselves admitted. Professionally, they were lawyers, economists, and otherwise professionals, not military men. But, in practice they were political soldiers, called together

¹⁵⁴ See Breitman, "Himmler and the 'Terrible Secret' among the Executioners," 80-81.

to fulfill the most important ideological task of the Third Reich. To suggest that they did not know they would be killing Jews, the avowed enemy of the Reich, requires almost a suspension of judgment.

As we have seen in this chapter, the “quality of the performance” of the prosecution had a significant impact on the course of the trial. The presiding judge in the trial, Michael Musmanno, was also an important figure. During trial he frequently interjected to flesh out a defendant’s testimony, to assist a defense attorney on a point of law, to clarify an issue or simply to make his presence felt. A careful reading of the transcript suggests that Musmanno’s voice was one of the loudest at Nuremberg, ultimately influencing the course and outcome of the trial. The next chapter will explore the important role of this judge in the trial.

Chapter 7 Judge

The perfect lawyer is the one who is at home in every trade, studied in every field of learning, visited every clime, lived with every people, fought in war, labored for peace, gathered flowers on the rugged mountain slope, penned poems to the sky, and loved in the light of the lambent moon. Universality is his name. He knows nature like a mother, science like a father – and the pages of the human heart turn under his sensitive fingers like the leaves of a treasured tome.

Michael Musmanno¹

All the world's a court and its men and women merely judges and defendants.

Michael Musmanno²

1. Introduction

In 1947 three prominent members of the American bar were appointed to Military Tribunal II-a to hear the evidence presented in the *Einsatzgruppen* trial: Richard Dillard Dixon, a judge of the Superior Court of North Carolina, recruited initially as Deputy Secretary General for all the Subsequent Nuremberg Proceedings; John Joshua Speight a leading member of the Alabama bar; and Michael Angelo Musmanno, a Reserve Naval Captain and

¹ Michael A. Musmanno, *Verdict!* (New York, 1958), 115.

² Michael Musmanno, undated letter, Nuremberg Correspondence file 1445, Personal Papers of Michael Angelo Musmanno, Gumberg Library, Duquesne University, (from here forward simply MMP). Note: when I carried out research at the Gumberg library Musmanno's papers were not indexed, cataloged or organized. Some of the material was arranged by a file system he had devised before his death. In these instances the name of the file and file number will be indicated, but where information was found outside of these files the reference will be cited as "loose documents."

judge of the Court of Common Pleas, Allegheny County, Pennsylvania.³ Musmanno, the only member of the military appointed to the bench at Nuremberg, was also named presiding judge.⁴

Michael Musmanno was at home in the courtroom. He was a colorful character, perhaps overly fond of the dramatic and, as Chief Prosecutor Benjamin Ferencz once described him, a natural “showman.”⁵ Nuremberg proved to be the ideal place for him to

³ Military Tribunal II-a was later renamed Military Tribunal II. Memorandum, Colonel John Ray, Secretary General Military Tribunals, Headquarters, European Command, 12 September 1947 in National Archives and Records Administration Record Group 153 (Judge Advocate General—Army from here forward simply JAG), War Crimes Branch, Nuremberg Administration Records 1944-1949, box 14, book 6 87-2 folder (from here forward NARA RG, file, box, folder). Dixon was born in 1888 in Edenton, North Carolina. He went to the University of North Carolina at Chapel Hill, and had spent four years as a special superior court judge in North Carolina. On Dixon’s role as Deputy Secretary General see confidential memorandum to Lt. Col. Cross, War Crimes Branch, USCC, Nuremberg, Germany, 21 October 1946 in *ibid*, box 3, book 4, 85-2 folder.

Speight was born 24 July 1885 in Alabama. He received his Bachelor of Laws in 1911. A well respected lawyer, Speight had never sat as a judge in the United States. Letter from Robert Patterson, Secretary of War, to Harry S Truman, President, 23 December 1946 in *ibid*, box 14, 87-2 folder.

On Musmanno’s appointment see letter from Robert Patterson, Secretary of War, to Harry S Truman, President, 23 December 1946 in White House Office File (from here forward WHOF), War Crimes Trials at Nuremberg and Tokyo 1945-1948, Harry S Truman Papers, Truman Presidential Library (from here forward title of collection, file, folder, HST). Despite Musmanno’s long and colourful history as a jurist in Pennsylvania and Nuremberg, as well as a very full career as a writer, very little if anything has been written about him. Steven Spector, a law librarian, is the only person to undertake any analysis of Musmanno’s career and then he only examines Musmanno’s writing style in the context of legal opinions. See *idem*, “Judicial Activism in Prose: A Librarian’s Guide to the Opinions of Justice M.A. Musmanno,” *Law Library Journal* 86 (Spring 1994), 311-321.

⁴ In early 1946, Musmanno was sent to Nuremberg by the US navy to cover the final proceedings against the naval leaders on trial. Memorandum, Louis Denfeld, Chief of Naval Personnel to Michael A. Musmanno, 10 October 1946, Navy file 2340, MMP; Memorandum from Military Governor Lucius D. Clay to Michael A. Musmanno, 10 September 1947, in *ibid*; and, Letter from Michael A. Musmanno to Brigadier General Joseph P. Sullivan, 5 November 1946, in Mark Clark file 1812, MMP.

⁵ Ferencz characterized Musmanno as a “showman,” but one with a “warm heart, a decent human being.” Interview with Benjamin Ferencz by Hilary Earl, 24 April 1997, 29.

perform. He was such a dominant personality that Speight and Dixon were in essence sidelined for the duration of the proceedings.⁶ While there were some initial reservations about his appointment, Dixon was nonetheless considered a capable jurist.⁷ Speight, on the other hand, was seen as incompetent from the outset, and at least two fellow judges at Nuremberg believed him to be “ineffective;” a mere “cipher,” as one said.⁸ Benjamin Ferencz concurred, and noted that the two alternate judges appeared to sleep through the entire eight month trial; he later speculated that perhaps they were “bored to death” by the experience.⁹ This was not the case for Musmanno who “found no boredom” at all at Nuremberg.¹⁰ In fact,

⁶ Barely a reference can be found to Speight and Dixon in the official trial transcript. While not a judge, Speight was seen initially by some as a good choice for the bench, having practiced law for more than thirty years prior to his appointment at Nuremberg. In addition, he had also been Special Assistant to the United States Attorney General for four years. Letter, Robert Patterson, Secretary of War, to Harry S Truman, 23 December 1946 in WHOF, War Crimes Trials at Nuremberg and Tokyo 1945-1948, HST.

Dixon had previously sat as an alternate judge (Tribunal 4), hearing Case 5 against Flick et al. According to Secretary of War, Robert Patterson, Dixon was “highly regarded [for] his legal and judicial ability.” See letter, Robert H. Patterson, Secretary of War, to Harry S Truman, President, 12 May 1947 in *ibid.*

⁷ Cable from OMGUS (Keating), undated, circa 1946 in NARA RG 466 (Records of the United States High Commissioner for Germany from here forward simply HICOG), Prisons Division, Security Segregated Records 1945-1947, box 10, War Crimes Trials Correspondence 1946-1947 folder.

⁸ Memorandum from W.H.Schroder to Col. Robinson and Alvin Rockwell, 22 November 1946 in *ibid.*; and, memorandum from Charles E. Sands, Acting Secretary General, Secretariat for Military Tribunals to OMGUS Chief of Staff, 15 December 1946 in *ibid.*

⁹ When asked what kind of men Speight and Dixon were, Ferencz replied, “quiet!” Interview with Benjamin Ferencz, 24 May 1997, 3.

¹⁰ Michael Musmanno, undated note to himself regarding Rebecca West’s, *Train of Powder*, Memoranda and Notes Nuremberg file 1247, MMP. Musmanno was responding to West who writes, “The trial was then in its eleventh month, and the courtroom was a citadel of boredom. Every person within its walk was in the grip of extreme tedium. This is not to say that the work in hand was being performed languidly....It might seem that this is only to say that at Nuremberg people were bored. But this was boredom on a huge historic scale. A

after Otto Ohlendorf, the principal defendant in the trial, Musmanno's was the loudest and most frequently heard voice in court. He participated in every phase of the proceedings, sometimes as judge, sometimes as prosecutor and sometimes as mentor to the defense attorneys. Not surprisingly then, from the very beginning Musmanno dominated in most aspects of the trial.

The judicial license Musmanno exercised in court would not have been tolerated in an American criminal proceeding. However, given the unprecedented nature of the Subsequent Nuremberg Proceedings and the extraordinary circumstances under which the trials were held, it is hardly astonishing that liberties could be, and were, taken by the judges, especially by a judge such as Musmanno.

The part the judge plays in any criminal trial is vital. In the case of the Subsequent Proceedings the function of the judge was of even greater importance because there were no jurors. Moreover, the Charter of the International Military Tribunal, Control Council Law No. 10, and Military Ordinance No. 7, laws under which the defendants were indicted and tried, were quite flexible providing the judges a great deal of latitude with respect to evidence, procedure and process.¹¹ For example, under Article 17 of the *Charter*, the tribunal was given the power to interrogate and question any defendant.¹² Most important for the progress of the trial, the tribunal had sole discretion concerning the submission of evidence, since its

machine was running down, a great machine, by which mankind, in spite of its infirmity of purpose and its frequent desire for death, had defended its life." West, *Train of Powder* (New York, 1955), 546-547.

¹¹ See especially United States Military Ordinance No. 7, Articles 2-10 in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 15 (Washington, 1951), xxiii-xxvi.

¹² Articles 17 and 18, *Charter of the International Military Tribunal*, 6 October 1945 in *ibid.*, xiv.

members were “not bound by technical rules.”¹³ Rather, the tribunal was mandated to “adopt and apply ...expeditious and non-technical procedure, and [to] admit any evidence which it deems to have probative value.”¹⁴ The nature, scope and flexibility of the rules opened the way for a dominant personality to control the proceedings and this is precisely what Musmanno did.

In addition to fully exercising his powers, Musmanno sometimes turned the courtroom into his own personal stage, using frequent outbursts of humor and sarcasm – often lost on the defendants – to lighten the moment. This behaviour in particular infuriated the prosecution counsel, who, given the grave nature of the charges, were “trying to convey a somber atmosphere” in the courtroom.¹⁵ Because of Musmanno’s behaviour, his peculiar rulings, and his humour, this trial, unlike many criminal trials, particularly lengthy ones such as this, was often quite lively and interesting.

Musmanno, fully appreciating the historic nature of Nuremberg, was determined to “mold international law” and leave his mark on history.¹⁶ Once described as “his own best press agent,” he took advantage of every opportunity to make his voice heard, whether in the courtroom, in his written judgment, to the press, or in his personal correspondence.¹⁷ Musmanno even wrote a book about his experiences at Nuremberg, *The Eichmann*

¹³ Article 19, *Charter*, in *ibid.*, xvi.

¹⁴ *Ibid.*

¹⁵ Interview with Benjamin Ferencz, 24 April 1997, 6.

¹⁶ Letter from Michael A. Musmanno, Captain, US Navy to Lt. Commander Ann Brennen, 11 December 1946 in Navy file 2340, MMP. Musmanno referred to Nuremberg as “the Bar of History itself.” *Idem*, *The Eichmann Kommandos* (London, 1961), 90.

¹⁷ Alfred E. Santangelo, New York House of Representatives, “Justice Michael Musmanno, Nemesis of Nazis, and a Man of the People,” *Congressional Record–Appendix*, 18 May 1961, A3554, Loose Documents, MMP.

Kommandos (originally and more appropriately titled *The Biggest Murder Trial in History*), but given the political climate of the early postwar period no press was willing to touch it, and it was not until many years later, when coverage of Adolf Eichmann's trial in Jerusalem in 1961 made the subject front page news, that it was published.¹⁸ In any event, Musmanno used his position as presiding judge to shape the trial, to determine what was admitted as evidence and to influence the outcome greatly. Much to the surprise of the defense, he came to the bench at Nuremberg fully prepared to listen to all the evidence. His experiences as a defense attorney had shaped his judicial world-view; teaching him the necessity of objectivity and the folly of partisanship for judges. As a defense attorney he had suffered several devastating losses, the result of what he viewed as "political considerations," and these profoundly influenced his behaviour on the bench.

Before coming to Nuremberg in 1946, Musmanno had had an extremely eventful and successful career first as a defense lawyer and then as a judge. Eleanor Roosevelt remembered him as "a man passionately dedicated to the welfare of the underprivileged."¹⁹ His political and judicial colleagues all agreed that he was a "champion of true justice," who could not rest "until all wrongs had been righted."²⁰ To right a wrong is what Musmanno had attempted to do in 1927, when he represented convicted murderers Nicola Sacco and Bartolomeo Vanzetti. His experience defending these men was a watershed in his career. The outcome of this

¹⁸ Musmanno erroneously believed that the *Einsatzgruppen* were under the authority of Adolf Eichmann, even testifying such at Eichmann's trial. He was also a publicity opportunist, using the Eichmann trial to sell his story to publishers.

¹⁹ Eleanor Roosevelt, undated, quoted in "Biographical Outline Pennsylvania Supreme Court, Justice Michael A. Musmanno," Biographical Jan-June 1969 file 940, MMP.

²⁰ Jacob K. Javits, US Senator, undated, quoted in *ibid* and David L. Lawrence, Governor of Pennsylvania, undated, quoted in *ibid*.

ordeal, the execution of two innocent men, had such a powerful impact on the young lawyer, that he began to actively campaign for the abolition of capital punishment in the United States, or to “state legislated murder” as he referred to it. Such an individual serving as presiding judge in the “biggest murder trial in history,” ensured that death sentences would not be considered lightly.

Musmanno’s sense of fair play and repugnance of judicial corruption, made him the ideal person to judge the evidence at the *Einsatzgruppen* trial. Despite the overwhelming documentary evidence against the defendants, his convictions ensured that the trial was not a *fait accompli* from the beginning or that it would become a mere show trial. Musmanno tenaciously believed that even the men of the *Einsatzgruppen* were entitled to fair treatment under the law. He firmly adhered to the American legal precepts that “every man is presumed innocent until proved guilty....[and] that the prosecution has the burden of proof and must prove the guilt of the accused beyond a reasonable doubt.”²¹ Moreover, he was certain that the gravity of the charges demanded that the judge weigh all the evidence carefully and that reason should prevail, lest innocent men be convicted, something he had struggled against his entire career. Again, his experience as a defense attorney was invaluable here and made Musmanno the perfect candidate to sit in judgment at Nuremberg, for it ensured a level of fairness that even the defendants would not be able to criticize.

Musmanno’s conduct at Nuremberg was beyond reproach largely because of his immutable sense of justice. In February 1948, *Die Zeit* called him the most “momentous” presiding judge since Justice Lawrence chaired the International Military Tribunal and in

²¹ Michael A. Musmanno, *Einsatzgruppen Case* — Statement from the Judgment, “Summary Statements from the Judgments of the Tribunals, or from Concurring or Dissenting Opinions on Procedure, Practice, and Evidence,” in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 15, 98.

April, the same paper reported that he was the only judge at Nuremberg to whom the defendants expressed their thanks for the fair manner in which he conducted the trial.²² A month earlier *Der Spiegel* had reported that even against defendants such as Ohlendorf and other SS-*Einsatzgruppen* leaders, Musmanno was kind, and the reporter conceded that his judicial conduct at trial was flawless.²³ Expressions of appreciation and praise were rare at Nuremberg especially by the Germans; in fact, most of the press coverage of the Subsequent Proceedings was critical, attacking the very legitimacy and course of the trials.²⁴ Yet,

²² Transcription of untitled article, *Die Zeit*, 26 February 1948, Loose Documents (Scrapbook), MMP and transcription of untitled article, *Die Zeit*, 1 April 1948, in *ibid*.

²³ Transcription of untitled article, *Der Spiegel*, 9 March 1948, in *ibid*.

²⁴ Some examples of newspaper articles from the German press critical of the trials include, "Urteil oder Racheakt? Landesbischof Wurm gegen Nürnberger Gerichtsmethoden," *Allgemeine Zeitung*, 15 May 1948; "Bischof Wurm gegen Nürnberg," *Rhein-Echo*, 10 June 1948; "Erneute Vorwürfe Dr. Wrums," *Die Welt*, 10 June 1948; "Bischof gegen Hinrichtung Aufschub der Vollstreckung erbeten," *Frankenpost*, 5 June 1948; "Der Weg des Freiherrn Ernst von Weizsäcker," *Christ und Welt*, 27 June 1948; "Kritik an Nürnberg," *Nordwest-Zeitung*, 15 May, 1948; "Anklagen ohne Beweise," *Telegraf*, 21 May 1948; "Die Grundlagen der Nürnberger Prozess: Dr. Alfred Seidl über die Einwände der deutschen Verteidiger," *Die Neue Zeitung*, 23 May 1948; "Die Grundlagen der Nürnberger Prozesse: Prof. Dr. Robert M.W. Kempner beantwortet Einwände der Verteidigung," *Die Neue Zeitung*, 27 May 1948; "Die Männer in roten Jacken: Ein Beitrag zum Rechtsbewußtsein unserer Zeit," *Hamburger Abendblatt*, 18 November 1948; and, "Verbrecher oder Märtyrer?" *Stuttgarter Nachrichten*, 12 June 1948. These articles and many more can be found in Nachlass Landesbischof D. Theophil Wurm, Bestand D1, IV (Nachkriegszeit), Kriegsverbrechen Bd. 289-336, Landeskirchliches Archiv (from here forward simply NL Wurm, LKA), Stuttgart. German criticism of the Nuremberg trials was not limited to the press, but also includes the collection of legal essays edited by Wilbourn E. Benton and Georg Grimm, *Nuremberg: German Views of the War Trials* (Dallas, 1955) and two widely distributed pamphlets by Otto Ohlendorf's attorney Rudolf Aschenauer, "Zur Frage einer Revision der Kriegsverbrecherprozess," (Nuremberg, 1949) and *idem*, "Landsberg," (Munich, 1951). Finally see an in-depth criticism of the United States war crimes trials written by high-ranking German church officials and some of the Nuremberg trial attorneys, "Memorandum by The Evangelical Church in Germany on the Question of War Crimes Trials before American Military Court," (Stuttgart, 1949), in NARA RG 238 (World War II War Crimes Records, from here forward simply WCR), Advisory Board on Clemency for War Criminals, HICOG 1947-1950, Correspondence and other Records 1950, box 4, General folder.

Musmanno's complete objectivity caught the attention of the German press. It also led the entire defense team of the *Einsatzgruppen* leaders to present him with a token of their respect for his conduct of the trial: an eighteen inch bronze statue of a penguin.²⁵ An odd gift to say the least, but one that symbolized their appreciation of his now famous "Penguin Rule," which dictated that the defense would be permitted to enter into evidence any and all material that might prove the innocence of their clients, including the social life of the Antarctic penguin if it would help.²⁶ The "Penguin Ruling," as it came to be called, was intended to offer the defense every opportunity to refute the serious charges against their clients, but in the end it did little to advance their cause. Odd as the decree was it helped assist Musmanno formulate his judgment. He was certain that those charged had had every opportunity to clear their names.

In the end this chapter will show that although the defendants and their crimes were the centerpiece of the trial, it was the presiding judge, Michael Musmanno, who directed and shaped the proceedings. His behaviour in court ensured that the defendants received a fair trial, but it also led to a far more detailed cross examination than the prosecution was able to offer. Because Musmanno took such an active and leading role in the proceedings, it will be useful to examine his background, legal career and personality in order to fully understand the course of the *Einsatzgruppen* trial and especially its outcome.

²⁵ The inscription on the statue reads "Presented to Navy Captain Michael A. Musmanno by German Defense Lawyers in appreciation of the Penguin Rule, Nuremberg 1946-1948." The statue is part of Musmanno's official collection located at the Gumberg Library, Duquesne University, Pittsburgh, Pennsylvania.

²⁶ Musmanno, *Eichmann Kommandos*, 246-247.

2. Musmanno before Nuremberg

Michael Angelo Musmanno was the seventh of eight children born to a devoutly Catholic Italian immigrant couple, on April 7, 1897 in Stowe Township, Pennsylvania, a mill and manufacturing community six miles outside of Pittsburgh on the Ohio river.²⁷ His father, Antonio, had emigrated to the United States to provide for his large family, working first as a coal miner, then a railway-worker and finally as a policeman. His mother Maddelena was killed by a drunk driver while he was still a boy.²⁸ To help support his family Musmanno began working in the coal mines at 14, but his father strongly encouraged him to acquire an education and thus he attended school the same time he worked as a coal loader.²⁹ Working excessively hard, as he did growing up in Pennsylvania, was one of the defining features of Musmanno's adult life.

So too did Musmanno demonstrate a lifelong passion for learning and thirst for knowledge. To this end, he earned an astonishing seven degrees from five different universities, and all before the age of thirty. He chose Washington, D.C. for his studies because the universities there offered flexibility. Since he worked full-time during the day, he earned his education by attending night classes, only interrupting his studies briefly to serve

²⁷ Musmanno refused to divulge the true date of his birth. Some documents identify it as 1900, but the date given on his military service records, 1897, is accepted here. He died in 1968. Letter from Robert Patterson, Secretary of War to Harry S Truman, President, re: Judicial Appointments, Nuremberg, 23 December 1946 in WHOF, War Crimes Trials at Nuremberg and Tokyo 1945-1948, HST.

²⁸ Conversation with A.E. Lawson, Pennsylvania Attorney who grew-up in Stowe Township, November, 2001; and, Biographical Information Michael A. Musmanno, in "Michael A. Musmanno and the Modification of the 1794 Sunday Laws of Pennsylvania," loose documents, MMP. Musmanno's book, *Listen to the River* apparently details the life of his mother and father, but this author could not locate the book anywhere, including the Library of Congress, all traces of it seem to have vanished.

²⁹ Biographical Information Michael A. Musmanno January-June 1968, Biography file 940, MMP.

as an infantryman in 1917 when the United States entered the war.³⁰ He earned a Bachelor of Arts from George Washington University and later a Master of Arts. His liberal arts degrees were followed by a Bachelor of Laws from Georgetown, Master of Laws and Master of Patent Laws both from National University, a Doctor of Juristic Science from American University and finally, a Doctor of Jurisprudence from the University of Rome in 1925.³¹ Later in his career, he also studied criminology at Harvard and Notre Dame although he did not receive degrees from either university.³²

While in Washington Musmanno honed his oratorical skills, joining the Delta Sigma Rho fraternity, renowned for producing excellent debaters, and in 1932 he put his debating expertise to use when he publically debated the question, “Does Man Live Again?” with the celebrated jurist Clarence Darrow at Carnegie Hall in Pittsburgh.³³ Musmanno worked on his elocution throughout his career as a jurist, priding himself on how effectively he could capture audiences with his speech. From an early age “worry and hard work” were Musmanno’s inspiration; attributes, he believed, that were key ingredients “to success.”³⁴ If hard-work was his trademark, it was his obsessive desire for legal victory, his hunger for notoriety, his passion for justice, and a naive idealism that were to shape the early part of his career as a lawyer.

³⁰ Musmanno, *Verdict!*, 27 and “Biographical Outline, Pennsylvania Supreme Court, Justice Michael A. Musmanno,” Biography file 940, MMP. Neither of these sources explain where Musmanno served during the war. Lawson recalls that Musmanno saw active duty in Europe. Conversation with Pennsylvania Attorney, A.E. Lawson, November 2001.

³¹ “Biographical Outline, Pennsylvania Supreme Court, Justice Michael A. Musmanno,” in *ibid.*

³² *Ibid.*

³³ Musmanno, *Verdict!*, 14 and 177.

³⁴ *Ibid.*, 177.

After completing his university education in early 1923, he returned to his home in Pennsylvania to take the state bar exam. Typical of Musmanno's life-long work habits, he spent nineteen hours a day for nearly two months preparing for the exam, constantly fretting that he might fail. He was so concerned about his performance that when he found himself slipping into exhaustion he would journey to the nearby railway station, a noisy and bustling spot, where he could stay awake to study.³⁵ In May 1923, Musmanno wrote his exam and in July he was officially admitted to the Pennsylvania bar as a lawyer. Despite his recent success, he had difficulty finding a job. He was so desperate for employment that he even considered options other than the law and applied to teach at no fewer than sixty-two different educational institutions. All turned him down. While looking for work as a lawyer, he was also churning out fictional short stories and legal articles by the dozen, desperately hoping to be published. During this period he published one legal article on amendments to the American Constitution in the *New York Times*, earning him his first remuneration – thirty-five dollars – and proffering a great amount of pride.³⁶ This small success encouraged him to continue his writing career, a vocation he courted until the end of his life.

Musmanno's preoccupation with writing at times upstaged his career as a jurist, although he did use his experiences in the law as the substance of his books, almost all of which focus on some aspect of his courtroom experiences. In total he published fifteen books (not including volumes of his legal opinions which number in the dozens) on topics as diverse as his legal career, his battle against communists in America and his experiences at

³⁵ *Ibid*, 28-29.

³⁶ This article was later expanded and turned into a book, *Proposed Amendments to the Constitution*, and published by the United States House of Representatives. Musmanno, *Verdict!*, 30-31.

Nuremberg.³⁷ Two of his books, *Black Fury*, a fictionalized account of his struggle for justice against the corrupt coal and iron police in the Pennsylvania coal fields, and *Ten Days to Die*, the story of Hitler's last ten days in the Reich Chancellery bunker, were made into films. Musmanno's prodigious writing career was very important to him and nurtured his ever-present need for fame. Even his writing allowed him to feed his appetite for the dramatic that defined his style as a judge.³⁸

A perusal of Musmanno's written work reflects his passion for drama. All of his publications, including his legal opinions, are replete with references to Shakespeare, his knowledge of which was acquired while a student in Washington where, for pocket change, he accepted work as a "supernumerary" with several different Shakespearean theater

³⁷ Musmanno's publications include: *Black Fury*; *After Twelve Years*, a book about his experiences as a defense attorney in the Sacco-Vanzetti trial; *Listen to the River*, a book about his parents as Italian immigrants; *Ten Days to Die*, a book based on interviews he conducted at Nuremberg concerning the last ten days of Hitler's life; *The Soldier and the Man*, a biography of General Mark Clark who Musmanno worked for during World War II; *Across the Street from the Courthouse*, a recounting of Musmanno's battle against American communists; *The Eichmann Kommandos*, a memoir of his experiences as presiding judge at Nuremberg; *Justice Musmanno Dissents*, Musmanno's dissenting opinions while on the bench of the Pennsylvania Supreme court; *Verdict!*, Musmanno's autobiography as a lawyer; *The Story of the Italians in America*; *World War II in Italy*; *An American Replies*, a response to the perceived defamation of the Italian people; *Columbus was First*, an argument refuting the authenticity of the "Vinland Map"; *That's my Opinion*, excerpts from Musmanno's dissenting and majority opinions; and, *The Glory and the Dream*, the story of Abraham Lincoln.

³⁸ Musmanno fancied himself a good writer, yet his books tend to be overly dramatic. His writing tends to be trite, self-absorbed, and frequently verbose; in short, quite juvenile. The following example is typical of Musmanno's prose. He writes, "Although youth is assured that perseverance brings success, that everyone is master of his fate, and that fame and fortune are his to conquer if only he wills it, the fact remains that one's chances of reaching the glittering Port of Achievement can be considerably enhanced if the sails of his ship of destiny catch a few of the winds of good luck which, according to the law of averages (more strictly enforced by nature than many man-made laws), are bound to blow. Of course it must be acknowledged that those wind currents are also capable of disabling or even wrecking one's ship, but when that happens the resolute individual swims and battles his way to another ship—and again sails on!" Musmanno, *Verdict!*, 59.

companies.³⁹ Along with references to Shakespeare, his writing, particularly his dramatized novels, is rife with references to the sea, another of his great loves. His books also tend to convey a sense of adventure, some are about overcoming adversity and all seem to end in victory for the protagonist, usually himself or some client of his who had been unjustly accused. Sometimes his writing is genuinely quite humorous, using puns as a narrative tool; at other times it is unintentionally comical, the result of an exaggerated and verbose writing style. But the defining feature of almost all of his writing, particularly his autobiographical works, is melodrama. To achieve this he relies heavily on hackneyed metaphors, dramatic language, and exaggerated scenarios which inevitably create a sensationalized rendition of the facts. His writing is reminiscent of modern day pulp fiction – “over the top” – a style which he once acknowledged, but one for which he refused to apologize. Musmanno viewed himself as a man of the people, always maintaining that while he had an obligation to convey his ideas to his colleagues in the legal profession, his most important task was to “write for the people.”⁴⁰

To appeal to the average reader, the young writer believed that he had to convey the “the drama of the events.” To achieve this desired level of “feeling” he permitted accuracy to go by the wayside because, in his view, it “distracted” from the “excitement of the narrative.”⁴¹ Musmanno’s attitude toward historical truth is thus somewhat skewed. For instance, his book *Ten Days to Die* was expressly written, he maintained, “to fill an historical

³⁹ *Ibid.*, 206-207. Musmanno believed that Shakespeare was “the most powerful writer that ever traced poetic drama across paper.” See Michael A. Musmanno, *An American Replies to a Defamation of the Italians* (Florence, 1965), 20.

⁴⁰ Julia Edwards, “Sailor on the Bench,” *Weekend*, 24 April 1948, in Einsatzgruppen Trial 1947-1948 Clippings, Photos, Record of Defendants and Listing of Sentences, Nuremberg Clippings file 2150, MMP.

⁴¹ Michael A. Musmanno, “Preface,” *Ten Days to Die* (London, 1951), unpaginated.

void” and clarify, once and for all, the details of Hitler’s death in the Reich Chancellery bunker. To elucidate this historical event he allegedly interviewed more than two hundred witnesses who had direct knowledge of Hitler’s death. The end product, while an interesting and compelling story, cannot be verified as accurate as he provides no notes, no bibliography, and no reference to the personal interviews he conducted. His memoir of the *Einsatzgruppen* trial, the inappropriately titled, *The Eichmann Kommandos*, is another example. The original version of the book, written while in Nuremberg, was titled *The Biggest Murder Trial in History*, and makes no reference whatsoever to Adolf Eichmann. But in 1948 Musmanno could not find a publisher for the book and the manuscript sat on his shelf until a more opportune time to publish presented itself. Thus, twelve years later when Eichmann was kidnaped in Argentina by Israeli agents and brought to Israel to stand trial, Musmanno, who was called to the stand during the trial as a witness for the prosecution, seized the opportunity to rename his book and add a section linking the *Einsatzgruppen* and their murderous activities to Eichmann. In fact, in the revised version Musmanno goes so far as to argue that Eichmann was both the brain behind the creation of the *Einsatzgruppen* as well as the planner of their murderous activities. As with his other “historical” works, he does not offer the reader evidence for his contentions.⁴² Musmanno altered his original work, he explained during cross

⁴² Musmanno, *Eichmann Kommandos*, 53-60, but see especially pages 56-57 where Musmanno writes, “Eichmann conferred with Himmler and Himmler conferred with Hitler. Eichmann’s recommendations were accepted and the *Einsatzgruppen* organization was born. Thus, in the early part of 1941, Hitler directed Himmler, Heydrich and Eichmann to recruit mobile bands of executioners which were to accompany and follow the German armies as they smashed forward through Eastern territory, killing all Jews there as soon as any region or community was cleared of enemy opposition....[f]or men to lead the *Einsatzgruppen* Heydrich asked Eichmann for recommendations. Eichmann looked for men with exceptional ability and with a capacity for Semitic destruction as intense as his own. He found the ideal men for top leadership in Walter Stahlecker, Arthur Nebe, Otto Rasch and Otto Ohlendorf.”

examination at Eichmann's trial in 1961, because Eichmann now "seemed important."⁴³ This is not the only historical error in the memoir. Some of the defendant's names are incorrect and, as in his other works of "history," he does not document his sources. But also like *Ten Days to Die*, *The Eichmann Kommandos* makes for powerful and dramatic reading, and importantly it places him at the centre of the narrative. The way in which Musmanno crafted the book gives the impression that he single-handedly prosecuted, tried, and convicted all of the defendants. In the end, while Musmanno claims to represent the "truth," what he ends up producing should be more appropriately described as a self-centered work of historical fiction.⁴⁴

Musmanno's dramatic rendition of the facts, a practice that pandered to his readership, the truth is that many of his books, particularly those with an autobiographical emphasis, are not very good. As one reader vigorously complained of *Listen to the River*, a biography of his mother and father written while in Nuremberg, it "is unquestionably the worst book I have ever attempted to read."⁴⁵ Ironically, whereas his prose style prevents any of his novels or autobiographical works from being classified as "good literature," these same practices had the opposite effect on his legal opinions. His humour, metaphors, drama and imagination do add significant colour to his legal opinions, making for very engaging reading, rather than the

⁴³ "US Judge Stirs Eichmann Trial," *The New York Times*, 16 May 1961, Loose Documents, MMP.

⁴⁴ Musmanno's weakness for the dramatic probably explains the appeal of the 1961 film, *Judgment at Nuremberg*, to which he gave glowing reviews. On the other hand, some of the other Nuremberg participants were particularly critical of the film's lack of historical accuracy. For example see letter from Benjamin Ferencz to Arnost Horlik Hochwald, 10 January 1961, in United States Holocaust Memorial Museum, Record Group 12.000, Benjamin B. Ferencz Papers, Drawer 11, Biographical Material, box 2, Correspondence re: Film Judgment at Nuremberg (sic) 1960-1961 folder.

⁴⁵ Letter to Alvin J. Rockwell, from Robert (last name illegible), OMGUS, 21 July 1948, in Alvin Rockwell Papers, HST.

dry legalistic style of most judicial opinions.⁴⁶ In fact, his imaginative legal writing was one reason his written judgment at Nuremberg was so well received, but earlier in his career his colourful legal writing is what helped him eventually to secure his first job as a lawyer.

In 1923, at the age of 26, Musmanno began his career in the law. He was hired by John R.K. Scott, a Philadelphia litigator of local fame, who had noticed Musmanno's article on amendments to the Constitution in the *New York Times*, and decided that the recent graduate was just the conscientious and hard-working young lawyer he wanted for his firm.⁴⁷

Musmanno quickly made a name for himself. His student-like courtroom theatrics, soon earned him a reputation as a showman. He firmly believed that, "to be a lawyer without knowing Shakespeare (sic) would be like being a musician without burning a candle to Beethoven."⁴⁸ His frequent melodramatic and sappy performances to juries, which he referred to as "the dramatic third act," coupled with his superior oratorical skills almost always proved successful in the courtroom.⁴⁹ Indeed, he was so good at captivating juries and gaining their

⁴⁶ Steven Spector, a law librarian, has written about Musmanno's legal prose, particularly his dissenting opinions written while a member of the Pennsylvania Supreme Court from 1952 to 1968. Spector praises Musmanno's legal writing as "good literature," "informative," "stimulating" and "enjoyable," although he does not comment on his lay writings. For a full discussion see Spector, "Judicial Activism in Prose: A Librarian's Guide to the Opinions of Justice Michael A. Musmanno," 311-321. Abraham E. Freedman agrees with Spector, "Justice Musmanno's style is so fascinating that one easily finds himself reading for enjoyment, apart from the principles of law and justice involved." See *idem*, "The Dissenting Opinions of Justice Musmanno," *Temple Law Quarterly* 30 (1957), 253.

⁴⁷ Musmanno, *Verdict!*, 12-13 and 31-32.

⁴⁸ *Ibid.*, 209.

⁴⁹ *Ibid.*, 218. Interestingly as Musmanno grew older he increasingly came under attack for his arrogant and verbose style of public speaking, a method of oratory that one of his public relations managers warned him was "old school technique" that went "out of vogue" years earlier. See letter from Terry Parker, Public Relations to Michael A. Musmanno, 31 August 1961, Buick Bats file 1811, MMP.

sympathy that he won the first forty-two cases he tried.⁵⁰

As many young lawyers do, Musmanno threw himself into his career, working extremely long hours. But he was no ordinary apprentice, rather he took everything to the extreme, even forgoing a social life in order to read volumes of legal judgments and prepare cases for his firm.⁵¹ This was a practice Musmanno had begun in youth and it continued throughout his career, as one of his colleagues observed of his later work at Nuremberg,

in all my life I never saw anyone work with the ardor, the continuity and thoroughness which Captain Musmanno brought to his judicial tasks....for the last five months I know that Captain Musmanno has been depriving himself of rest and sleep. During this period he has not had more than the average of 4 to 5 hours sleep a night so that the work could be done and the job completed.⁵²

As a young lawyer Musmanno became so self-absorbed that when he lost his first case he was truly devastated. He quickly regained his momentum however, winning an additional fifteen cases, but after losing several consecutively his sense of failure was so overwhelming that he impetuously tendered his resignation at the law firm. In what can only be referred to as a typical "Musmannoism" he dramatically proclaimed in a letter to his employer that,

⁵⁰ Musmanno, *Verdict*, 9-23, 33-45 and 67-68.

⁵¹ One newspaper reported that Musmanno never found time to marry because the women who were interested in him took one look at his attitude toward work and "kept on running." Julia Edwards, "Sailor on the Bench," *Weekend*, 12 April 1948, in *Einsatzgruppen Trial 1947-1948*, Clippings, Photos, Record of Defendants and Listing of Sentences, Nuremberg Clippings file 2150, MMP.

⁵² Letter from Judge John J. Speight to John L. Sullivan, Secretary of the Navy, 13 April 1948, in General Lucius D. Clay file 1138, MMP. One newspaper reported that Musmanno worked at the Palace of Justice in Nuremberg from eight-thirty a.m. to eleven p.m. daily, only to return to his room at the Grand Hotel where he continued working until 2 a.m. See Edwards, "Sailor on the Bench," in *Einsatzgruppen Trial 1947-48*, Clippings, Photos, Record of Defendants and Listing of Sentences, Nuremberg Clippings file 2150, MMP. Not only did Musmanno work on the *Einsatzgruppen* case while in Nuremberg, he also interviewed hundreds of Hitler's former employees and colleagues in order to write *Ten Days to Die*, written to prove that Hitler was indeed dead. He also wrote *Listen to the River*, and was a judge at two other trials while in Nuremberg.

I lost another case today and I am, with this letter, hereby tendering to you my irrevocable resignation as junior counsel in your office. When I lose a case I experience a threefold disappointment. I sense, firstly, the pang of loss that the client suffers; then, as the one responsible for the defeat, I personally experience the most intense personal chagrin and mortification; but most of all I suffer in the realization that I have lost for you, you who have placed so much confidence in me. I shall never forget the chance you gave me, and I shall always be, most gratefully yours.⁵³

Musmanno's inability to cope with failure and his incessant need to please those in authority highlights an important contradiction in his personality: he was a man who possessed both a fragile ego and an exaggerated sense of self. Both of these personality traits defined Musmanno, who not only strove for success and recognition out of fear of failure, but who also expected it. It was his inability to cope with failure which prompted his (temporary) abandonment of the law in 1924. At this juncture in his life no amount of pleading by his colleagues or employer – who thought him an excellent junior lawyer – could console him. A week after his resignation in 1924, feeling the need for change, he boarded a ship and sailed to Italy.⁵⁴

Despite the surrender of his chosen profession, while in Italy Musmanno could not stay away from the law. His frequent visits to the Italian courts brought him into contact with several prominent Italian jurists, who encouraged him to continue his study of the law in Rome.⁵⁵ To do this Musmanno needed money. As he had done in Washington earlier, he took

⁵³ Musmanno, *Verdict*, 70-71. Musmanno had drafted a letter of resignation upon losing his first case, but a colleague in his firm encouraged him not to submit it.

⁵⁴ Musmanno, *An American Replies*, 9. Musmanno wrote and published this book while on a fact-finding mission in Italy. The book is a response to Italian parliamentarian, Luigi Barzini's, *The Italians*, in which the author derides Italian Americans as scoundrels, who lacked honour. Outraged that anyone would defame Italians, Musmanno wrote the book, as he said, because of his "love of the truth" and his "attachment to the land of [his] ancestors." In *ibid.*, "Introduction," not paginated.

⁵⁵ Musmanno, *Verdict!*, 81.

on several different jobs at once. He worked as an extra in the film *Ben Hur* then being shot in Italy, he had a small role in an opera, he taught English to Italians and he wrote news articles for an English daily published in Rome. As a result of the latter, he met Mussolini and rode on the Duce's horse. A picture of this can be found in his papers in Pittsburgh, although given his later political inclinations and his role as United States Naval Captain in World War II, no mention of this encounter is made in any of his written work.⁵⁶ While at the University of Rome, Musmanno studied under the criminologist Enrico Ferri, but he also took courses from former Italian prime ministers, Vittorio Emmanuel Orlando and Francesco Nitti.⁵⁷ After a year of hard-work, in June 1925, Musmanno received a Ph.D. in Jurisprudence from the University of Rome. His thesis, for which he proudly earned 110 percent, was a comparison between the American and Italian jury systems.⁵⁸ In July 1925, Musmanno visited Paris and London before setting sail for home.

Reinvigorated and back in Pennsylvania, Musmanno decided to resume his career in law. He again had difficulty securing a position with a local firm. While pounding the pavement in search of employment, he was asked to represent a coal miner who had been unjustly arrested and beaten by the corrupt and brutish police organization of the coal and iron magnates. This proved to be the beginning of a long battle against the tyranny and injustice of the coal and iron industry in Pennsylvania and eventually led to his book *Black Fury* and later the film by the same name produced by Warner Brothers, starring Paul Muni.⁵⁹ As a result of

⁵⁶ One reference to this encounter can be found in "Interview with Michael A. Musmanno," undated, Nuremberg Correspondence file 1445, MMP.

⁵⁷ Musmanno, *An American Replies*, 9-10.

⁵⁸ Musmanno, *Verdict*, 82-86.

⁵⁹ Typical of Musmanno's penchant for the dramatic, he wrote a fictionalized account of the prolonged coal strike of 1925-1928 and the Pennsylvania coal miners struggle to gain

this case Musmanno quickly earned a reputation as a fighter for the “little man” against injustice and was subsequently offered (by an individual sympathetic to his cause) free office space in Pittsburgh to open his own law practice.⁶⁰ His defense of the coal miners marked the beginning of his career as a defense attorney who fought against systemic injustice, frequently in personal injury cases, but also against corrupt institutions not only in the mining industry but also in civil society. He wore his new reputation beside his Legion of Merit medal – as a badge of honor – and was not ashamed to admit that he used emotion, oratory, and reason as his main weapons against his opponents in the courtroom.⁶¹

Despite Musmanno’s keen sense of competition, his need for success and his desire to make money, he also fundamentally believed as a lawyer he had an obligation to represent those who required his services most, both financially and morally. Furthermore, he believed that even though the law profession is inherently partisan, he could not remain morally true to himself by representing individuals whose innocence, he believed, was in question. As

Musmanno put it,

[t]he true lawyer is not the one who pleads any case regardless of the right or wrong of it. Such indiscriminate championing can only blunt one’s appreciation of the important distinction between justice and injustice, and eventually it may deaden the moral sensibility of the heart.⁶²

How Musmanno determined a client’s innocence or guilt he never explains. A good lawyer and one true to himself, the young lawyer believed, must crave justice and fight for it, even if

the legal right to unionize in *Black Fury* (New York, 1966).

⁶⁰ *Ibid.*, 105-115.

⁶¹ *Ibid.*, 218-219. The Legion of Merit was a medal authorized in 1942 and is awarded to individuals for meritorious conduct in the performance of outstanding service to the United States.

⁶² *Ibid.*, 237.

it leads to defeat. Musmanno's fight against injustice and his keen sense of fair play were defining features of his personality, traits he held onto throughout his life and ones he later brought to his work on the bench in Pennsylvania and Germany. As we shall see, while sitting in judgment at Nuremberg, his adherence to fairness won him the accolades of American occupation authorities, the German defense team, his colleagues, and the press.

The defining moment of Musmanno's early career as a lawyer came in 1927, when the famous case against Nicola Sacco and Bartolomeo Vanzetti (more commonly known as the Sacco-Vanzetti case) came to a head seven years after they originally had been sentenced. Sacco and Vanzetti, Italian immigrants and labour activists (at the time they were viewed as a threat to established political and economic norms since both had links to the anarchist movement), were sentenced to death by electric chair in a Massachusetts county court. According to Musmanno, and many others for that matter, the two men were treated unjustly by a system that favoured the upper classes and political tradition over the working classes and labour activism.⁶³ In short, they were tried, convicted and executed not because they were guilty of the crime, but rather because they were anarchistic trouble-makers and those in

⁶³ Ironically, after World War II Musmanno became a zealous cold warrior. His anti-communism was so strong that he denounced several people to federal authorities for their alleged ties to the communist movement in the United States eventually testifying against them in court. He also corresponded with J. Edgar Hoover who he repeatedly praised for his work ferreting out communists from American society. His main contribution to the anti-communist movement however, was authoring the "Musmanno Act" which outlawed the Communist Party in Pennsylvania in an attempt to "topple the communist conspiracy." Sacco and Vanzetti's links to the anarchist movement seemed unimportant to Musmanno at this early date. "Biographical Sketch of Pennsylvania Supreme Court Justice Michael A. Musmanno on the subject of Americanism," Biography file 940, MMP and letters from Michael A. Musmanno to J. Edgar Hoover, 26 October 1959, 21 January 1960 and Hoover to Musmanno, 25 July 1957, 19 October 1959, and 1 February 1960 in Anti-Communist file 1288, MMP.

positions of power wanted to make an example of them.⁶⁴

As Musmanno recounts the story, the two men, Sacco a shoemaker, and Vanzetti a fish monger, had been indicted mistakenly, tried and convicted for first-degree murder in Braintree, Massachusetts. The state prosecutor had argued that they were responsible for planning and executing the theft of fifteen thousand dollars from a local shoe factory on April 15, 1920 and, in the course of the crime, had murdered the factory paymaster and a security guard. For Musmanno, all of the evidence in the case pointed to their innocence, but the Massachusetts authorities were determined, at the expense of justice and the rule of law he believed, to uphold the conviction and carry-out the death sentences. As the years passed and the injustice of their conviction became increasingly apparent they became the *cause célèbre* for many working-class and fair minded people across the United States. That included Musmanno.⁶⁵

For Musmanno, the maltreatment of Sacco and Vanzetti was a grave inequity. The case against these two working-class immigrants rankled his sense of American justice, which he had naively believed was incorruptible. After all, he himself was the son of Italian immigrants, whose entire youth was spent working hard to make a name for himself. In his professional life he had successfully worked within the Pennsylvania judicial system to secure

⁶⁴ The Sacco-Vanzetti case has generated a great deal of interest over the years by intellectuals, legal professionals and lay people alike. The literature on the subject is too vast to list here, but some examples are Louis Joughin and Edmund M. Morgan, *The Legacy of Sacco and Vanzetti* (New York, 1948); Roberta Strauss Feuerlicht, *Justice Crucified. The Story of Sacco and Vanzetti* (New York, 1977); William Young and David E. Kaiser, *Postmortem. New Evidence in the Case of Sacco and Vanzetti* (Amherst, 1985); Francis Russell, one of the first converts to call into question the innocence of Nicola Sacco wrote *Tragedy in Dedham: The Story of the Sacco-Vanzetti Case* (New York, 1971) and *idem, Sacco and Vanzetti: The Case Resolved* (New York, 1986); and finally, Joseph B. Kadane and David A. Schum, *A Probabilistic Analysis of the Sacco and Vanzetti Evidence* (New York, 1996).

⁶⁵ Musmanno, *Verdict!*, 239-258.

acquittals for hundreds of wrongly accused individuals. Moreover, as his earlier experiences with the coal and iron police taught him, if one worked hard enough, and demonstrated the truth to the court, justice would eventually prevail. Thus, when he learned of the circumstantial nature of the evidence against Sacco and Vanzetti and the selective way in which the case was prosecuted, he was outraged. What particularly disturbed him was that the judicial system, in place to help those in need, was being misused to perpetrate such a legal travesty.⁶⁶

Musmanno followed the case for years, since his days in Washington as a law student and, in April 1927, when he learned the two men would soon be executed, his sense of fair play prevented him from remaining a disinterested party. Thus, he closed the doors to his private practice in Pittsburgh, boarded a train to Massachusetts and became involved in the case even though he had not been retained by the two men. Musmanno reasoned that Sacco and Vanzetti were “the clients of every lawyer devoted to the ideal of universal justice,” and since he was one such lawyer he would do whatever he could to right this legal wrong.⁶⁷ Once in Massachusetts he visited the two convicted men in prison and offered his services free of charge. They accepted. Musmanno had never shied away from hard-work and this case was no exception. Along with a team of lawyers, he threw himself into his work, sleeping little for nearly five months, to secure pardons, stays of execution, and retrials. This was the first time his hard-work did not pay off and, on August 10, 1927, after subjecting them to the mercies of the Massachusetts Governor and four of the nine US Supreme Court justices, Sacco and Vanzetti were electrocuted in a small Massachusetts prison. He was devastated by the

⁶⁶ *Ibid.*, 240.

⁶⁷ *Ibid.*

experience.⁶⁸

The execution of Sacco and Vanzetti in 1927 altered Musmanno's perspective of the judicial system forever. He had discovered that it was fallible; that good people do not always win. He wrote despairingly of his experience,

I found that it was not always true that truth crushed to earth would rise again; I learned that right does not always triumph though the heavens fall; I ascertained that in the law there could be a wrong without a remedy. Nor did it appear that all those entrusted with administering American freedoms were worthy of that trust. In the very cradle of America I had seen individual human liberty and life itself suffocated under the blankets of personal greed, political ambition, and unqualifiable (sic) infamy.⁶⁹

In 1927, Musmanno vowed to change what he could in the corrupt system. He made two important decisions. First, he decided to run for a seat in the Pennsylvania State Legislature. This he did in 1928, winning the election by a narrow margin. He ran again in 1930 and won a landslide victory.⁷⁰ While a member of the Pennsylvania legislature (District 12), Musmanno did everything in his power to change the antiquated legislation that governed the Coal and

⁶⁸ *Ibid.*, 239-293. Musmanno wrote a book about his involvement in the case, *After Twelve Years* (New York and London, 1939) of which two experts on the subject have written, "The most tantalizing book which has been written about Sacco and Vanzetti is Michael A. Musmanno's *After Twelve Years*....[but] page after page of Musmanno's book is given to direct quotation of interviews between himself and officials of the Department of Justice....The author's practice raises an exasperating impediment to the acceptance of his material. Assume, as one should and must, that his personal and professional honesty has led to an accurate rendering of each of these interviews and debates. Virtually everything stated must therefore be true. But there is a fatal flaw; there was no stenographer present—there is no record. And no man could retain a complete recollection of so much material in his mind. Therefore, one is left with the belief that almost all of the Musmanno book is entirely acceptable, but that any one fact or opinion may have been imperfectly recorded." Quoted in Louis Joughin and Edmund M. Morgan, *The Legacy of Sacco and Vanzetti*, 352-353. Musmanno's sloppy scholarship is not unique to this book, seldom does one find reference to verifiable documents in any of his books. Despite Musmanno's claim to "love the truth," this practice frequently led to factual errors in many of his written works.

⁶⁹ Musmanno, *Verdict!*, 293-294.

⁷⁰ *Ibid.*, 293-323.

Iron Police. While he was not immediately successful in overturning the dated legislation, he did put up a good fight to change the laws. In 1935 the corrupt Coal and Iron Police system ended when the Governor of Pennsylvania repealed the dated legislation after the film *Black Fury* caused such a public outcry over the injustices perpetrated by the coal industry, that had he not repealed the legislation he would have lost his seat.⁷¹ Second, and most importantly for an understanding of his later behavior at Nuremberg, he became a full-time advocate for the abolition of the death penalty.⁷²

Musmanno referred to the death penalty as state legislated murder.⁷³ His opposition to capital punishment was the direct result of his first-hand work as a defense attorney, particularly his work with clients who were less privileged members of society. His concern about the issue first surfaced in 1925, when he defended a seventeen year old boy, Albert Carelli, the son of a friend of his father's who was wrongly accused of a saloon hold-up and the murder of its bartender.⁷⁴ In appealing the conviction of the death sentence, Musmanno was successful in proving his client's innocence, thereby saving the boy from the electric

⁷¹ Musmanno recounts the details of this struggle in *Black Fury* (New York, 1966), 371-374. See also *Verdict*, 323. Lawson argues that Musmanno deserves a lot of credit for the changes imposed to the coal and iron police system, and thus should be considered one of his legacies. Conversation with A.E. Lawson, November 2001.

⁷² Although Musmanno had been a member of the American League to Abolish Capital Punishment since 1925, after the execution of Sacco and Vanzetti in 1927, he became increasingly more active in League activity, giving speeches and writing letters. For more information on the history of the death penalty in the United States see Roger E. Schwed, *Abolition and Capital Punishment. The United States' Judicial, Political, and Moral Barometer* (New York, 1983); Philip English Mackey (ed.), *Voices Against Death: American Opposition to Capital Punishment, 1787-1975* (New York, 1976); and, Hugo Adam Bedau (ed.), *The Death Penalty in America* (Garden City, 1964).

⁷³ Michael A. Musmanno, "Death Penalty does not Prevent Crime," Letter to the Editor, *New York Herald Tribune*, May 1963 in Capital Punishment file 1477, MMP.

⁷⁴ Musmanno, *Verdict!*, 115-124 and Letter to Musmanno, undated and unsigned, Capital Punishment file 1477, MMP.

chair. In one case, three years later, he wrote the Governor of New York, Alfred E. Smith asking for a commutation of the death sentence for another client, Ruth Snyder who was guilty of killing her husband. But in this case the defendant's innocence was somewhat in question thus Musmanno argued that whether or not Snyder was guilty was irrelevant, capital punishment should be abolished since two wrongs do not make a right.⁷⁵ Musmanno again succeeded in winning a reprieve for his client. But as we saw earlier, he was not so fortunate with Sacco and Vanzetti. Musmanno's experience with the Sacco-Vanzetti case was irrefutable proof to him that the death penalty should be abolished if for no other reason than there existed, in a fallible system that did not always acquit the innocent, the possibility that innocent men would be executed.⁷⁶ As Musmanno passionately argued in one of many speeches he gave on the subject,

Capital punishment should be abolished because of the Sacco and Vanzetti case alone. Nothing, absolutely nothing, can ever be done to right the wrong done these innocent men.... They are dead: irretrievably, incurably and uncompromisingly dead. And I was only two or three hundred feet away from them when their lives were being snuffed out. I knew they were being put to death—and yet they were innocent.⁷⁷

Musmanno remained a strong and vocal opponent of the death penalty until his death in 1968, which on the surface seems to contradict his later behaviour at Nuremberg where in 1948 he sentenced fourteen *Einsatzgruppen* leaders to death. Yet, his actions at Nuremberg were no disavowal of his conviction, despite the seeming divergence from his previous position.

Musmanno's opposition to the death penalty rested neither on principle nor on

⁷⁵ Letter Michael A. Musmanno to Governor Alfred E. Smith, New York, 1928, *ibid*.

⁷⁶ Michael A. Musmanno, "Death Penalty does not Prevent Crime," Letter to the Editor, *New York Herald Tribune*, May 1963 in *ibid*.

⁷⁷ Michael A. Musmanno, "Is it Possible to Execute Innocent Men?" Address to Annual Conference of the American League to Abolish Capital Punishment, New York, 26 April, 1940 in *ibid*.

morality. What bothered him so much was the possibility of the miscarriage of justice; that is, that the system was fallible and as a result innocent people could – indeed had – lost their lives. As the Sacco and Vanzetti case so clearly demonstrated to him, there was irrefutable evidence that these two men were innocent, yet their innocence was irrelevant to a prosecution and court that only had political considerations in mind. As a result, two innocent people were, in his view, murdered and he could no longer tolerate the possibility that this might happen again.⁷⁸

This points to a second and more interesting contradiction in Musmanno's character. While he was willing, even eager to dramatize and distort historical events in his writing, when it came to the courtroom – that is to real life – he insisted on judicial truth. When Musmanno was elected as a judge to the Court of Common Pleas and later to the Pennsylvania Supreme Court, he sought to ensure the utmost fairness for those who came before his bench in the interest of truth. At Nuremberg he practiced the same behaviour, ensuring a trial that was fair to the defendants, providing them with every opportunity to prove their innocence in spite of overwhelming documentary evidence against them.

3. Musmanno's "Road to Nuremberg"

In 1931-1932 Musmanno was elected judge of the Allegheny County Court (Pittsburgh). Two years later he was named judge of the Court of Common Pleas, Pennsylvania where he served on the bench until December 1941, when the United States officially entered the war. Musmanno's career as a judge at the county and state level was as eventful, colourful and controversial as had been his career as a defense attorney. His

⁷⁸ Michael A. Musmanno, "Death Penalty does not Prevent Crime," Letter to the Editor, *New York Herald Tribune*, May 1963 in *ibid*.

personality was so expansive and his showmanship frequently so outrageous, that had he been born to this generation he might well have had his own court television show. On one occasion he sentenced himself to three days in jail because, as he later explained, he “wanted to see what [prison was] like.”⁷⁹ He also became somewhat famous for his “campaign against drunk drivers” when he actively and harshly sentenced hundreds of individuals with up to six months in jail, a level of punishment for drinking and driving unheard of at the time, but undoubtedly prompted by his mother’s premature death at the hands of a drunk driver.⁸⁰ In one twelve month period he doled out more than 481 sentences, enough to have him temporarily suspended from the bench.⁸¹ Musmanno spent nearly eight years as a judge in the Court of Common Pleas, until he was called up for active duty because he was “urgently needed” by the United States Navy.⁸²

As a forty-three year old patriot Musmanno had enlisted as a reservist for the US Navy in early 1940, not long after war had broken out in Europe.⁸³ Musmanno was called to active duty on January 2, 1942, less than one month after the bombing of Pearl Harbor and

⁷⁹ Alfred E. Santangelo, New York House of Representatives, “Justice Michael Musmanno: Nemesis of Nazis, and a Man of the People,” *Congressional Record—Appendix*, 18 May 1961, A3554, Loose Documents, MMP. See also, Musmanno, “I went to Prison,” *Shadows* 1:11 (Salem, Oregon, July 1946), 7.

⁸⁰ Conversation with A.E. Lawson, Attorney, November, 2001.

⁸¹ Alfred E. Santangelo, New York House of Representatives, “Justice Michael Musmanno: Nemesis of Nazis, and a Man of the People,” *Congressional Record—Appendix*, 18 May 1961, A3554, Loose Documents, MMP. See also, Musmanno, “I went to Prison,” 7.

⁸² Letter from C.W. Nimitz, Chief of Bureau, Navy Department Bureau of Navigation to Michael A. Musmanno, 29 July 1941, Navy file 2340, MMP.

⁸³ Memorandum to Michael A. Musmanno from Chief of Naval Personnel, Re: Appointment in Naval Reserve, 16 August 1940, Navy file 2340, MMP. See also, letter from Robert Patterson, Secretary of War to Harry S Truman, President, 23 December 1946 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Records 1944-1949, box 14, 87-Z folder.

was given the rank of Lieutenant Commander, US Naval Reserve. Not many details are known about his Naval career, but we do know that he did not see action until sometime in 1943, during the Allied campaign in Italy where he served under General Mark W. Clark.⁸⁴ During this period Musmanno was wounded twice, once in February 1944 during the Battle of Minturno for which he received the Bronze Star for Valor, and again later in 1944 when he was wounded by shrapnel at Mount Formichi.⁸⁵

During the Italian campaign Musmanno was Naval Aide to General Mark W. Clark, who commanded the American Fifth Army and later the Allied Fifteenth Army Group.⁸⁶ When the Allies liberated the southern Italian city of Sorrento, Musmanno was made Military Governor of the Sorrentine Peninsula. How he obtained this position is unclear. In any event, as Military Governor Musmanno developed an intense fondness for the Italians of the region, viewing them as “underprivileged” and therefore in need of his help. Unlike the accolades he received during his days fighting for “the underdog” as a defense attorney however, this time as a military commander in charge of an occupation government, his actions were frequently questioned and heavily scrutinized. On one occasion Musmanno commandeered a ship in Bari in order to obtain olive oil for the population of his region who were, he believed, deprived of this “staple.” While leaving the harbour the ship was bombed and sank, but he managed to save several crew members and was subsequently decorated for bravery by the King of Italy.⁸⁷

⁸⁴ Memorandum from Michael A. Musmanno to Staff Personnel Officer, US Naval Forces, Germany, 12 December 1946, Navy file 2340, MMP.

⁸⁵ “Biographical Sketch of Pennsylvania Supreme Court Justice Michael A. Musmanno on the subject of Americanism,” Biography file 940, in MMP.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* See also Musmanno, “The Monitor and Merring,” July 1941, Navy file 2340, MMP.

After the olive oil debacle, more serious incidents of insubordination followed. He became the subject of investigation when he physically challenged, with a gun, a British general over the “requisitioning” of Benedetto Croce’s house in Sorrento. When the British general attempted to take Croce’s house by force, Musmanno fiercely and boldly protected the aging Italian liberal and his home. As a result of the confrontation, American investigators questioned Musmanno’s allegiance to the United States, and accused him of harbouring an “Italian complex.” After a lengthy investigation (more than a year) Musmanno was found guilty of “flouting orders which do not agree with his interpretation of conditions and...constant[ly] befriending and championing...Italians.”⁸⁸ Not wanting any negative publicity, Musmanno’s behaviour led the Navy to transfer him out of Italy altogether. After twenty months serving under General Clark and the Fifth Army, Musmanno accompanied Clark, who was also transferred, to Austria where the General was named American High Commissioner.⁸⁹

Once in Vienna, General Clark assigned Musmanno to the presidency of what became known as the United States Board of Forcible Repatriation. The Americans established these review courts as a way to avoid an agreement they had signed at Yalta with the Soviets and British in February 1945 where it was decided that at war’s end the British and Americans would assist the Soviets in forcibly repatriating those Soviet citizens who refused to return to

⁸⁸ Confidential Naval Report, March 1944, Navy file 2340, MMP. Musmanno was investigated by the Navy and it was decided not to pursue charges against him because it would have brought unwanted negative publicity to the British. See memorandum from R.D. La Marr (Captain), to Michael A. Musmanno, 17 December 1943; confidential letter to RC and MG Section, Headquarters ACC from SFT, 30 April 1944; letter from Brigadier General Edgar Hume, Allied Military Headquarters to Allied Control Commission, 23 May 1944 all letters in Navy file 2340, MMP.

⁸⁹ Michael A. Musmanno, Background notes to himself, undated, Soviet Board file 1101, MMP.

their native homeland.⁹⁰ Following the tragic mass-suicide of sixty Russian ex-patriots who American and British soldiers had forced to board a Munich train bound for Moscow, the American authorities concluded that urgent action was necessary to prevent grave injustices in undecided cases.⁹¹ General Clark agreed to establish a review board whose job it would be to hear arguments from individuals who did not want to be (forcibly) repatriated to the Soviet Union. Musmanno served as a judge on one of these boards, which essentially functioned as a review court. He and three other judges were assigned to hear cases.⁹² For nearly a year Musmanno traveled the Austrian country-side, going from DP camp to DP camp, hearing tragic stories of Russians who had no desire to return to the Soviet Union. Perhaps foreshadowing his later aggressive campaign against communists in America, Musmanno did his utmost to protect those refugees who came before him, but inevitably he had to send some people back to the Soviet Union even though he understood that in all likelihood they would be exiled to Siberia.⁹³

Musmanno's work in Austria came to an end in September 1946, when he was sent home a fully decorated Naval Commander after nearly five years in Europe. However, his sojourn in the United States was short-lived.⁹⁴ Even before he was discharged from the Navy

⁹⁰ "Musmanno Transferred from Italy to Austria," *Pittsburgh Gazette*, 28 July 1945, Scrapbook 1946-1949, Loose Documents, MMP.

⁹¹ Memorandum from General McNarney to Commanding General, Seventh US Army, 31 January 1946, Soviet Board file 1101, MMP.

⁹² Musmanno, Background notes to himself, undated, in *ibid.*

⁹³ *Ibid.* See especially Musmanno, *Across the Street from the Courthouse* (Philadelphia, 1954), in which Musmanno recounts his experiences as a judge on the Board as well as his personal battle against communism in America.

⁹⁴ Letter from James G. Fulton to General Lucius Clay, 13 September 1948, General Lucius D. Clay file 1138, MMP.

he received word that he had been reassigned to work under Admiral William Glassford to review the cases against the German naval commanders Karl Dönitz and Erich Raeder currently being tried at Nuremberg.⁹⁵ Acutely aware of Nuremberg's historic importance, Musmanno returned to Germany immediately.

Since its inception in the autumn of 1945, Musmanno had been following the International Military Tribunal closely, he had even written a series of articles on the Nuremberg trials for the Pittsburgh press. While in Nuremberg Musmanno followed the controversy surrounding the death of Hitler. Never one to miss an opportunity for notoriety, he asked the Military Government for permission to interview imprisoned former Nazis in order to determine, once and for all, the circumstances surrounding the death of Hitler. His superiors in the Military Government agreed to his request as long as this work did not interfere with his Navy duties at the trial. He was subsequently granted free access to interview imprisoned war criminals. In his spare time, between 1946 and 1948, Musmanno interviewed more than two hundred so-called witnesses to Hitler's last days which culminated in the 1951 publication of *Ten Days to Die*.⁹⁶ It was also while working for the Navy in Nuremberg that Musmanno was asked and appointed to the bench of the Subsequent Nuremberg Proceedings. His appointment was as much a case of being "in the right place at

⁹⁵ Musmanno, *Eichmann Kommandos*, 48; Letter from Michael A. Musmanno to Henrietta Sherwood, 16 October 1946, Admiral Glassford file 1186, MMP. See also "Judge Musmanno to Return in Fall. Services Requested at Nuremberg Trial," *Pittsburgh Press*, 25 June 1946, and "Musmanno Recalled by Navy to Nazi Trial," *Pittsburgh Press*, 2 October 1946 in *ibid*.

⁹⁶ Copies of his interviews with Karl Doenitz (naval admiral), Leni Riefenstahl (Film maker), Karl Koller (General in Luftwaffe), Julius Schaub (Hitler's adjutant), Hermann Karnau (Hitler's body guard), Franz Halder (Chief of General Staff), Traudl Junge (secretary), Hugo Blaschke (dentist), Erich Kempka (Hitler's Chauffeur), and Ilse Braun (Eva Braun's sister) among others, can be found in Musmanno's personal papers at the Gumberg Library, Duquesne University, Pittsburgh.

the right time” as it was due to his professional qualifications.

As mentioned earlier in this work, one of the major obstacles the United States authorities encountered in planning the Subsequent Nuremberg Proceedings was recruiting staff. Very early on in the planning phase the Americans discovered that the vast majority of the high profile candidates they selected for work at Nuremberg simply did not want to go to Europe for extended periods of time. This was especially true for judges from the federal court system who American authorities wanted to staff the tribunals at Nuremberg. Even had these judges wanted to go to Nuremberg, the attitudes of many prominent jurists was beginning to change.⁹⁷ When American Supreme Court Justice, Fred Vinson, refused to grant leaves to federal court judges, Taylor, Clay and the other trial planners realized, they would be unable to man the tribunals with exclusively federal justices.⁹⁸ As a result, they began to search for judges from state courts.⁹⁹

Judges were recruited in the United States by the Department of the Army which in turn submitted names to the Office of the Military Governor (OMGUS) for approval.¹⁰⁰ OMGUS officials wanted to ensure that the judges for the Subsequent Proceedings were “of [the] highest caliber,” to ensure the integrity and fairness of trials,¹⁰¹ as well as to preside over

⁹⁷ Peter Maguire, *Law and War: An American Story* (New York, 2000), 150.

⁹⁸ *Ibid.*

⁹⁹ Letter from Robert Patterson, Secretary of War, to Harry S Truman, President, 7 November 1946, Subject File: Foreign Affairs File (Germany–Nuremberg War Crimes), PSF, HST.

¹⁰⁰ Telford Taylor, “Nuernberg Trials: War Crimes and International Law,” in *idem*, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial* (Washington, 1949), 156-157.

¹⁰¹ Cable from OMGUS to AGWAR, 20 November 1946, in NARA RG 466 (HICOG), Prisons Division, Security Segregated Records 1945-1947, box 10, War Crimes Trials, Correspondence 1946-1947 folder.

these “novel and complicated” proceedings.¹⁰² Although the Office of Chief of Counsel was not assigned a role in recruiting judges, Taylor did make his voice heard regarding the types of judges to be recruited. He was adamant that civilian rather than military justices be employed on the tribunals. Even though the tribunals were technically labeled “military,” one of the major tasks of those appointed would be to write opinions of their judgments. Given this was not standard practice in military hearings, Taylor preferred the use of civilian judges whose jobs regularly required them to do so.¹⁰³ Taylor was not alone in his concerns, others in the Military Government also seemed to have doubts about the ability of military men to carry out such historically important tasks. As General Clay awkwardly expressed on one occasion,

because of the very difficult legal problems and complicated subject matter which will necessarily be involved, we...doubt if retired Army officers would have the requisite legal experience and background to establish historically the record of utmost legal consideration in these cases.¹⁰⁴

When Musmanno’s name was put forward as a candidate for judge, there were some concerns about his military standing. Taylor worried about the “appropriateness of [a] naval officer with [the] rank of commander sitting on [a] tribunal which may be called upon to try field marshals and high ranking generals.”¹⁰⁵

¹⁰² Memorandum from Telford Taylor to the War Department, 2 September 1946, Library of Congress, Manuscript Division, Robert H. Jackson Papers, box 10 Nuremberg War Crimes Trials, Office File, US Chief of Counsel, Subsequent Nuremberg Trials, folder 2.

¹⁰³ The rules which governed the Subsequent Nuremberg Proceedings also dictated that opinions accompany judgments. Article 26 of the *London Agreement* stated that tribunals must “give the reasons on which it [the judgment] is based....” See Taylor, *Final Report*, 29 & 35.

¹⁰⁴ Memorandum from Lucius Clay, Military Governor, to War Department, 4 September 1946 in NARA RG 153 (JAG), War Crimes Branch, Nuremberg Administration Files 1944-1949, box 1, 85-1-76 folder.

¹⁰⁵ Memorandum from Telford Taylor, to War Department, Washington, 21 November 1946 in NARA RG 466 (HICOG), Prisons Division, Security Segregated

Despite these apprehensions, Musmanno received high recommendations for the job at Nuremberg. His appointment was endorsed by his former superior General Mark Clark, as well as from the Mayor of Pittsburgh, and the Dean of the Georgetown Law School where the Department of the Army had been looking for judges.¹⁰⁶ But, it was Colonel David “Micky” Marcus, the individual in Washington in charge of recruiting personnel for Nuremberg, who personally told Taylor that Musmanno would be an excellent candidate for the job.¹⁰⁷ Such high recommendations coupled with Musmanno’s civilian legal experience and recent position on the review board of the Navy, was enough for the Military Governor and Taylor to agree to Musmanno’s appointment.¹⁰⁸ Initially Taylor wanted Musmanno as an alternate judge, but the naval Commander’s position was elevated when Geoffrey Keyes, Lieutenant General of the US Army, wrote to Alvin Rockwell, head of the Legal Division of OMGUS, suggesting that Musmanno’s “experience and background,” made him eminently qualified for a post of presiding judge.¹⁰⁹ While Musmanno was not immediately named presiding judge,

Records 1945-1947, box 10 War Crimes Trials, Correspondence 1946-1947 folder.

¹⁰⁶ Memorandum from War Department, No. 86237, 23 November 1946, in *ibid*.

¹⁰⁷ Letter from Colonel David “Micky” Marcus to General Telford Taylor, undated, Navy file 2340, MMP.

¹⁰⁸ Memorandum from Commander Talbot, 12 May 1946 and Memorandum from Louis Denfeld, Navy Department to Michael A. Musmanno, Captain, 1 October 1946, in *ibid*. See also letter from Lucius Clay to James G. Fulton, US Congressman, 5 October 1948, General Lucius Clay file 1138, MMP, in which Clay writes, “It is because we determined as a matter of policy that these tribunals would not be composed of military personnel but would be composed of experienced civilian jurists so that the record would be crystal clear as to the nature and justice of the trials. Captain Musmanno was the only one of the judges who was in military service. For this reason, I accepted him in uniform only because of his long experience as a civilian jurist.”

¹⁰⁹ Letter from Geoffrey Keyes, Lieutenant General, U.S. Army Commanding, to Alvin J. Rockwell, Director Legal Division, OMGUS, 8 December 1946, Navy file 2340, MMP.

he was appointed, on January 10, 1947 by Executive Order 9819, one of three judges in the case against German Field Marshal Erhard Milch.¹¹⁰ In accordance with the prestigious position at Nuremberg, the Navy promoted Musmanno to Captain.¹¹¹ A year later in 1947, after having sat in judgment on two tribunals and in the process of presiding on a third, Musmanno requested that the Navy elevate his rank “one more notch” to Commodore in order to eliminate, as he phrased it, the “incongruity” between his rank of Captain and that of four of the defendants in the *Einsatzgruppen* trial who outranked him as Generals. The Navy declined his request.¹¹²

While Musmanno was presiding over the Milch case, the Office of Chief of Counsel found itself in particular need of judges. Given these shortages and the reputation that Musmanno had already earned as a work horse, it should not be surprising that he was asked to sit as a judge in the case against Oswald Pohl. Without reservation or any vacillation, he accepted the position. While Pohl’s trial got under way, the indictment against the *Einsatzgruppen* leaders was filed and the trial was scheduled to begin in September 1947. The perennial problem of staffing again confounded the Office of the Chief of Counsel, but never one to pass up an historic opportunity and without any family or children in the United States to demand his return, Musmanno again accepted the position as presiding judge for a third

¹¹⁰ Harry S Truman, Executive Order 9819, 10 January 1947, in NARA RG 260 (Records of the United States Occupation Headquarters, WW II, from here forward simply USOH), OMGUS, Records of Functional Offices and Divisions, OCCWC, box 99, SPD Memos folder. See also *ibid* in Navy file 2340, MMP.

¹¹¹ Letter from Robert Patterson, Secretary of War to James E. Webb, Director Bureau of the Budget, 21 December 1946, WHOF, 325-B, International Military Tribunal, HST. See also “Musmanno Heads Nuernberg Court: Navy Vet Jurist to Try High Nazis,” *The Pittsburgh Press*, 17 November 1946, Nuremberg Correspondence file 1445, MMP.

¹¹² Letter Michael A. Musmanno to James G. Fulton, House of Representatives, 30 September 1947, General Lucius D. Clay file 1138, MMP.

time in the trial against Otto Ohlendorf and the leaders of the mobile killing units.¹¹³ On September 10, 1947, Lucius D. Clay, the American Military Governor, officially appointed Musmanno presiding judge for Military Tribunal II-a to hear the evidence in the *Einsatzgruppen* trial.¹¹⁴

4. Musmanno at Nuremberg

From the very beginning of the trial Musmanno established his total authority in the courtroom, a sign that he was both comfortable in his role as presiding judge as well as intensely interested in the course of the proceedings. On the first day of arraignment, Otto Rasch, Commander of *Einsatzgruppe C*, who suffered from Parkinson's disease collapsed in a "paralytic attack" and Eduard Strauch, former head of *Einsatzkommando 2*, stood up to answer to his name during the entering of pleas and "dropped to the floor as if hit with a pistol shot," while suffering an epileptic seizure.¹¹⁵ Refusing to be distracted or allow any delays in the trial, the presiding judge simply ordered Strauch and Rasch removed from the courtroom and continued arraigning the remaining defendants as if nothing had happened. Later that same day, Musmanno also reversed established procedure for the Nuremberg Tribunals when he refused to grant defense counsel a two to three weeks recess after the "completion of the prosecution's case." Musmanno viewed the request as a frivolous and an unnecessary waste of

¹¹³ The Pohl and Ohlendorf cases overlapped slightly. The Proceedings in Pohl's case ended September 22, 1947 and arraignments for the *Einsatzgruppen* case got underway September 15 and were completed on September 29.

¹¹⁴ Memorandum from Lucius D. Clay, Military Governor, to Michael A. Musmanno, 10 September 1947, Navy file 2340, MMP.

¹¹⁵ Noah J. Jacobs, "The Biggest Murder Trial in History," undated, 16, in Material to Review while Reading of Biggest Murder Trial in History file 249, MMP. See also "Arraignment," *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4, 26.

time, a likely “delaying tactic” he later stated.¹¹⁶ But the presiding judge was nothing if not fair. That first day, he not only established his authority vis-à-vis the defense, but he also made certain that the prosecution knew he would be carrying out a fair trial when he denied their first motion to enter into evidence a film he believed to be prejudicial to the defense.

The film in question was a short documentary which graphically depicted mounds of corpses being placed in mass graves for burial. The bodies were those of Soviet Jews presumably, the prosecution surmised, killed by the units of the *Einsatzgruppen*. The film was grisly and controversial and had already been shown during the IMT trial, causing great emotional outbursts by the defendants then on trial.¹¹⁷ This time round, the prosecution in the *Einsatzgruppen* trial wanted to show the film to the court and then enter it into evidence as proof of the murderous activities of the defendants. Some judges might have allowed the film into evidence as was the case with the IMT, but Musmanno, always intent on fairness, ruled against the prosecution and in doing so noted that the tribunal believed the film did not implicate any of the defendants individually or directly and therefore it had no evidentiary basis and could not be shown to the court. Besides, Musmanno added, “personally...I could not in any way use that exhibit in the disposition of this case, because I closed my eyes [in horror] after the first five minutes.”¹¹⁸

¹¹⁶ “Arrestment,” *ibid.*, 27-28.

¹¹⁷ Letter from Benjamin B. Ferencz to Defense Information Center, RE: Documentary Motion Picture USSR 81, 22 September 1947, in NARA RG 260 (USOH), OMGUS, OCCWC, General Records of Secretary of Nuremberg Military Tribunals 1946-1949, box 139 607.3 – Appointment of Howard Russell as Secretary General, 609.3 folder. On the defendant’s reactions to the film at the IMT trial see G.M. Gilbert, *Nuremberg Diary* (New York, 1947 and 1995), 45-49.

¹¹⁸ Ruling by Michael Musmanno, 3 October 1947, in *The United States of America v. Otto Ohlendorf et. al*, National Archives Microfilm Publication M895, roll 2, 257 (from here forward simply *Trial*).

Musmanno's ruling on the film set the tone for the trial. His rulings most frequently sided with the defense, and was his attempt to be as fair as possible. Along with the now famous "Penguin Ruling" he was willing to overlook, on many occasions, prosecution counsel's legitimate objections to the scope of defense evidence the tribunal accepted as well as to some procedural issues. One such instance occurred during the case of Walter Blume, former head of *Sonderkommando 7a*. Blume's principal defense was that he was following superior orders, but he also argued that he carried out his orders, in part at least, because he adored Hitler and believed his *Führer* could do no wrong. Dr. Günther Lummert, Blume's attorney, asked the court to accept an affidavit by an Austrian Catholic Bishop which would provide a "window through which" the court could "get a view of the psychological conditions of Germany under Hitler" and thereby try to understand Blume's unnatural devotion to the *Führer* and his subsequent behaviour in Russia. When the issue of Blume's attitude to Hitler was raised, the prosecution vehemently objected to the submission of the affidavit as irrelevant to the charge of murder, but Musmanno, wanting to be as fair as possible to the defense, ruled that the affidavit was admissible. While this rightly infuriated the prosecution, it helped to create an atmosphere of fairness in Musmanno's court.¹¹⁹

Another example in which Musmanno ruled for the defense was during the cross examination of Lothar Fendler, Deputy Chief of *Sonderkommando 4b*. In this case, Dr. Suess, one of the assistant attorneys working for Erwin Schulz, commander of *Einsatzkommando 5*, wanted to ask Fendler a question about an issue that had been raised during direct examination but which had not been brought-up during his cross examination. Under American criminal procedure this practice would have been impermissible and as such Arnost

¹¹⁹ Exchange between Guenther Lummert and Michael Musmanno, 4 November 1947, in *Trial*, roll 3, 1844-1845.

Horlik-Hochwald, one of the more seasoned prosecution lawyers at Nuremberg, objected. Even though Musmanno took judicial notice that Horlik-Hochwald was “absolutely right,” as supreme authority in the courtroom, he decided he would “pay no attention” to the objection and allow the question anyway. Exercising his discretion and bending the rules of procedure was typical behaviour of Musmanno at Nuremberg and undoubtedly his conduct at trial was one of the reasons the defense team appreciated and later praised the presiding judge.¹²⁰

Musmanno’s leadership in the courtroom was not limited to ruling on motions. In fact, he frequently voiced his own opinion when a defendant made, what seemed to him, an outrageous statement. One such instance was during the cross-examination of Paul Blobel, head of *Sonderkommando* 4a, and a defendant with whom Musmanno had difficulty hiding his irritation. In an attempt to justify his role in reprisal murders in the Soviet Union and to illustrate that reprisals were a “natural” part of war, Blobel defiantly pointed out to the court that the Americans also carried out reprisal shootings. According to Blobel, it was a “well known fact” that General Dwight Eisenhower had ordered that for each American killed, two-hundred Germans would be executed in retaliation. Musmanno seemed to take the accusation personally and expressed his outrage by embarrassing Blobel in front of his co-defendants.

Musmanno: You say there is a well known order of General Eisenhower that two hundred were to be executed to one?

Blobel: All the German people know, your Honor, that an order was given by General Eisenhower that for every one American killed, two hundred Germans are to be shot.

Musmanno: ...do you say that every German and every defense counsel here knew of such an order?

Blobel: ...I am convinced that many of the defense counsel knew of this order.¹²¹

Musmanno recalled that at this point he “swept” his hand “from left to right to encompass the

¹²⁰ Michael Musmanno Ruling on prosecution motion, 15 December 1947, in *Trial*, roll 5, 4116-4117.

¹²¹ Exchange between Michael Musmanno and Paul Blobel, 30 October 1947, in *Trial*, roll 3, 1728-1729.

entire audience” and then demanded that Blobel, “point out one [person in the courtroom] who will make the statement.”¹²² Musmanno waited a moment, looked around the courtroom, but not one person raised their hand or acknowledged Blobel’s claim. He again demanded to know if the defendant still believed that all Germans knew of such an order. Blobel meekly whispered, “no.”¹²³ Dissatisfied with the defendant’s retraction, Musmanno insisted Blobel “make an apology for having cast this aspersion upon the [good] name of General Eisenhower, who up until this very time has earned the respect of not only those in his services on the Allied side, but even the respect of the foe.”¹²⁴ According to Musmanno’s recollection of the exchange, Blobel “wilted” under his relentless pressure, stating for the record that, “under the circumstances, I have to beg your pardon.”¹²⁵ Blobel’s pathetic contrition seemed to satisfy the presiding judge.

Musmanno’s natural inclination toward showmanship, his ease when speaking publically, as well as his desire for justice, prompted him to become involved in the trial on a regular and daily basis (he took every opportunity to question the defendants and to clarify defense arguments), despite his oft felt “sadness” and “disbelief” at the nature of the evidence put before the tribunal.¹²⁶ He not only presided as judge at the trial, he frequently took on the role of prosecutor as well, especially when he felt that a defendant was being less than frank in his responses to the court. In these instances he would relentlessly question a defendant

¹²² Musmanno, *Eichmann Kommandos*, 154.

¹²³ *Ibid.*, 154-155.

¹²⁴ Exchange between Michael Musmanno and Paul Blobel, 30 October 1947, in *Trial*, roll 3, 1732.

¹²⁵ *Ibid.*; and, Musmanno, *Eichmann Kommandos*, 156.

¹²⁶ *Ibid.*, 82-83.

until the defendant either recanted his testimony or admitted to his actions. As one observer keenly noted of Musmanno's cross-examination skills, he had the ability to get at the heart of an issue by asking "penetrating questions...[which] always hit the mark."¹²⁷ Musmanno's insightful questions were often asked when the prosecution counsel was unable to elicit a desired response from a defendant. In these instances Musmanno would exert his authority and, in most cases, eventually get to the heart of a defendant's testimony. He never regretted or apologized for his actions, always maintaining his right to question witnesses. Moreover he noted, "no witness is compelled to take the stand if he does not wish to, but once he takes the stand, he is subject to cross examination and then, if he volunteers statements, certainly those statements are open to inquiry," even by the presiding judge.¹²⁸ He also made a practice of questioning witnesses because their "believability has to be tested" and if the prosecution was unable to perform this function, it was his duty, he affirmed, to probe deeper in order to ascertain the facts of the case and the motivations of a defendant and thereby determine their innocence or guilt.¹²⁹

Not surprisingly under the circumstances, in almost every instance where Musmanno acted as prosecutor and directly questioned a defendant, it was in an attempt to unearth how the defendant ethically, morally, and personally viewed the order to murder innocent human beings, especially the Jews. Musmanno did so, he frankly told the defendants one day in court, because this was "the only way the issue [of conscience] can be decided by the tribunal" and thus it formed an important part of his opinion and judgment and as shall be

¹²⁷ Letter from James G. Fulton to General Lucius Clay, 13 September 1948, General Lucius D. Clay file 1138, MMP.

¹²⁸ Musmanno, *Eichmann Kommandos*, 178.

¹²⁹ *Ibid.*, 200.

shown, their sentences as well.¹³⁰

Musmanno's exchange with Werner Braune, former Commander of *Einsatzkommando* 11b, was typical of his courtroom behaviour and is worth examining at length to illustrate this point.

Musmanno: What was your inner reaction to this Fuehrer-Order to kill defenseless people, women and children?

Braune: I rejected this order innerly....What I am trying to express is that I innerly objected to having defenseless people killed and shot, and I cannot imagine that there is any human being who does not feel in this inner struggle.

Musmanno: Was it the feeling that this order was unethical?

Braune: This question has been asked here repeatedly and it is difficult for me to answer.¹³¹

Not satisfied with Braune's sidestepping of the issue, Musmanno demanded that the defendant explain what kind of inner objection he had to the *Führerbefehl* to murder Russian Jews. But, as was typical of most of the defendants under cross examination, Braune avoided the question and instead stated quite generally that "there are human beings who could kill defenseless people and go about their affairs and sleep at night...who could kill defenseless people and not [have] any...regret."¹³² Musmanno would not let the matter pass and insisted that Braune explain his own personal feelings and not those of some other, anonymous commander. Giving in somewhat to Musmanno's pressure, Braune admitted that during "normal times" he believed that killing defenseless people was indeed unethical, but that the war on the eastern front was "different," it was a war until the death. Besides, he continued, the order to kill the Jews came from Hitler who he believed was not only above international law, but who also had the right "by the [German] constitution to decide about war or peace

¹³⁰ Cross examination of Werner Braune by Michael Musmanno, 25 November 1947, in *Trial*, roll 4, 3052.

¹³¹ *Ibid.*, 3040.

¹³² *Ibid.*, 3042.

and therefore...to decide about the lives of millions of people.”¹³³ In other words, Braune believed that the order to murder Soviet Jews was not only legal but justified under the circumstance of total war and by extension, he could not be held legally accountable for carrying it out.

Neither satisfied nor convinced by Braune’s explanation about his “inner feelings” Musmanno, as he was frequently wont to do, attempted to test Braune’s contention that he inwardly objected to the order. Musmanno wanted to know why, if Braune objected to the order so much, he did not attempt to evade it. Braune told the court that he did not arrive in Russia until 1942, a full year after the killing spree had begun, and therefore there was no point in evading the order because the *Kommando* he supervised was already conditioned to carry it out. Besides, he said, his superior Ohlendorf, a commander who outranked himself, had tried to have the order rescinded but even he could do nothing to stop the carnage. Musmanno pushed further, wanting to know why, if he and Ohlendorf were so close, he did not confide in him and ask for his help. To which Braune replied,

Braune: Herr Ohlendorf would not have understood me at all if I had come to him and said, ‘please send me home, and let somebody else do this very difficult task instead of me.’ I believe Herr Ohlendorf would have considered me a shirker if I had done this and he would not have had the slightest understanding in spite of our good relation.¹³⁴

Musmanno: Well then, you were more afraid of being considered a coward than to take the chance in asking him to relieve you from this task which you found so onerous and distasteful?

Braune: No, your Honor. I was convinced that there would be no point in it, and that Herr Ohlendorf would not have been able to do anything.

Musmanno: Well, then you decided what his answer would be without even putting the question to him?¹³⁵

Obviously Braune had forgotten that Ohlendorf had earlier testified that he personally sent

¹³³ *Ibid.*, 3046.

¹³⁴ *Ibid.*, 3062.

¹³⁵ *Ibid.*, 3062.

men, who expressed or displayed their inability to deal with their tasks, back to Germany. But the presiding judge had not forgotten. Besides, the prosecution had entered evidence which showed that while Braune was working in Norway, he had repeatedly gone against Reich orders without suffering any consequences. Musmanno wondered whether Braune was “more humanitarian in Norway than in Russia.” No, he concluded, the difference was that with the Jews, “there was no one to take up their cause and, therefore, there was nothing [for Braune] to fear in killing them.”¹³⁶ Musmanno concluded Braune was lying and in an attempt to irrefutably demonstrate this he pursued another avenue of questioning.

The presiding judge asked whether or not Braune believed Hitler’s propaganda, that the Jews were the bearers of Bolshevism. “Yes,” Braune said that to the best of his knowledge, the leadership and administration of the Soviet state was largely, almost 90 percent he thought, Jewish in composition. “Well,” Musmanno logically reasoned, “if the Jews carried the flag of Bolshevism and played the active part which you have indicated, then they were definitely enemies and dangerous enemies...weren’t they?”¹³⁷ He was trapped by the judge’s logic. Either Braune had to argue that killing Jews was militarily justifiable in the course of total war or that he knew the order was morally wrong and that is why he objected to it. Under the law, he could not argue both positions. Realizing the direction of Musmanno’s questions, Braune attempted to avoid the trap by arguing both positions.¹³⁸ Musmanno found the argument illogical. If Braune really had “inner misgivings” about the order to murder the Jews as he claimed, surely, the presiding judge reasoned, he would have at least made some

¹³⁶ Musmanno, *Eichmann Kommandos*, 138-139.

¹³⁷ Cross examination of Werner Braune by Michael Musmanno, 25 November 1947, in *Trial*, roll 4, 3064-3065.

¹³⁸ *Ibid.*, 3066.

attempt to ease his guilty conscience. To find out, Musmanno asked,

Musmanno: Did you ever excuse one Jew just because there may have been some doubt as to whether he was a participant in communism or not?

Braune: No, your Honor.¹³⁹

Braune had failed the test and Musmanno had his answer. Like so many others, this defendant carried out his orders, Musmanno deduced, without remorse. He killed people he knew to be innocent because Hitler ordered him to do so and because they were Jews. The defendant had lied to the tribunal, never feeling any “inner misgivings.” For these acts, Braune would pay the ultimate price.

As illustrated, Musmanno could be both a tenacious and aggressive jurist on the bench. In this way he was best able to test the credibility of defense arguments. In the case of Walter Blume, leader of *Sonderkommando 7a*, he did so during the defendant’s direct testimony. Dr. Günther Lummert, Blume’s attorney, was attempting to show that a suicide attempt in early 1947 by the defendant was the result of American ill-treatment of Blume during his internment prior to his trial. Blume had tried to kill himself while in prison, Lummert argued, because he was afraid of being physically harmed, even tortured by his captors. Musmanno, clearly wanting to test the assertion, and annoyed by the suggestion that Blume was tortured while in custody, demonstrated his force as presiding judge.

Musmanno: Well, it was just a blow or two given in anger. Isn’t that about what it was?...I am not trying to justify it, witness...I am only trying to get at the facts...it was just a blow struck in hatred?

Blume: Yes.

Musmanno: You really didn’t feel any ill effects of it after the actual striking?

Blume: Not of a special kind. [Just] the general pain.

Musmanno: There was no attempt on the part of this interrogator...to permanently disable you?

Blume: No.

Musmanno: You didn’t have to have any medical treatment, did you?

¹³⁹ *Ibid.*, 3074.

Blume: No.

Musmanno: So you exaggerated in your own mind what had happened to you, and made that the basis for a suicide attempt, didn't you?

Blume: I only wanted to express, ... that the psychological pain of the situation moved me very much.

Musmanno: Well, were you so touched by a slap or two—that you having been a soldier all these years—that because of this temporary humiliation...you wanted to commit suicide?

Blume: Your honor, it was not only one or two blows; it took quite some time.

Musmanno: Well, whatever they were, they weren't bad enough to cause you to be hospitalized...Now, do you want to tell us that you, a big, strapping fellow who had been through a war...would want to commit suicide just because someone struck you with his fists?

Blume: Your Honor, I had assumed that this would continue, this ill-treatment, after the interrogation, I was, of course, overwhelmed by the fact that when questions were asked as to names of comrades, and I thought that I would be thus put into a forced situation, and I was afraid of all this.

Musmanno: You were afraid that you would have to divulge some information which might implicate your comrades. Is that what I understand?

Blume: Yes. I thought I would not be hard enough, perhaps, to bear it in the long run.¹⁴⁰

In the end, Musmanno succeeded in forcing Blume to admit that his so-called suicide attempt was not the result of fear of intimidation and brutality by his captors, but rather fear of retribution from his colleagues in the event that he betrayed them.

Along with relentless cross examination, one of Musmanno's favorite techniques for testing the veracity of testimony or to get a defendant to answer a question (often a very incriminating one) was to put the defendant in a "provocative" hypothetical situation, a practice that never would have been tolerated in an American criminal proceeding and, even if it were would have been grounds for an appeal, but a technique which Musmanno nonetheless employed regularly at Nuremberg.¹⁴¹ Only one defense attorney, Hans Gawlik, ever

¹⁴⁰ Exchange between Michael Musmanno and Walter Blume, 4 November 1947, in *Trial*, roll 3, 1827-1830.

¹⁴¹ Musmanno, *Eichmann Kommandos*, 202.

challenged this practice and it ended in disaster for his client, Willy Seibert, Deputy Chief of *Einsatzgruppe D*. It is interesting to note that while the defendants frequently ignored or side-stepped sensitive questions posed by the prosecution, when Musmanno exerted his authority, they almost always answered his questions, even hypothetical ones. This was no less true for Ohlendorf, the lead defendant in the trial. After three days on the stand, Ohlendorf and James Heath, the prosecutor assigned to cross-examine the former leader of *Einsatzgruppe D*, had had numerous acrimonious exchanges. For days Heath had been attempting to get Ohlendorf to explain how he felt about Hitler's order to kill civilians, but all to no avail. Each time Heath asked Ohlendorf about his personal feelings, the SS man successfully avoided answering the question. Musmanno, who thought it imperative to know how the leaders of the mobile killing units viewed their work, stepped in. To test Ohlendorf's principal defense that he legally had no choice but to carry out the order, Musmanno insisted Ohlendorf answer a hypothetical question: under the circumstance of total war, if he were ordered to murder his sister, would he do so? Ohlendorf, unlike defendants who testified later, wasted no time with his response. Able to think on his feet quickly and probably fearful of jeopardizing his defense of compulsion to superior orders, he told the court that if he were ordered to, he would murder his own sister.¹⁴² Most defendants were not as adept at dealing with Musmanno's intense cross examinations as was Ohlendorf. This was the case with Willy Seibert who found himself in a similar situation as Ohlendorf, but who was unable to adequately defend himself against Musmanno's intense questioning.

Testifying in his own behalf Willy Seibert claimed that any order issued by a superior, especially by Hitler, could not be considered murder. Furthermore, Seibert maintained, a person who carries out a *Führerbefehl*, "cannot be blamed" for committing a crime because

¹⁴² Testimony and cross examination of Otto Ohlendorf, in *Trial*, roll 2, 740-752.

anything that Hitler ordered was legal. Musmanno, viewing himself as both “judge and jury” felt it his responsibility “to ascertain...to the extent possible, just what [Seibert’s] concept of coercion under superior orders” consisted of.¹⁴³ To test Seibert on this issue, Musmanno posed what proved to be an impossible hypothetical situation for the former Deputy Chief of

Einsatzgruppe D:

Musmanno: let us suppose you received an order directly from Hitler...that you were to execute the chief of the *Einsatzgruppen*. Would you execute that order?

Seibert: No, I would not have carried it out.

Musmanno: Well, then suppose you received an order to shoot a 12 year old Jew. Would you shoot him?

Seibert: I cannot say.

Musmanno: You had no trouble in answering that you would have refused to shoot Ohlendorf, but you have some hesitation in saying whether you would have refused to shoot a Jewish boy of twelve. And the answer, would you say, is that Ohlendorf means something to you, but a 12 year old Jewish lad means nothing – except the abstract inhumanity of wiping out an innocent child?

Seibert: No, this is not what I want to say.¹⁴⁴

Musmanno: Well, let us suppose a situation where your superior officer tells you that the situation is such that the only way we can get out of it is for you to shoot your parents. Now, that’s an order....are you going to live up to [it] or not?¹⁴⁵

According to Musmanno’s recollection of events, Seibert became quite “nervous” and agitated by this question. His dilemma was that he would either have to admit he was inhuman enough to kill his parents or he would have to abandon his defense that he had no choice but to follow superior orders. He looked to his attorney, Dr. Hans Gawlik, for direction. Seeing the damage such a question could do to Seibert’s defense, and undoubtedly “disturbed” by the question, the German attorney immediately stood-up and objected, noting that under German and American criminal procedure, such hypothetical questions are

¹⁴³ Musmanno, *Eichmann Kommandos*, 128.

¹⁴⁴ Exchange between Michael Musmanno and Willy Seibert, 19 November 1947, in *Trial*, roll 4, 2670-2671.

¹⁴⁵ *Ibid.*, 2671.

inadmissible.¹⁴⁶ Certainly Musmanno knew that Gawlik was right, but nonetheless demanded that the defense attorney “prove” his objection. Gawlik told the presiding judge he would get back to him when he located the evidence. Gawlik quickly left the courtroom and came back with a copy of *Wharton’s Law* – an American legal text the defense attorneys referred to – which stated that hypothetical and speculative questions can only be asked if they are based on the facts of the case. Not one to be outsmarted, and clearly exercising his authority, Musmanno disagreed with Gawlik’s interpretation of relevant questioning; clearly, in Musmanno’s view, knowing the extent to which a defendant would go to follow an order went to the heart of the defense. If the prosecution was unable to test the defense claims, then he would, even if the way in which he did so was procedurally incorrect. Moreover, men’s lives were on the line and he wanted to make certain that he had all of the “facts” in the case before he rendered judgment. In the end, Musmanno overruled Gawlik, but he did give the defense attorney the right to object. This was small comfort for the defense, whose entire case rested on the issue of compulsion to superior orders.¹⁴⁷ Seibert’s reprieve was short-lived, and he was again instructed to answer the question, “would he kill his parents if ordered to do so?” Seibert refused to answer and the presiding judge decided to give him until morning to think about it. After Musmanno had adjourned for the day, he recalled that the courtroom was “abuzz” with speculation: “would [Seibert] be better off by hypothetically slaying his mother and father or by outrightly disgracing his lawyer,” who had introduced the subject of superior orders in the first place.¹⁴⁸

¹⁴⁶ Musmanno, *Eichmann Kommandos*, 129.

¹⁴⁷ Exchange between Michael A. Musmanno and Hans Gawlik, 18 November 1947, in *Trial*, roll 4, 2611.

¹⁴⁸ Musmanno, *Eichmann Kommandos*, 132.

The next morning Musmanno remembered that the courtroom was full to overflowing with spectators interested in Seibert's moral dilemma.¹⁴⁹ Musmanno gave Seibert a moment to compose himself and repeated the question. Would he kill his parents if ordered to do so? The courtroom was silent, Seibert, looking worn-out and unable to respond as unequivocally as Ohlendorf, responded, "no, Mr. President, I would not do so."¹⁵⁰

Musmanno: Then there are some orders which are issued by the chief (sic) of state which may be disobeyed?

Seibert: It is inhuman – to ask a son to shoot his parents...I would not have obeyed such an order.

Musmanno: Now, suppose the order came down for you to shoot the parents of someone else, let us say, a Jew and his wife...it is established beyond any doubt that [they] have not committed any crime...the only thing that is established is that they are Jews and you have this order...would you shoot the parents?

Seibert: Your honor, I would not shoot these parents.

Musmanno: Yes, so therefore, this order issued by the Fuehrer to kill all Jews indiscriminately did not have to be obeyed by the German soldiers in your estimation.¹⁵¹

With Seibert's admission Musmanno was satisfied: some orders could be disobeyed. Years later recounting the exchange with Seibert he explained the absurdity of arguing superior orders. He wrote that , "under such a doctrine, a sergeant could order the corporal to shoot the lieutenant, the lieutenant could direct the sergeant to shoot the captain, the captain could command the lieutenant to shoot the colonel and in each instance the executioner would be blameless."¹⁵² Carrying his logic to the extreme, he noted that Seibert's argument meant that, "if a soldier is required...to put into effect the most patently unjust order, his superior officer

¹⁴⁹ *Ibid.*, 132-133.

¹⁵⁰ Testimony of Willy Seibert, 19 November 1947, in *Trial*, roll 4, 2676.

¹⁵¹ Exchange between Michael Musmanno and Willy Seibert, 20 November 1947, in *ibid.*, roll 4, 2676.

¹⁵² Musmanno, *Eichmann Kommandos*, 134.

could order him to shoot himself and the soldier would have to turn his gun on himself, or otherwise be shot for disobeying orders!”¹⁵³ Clearly, Musmanno succeeded in proving the weakness of the defense of compulsion to superior orders, albeit by using questionable procedure, particularly the use of hypothetical situations.

As he had with Ohlendorf and Seibert, Musmanno tested each and every defendant on the witness stand. And, as should be expected, some defendants such as Dr. Franz Six, former leader of *Vorkommando* Moscow, refused to submit to his authority, whereas others simply buckled under his continued pressure. This was the case with Walter Blume, former head of *Sonderkommando* 7a. Blume tended to be much more forthcoming on the witness stand than many of the other defendants, acknowledging that he carried out his orders, although perhaps not to the full extent that was expected of him. Blume also admitted that one of the reasons he did so was because of his faith in Hitler. Musmanno found this explanation perplexing and probed deeper.

Musmanno: ...according to your statement, you did not execute all Jews?

Blume: No.

Musmanno: So therefore, you did not follow the Fuehrer-Decree?

Blume: No, not to that extent.

Musmanno: You were very fond of Hitler at the time weren't you?

Blume: Yes, your Honor.

Musmanno: You adored Hitler?

Blume: Yes, your Honor.

Musmanno: Then, why did you not follow out his order which was very expressly given to you?

...

Blume: ...in this particular moment I deviated from the path of my duty.

Musmanno: You lied to your adored leader?...By your actions, not by words...but by your actions you told a lie, an untruth, to your adored leader, Adolf Hitler...answer that!

Blume: One can formulate it so, your Honor.

...

Musmanno: How do you feel about Adolf Hitler today? Do you still think he was the

¹⁵³ *Ibid.*

perfect man you believed him to be?

Blume: The results speak against it, your Honor.¹⁵⁴

Musmanno later recalled that Blume carried out the murderous orders of Hitler because he foolishly and naively “submitted his will” to the *Führer* and, in doing so, the presiding judge concluded, Blume “wiped out the defense of [compulsion] to superior orders.”¹⁵⁵

Even though Musmanno frequently and enthusiastically questioned defendants for more information, he was also unwaveringly fair and as such he made a practice of assisting the defense attorneys with their jobs whenever he could. From the beginning of the trial Musmanno felt it was his duty to mentor the inexperienced German attorneys with their cases. For example, on the very first day of the trial, the presiding judge alerted the defense that Ralph Wartenberg, the main interrogator employed by the Office of Chief of Counsel for the prosecution of War Criminals, would be made available for cross-examination and, he suggested, they should take advantage of this opportunity to question him as they might not have another opportunity.¹⁵⁶ In another instance, Musmanno even appeared to take the side of the defense when he got into a heated exchange with prosecutor James Heath whose job it was to cross examine Ohlendorf. Heath was vainly attempting to establish Ohlendorf’s state of mind toward the *Führerbefehl* and the murder of Russian Jews. Specifically Heath demanded to know why Ohlendorf never questioned the murderous order. Musmanno, sounding somewhat irritated, interjected explaining to Heath that the answer was simple: Ohlendorf did not object to the order because he believed the order came from Hitler and was therefore

¹⁵⁴ Exchange between Michael Musmanno and Walter Blume, 4 November 1947, in *Trial*, roll 3, 1860-1863.

¹⁵⁵ Musmanno, *Eichmann Kommandos*, 166-167.

¹⁵⁶ Musmanno to defense attorneys, 6 October 1947, in *Trial*, roll 2, 290-291.

legal.¹⁵⁷ Musmanno objected to the manner in which Heath was questioning Ohlendorf, who he believed was the model defendant always “clear and forthright” in his answers.¹⁵⁸

Musmanno also stepped in when he believed that the defense should have objected to the way their defendants were being cross examined by the prosecution. On many occasions throughout the trial, Musmanno would counsel defense attorneys when he felt they needed assistance. This advice always came unsolicited and the inexperienced lawyers seemed to appreciate it. In several instances Musmanno came to the aid of Dr. Hans Gawlik, the attorney for Erich Naumann, the former leader of *Einsatzgruppe B*. Gawlik’s defense of Naumann rested on the argument that the former commander neither participated in nor ordered the murder of any civilians while in the Soviet Union. In the middle of Naumann’s direct examination, Gawlik asserted that his defense was based on a precedent set in the Milch case which stated that knowledge of a crime alone was not sufficient to prove guilt. He explained to the court that according to precedent, “the defendant must either have participated in...or he must have given an order to kill, or he must have had the possibility to intervene in this order,” to be found guilty. Musmanno, while not denying Gawlik’s defense, interrupted the attorney to explain that his speech was more of a closing argument than a direct defense for his client. Gawlik thanked the presiding judge and moved on.¹⁵⁹ In another instance in which Gawlik was involved, Musmanno made light of the situation. Willy Seibert, another client of Gawlik’s, was being cross examined by Peter Walton. Walton asked Seibert to look at Document No. 3422. Walton then asked Seibert to indicate when he found his place. Seibert

¹⁵⁷ Exchange between Musmanno and Heath, 14 October 1947, in *Trial*, roll 2, 635-637.

¹⁵⁸ Musmanno to the court, 14 October 1947, in *ibid.*, 628-629.

¹⁵⁹ Hans Gawlik to the court, 16 October 1947, in *ibid.*, 821-822.

quickly located the document. Just as Seibert said this, Gawlik jumped from his seat: "I object to this question, your Honor," he told the court. Musmanno replied, "He hasn't put a question yet. What are you objecting to?" To which Gawlik responded, "I object to any question that might refer to this document." In his usual humorous way, Musmanno retorted, "you say you object to any question he might put regarding this document. Suppose the question shows that your client is innocent? Would you object to that?" Gawlik acknowledged that perhaps he should "wait" before he objects.¹⁶⁰

During the direct testimony of Erwin Schulz (Commander of *Einsatzkommando 5*), Musmanno had to prevent one assistant defense attorney, Dr. Oskar Ficht, from making the case even worse for his client Walter Haensch, the former head of *Sonderkommando 4b*. Ficht had asked one defendant, Erwin Schulz, whether or not Haensch was an exemplary employee and carried out his job well. Musmanno felt compelled to point out to Ficht that when he asked Erwin Schulz how well the defendant Haensch performed in his work "we are not talking about a street car conductor (sic), we are talking about someone who is charged with the execution of an order which involved the killing of human beings. Now, if you ask him 'if [Haensch] was conscientious in the discharge of his duty, if he did it well,' and this witness [Erwin Schultz] replies, 'yes, he did it well, and sometimes even did better than was expected for him,' and if we are thinking of that order we must assume that he killed more people than the order required of him to kill, so I merely want to call to your attention that when you use generic language of that kind that is capable of an interpretation not so favorable to your client."¹⁶¹ Ficht seemed appreciative of Musmanno's comments.

¹⁶⁰ Exchange between Hans Gawlik and Michael Musmanno, 20 November 1947, in *Trial*, roll 4, 2684-2685.

¹⁶¹ Michael Musmanno to Oskar Ficht, 20 October 1947, in *ibid.*, roll 2, 1043.

Musmanno's behaviour in the courtroom did not always reflect the grave nature of the trial and the seriousness of the charges against the defendants. Indeed, as we saw with his writing earlier in this chapter, he frequently used sarcasm and made jokes to lighten the moment in the courtroom. This was the case when Heinz Jost, former Commander of *Einsatzgruppe A* and one of the most reviled of all the *Einsatzgruppen* leaders, took the stand. When Jost began to speak Musmanno observed ironically that,

since we have been sitting here, our greatest difficulty with witnesses has been that they speak too rapidly. Now this present defendant is a refreshing contradiction to that, in that he speaks slowly, and I am just hoping that we don't all go to sleep, because of the very leisurely manner he is testifying. Perhaps he might speed it up a little bit.¹⁶²

During the testimony of Franz Six, Musmanno displayed his usual tenacity when questioning a defendant, but he also found room for some humour, which appeared to be lost on the German-speaking defendant. The former SS-Brigadier General had testified that he had committed no crimes in the Soviet Union, rather he stated he was a university professor, sent to Russia to study archives, protect churches and to instill culture in the local population. But never had he received or carried out the *Führerbefehl* to murder Soviet Jews. To test Six's credibility, Musmanno asked him what he would have done had he received the order to murder Jews. Like Seibert before him, he initially refused to answer the question, but then thought better of it and told the presiding judge he would need additional time to consider his answer. Musmanno gave him three days to think it over. When Six took the stand again, he told the court that he could only answer a hypothetical question with a hypothetical answer. He could answer the question as a professor, a philosopher and as a soldier, but he could not answer as a defendant. To which Musmanno dryly commented, "your name may be Six, but you are here only as one man. You will reply directly." Six, oblivious of the pun, stated that

¹⁶² Musmanno to the Court, 20 October 1947, in *ibid.*, 1140.

hypothetically, if given the order he would refuse to obey it, an answer which immediately threw the other defendants and their counsel into an uproar, since their defense was predicated on the basis of superior orders.¹⁶³

Despite these humorous punctuations at trial, Musmanno was acutely aware of the seriousness of the crimes. He felt a tremendous burden in his job as presiding judge and wanted to be absolutely certain that he had all the facts of the case. This was the main reason he spent so much time cross examining each defendant. Had he not done so, he would not have been able to formulate a fair judgment. Thus, as each defendant took the stand, Musmanno made a point of questioning his testimony and drawing his own conclusions. And, after nearly six months of trial testimony, he felt satisfied with the facts established at trial.

On February 13, 1948, the prosecution presented its closing arguments and the defendants made their final pleas to the court. This practice was not part of Anglo-American law, but defendants were granted this right at Nuremberg because it conformed with continental and German trial procedure and as such was incorporated into Control Council Law No. 10. All of the defendants except Biberstein, Braune, Sandberger and Strauch availed themselves of the opportunity which, on the whole, was notable only for its banality and as such did not add much to the defense. The most eloquent words were, as usual spoken by Ohlendorf who addressed the court first. The presiding judge remembered thinking, he hoped that the “erudite and profound” lead defendant would speak longer, so captivating was his speech, although ultimately he admitted it too was “not very convincing” as a plea for innocence. Closing remarks aside, Musmanno was oddly appreciative of Ohlendorf’s public

¹⁶³ Excerpt from trial, undated, Nuremberg Correspondence file 1445, MMP. See also, exchange between Michael Musmanno and Franz Six, 24 and 27 October 1947, in *Trial*, roll 3, 1369-1415.

recognition that his trial had been a fair one.¹⁶⁴ Once all of the defendants had made their final pleas, the advocacy portion of the trial was over and the court adjourned so that the judges could confer.

5. Conclusion

Upon reflection and after reviewing the evidence there can be no question that Musmanno had an enormous impact on, and contributed significantly to, the *Einsatzgruppen* trial. His background, particularly his career as a defense attorney, helped shape his world view. His strong work ethic and natural showmanship, coupled with an unquenchable ego ensured that Musmanno, one of three judges at the *Einsatzgruppen* Trial, would dominate the proceedings. This of course was an anomaly at Nuremberg where in the other trials at least two of the three judges took active parts in the proceedings. In some instances, dissenting opinions were registered. At the *Einsatzgruppen* trial however, the proceedings, from beginning to end were the domain of one man.

Initially uncomfortable with the gruesome evidence, as the trial progressed Musmanno became increasingly more at ease interjecting his presence in the trial. He openly admitted that he was quite overwhelmed by the nature of the charges and the evidence and as such it took him a bit of time to get acquainted with the facts of the case. Once he had gained confidence and knowledge and as the trial progressed, he felt compelled to question witnesses

¹⁶⁴ Musmanno, *Eichmann Kommandos*, 252-253. Henry Lea, one of the interpreters at the trial remembered Ohlendorf's closing statement differently: he described it as "absolutely hair-raising." See Letter from Henry Lea to Benjamin B. Ferencz, 24 November 1989, United States Holocaust Memorial Museum, RG 12.000 Benjamin B. Ferencz Collection 1919-1994, Drawer 24 War Crimes Trials, box 2, folder Nuremberg Supplementary Materials.

repeatedly. And, as the months passed, Musmanno made a practice of directly questioning the witnesses, frequently his questions were far more grueling and provocative than those asked by the cross examiner. In doing this, he unwittingly provided for the historical record testimony from mass-murderers, that otherwise would have gone unrecorded, information which helps us today reconstruct the motivation and mind-set of some of the most notorious perpetrators of the Nazi regime.

Perhaps Musmanno's greatest contribution was in his ability to carry-out as fair a trial as possible under the circumstances. His own experiences as a defense attorney leant him a measure of impartiality that, under other circumstances and with another justice presiding, might not have been the case. After all, the documentary evidence in the trial was so incriminating that a man of lesser judicial ethics might well have declared the defendants guilty before the trial even got underway. Of course, this was not Musmanno's style. His personality and legal ethic was such that he insisted on actively participating in all aspects of the trial. Because of this he dissected every aspect of defense arguments and in doing so shaped the course of the trial, as well as the historical record. In the next chapter we will see how Musmanno contributed to and affected the outcome of the trial, especially the judgment.

Chapter 8 Judgment

1. Introduction

In his *Final Report to the Secretary of the Army* in 1949, Telford Taylor noted that with the conclusion of each Subsequent Trial, “sentences became progressively lighter.”¹ This was not the case with the *Einsatzgruppen* trial however, where two-thirds of the defendants received death sentences, one third were sentenced to lengthy prison terms, and only one individual was released with time served. Yet, in the same report Taylor also noted that “the conclusions and reasoning of the judgments [in the Subsequent Trials] are...far more important than the sentences.”² In Taylor’s view, the written judgments were particularly important for the future development of international law.³ In other words, the opinion and judgment of the tribunal was meant to have a lasting impact both legally and historically. This chapter addresses both of these issues; how, why and with what evidence the defendants of the *Einsatzgruppen* trial were adjudicated and the reasoning behind the tribunal’s harsh sentences.⁴

Although all three judges – Richard Dixon, John Speight and Michael Musmanno –

¹ Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington, 1949), 92.

² *Ibid.*, 90-91 and 93.

³ *Ibid.*, 93.

⁴ To my knowledge, no one has attempted to analyze the judgment of this trial.

were assigned the task of evaluating the evidence in the so-called *Einsatzgruppen* trial, Case 9 of the Subsequent Nuremberg Proceedings, ultimately it was Musmanno who took on the bulk of the work, directing the proceedings, crafting the and passing the sentences.⁵ As we saw in the last chapter, Musmanno was the most important judicial figure at the *Einsatzgruppen* trial. Certainly he was also the most important of the three judges in terms of evaluating the evidence and sentencing the defendants. The , what one observer gratuitously called “a brilliant contribution to international law,” was written exclusively by him.⁶ It is a reasonably lengthy legal document containing the most pertinent legal arguments relating to the trial. It also lays out the criminal history of the *Einsatzgruppen* and the significance of their acts, and Musmanno’s opinion on the issue of “superior orders” – one of the major defense arguments – helped to create precedent for international law. The also attempts to clarify the nature of the charge of “crimes against humanity,” as well as providing examples of the crimes committed by these men, all of which are written in Musmanno’s dramatic style.

How did the tribunal judge the evidence against these men, and how did they reach their decision concerning sentencing? The tribunal found the prosecution’s evidence

⁵ While Musmanno was the dominant judge of the trial, Speight and Dixon did participate in the as mandated under United States Military Ordinance No.7, Article 2(h) which states that “decisions and judgments, including convictions and sentences, shall be by majority vote of the members.” See “Military Ordinance No.7: Organization and Powers of Certain Military Tribunals,” quoted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No.10*, vol.15 (Washington, 1951), xxiii-xxiv.

⁶ Letter from James G. Fulton to General Lucius D. Clay, 13 September 1948 in General Lucius D. Clay file 1138, the Personal Papers of Michael Angelo Musmanno, Duquesne University, Gumberg Library, Pittsburgh, Pennsylvania (from here forward document, file, MMP).

overwhelming. Excerpts from the *Einsatzgruppen* reports, written by the Nazis themselves, the defendants' SS personnel records, their pre-trial interrogations and affidavits, coupled with their testimony at trial was enough to convince the tribunal of the defendants' guilt. Such evidence made for a trial in which "the incredible...bec[a]me the norm."⁷ In terms of sentencing, the *Einsatzgruppen* trial produced more death sentences than any other Nuremberg trial including the IMT, and this even though Musmanno strongly and actively opposed the death penalty. It may seem contradictory and odd that he could then sentence fourteen of the *Einsatzgruppen* leaders to death by hanging at Nuremberg, but he did. And, as shall be shown, Musmanno did so with the certainty that these fourteen defendants were guilty of the mass murders with which they had been charged. By the end of the trial, in spite of the submission of more than five hundred affidavits attesting to the good character of the defendants, Musmanno was convinced, beyond any doubt, that twenty-one of the twenty-two men charged with the gravest of crimes, were indeed guilty and needed to be punished to the full extent of the law.⁸ He outlined Tribunal II's position in a two hundred and twenty-eight page , arranged in four sections. The first section of the is devoted almost entirely to an explanation of the crimes of the defendants, including numerous examples taken directly from the Operational Situation Reports of the *Einsatzgruppen*. The second portion of the

⁷ Opinion and Judgment of the Tribunal, 8 April 1948, in National Archives Microfilm Publication M895, *The United States of America v Otto Ohlendorf et al.*, 38 rolls, roll 7, 139 (from here forward simply Judgment, page).

⁸ Although the ruling helped Musmanno formulate his , the submission of the affidavits left him wondering "how and why such well-schooled men should have strayed so far and so completely from the teaching of their childhood which embraced reverence for the biblical virtues of honesty, charity, and cleanliness of spirit. Did they completely forget those teachings? Were they no longer aware of moral values?" See *idem*, *The Eichmann Kommandos* (London, 1961), 246.

opinion and is the tribunal's assessment of defense arguments. The penultimate section deals with two issues: first, the nature of the charges brought against the defendants, and second, an attempt by Musmanno to comprehend the defendant's motives for these crimes. The fourth and final section is exclusively concerned with individual judgments. What follows is an analysis of the judgment of Tribunal II against twenty-two leaders of the *Einsatzgruppen*.

2. Identifying and Recording the Crimes of the Einsatzgruppen Leadership

As presiding judge of the tribunal and probably the most well versed in the facts and evidence, and certainly the judge most involved in the case, Musmanno undertook the task of writing the opinion and judgment in behalf of the tribunal. While the document was not solely the opinion of Musmanno, for the judgment required unanimity under *Control Council Law No. 10*; its authorship, language and reasoning certainly have Musmanno's stamp all over them. As Musmanno had told Benjamin Ferencz: he had "poured [his] heart" into the document.⁹ To come to consensus on the guilt or innocence of the twenty-two surviving defendants, the three judges worked together every day for nearly a month to review the 6,895 pages of trial transcript and the 984 documents entered into evidence.¹⁰ Musmanno viewed the job solemnly, never taking lightly the task of passing judgment on

⁹ Letter from Michael A. Musmanno to Benjamin B. Ferencz, 13 April 1948, in United States Holocaust Memorial Museum, RG 12.000 Benjamin B. Ferencz Collection 1919-1994, Drawer 11 Biographical Material, box 1, folder C Biographical Material Job Related Personnel File 1946-1955.

¹⁰ Musmanno, *Eichmann Kommandos*, 254.

the “life and liberty” of other men.¹¹ He was also acutely aware of the historic nature of the judgment, not only as precedent for international law and a warning to future dictators, but also as an historical document which would serve to illustrate for the German people the true “character of those who were their leaders.”¹²

With these issues in mind, the opinion and judgment begins with a statement about the nature of the charges against the defendants and a recounting of the crimes they committed. As it explained, “the biggest murder trial in history” saw the defendants charged with the murder of more than one million human beings.¹³ A crime of such magnitude and “inconceivable savagery,” observed Musmanno in the opening pages of the judgment, is simply unbelievable and therefore the

mind rebels against its own thought image and the imagination staggers in the contemplation of a human degradation beyond the power of language to adequately portray. [And because] no human mind can grasp the enormity of one (sic) million deaths...one must visualize not one million people but only ten persons – men, women and children, perhaps all of one family – falling before the executioners’ guns. If one million is divided by ten, this scene must happen one hundred thousand times, and as one visualizes the repetitious horror, one begins to understand the meaning of the Prosecution’s words: ‘It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenseless men, women and children.’¹⁴

For these “inconceivable” crimes the defendants were not answering to any particular country, but to all of humanity, and therefore, as Musmanno wrote, “this Opinion is of

¹¹ *Ibid.*

¹² *Ibid.*, 254-255.

¹³ Judgment, 2.

¹⁴ *Ibid.*, 3-4.

necessity severe, [but] it is without bitterness.”¹⁵

The “unprecedented” and historic nature of the crimes charged at Nuremberg, particularly the crimes of the *Einsatzgruppen* leadership, led Musmanno to conclude that the judicial opinion of the tribunal must include explanations of an unusual and non-legal nature. The opinion of the tribunal should elucidate not only the circumstances that brought about these unspeakable acts, the facts on which the Nuremberg judgment is based and the reasons for which the crimes were committed, but the tribunal should also ask “what type of morality or lack of it” brought the world to its knees at the hands of the Third Reich.¹⁶ While the judgment falls short of such grandiose aims, it does offer a contribution to our understanding of what transpired on the eastern front between 1941 and 1943 and even some insight into the character, personality and motives of the defendants. In what follows the introduction, Musmanno outlined and explained the origins, tasks, goals and methods of the mobile killing units and each individual defendant’s role in these crimes as proven beyond a reasonable doubt by the evidence.

The first fifty pages of the judgment offer the reader an explanation of the crimes of the *Einsatzgruppen* leadership as the evidence and testimony revealed to the court and the section opens with a typical dramatic “Musmannoism:”

When the German Armies, without any declaration of war, crossed the Polish frontier and smashed into Russia, there moved with and behind them a unique organization known as the *Einsatzgruppen*...No writer of murder fiction, no dramatist steeped in macabre lore, can ever expect to conjure up from his imagination a plot which will

¹⁵ *Ibid.*, 117.

¹⁶ *Ibid.*, 4.

shock sensibilities as much as will the stark drama of these sinister bands.¹⁷

Following this introduction, Musmanno then went on to explain, in far less dramatic fashion, the organizational structure of the units of the *Einsatzgruppen*, their orders, and the crimes these men committed. He based this “history” on both the oral testimony of the defendants, as well as on the reports of the *Einsatzgruppen* submitted to the tribunal as evidence. Thus, while some of the descriptions are accurate, other sections, particularly those dealing with the orders of the *Einsatzgruppen*, are far less so.

As Musmanno understood it, the officer corps of the *Einsatzgruppen* came from the various paramilitary organizations of the Gestapo, SD, SS and Kripo, whereas the lower-ranking men – the troops so to speak – were recruited from the *Waffen* SS, Order Police and locally recruited police. The groups were formed, he wrote, through an agreement between the RSHA, the OKW and the OKH. Since the *Wehrmacht* and the *Einsatzgruppen* were meant to cooperate, the former would supply the latter with supplemental personnel should the need arise.¹⁸ While there is little to dispute in his recounting of the organization and structure of the mobile security and killing units, when it comes to explaining their orders, Musmanno relied almost exclusively on Ohlendorf’s version of the facts. The presiding judge accepted the lead defendant’s contention that the *Einsatzgruppen* leaders knew before they were deployed in June 1941 that their task would be to murder, “whole categories of people...without investigation, without pity, tears or remorse.” These orders, Musmanno wrote, were given to the *Einsatzgruppen* and *Kommando* leaders in Pretzsch and Dueben,

¹⁷ *Ibid.*, 5.

¹⁸ *Ibid.*, 5-6.

Saxony in May 1941, by Bruno Streckenbach head of personnel in the RSHA and were reiterated by Heydrich “later in Berlin.”¹⁹ Most importantly, the crimes these men committed, for which they are now charged, Musmanno concluded, is the direct result of the “notorious Fuehrer-Order” which in May 1941 directed the defendants to murder all Jews, Gypsies, the insane, Asiatic inferiors, communist functionaries and asocials, including women and children.²⁰ As the defendants had testified, they were not furnished with a “precise definition” of any of these groups and because of this “were authorized to take executive measures on their own responsibility” to determine who was and was not a member of one of these target groups.²¹ These presumptions about the tasks of the *Einsatzgruppen* shaped the opinion and judgment of the tribunal; all crimes committed by the defendants, as far as the tribunal was concerned, were committed because of this so-called “Führer-Order.”

Because Musmanno viewed the opinion and judgment of the tribunal not just as a legal opinion, but as an historical document as well, he went to great lengths to record for history, some of the crimes of the mobile security and killing units, as well as the way in which the victims were murdered and the tenor in which the crimes were reported.²² He

¹⁹ *Ibid.*, 6.

²⁰ *Ibid.*, 6-8. Musmanno reiterates this contention throughout the judgment, accepting as fact that the aim of the *Einsatzgruppen* was the ‘extermination’ all people falling into the categories outlined in the *Führerbefehl*. For example see *ibid.*, 27-28.

²¹ *Ibid.*, 6-7 and 8.

²² *Ibid.* Pages 9-21 of the judgment include numerous examples of the crimes of the *Einsatzgruppen* taken directly from their reports and pages 42-55 are devoted to a description of how the victims were killed.

feared that without such a record, “a shocked world” might not “believe that these things could come to pass in the twentieth century.”²³ For instance, he noted that on November 30, 1941, *Einsatzkommando 2* murdered 10,600 Jews in Riga and in two days in September, *Sonderkommando 4a* killed a record 33,771 Jews in Kiev.²⁴ All of the examples Musmanno cited came directly from the Operational Situation Reports of the *Einsatzgruppen* the prosecution had entered into evidence. He also talked at length about the pogroms the various units of the *Einsatzgruppen* instigated, the expropriation of Jewish property as well as the treatment of POWs.²⁵ This portion of the judgment is replete with examples of the crimes of the *Einsatzgruppen* units and they are frequently cited in graphic detail, an attempt by Musmanno to capture the full horror of the deeds.²⁶

More interesting than the record of the crimes, however, is Musmanno’s interpretation of the attitudes of those who perpetrated them. Here Musmanno seems to be assume that the killers and the writers were always one in the same, when they were not. Some of the Reports of the *Einsatzgruppen* were in fact compilations of information from the field reports sent to Berlin and written by administrative personnel, not the killers themselves. Perhaps this is the reason for his observation that in some of the *Einsatzgruppen* Reports the killers appeared detached from their crimes, reporting the numbers of those

²³ *Ibid.*, 9.

²⁴ *Ibid.*, 15 and 25.

²⁵ *Ibid.*, 31-35, 36-38, and 39-41

²⁶ *Ibid.*, 10-21.

murdered rather matter-of-factly and with “indifference.”²⁷ Other perpetrators, Musmanno observed, were far less ambivalent, some even complained when the victims would not submit to the will of the executioners. Still others tended to sentimentalize their work, some portrayed their murderous actions as a personal sacrifice for Germany, but the most common response Musmanno detected was how “routine” murder became for the perpetrators; the murderous tasks of the defendants had become simply, “a job.”²⁸

In this section of the judgment Musmanno also called into question the actual number of victims the defendants murdered. Today historians have not reached consensus on the issue and estimates range between three quarters of a million to just over one million Soviet Jews murdered by the units of the *Einsatzgruppen*. Whereas the indictment against the *Einsatzgruppen* leaders charged them with one million murders (based on a physical counting of the numbers recorded on the Operational Situation Reports), Musmanno believed the number of victims “went far beyond” this, perhaps as many as two million.²⁹ Musmanno’s figure of two million included not only Jews who had died as a result of open-air shootings and death by the gas vans employed on the eastern front, but he also speculated about those who had perished from disease and starvation. These victims, Musmanno noted, died as a result of Nazi ghettoization policy, and even though their numbers were not included in the meticulously kept *Einsatzgruppen* reports, these individuals were still the

²⁷ *Ibid.*, 47.

²⁸ *Ibid.*, 20, 21, 26, and 47.

²⁹ Amended Indictment, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4 (Washington, 1951, reprint New York, 1997), 13; and, Judgment, 26.

victims of the men on trial and should therefore be included in the count.³⁰ Oddly, Musmanno based his estimate on one report by the International Military Tribunal which stated that the Nazis murdered approximately six million Jews of whom “two million were killed by Einsatzgruppen and other units of the Security Police.”³¹ While the IMT may have been correct, two million Jews may very well have been killed by all of the police forces that operated in the eastern territories, Musmanno clearly misunderstood the nature of the paramilitary organizations operating there, conflating the acts of all of the various police units with those of the *Einsatzgruppen*.

Even though Musmanno took judicial notice of all the victims of the *Einsatzgruppen*, citing examples of crimes against each group, particularly striking is his emphasis on the special nature of the crimes against the Jews. Much of the early section of the judgment is taken-up describing these murders and while Musmanno did bandy about the term “genocide,” referring on one occasion to the use of the gas van as an “ultra modern” method of killing, a veritable training ground in “genocide” he wrote, he never actually defined the mass-murder of Soviet Jewry as “genocidal.”³² This should not be surprising given the

³⁰ *Ibid.*, 27-28.

³¹ *Ibid.*, 26.

³² *Ibid.*, 50. In 1944, the term genocide was coined by Raphael Lemkin to describe “the destruction of a nation or of an ethnic group.” Lemkin argued that genocide was a “new word” used “to denote an old practice in its modern development.” For a full discussion of Lemkin’s interpretation of the term see *idem*, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, 1944), 79-95. For contemporary views of the term genocide see Helen Fein, *Genocide: A Sociological Perspective* (London, 1990); Frank Chalk, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven, 1990) an *idem*, *Definitions of Genocide and Their Implications for Prediction and Prevention* (Montreal, 1988); and, Israel Charny (ed.), *Toward the Understanding and Prevention of Genocide: Proceedings of the International*

newness of the term, and the lack of precise definition furnished by the prosecution. Still, in page after page of the judgment, Musmanno brought home to the reader the fact that the task of the *Einsatzgruppen* was the complete destruction of Soviet Jewry. As Musmanno observed, no matter how much the perpetrators attempted to mask their crimes through the use of deceitful language, it was clear to him that this was “only macabre window dressing” used to disguise the murder of “all Jews,” an “insane mission of extermination” he concluded³³ Although Musmanno understood that the Jews were special targets of Nazi racial policy, he admitted that he is not entirely certain why the Nazis targeted them specifically.³⁴ He could only conclude rather lamely that “reason, with its partner Conscience, had been lost long ago in the jungle of Nazi greed and arrogance, and so Madness ruled, Hate marched, the sky reddened with the flames of destruction and the world wept – and still weeps.”³⁵

3. Assessing Defense Arguments

The subsequent section of the opinion and judgment is important as it addresses all of the defense arguments put forth during the trial among which are: lack of jurisdiction by the court; self-defense and necessity; selective prosecution; non-involvement; and most importantly, superior orders. This section requires explanation and elaboration as it not only

Conference on the Holocaust and Genocide (Boulder and London, 1984).

³³ Judgment, 13 and 51.

³⁴ *Ibid.*, 36.

³⁵ *Ibid.*, 55.

formed the basis of the defense case, but also the essence of the individual judgments which were, on the whole, straightforward.³⁶

From the very beginning of the trial, the defense had argued that Control Council Law No. 10 was not binding because one of its signatories, the Soviet Union, had also signed a treaty with Germany on August 23, 1939 agreeing to the division of Poland. The Soviet's involvement in this secret treaty tainted its objectivity, the defense had argued, and therefore, any postwar laws which it signed must be considered null and void.³⁷ But the tribunal rejected this argument, noting that Germany irrefutably launched a war of aggression against Poland, as determined by the judgment of the IMT, and that this fact may not be altered because "someone else may also have been at fault."³⁸ Furthermore, the judgment stated, the defense was "fish[ing] in troubled waters" on this issue as the crimes the defendants were charged with occurred during the war, not before, and, in any event, the Allies were not prosecuting an entire nation for these crimes, but rather individuals.³⁹ On this issue, the tribunal concluded that, "it is a fallacy of no small proportion that international obligations can apply only to the abstract legal entities called States," since "nations can act only through human beings, and when Germany signed, ratified and promulgated the Hague and Geneva Conventions, she bound each one of her subjects to their observance," and that

³⁶ *Ibid.*, 58.

³⁷ *Ibid.*, 59.

³⁸ *Ibid.*, 60.

³⁹ *Ibid.*, 60 and 61.

included the defendants charged in this case.⁴⁰

The tribunal also concluded that Control Council Law No. 10 was binding and not based on *ex post facto* law as the defense maintained. Rather, laws such as this one develop and are codified in more than written form. Law, the tribunal concluded, “may also develop effectively through custom and usage and through the application of Common Law” just as easily as through official (written) enactment.⁴¹ For instance the judgment cited the Hague Convention on Land Warfare, to which Germany was a signatory, which “universally condemns the wanton killing of non-combatants.” Given that the defendants in the *Einsatzgruppen* trial were charged with murder, the court concluded that “no one can claim with the slightest pretense at reasoning that there is any taint of *ex post facto*ism in the law of murder...it cannot be said that prior to Control Council Law No. 10 there existed no law against murder. The killing of a human being has always been a potential crime which called for explanation” even if it was deemed legal by the German *Führer*.⁴² On the issue of jurisdiction then, not only did Russia have a right, “in accordance with every recognized principle of international law,” to “participate in the formulation of Control Council Law No. 10,” but that this law represented a “significant contribution to written international law.”⁴³

One of the major defenses put forward in the Ohlendorf case, it will be recalled, was

⁴⁰ *Ibid.*, 64.

⁴¹ *Ibid.*, 62.

⁴² *Ibid.*, 62-63.

⁴³ *Ibid.*, 64.

that of putative self-defense under the condition of presumed necessity. That is, Ohlendorf and others murdered Soviet Jews because they (mistakenly) believed that the Jews posed a threat, as bearers of Bolshevism, to the very existence of Germany. They killed, in other words, preemptively to protect their state and they were, therefore, not legally responsible.⁴⁴ The tribunal found this argument so egregious that its advancement points to “the need for a further reevaluation of the sacredness of life and for emphasizing the difference between patriotism and murder.”⁴⁵ Moreover the judgment stated, the defense never proved how the Jews “were bearers of Bolshevism,” nor how “this translated into an attack on Germany.”⁴⁶ And, given that no Jewish lives were spared, even if the victim did not embrace Bolshevism, the court could only reasonably conclude that Jews were murdered not to protect Germany from the threat of Bolshevism, but “simply because” they were Jews.⁴⁷ Musmanno reckoned that the tribunal’s ruling on the issue of putative threat and necessity meant that “no longer can any individual or group of individuals commit mass murder and expect exoneration on the argument of national necessity.”⁴⁸

Another defense put forward during trial was the *tu quoque* (you did it too) argument, that the accused should be acquitted on the charge of killing non-combatants

⁴⁴ *Ibid.*, 67-68.

⁴⁵ *Ibid.*, 68.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 70.

⁴⁸ “Nuremberg Judge Comes Back to US: Musmanno Says National Need No Longer is Valid Excuse for Mass Murder,” *New York Times*, 23 May 1948, Nuremberg Clippings file 2150, MMP.

because all the belligerents involved in the war had killed civilians, particularly the United States who had wantonly bombed German cities.⁴⁹ But again, the tribunal rejected this argument, noting that the bombing of German cities such as Berlin, Dresden, Hamburg, and Cologne was in retaliation for the German bombing campaigns against London, Coventry, Rotterdam, and Warsaw. Moreover, noted Musmanno in the judgment, the tribunal found no “parallelism between an act of legitimate warfare...and the premeditated killing of all members of certain categories of the civilian population in occupied territories.”⁵⁰ Bombing a city for tactical reasons during the course of a war in which civilians were inadvertently killed is certainly tragic, he noted, but it is also an “unavoidable” part of war and certainly is not a “corollary...in fact or in law” to “entering...houses and dragging out the men, women and children and shooting them.”⁵¹ Even the incredibly destructive atomic bomb was dropped on the Japanese to “overcome military resistance,” Musmanno concluded; once the Japanese military surrendered, the bombing ceased and thus so did the killing of non-combatants.⁵² This, in contrast to the murderous actions of the *Einsatzgruppen*, which had nothing to do with the “German war effort,” could not be compared.⁵³

The third and most important of the defenses expounded at Nuremberg for those like Ohlendorf who had admitted killing, was that they had acted pursuant to military (superior)

⁴⁹ Judgment, 72.

⁵⁰ *Ibid.*, 72-73.

⁵¹ *Ibid.*, 73.

⁵² *Ibid.*

⁵³ *Ibid.*, 74.

orders, were under duress in doing so and therefore had “no will of their own.”⁵⁴ As has been illustrated throughout this work, Musmanno in particular did not find this a convincing argument. After questioning all of the defendants on this issue, a good number admitted there were circumstances under which they would not obey orders, and it was only Ohlendorf who maintained the fiction that he would shoot his sister if ordered to do so. Throughout the trial Musmanno believed he had succeeded in demonstrating, beyond a reasonable doubt, that even soldiers are “reasoning agents” and not “automatons.”⁵⁵ His opinion was reflected in the judgment. Indeed, the defendants had a choice in carrying out their orders, especially since the orders were “non-military” in nature.⁵⁶

In line with the superior orders defense, the tribunal also concluded that the *Führerbefehl*, which the tribunal implicitly accepted as fact, was manifestly illegal and that the defendants should have realized this, regardless of how much propaganda they had been subjected to. Musmanno illustrated this point through one of his characteristic analogies. He substituted the word “Jewish” for “grey-eyed people” and noted that the “analogy is unassailable:” had the defendants been ordered to murder all grey-eyed people instead of the Jews, they would have “balked” at the order, undoubtedly finding it not only illegal, but immoral as well.⁵⁷ The fact is, Musmanno wrote, according to Nazi ideology “it was all a

⁵⁴ *Ibid.*, 77.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, 78.

⁵⁷ *Ibid.*, 83-84.

matter of blood and nothing could save the person with Hebrew arteries.”⁵⁸ That said, Musmanno also concluded that the defendants knew that the *Führerbefehl* was illegal. His deduction came as the result of the testimony of Paul Blobel who explained his attempts to eradicate all “incriminating evidence of the [illegal] killings, by dynamiting mass graves on the eastern front,” evidence, Musmanno believed, of Blobel’s awareness, indeed of the regimes awareness that the murders they committed were illegal.⁵⁹

The tribunal also ruled that even though the defendants knew their actions were criminal, they could not be held legally responsible if it could be shown that by not carrying out their orders they would have suffered “serious harm.” In Musmanno’s view, this constituted duress.⁶⁰ Of course, the defense would have had to show that “the threat” was “imminent, real and inevitable,” which none of the defendants did convincingly.⁶¹ However, even if the “doer” was under duress, yet agreed with the order, then the defense of superior orders was nullified. Nor was it enough to “mentally rebel at the time the order is received” rather the “doer” had to be “constant” in his “opposition” to the order. If he even once “acquiesced” to the order then “the defense of Superior Orders [was] closed to him.”⁶² To this end, the tribunal found that the defendants were neither under a real nor imminent threat when they committed their crimes. As Ohlendorf had testified, he “sent some [men] back to

⁵⁸ *Ibid.*, 87.

⁵⁹ *Ibid.*, 89.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, 89-90.

⁶² *Ibid.*, 91.

Germany” who could not reconcile their inner consciences with the *Führerbefehl*.

Ohlendorf’s claim was also confirmed by the witness Albert Hartl who had worked with *Einsatzgruppe B*, as well as inadvertently by many defendants who had opposed other policies of the Third Reich but who, in doing so, had not been punished.⁶³

Moreover, Musmanno noted, it was not enough to say that you inwardly disagreed with the order, but did nothing to evade it. “Exculpation is not so easy as that...no one can shrug off so appalling a moral responsibility with the statement that there was no point in trying.”⁶⁴ The tribunal could only conclude that in making no attempts to withdraw from their tasks, the defendants either endorsed the killings or they were motivated by racial antipathy, or by a desire to gain acceptance from “comrades,” or to earn a “promotion.”⁶⁵ The tribunal also rejected the argument that they did nothing because “it would have been useless to avoid the order,” because someone else would have done the task anyway, because “no defendant knows what his successor would have done,” Musmanno reasoned.⁶⁶

The tribunal also rejected the argument that the defendants were not guilty by reason of non-involvement in the crime, that their acts were reprisal shootings and therefore not a crime, and that those they killed were deemed, after lengthy investigations, partisans. As far as the tribunal could tell there was absolutely no evidence that any investigations whatsoever

⁶³ *Ibid.*, 92 and 118-119.

⁶⁴ *Ibid.*, 92-93.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, 96.

took place before an execution.⁶⁷ In fact, the tribunal found that many of the so-called investigations were actually inquisitions in which the defendant was attempting to gain more information about potential victims and their whereabouts.⁶⁸ On the issue of partisan warfare, the tribunal ruled that while “many of the defendants seem to assume that by merely characterizing a person as a partisan he may be shot out of hand,” but under the rules of international law, if partisans are identified they are “entitled to be protected as combatants.”⁶⁹ Finally on the issue of reprisal shootings, the tribunal found that it would have to be shown that the enemy had behaved “illegally” and that reprisal shootings could not “be disproportionate to the wrong for which they are to retaliate.”⁷⁰ But the tribunal found that the execution of, for example, 2,100 innocent people for the murder of twenty-one Germans was not only disproportionate, but downright “savage and inhuman.”⁷¹

4. Evaluating the Charges

The opinion and judgment of the tribunal of the *Einsatzgruppen* trial did not offer anything new in terms of its interpretation of “war crimes;” rather, the tribunal merely reiterated the findings of the IMT.⁷² But in its application of the crime of “membership in

⁶⁷ Michael Musmanno, Notes to Himself, Memoranda and Notes Nuremberg file 247, MMP.

⁶⁸ Judgment, 101-102.

⁶⁹ *Ibid.*, 105.

⁷⁰ *Ibid.*, 106-107.

⁷¹ *Ibid.*, 107.

⁷² *Ibid.*, 109-111.

organizations declared criminal by the IMT” guilt was assumed if it could be shown that the defendant had been a member of an organization the IMT had declared criminal and that the defendant had willingly joined that organization. Where the tribunal made a substantive contribution was in its clarification of what constituted “crimes against humanity.”⁷³ In the case of the IMT trial, the London Charter had severely limited crimes against humanity to acts “committed in the execution of or in connection with crimes against peace and war crimes.”⁷⁴ But under Control Council Law No. 10, this limitation was removed, allowing the tribunal “jurisdiction to try all crimes against humanity,” whether they were committed during the war or independently thereof.⁷⁵

The tribunal also attempted to define humanity, not as a specific ethnic, racial or religious group, but literally as all peoples, of all countries, regardless of nationality or geographic boundaries. As Musmanno put it, “humanity is man itself.”⁷⁶ Furthermore the tribunal ruled that crimes against humanity were “acts committed in the course of wholesale and systematic violation of life and liberty,” and as such came under international jurisdiction, especially when the state involved in these crimes, for whatever reason, was “unable or ha[d] refused to halt the crimes and punish the criminals.”⁷⁷ Finally, the tribunal

⁷³ On the issue of Nuremberg’s contribution to developing precedence for “crimes against humanity” see Matthew Lippman, “The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany,” *Indiana International and Comparative Law Review* 1:3 (1992), 90-99.

⁷⁴ Judgment, 114-115.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 113-114.

⁷⁷ *Ibid.*, 114.

concluded that while Nuremberg represented the first time “international tribunals have adjudicated crimes against humanity as an international offense,” this was by no means to suggest that the crime was new. Man had the right, indeed, the obligation to “maintain a tribunal [which] holds inviolable the Law of Humanity, and, by doing so, preserve the human race itself.”⁷⁸ Foreshadowing future international legal efforts, the tribunal finally ruled that “crimes against humanity” have no national jurisdiction and as such everyone must work together to build “a tower of justice, a tower to which the persecuted and the downtrodden of all lands, all races and all creeds may repair.” Nuremberg, Musmanno wrote, is the foundation of that “tower” in the “Law of Humanity.”⁷⁹

5. Motivation of the Defendants

In the penultimate section of the opinion and judgment, Musmanno sought to understand and elucidate how well-educated men, who were described in hundreds of affidavits as honest, truth-loving, friendly and good-natured, could “willingly” and “enthusiastically” commit such heinous crimes against defenseless civilians.⁸⁰ One explanation offered came from the defendants themselves. They argued, as have some psychologists, that they could not resist Hitler’s will, they were completely captivated by their leader’s charisma. Indeed, at trial some still expressed their reverence and adoration for the *Führer*. But Musmanno was not entirely convinced by this argument, noting that not all

⁷⁸ *Ibid.*, 115-116.

⁷⁹ *Ibid.*, 116.

⁸⁰ *Ibid.*, 125.

Germans followed Hitler. He wrote that,

There were people who could resist him, or at least refused to be a party to his monstrous criminality. Some voluntarily left Germany rather than acknowledge him as their spiritual leader. Others opposed him and ended up in concentration camps. It is a mistake to say or assume that all the German people approved of Nazism and the crimes it fostered and committed. Had that been true, there would have been no need of Stormtroopers in the early days of the Party, and there would have been no need for concentration camps or the Gestapo, both of which institutions were inaugurated as soon as the Nazis gained control of the German state.⁸¹

Musmanno sensed that something else was at work in the minds of these men. It was not Hitler that was irresistible, but rather the promise of the outcome of a successful, extreme form of nationalism; simply put, it was the specter of the “unbridled domination” of Germany, as Musmanno phrased it, that seduced these seemingly normal men to commit such extraordinary acts of evil.⁸²

Musmanno held out little hope that through their trial the defendants would come to realize their “mistake” in following Hitler, especially since none were willing to express remorse to the court and chose instead to “rationalize” their crimes, clinging tenaciously to their view of Hitler. Noting that the defendants seemed oblivious to the role they played in “mass-murder,” Musmanno concluded that perhaps there was a link between National Socialism’s anti-religious attitude (ten of the defendants had admitted, when asked by Musmanno, that they had “formally left the church of their childhood”) and their criminal behaviour.⁸³ Extrapolating from this and acknowledging that faith has no place in the courtroom, he concluded that the correlation between godlessness and murder cannot be

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*, 121.

ignored:

When the Swastika replaced the Cross and Mein Kampf dislodged the Bible, it was inevitable that the German people were headed for disaster. When the Fuehrerprinzip took the place of the Golden Rule, Truth was crushed and the Lie ruled with an absolutism no monarch has ever known. Under the despotic regime of the Lie, prejudice supplanted justice, arrogance canceled understanding hatred superseded benevolence – and the columns of the Einsatzgruppen marched.⁸⁴

For Musmanno, the crimes of these otherwise “truth-loving” men could only be explained with a paradigm that he understood – religion. As the disciples of National Socialism, the leaders of the *Einsatzgruppen* “made it possible for a megalomaniac [such as Hitler] to achieve his ambition.”⁸⁵ The lesson in all of this horror Musmanno noted rather tritely at the end of this section, was to “do unto others as you would have them do unto you.”⁸⁶

6. Individual Judgments

In the final section of the judgment, Musmanno presented the tribunal’s adjudication of each defendant’s case. No attempt was made here to elucidate all of the crimes of these individuals; there were far too many to record, nor was all of the evidence against them presented. Rather, the individual judgments addressed the specific “charges of criminality presented in the indictment” and, in most cases, offered the reader a short summary of the defendant’s crimes, their defense of the charges, followed by an explanation of the court’s findings on guilt.⁸⁷ For a complete record of the court’s findings see Figure 8.1, Judgment,

⁸⁴ *Ibid.*, 123-124.

⁸⁵ *Ibid.*, 127.

⁸⁶ Paraphrase of Musmanno’s concluding remark, *ibid.*, 129.

⁸⁷ *Ibid.*, 133.

below. Space precludes a discussion of all of the individual judgments, instead this section will be limited to an analysis of the opinion and judgments against the three highest-ranking *Einsatzgruppe* leaders tried, Otto Ohlendorf (*Einsatzgruppe D*), Heinz Jost (*Einsatzgruppe A*) and Erich Naumann (*Einsatzgruppe B*) as well as a sample of the remaining defendants, the leaders or deputy leaders of the sub-*Kommando* units of the four parent groups, and finally the judgment against the two lowest-ranking members of the *Einsatzgruppen* indicted, Felix Rühl and Matthias Graf.

Figure 8.1

Judgment and Sentences⁸⁸

Defendant	Count One	Count Two	Count Three	Sentence
	Crimes against Humanity	War Crimes	Membership	
Biberstein, Ernst	X	X	X	Death by Hanging
Blobel, Paul	X	X	X	Death by Hanging
Blume, Walter	X	X	X	Death by Hanging
Braune, Werner	X	X	X	Death by Hanging
Fendler, Lothar	X	X	X	10 Years
Graf, Matthias	Not Guilty	Not Guilty	X	Time Served
Haensch, Walter	X	X	X	Death by Hanging
Jost, Heinz	X	X	X	Life Imprisonment
Klingelhöfer, Waldemar	X	X	X	Death by Hanging
Naumann, Erich	X	X	X	Death by Hanging
Nosske, Gustav	X	X	X	Life Imprisonment
Ohlendorf, Otto	X	X	X	Death by Hanging
Ott, Adolf	X	X	X	Death by Hanging
Radetzky, Waldemar von	X	X	X	20 Years
Rühl, Felix	Not Guilty	Not Guilty	X	10 Years
Sandberger, Martin	X	X	X	Death by Hanging
Schubert, Heinz	X	X	X	Death by Hanging
Schulz, Erwin	X	X	X	20 Years
Seibert, Willy	X	X	X	Death by Hanging
Six, Franz	X	X	X	20 Years
Steimle, Eugen	X	X	X	Death by Hanging
Strauch, Eduard	X	X	X	Death by Hanging

NB: X = Guilty

⁸⁸ *Ibid.*, 130-228.

Ohlendorf, leader of *Einsatzgruppe D* and the principal defendant in the trial, was also the first defendant the judgment dispensed with. Since Ohlendorf had admitted his crimes and the evidence against him was very straight-forward, his case was the easiest for the tribunal to adjudicate. Still, Musmanno felt the need to take judicial notice of Ohlendorf's "Dr. Jekyll and Mr. Hyde" personality. On the one hand, Musmanno noted, was the "humanitarian" Ohlendorf who studied law and economics, who wrangled with his superiors, and who opposed the dictatorial tendencies of fascism. Despite these admirable qualities, noted Musmanno, it was the other Ohlendorf, the one who admitted to and was charged with supervising the murder of 90,000 people, that the judgment was concerned with.⁸⁹ Because Ohlendorf had voluntarily admitted that he had supervised these murders, and his testimony was corroborated by documentary evidence, the tribunal concluded that the 90,000 murders had indeed taken place, and the prosecution had established them as fact. With the facts of the murders established, the defense of superior orders and necessity, which Ohlendorf advanced at trial and which were thoroughly rejected by the tribunal, did not mitigate Ohlendorf's guilt. Thus, the tribunal found Ohlendorf guilty of both "crimes against humanity" and "war crimes" (see Figure 8.1). Moreover, as the leader of *Einsatzgruppe D* and head of "Office III of the RSHA before he went to Russia," the tribunal found Ohlendorf guilty of membership in the criminal organizations the SS and SD, as outlined and "defined by the Judgment of the International Military Tribunal."⁹⁰

Whereas the tribunal had no difficulty determining Ohlendorf's guilt, other

⁸⁹ *Ibid.*, 131.

⁹⁰ *Ibid.*, 133.

defendants had been far less forthcoming about their activities and therefore the tribunal's assessment of the evidence was, of necessity, more involved and lengthy. This was the case with Heinz Jost, the former leader of *Einsatzgruppe A*. The evidence against Jost came almost exclusively from the Operational Situation Reports of the *Einsatzgruppen* as he was unwilling to admit to carrying out his orders. Although it did not name Jost directly, one of the Operational Situation Reports stated that up-to-and-including March 29, 1942, *Einsatzgruppe A* (the unit he commanded) had killed in excess of one hundred thousand people. The prosecution contended that because Jost was leader of that group beginning in March 1942, he was responsible for some of these murders. The most damning evidence the prosecution offered against Jost came from report, No. 195, dated April 24, 1942, which recorded the murder of 1,272 persons by *Einsatzgruppe A* as well as naming Jost directly in the participation of the slave labour program in White Ruthenia.⁹¹ To counter these charges Jost had offered a variety of defenses at trial. Foremost among these was his outright denial of participating in "the execution of the Führer-Order." He also claimed that he was never present during any killings, and most importantly he was not aware of the criminal purpose of the *Einsatzgruppen*.⁹² The tribunal had great difficulty believing Jost's arguments, noting that it found it "extraordinary" that *Einsatzgruppe A*, given the group's long-standing orders to murder, would suddenly cease doing so just as Jost arrived to command the unit.⁹³ Moreover, the tribunal reasoned that "the Fuehrer-Order was in effect prior to Jost's arrival

⁹¹ *Ibid.*, 134, 135, 136.

⁹² *Ibid.*, 133-134.

⁹³ *Ibid.*, 135.

at Riga” in March 1942, and since Jost had never revoked the order, he was still responsible for the acts committed by the group which he commanded.⁹⁴ In the end, the only evidence Jost could produce to prove his innocence was his own testimony; he could provide no documentary proof to counter the prosecution’s evidence as presented in the Operational Situation Reports of the *Einsatzgruppen*; therefore, he was found guilty of all three counts in the indictment.⁹⁵ But because Jost never admitted to any wrong-doing, he was the only leader of the parent organization of the *Einsatzgruppen* not to receive a death sentence.

The third of the *Einsatzgruppen* commanders to face judgment was Erich Naumann, leader of *Einsatzgruppe B*. It will be recalled that Naumann had gone to great lengths to conceal his crimes to American authorities, but had been caught trying to influence the testimony of his co-defendant and former head of *Vorkommando Moscow* of *Einsatzgruppe B*, Waldemar Klingelhöfer. Yet the tribunal ignored Naumann’s mendacity, preferring instead to rely on more concrete evidence, especially the information supplied by the Operational Situation Reports of the *Einsatzgruppen*. For instance, Musmanno noted that USSR Report No. 194, dated April 21, 1942 showed “inter alia,” that *Einsatzkommando 9*, *Sonderkommando 7a*, and *Einsatzkommando 8*, all sub-*Kommandos* of the parent organization *Einsatzgruppe B*, had killed, between March 6 and 30, a total of 3,539 persons, including Jews, partisans, Gypsies and communist functionaries, a time frame in which Naumann was unequivocally leader of group B.⁹⁶ At trial, Hans Gawlik, Naumann’s

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 137.

⁹⁶ *Ibid.*, 138-139 and USSR No. 194, 21 April 1942, in Yitzhak Arad, Shmuel Krakowski, and Shmuel Spector (eds.), *The Einsatzgruppen Reports: Selections from the*

attorney, had attempted to counter this evidence by calling into question the authenticity of the reports, arguing that the reports did not derive “from the actual observation of the author of the document.” But Naumann foiled his own defense when in the summer of 1947, during one pre-trial interrogation, he admitted that *Einsatzgruppe B* “regularly” reported their activities to Berlin, and that these reports were “prepared by my staff and submitted to me [for review] as a matter of routine.”⁹⁷

Because the evidence had demonstrated that the charges against Naumann were fact, Musmanno had to consider the defense of superior orders as a mitigating factor in Naumann’s case. Naumann had told the tribunal that he had never “transmitted” the so-called *Führerbefehl* to kill civilians because the order was already “in effect” when he arrived in the Soviet Union.⁹⁸ The reports of the *Einsatzgruppen* submitted into evidence by the prosecution proved that Naumann was fully aware of the “*Führer-Order*,” had “carried it into effect” and therefore knew that the sub-*Kommando* units of *Einsatzgruppe B* were carrying out mass murder. Most importantly, Musmanno noted in the judgment, Naumann had no moral objection to his murderous orders because, as he stated at trial, he “considered [the *Führerbefehl*] to be right.”⁹⁹ On the issue of superior orders Musmanno also had legal precedent to rely on. A year earlier Military Tribunal I had ruled in the case against Karl Brandt et al., that under the law of war a commanding officer has a duty to prevent the

Dispatches of the Nazi Death Squads’ Campaign Against the Jews in Occupied Territories of the Soviet Union July 1941-January 1943 (New York, 1989), 333-334.

⁹⁷ Judgment, 139.

⁹⁸ *Ibid*, 140.

⁹⁹ *Ibid*, 140 and 141.

criminal actions of those under his authority. This ruling especially convinced Musmanno that Naumann was guilty as charged, and like Ohlendorf should be sentenced to death by hanging.

Of the leaders of the sub-*Kommando* units of the *Einsatzgruppen*, the tribunal's findings against Franz Six, who obfuscated in his pre-trial interrogations as well as throughout the trial, and against whom the prosecution had very little direct evidence, is fairly typical. Because Six never admitted to any crime whatsoever – it will be recalled that his defense strategy was to deny everything – it made Musmanno's job of judging the evidence more difficult. At trial Six portrayed himself as a man of "moral honesty" dedicated to teaching and research, and nothing more. But Musmanno did not believe Six, and in fact found much lacking in both the former professor's defense as well as in his character.¹⁰⁰ The main issue for Musmanno was the veracity of Six's defense. Six had told the tribunal that he had harboured "no animosity" toward the Jews and in fact had great respect for two Jewish colleagues at the University of Heidelberg. But upon further inquiry Musmanno found the argument specious, especially after Musmanno had directly questioned Six about his attitude toward the Jews. Six had told the tribunal that he found the destruction of Jewish synagogues scandalous, mainly because the destruction was a spontaneous act not authorized from above, but more importantly for the judgment of the tribunal that he did not feel the same way about the execution of the *Führerbefehl* to murder innocent civilians because it was a legal order that originated from Hitler.¹⁰¹

¹⁰⁰ *Ibid.*, 146.

¹⁰¹ *Ibid.*, 147-148.

Further evidence indicated that Six was more committed to carrying out Nazi racial policy than he was willing to acknowledge at trial. Six had voluntarily joined the party in 1930 while still a graduate student at the University of Heidelberg, had joined the SA in 1932 and the SS and SD in 1935, achieving the high-rank of *Brigadeführer*. On June 20, 1941 Six was appointed head of *Vorkommando* Moscow where he remained its leader until late August.¹⁰² While this in itself was not enough to convict Six, the prosecution did have some evidence to suggest that Six was more than a mere “collector of archives” as he maintained at trial.

Operational Situation Report No. 73, of September 4, 1941, in particular detailed some of the activities of *Vorkommando* Moscow of *Einsatzgruppe* B. The report noted that Six’s *Kommando* was responsible for the murder of one-hundred forty-four persons and an additional forty-six persons of whom, thirty-eight were Jewish intellectuals residing in the Smolensk Ghetto.¹⁰³ Like other defendants, Six’s attorney attempted to show that while *Vorkommando* Moscow may very well have committed these acts, Six was not with the unit then, rather he had already returned to Germany. But Musmanno did not find this argument convincing.¹⁰⁴ More damning however, were the activities that Six participated in, namely his “scientific” work. In one speech from April 1944, Six spoke on the Jewish question in which he stated that his “solution” to the Jewish question would be their “physical elimination...which would deprive Jewry of its biological reserves.” At trial Six denied that

¹⁰² Six was actually appointed leader of *Vorkommando* Moscow in late May 1941.

¹⁰³ Judgment, 148-149 and Arad et al. (eds.), *The Einsatzgruppen Reports*, 120-125.

¹⁰⁴ Judgment, 149.

he was the author of the remarks, but he did admit to being present at the meeting.¹⁰⁵ Other circumstantial evidence included Six's promotion to *Oberführer* which his SS-Personnel Record stated was for "outstanding service in the east."¹⁰⁶ Despite the large amount of circumstantial evidence against Six, his refusal to admit to anything illegal forced Musmanno to conclude that it was impossible to determine with "scientific certitude," that Six "took an active part in the murder program," of *Vorkommando* Moscow. The tribunal did determine, however, that Six had engaged in "atrocities, offenses and inhumane acts against civilian populations," and therefore the prosecution had met its burden of proof. Thus, Six was found guilty of "crimes against humanity" and "war crimes." In addition, his SS record proved he was guilty of "membership in organizations declared criminal by the IMT" for which he received a sentence of twenty years imprisonment (see Figure 8.1).¹⁰⁷

The last two individual judgments to be examined here are those of Felix Rühl and Matthias Graf, the two lowest-ranking men of the *Einsatzgruppen* indicted. The charges against Rühl were the same as those against the other defendants, despite his noticeably lower rank, but the evidence against him was more circumstantial than direct. The most important piece was an affidavit by one "Robert Barth," allegedly a member of the same *Sonderkommando* (10b) as Rühl, who had accused the latter of acting as a temporary commander of the *Kommando* when their leader was absent.¹⁰⁸ The rules of evidence

¹⁰⁵ *Ibid.*, 150.

¹⁰⁶ *Ibid.*, 150-151.

¹⁰⁷ *Ibid.*, 151.

¹⁰⁸ *Ibid.*, 217-218.

permitted both the prosecution and defense to freely submit such affidavits to the tribunal for consideration, but if done in a criminal trial witnesses must be available for cross-examination by the other side. Given the significance of Barth's statement and the fact that the prosecution did not make him available for cross-examination by the defense, Musmanno ruled that, this "lone piece of evidence" was not substantial enough to prove, "so momentous a weight as the leadership of a kommando with its concomitant responsibility for executions," when the witness was not present in the flesh.¹⁰⁹

The rest of the evidence submitted by the prosecution against Rühl was also circumstantial. For example, USSR No. 19 and 40, dated July 11 and August 1, 1941 respectively, involved the activities of Rühl's *Kommando*, but nowhere in the document is Rühl specifically identified. Moreover, Rühl denied any and all knowledge of the executions that were recorded in these two documents. Again, Musmanno ruled that while Rühl may not have personally participated in the executions, to suggest as he had that "as a member of a unit made up of only seven officers and 85 men he could not know that killings were taking place, is to enter into a fairyland which was quite the antithesis of the demons' land in which they were operating."¹¹⁰ The real mitigating factor in Rühl's case, as far as Musmanno was concerned, was Rühl's rank, as Musmanno phrased it, "his low rank [did not] place him automatically into a position where his lack of objection [to the executions] in any way contributed to the success of any executive operation." For this reason, the tribunal could not find Rühl guilty of either count one or two of the indictment, as far as they were concerned,

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, 219.

one had to be in a position of authority to be found guilty of these crimes. Instead, the tribunal ruled that the defendant was guilty only of count three, “membership in criminal organizations (see Figure 8.1).”¹¹¹

The final case to be examined here is that of Matthias Graf, the only defendant to be released with time served. He was also the only defendant who never commanded an *Einsatz* or *Kommando* unit, nor was he a commissioned officer, rather he entered *Einsatzkommando* 6 of *Einsatzgruppe C* as a corporal eventually making his way up to master sergeant.¹¹² For some reason Musmanno believed Graf’s assertion, unlike the other defendants, that he was away from his unit for five of his thirteen months in the east. Perhaps what persuaded the presiding judge was Graf’s contention that in September 1941 he had turned down an offer to lead a sub-*Kommando* unit. Graf claimed that his refusal led to disciplinary action, but that this was never followed through on.¹¹³ While Musmanno never disputed the fact that Graf’s unit killed civilians, he found Graf’s rank of prime importance in adjudicating his case. The presiding judge reasoned that given Graf’s low-rank it was unlikely that he would have been present at officers’ meetings, or privy to information regarding the planning and preparation of the mass murders. Moreover, the evidence presented by the prosecution was, in Musmanno’s view, inadequate “proof [as] required by the principles of justice and the concomitant guarantees of correct procedure to warrant a finding of guilt beyond a reasonable doubt.” For this reason, the tribunal judged that Graf was not guilty under counts

¹¹¹ *Ibid.*, 220.

¹¹² *Ibid.*, 225.

¹¹³ *Ibid.*

one and two of the indictment (see Figure 8.1).¹¹⁴

Even on the charge of membership, the tribunal could not find him guilty. While Graf had joined the SS in 1933, he was expelled from the organization in 1936, for what he claimed was his “general indifference to the organization.”¹¹⁵ More important in Musmanno’s view, was the fact that according to the IMT’s decision, September 1, 1939 was the “crucial date” of membership in organizations they declared criminal. On this date Graf was not a member of the SS although he did rejoin the organization in 1940, the same year he joined the SD. But Graf produced evidence that he had tried to leave the SD in the spring of 1941 when he was sent to the eastern front with the *Einsatzgruppen*, apparently he had requested a transfer, but it was ultimately denied.¹¹⁶ For the tribunal, the fact that Graf had attempted to leave the SS and had evidence to prove such, was enough to demonstrate “a clear intention to disassociate himself from that organization,” thus he was found not guilty of membership in the SS. But because the SD was a voluntary organization, Musmanno noted, he was found guilty of membership in it, but with mitigating circumstances. The tribunal ruled therefore, that Graf be released with time served.¹¹⁷

In the end, even though Musmanno noted that some of the defendants might “realize the mistakes which they made,” for the vast majority of them the evidence of their criminal behaviour was so overwhelming that all the defendants, with the exception of two, were

¹¹⁴ *Ibid.*, 226.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, 227.

¹¹⁷ *Ibid.*, 228.

found to be guilty of all three counts in the indictment: “crimes against humanity,” “war crimes” and “membership in organizations declared criminal by the IMT” (see Figure 8.1).¹¹⁸ With Graf’s case the opinion and judgment was complete, the only issue that remained was sentencing the twenty-two defendants.

7. Sentences

As Musmanno, Speight and Dixon deliberated over the judgment, it became clear that they would be required to impose death sentences on some of the defendants.¹¹⁹ Although Musmanno had already made morally vexing decisions when he had helped pass judgment in the trials against Oswald Pohl and Erhard Milch, both of whom received death sentences, he was not presiding in either of these trials. As presiding judge in the *Einsatzgruppen* trial he felt more morally and spiritually taxed than he had previously. In this leadership role he had to be certain that he had done a decent job supervising a fair and impartial trial. But the issue of the death penalty, something he had inveighed against throughout his career as a defense attorney in the United States, weighed particularly heavily on his conscience; in fact, he found it an “intolerable burden.”¹²⁰ Despite all he had heard and seen in court, he still held to the view that these men were human beings and the thought of ending their lives filled him with dread. In an early draft of his memoir of the trial (which

¹¹⁸ *Ibid*, 128.

¹¹⁹ Musmanno, *Eichmann Kommandos*, 257.

¹²⁰ Letter from Musmanno to Ferencz, 13 April 1948, in United States Holocaust Memorial Museum, RG 12.000 Benjamin B. Ferencz Collection 1919-1994, Drawer 11 Biographical Material, box 1, Folder C Biographical Material Job Related Personnel File 1946-1955.

was subsequently eliminated in the published version) he admitted that he had gotten to know the defendants so well during the trial that he was no longer able to view them as “beasts,” rather he found many of them “personable individuals” and this made the task of sentencing “particularly painful.”¹²¹ He spoke especially fondly of Ohlendorf, who he regarded as possessing “courage and character [as well as] some strand of moral fortitude,” and he worried about the time when he would have “to look this man in the eye and tell him he was going to die.”¹²² As a result, Musmanno spent many sleepless nights at Nuremberg thinking over his moral dilemma. He found Nuremberg distracting however, and was unable to resolve his moral crisis.¹²³ Musmanno turned to an old and dear friend, US army chaplain, Francis B. Konieczny.

Toward the end of March 1948, once the committee work was completed and the opinion and judgment written, Musmanno asked Konieczny to assist him in finding a “retreat” where he could “dwell in meditation and prayer.”¹²⁴ The chaplain recommended a Cistercian monastery about thirty miles outside Nuremberg. Musmanno spent some weeks at the retreat under the spiritual guidance of Father Stephan Geyer and Father Carol Mesch. The latter spoke both Italian and German and thus acted as Musmanno’s interpreter in his discussions with Father Geyer. Musmanno also invited a close friend from his days in Sorrento, Lieutenant Guisepe Ercolano who served to keep him isolated from all “secular”

¹²¹ Musmanno, draft of *The Eichmann Kommandos*, 14 March 1959, 81, in Memoranda and Notes file 247, MMP.

¹²² *Ibid.*, 82.

¹²³ Noah J. Jacobs, “Justice Musmanno and the Death Sentence: An Article on the Sentencing in the Einsatzgruppen Case,” *Venerdi*, 1 September 1961, Einsatzgruppen file 1691, MMP.

¹²⁴ Musmanno, *Eichmann Kommandos*, 257-258.

affairs so that he could do some “soul-searching” before he was required to hand down sentences on twenty-two human beings.¹²⁵ It was while at the monastery that Musmanno found the necessary spirituality and peace of mind to decide on sentences for the defendants (see Figure 8.1).

It should be recalled that Musmanno had actively campaigned against the death penalty throughout his career and he felt “singularly fortunate” not to have had to pass such a sentence while on the bench in Pennsylvania.¹²⁶ He talked at great length to Geyer and Mesch, and was forever grateful to his “spiritual brothers” for aiding him in what he regarded as “very trying days.”¹²⁷ Musmanno never revealed the content of his discussions with these men, but one can surmise, from his earlier opposition to the death penalty, that their discussions concerned his feelings about the death penalty and the moral dilemma which he now faced. Musmanno never had any great difficulty in reaching a decision on the guilt or innocence of the defendants as he found that little by little as the trial progressed, the issue of guilt and innocence “resolve[d] itself.”¹²⁸ But determining sentences was another matter. That said, while in all likelihood we will never know exactly how he reached his decisions on the death penalty, there is one clue that cannot be overlooked. For each death sentence passed, one cannot help but notice that in each case the defendant in question had admitted to the crime of murder.¹²⁹ In no instance was a defendant who had refused to admit

¹²⁵ *Ibid.*, 258-259.

¹²⁶ *Ibid.*, 257.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, 146.

¹²⁹ Ohlendorf admitted to killing 90,000 people in his testimony before the IMT, but then at his own trial stated that the numbers were inflated. Blobel said the estimated 33,000

to his crimes in front of the tribunal sentenced to death. In this sense, Musmanno was true to himself and his earlier position on the death penalty as he had articulated it during the execution of Sacco and Vanzetti twenty years earlier: he abhorred the irrevocable punishment mainly because of the possibility that a defendant might be innocent. In choosing this path Musmanno may well have reached a compromise with himself. He could pass the harshest of sentences on those who had confessed their crimes, and at the same time sentence those who did not confess to murder to prison terms and still live with himself knowing that at the very worst, someone who was innocent had not lost his life forever.

With the spiritual guidance that Musmanno received he felt able to return to Nuremberg on April 10, 1948 to pass sentences on the defendants. The day before the tribunal had released its judgment on each defendant, so most were undoubtedly prepared to hear the worst. But Musmanno too wanted to prepare himself for the day, since he knew that his "sensitive spirit would suffer a horrible wrench when the moment would arrive."¹³⁰ To make his task as easy as possible, when each defendant arrived before the panel of judges via

killed at Babi Yar was an exaggeration, but admitted to killing somewhere between ten and fifteen thousand people. Blume admitted to killing people, and he even told the court that he justified the act to his men. Sandberger admitted to killing, but said that under Hitler's orders he had no choice. Braune admitted to the Simferopol massacre. Haensch admitted that he supervised executions, but that he could not remember how many. Ott told the court he carried out between eighty and one hundred executions, but said that this meant eighty to one hundred people. Naumann told the court he believed the *Führerbefehl* was correct and carried out his orders accordingly although he thought the figure of 135,000 victims was probably too high. Biberstein told the court that he went to executions to experience the sensation. Schubert admitted to supervising the execution of eight hundred people. Willy Seibert admitted to being Ohlendorf's deputy. Although his testimony was jumbled, Strauch admitted to carrying out his orders. Klingelhöfer admitted he hoped that Hitler had won the war and that he carried out his duties. Notes to himself, 1948, Material to be Read while Reading Manuscript of Biggest Murder Trial in History file 249, MMP.

¹³⁰ Musmanno, draft of *The Eichmann Kommandos*, p. 83, 14 March 1959, Memoranda and Notes file 247, MMP.

an elevator from the basement, he planned to read from a prepared text, and to keep his reading glasses on which blurred his distance vision and made objects appear “vague and undistinguishable.”¹³¹ In this way he hoped he would be able to distance himself from each individual defendant, at least enough to pass sentence on their lives. Ohlendorf was the first defendant to appear before the reconvened tribunal. But at the last moment, when the charming and charismatic Ohlendorf stepped in front of the presiding judge and looked Musmanno square in the eye, “calm and poised” and ready to accept his fate, he made Musmanno “ashamed” of his avoidance techniques. So much so in fact that the presiding judge abandoned his plan and faced the number one defendant directly and delivered his irrevocable sentence.¹³² Musmanno told Ohlendorf that he had been found guilty of all three charges and the tribunal hereby sentenced him to death by hanging. Ohlendorf accepted his fate stoically. Before he turned to leave however, he briefly bowed to the tribunal in a gesture of respect. The number one defendant then returned to the elevator that would take him back to his prison cell to await his end. Following Ohlendorf, one by one each defendant emerged from the basement of the courthouse to face the tribunal and hear his punishment. In all, out of twenty-two convicted defendants, the tribunal sentenced fourteen former *Einsatzgruppen* leaders to death by hanging, two more than had been sentenced to death at the original IMT trial and more than any other tribunal convened for the Subsequent Nuremberg Proceedings. Tribunal II further sentenced two of the defendants to life terms and five to prison terms of ten to twenty years. One defendant, Matthias Graf, who the court found had not participated in any executions and whose role in the murderous operation was

¹³¹ *Ibid.*, 86.

¹³² *Ibid.*

a minor one, was released with time served (see Figure 8.1).¹³³ With the twenty-two sentences read in open court, the *Einsatzgruppen* Trial was officially over.

8. Conclusion

If the success of a criminal proceeding is measured by the number of convictions and the severity of sentences handed down, then the *Einsatzgruppen* trial was indeed a resounding success. Twenty defendants were convicted of all three charges of the indictment, whereas two were convicted only on count three, “membership in organizations declared criminal by the IMT.” Fourteen death sentences, two life terms, five sentences ranging from ten to twenty years and one release based on time served is certainly a good indication that the tribunal found substantial evidence of the crimes for which the defendants had been indicted and charged and therefore justice was served in the trial of the *Einsatzgruppen* leadership.¹³⁴ But was the opinion and judgment of Tribunal II really a “brilliant contribution to international law” as noted at the beginning of the chapter?

Certainly Musmanno and the tribunal received high praise for their conduct of the trial, not only from American authorities and the prosecution who were all delighted with the outcome of the trial, but also from the defendants themselves, their attorneys, even the

¹³³ Judgment, 225-228.

¹³⁴ For example see Letter from General Lucius D. Clay to Michael Musmanno, 9 October 1948, Lucius D. Clay file 1138 in which Clay writes, “As you know, I have always felt it essential that the US Military Tribunals establish a high example in Germany. Without the willingness of men of your high standing to participate in the work this objective would have been impossible. I am grateful to you for your contribution which has lived up in every way to the American tradition of justice.”

German press praised the conduct of the tribunal at Nuremberg.¹³⁵ Yet, despite the interesting way the judgment was written, it did not address the one issue that could have made it remarkable. That is, it failed to confront specifically the charge of genocide.

Genocide, which the prosecution defined as “more than murder...the right of whole peoples to exist,” had only been developed as a concept three years earlier in 1944.¹³⁶ Raphael Lemkin, the Polish lawyer who coined the term, had apparently been to Nuremberg to discuss the charge as the *Einsatzgruppen* trial was to be the first time the term was legally applied to a group of individuals.¹³⁷ The problem with using the term however, was that no one – neither the defense, the prosecution nor the tribunal – attempted to define the crime. The judgment reflects this short-coming. To be sure it appears that Musmanno understood that the crimes of the *Einsatzgruppen* leadership on the eastern front were aimed at the Jewish population specifically, as on so many occasions he noted this. He also seemed to have grasped the grand scale of the atrocity. But just as the prosecution failed to define the term, so too did Musmanno. Instead he found the defendants guilty of the more traditional crime of murder or, as in the case of Ohlendorf and several of the other defendants, mass murder. Thus Musmanno and the tribunal missed an opportunity to significantly contribute to innovations in international law. The crime of genocide would remain for future tribunals to grapple with.

¹³⁵ In general the German press was extremely critical of the Subsequent Nuremberg Proceedings, but there were a number of journalists who praised the conduct of this trial as fair and impartial. For example, *Die Zeit* (26 February 1948 and 1 April 1948) and *Der Spiegel* (9 March 1948) both ran articles that noted this. In Loose Documents (Scrapbook), MMP.

¹³⁶ Benjamin Ferencz, opening statement to the court, 29 September 1947, 33.

¹³⁷ Ferencz recalled that Lemkin was in Nuremberg. Interview with Benjamin Ferencz, 24 April 1997.

Chapter 9

From Perpetrators of Genocide to Ordinary Germans: The Aftermath, 1948-1958

This inmate is somewhat reserved. He is at no time a trouble maker and endeavors to make the best of things. He seems devoted to his faith and his family; he is anxious to get released, reestablish his home, and pursue his profession. He is a model inmate and possesses the qualifications to make a good adjustment in a free society.

Robert Karicher,
Prison Director¹

If I had all the facts I now have, I might have reached a more just result.

John McCloy²

1. Introduction

The work of Tribunal II at the *Einsatzgruppen* trial officially ended with the pronouncement of sentences on April 10, 1948. For the defendants, of course, the story did not end there. Rather a new, lengthier, and far more favourable ordeal – for all but four of the convicted – was just beginning. In fact, their legal story would not be complete until 1958 when, only ten years after they originally had been sentenced, the last of the *Einsatzgruppen* leaders tried and convicted at Nuremberg was released from prison.

¹ Robert Karicher, Prison Director, Landsberg, commenting on the prisoner Ernst Biberstein WCP # 1420, 23 August 1957 in National Archives Records Administration Record Group 466 (United States High Commissioner for Germany-HICOG), Prisons Division, Administration and Medical Landsberg, box 1, Biberstein folder (from here forward NARA RG, file, box, folder).

² John J. McCloy quoted in letter from Benjamin Ferencz to Martin Gilbert, 10 November 1989, United States Holocaust Memorial Museum, Record Group 12.000 1919-1994 Benjamin B. Ferencz Papers, Drawer 24 War Crimes Trials, box 2, Folder A John J. McCloy file.

What went so horribly wrong to allow some of the most active and notorious perpetrators of the Third Reich to be released back into German society so soon after they were punished? Between 1948 and 1958 much changed. The most drastic and important transformation was that of the political landscape. Former Allies were now enemies and icy relations with the Soviet Union defined and conditioned the foreign policy of the United States. The Cold War seriously affected American policy toward Germany and, by extension, its war crimes policy there. The fallout from this shift was that the American leadership little-by-little lost its political will to carry through with the punishment of the former enemy, preferring instead potential German political support against the Soviets. Moreover, during this crucial postwar period, Germans began to regain their political confidence, especially after they won their sovereignty in 1949, and some nationalist minded groups began massive and organized campaigns to free convicted war criminals. These groups, among them German defense attorneys, the Catholic and Protestant clergy, and other “pro-German” lobbyists argued that the men who were convicted in foreign courts were not war criminals at all, but rather good German soldiers who had merely followed orders.³ These groups believed that the Subsequent Nuremberg Proceedings, as well as the American army’s military trials were acts of political vengeance and therefore not legitimate. Those sentenced by American tribunals (at Nuremberg and in Dachau by the army), they believed, should be granted pardons and released from prison. These two factors – a changing political climate and a resurgent German nationalism – coalesced and resulted in the gradual erosion of punishment, first through the establishment of a commission to review the army’s military

³ Other groups included the National Council for the Prevention of War, Stille Hilfe, and prominent individuals, mainly attorneys.

war crimes trials, followed closely by an American Senate review of war crimes trial procedure, then an executive review of all sentences, and finally two clemency panels that were established in 1950 to review sentences in both the Dachau military trials as well as the Subsequent Nuremberg Proceedings . The cumulative effect of these reviews was a massive reduction of sentences and the release of a good number of those tried at Nuremberg. Indeed, all but four of the *Einsatzgruppen* leaders tried at Nuremberg were released from prison, the other four were eventually hanged at Landsberg war crimes prison, along with three others, on June 7, 1951.⁴ How this gradual but radical shift in policy came about, and how the life sentences of the *Einsatzgruppen* leadership turned into freedom, will be briefly examined here.

2. Appeals for Clemency

As with the original IMT trial, the Americans did not make any provisions for the establishment of an appellate court in which those convicted in the Subsequent Nuremberg Proceedings could launch appeals of their convictions and sentences.⁵ Article 26 of the

⁴ Landsberg prison, located in the small Bavarian community of Landsberg am Lech, was designated war criminals prison no.1 by the Americans. Hitler was incarcerated there after his failed putsch attempt and it is where he wrote *Mein Kampf*. It was also the prison where nearly one thousand convicted war criminals were housed following their trials by the US army and the Nuremberg tribunals. Ernst Klee, *Persilscheine und falsche Pässe. Wie die Kirchen den Nazis halfen* (Frankfurt, 1991), 72-73 and 75.

⁵ Letter from Robert H. Jackson to Howard C. Petersen, Assistant Secretary of War, 12 September 1946, Office Files, Allied Control Council Directives, box 98 US Chief of Council, in Personal Papers of Robert H. Jackson, Manuscript Division, Library of Congress (from here forward simply RHJ Papers). See also Bradley Smith, *Judgment at Nuremberg* (New York, 1977), 299-300; Ann Tusa and John Tusa, *The Nuremberg Trial* (New York, 1984), 479-480; and Robert E. Conot, *Justice at Nuremberg* (New York, 1983), 498-507.

Nuremberg Charter and Article 15 of American Military Ordinance No. 7, stated that the judgments of the tribunals “shall be final and not subject to review,” yet both documents also made room for the possibility of sentence reductions at the executive level.⁶ Whereas the Nuremberg Charter provided for the possibility of sentence reduction by the unanimous consent of the quadripartite Control Council for those tried by the International Military Tribunal, under Military Ordinance No. 7 – the law under which the Subsequent Nuremberg Trials were conducted – sentence reductions were the sole prerogative of the American Military Governor, who was given “the power to mitigate, reduce or otherwise alter the sentence[s] imposed by the tribunal[s]” of the Subsequent Trials.⁷ There was an important codicil to all of this however. Article 18 of Ordinance No. 7, also stated that death sentences could not be carried out “unless and until confirmed in writing by the Military Governor,” and that the Military Governor was empowered to defer the death sentence of anyone he believed could be of value in future prosecutions of war criminals.⁸ In other words, the Military Governor had to review the sentences before they were executed. Under the circumstances of the postwar period, especially with American and British emphasis on reviving the German economy, sentence review was not a top priority and thus it took time.

⁶ Article 26 and Article 29, “Charter of the International Military Tribunal,” 6 October 1945, and Article 15 and Article 17, “Military Ordinance No. 7,” 18 October 1946, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4 (Washington, 1951), xvi and xxvii.

⁷ Article 17, “Military Ordinance No. 7,” 18 October 1946, in *ibid.*, xxvii.

⁸ *Ibid.*, xxvii-xxviii. Otto Ohlendorf attempted to evade the death penalty by testifying for the prosecution at the trial of the OKW. Untitled article, *Christ und Welt*, 20 August 1948, Bestand D1, file 332, Nachlass Landesbischof D. Theophil Wurm, Landeskirchliches Archiv Stuttgart (from here forward simply D1/file number, NL Wurm, LKA).

Yet, the intention of these provisions was never, as Robert H. Jackson noted, “to authorize anything in the nature of an appeal from the Tribunal’s sentences or a reexamination of the law or the decision on the facts,” as the tribunal’s judgment was final.⁹ But a court of last resort is exactly how the defense attorneys at Nuremberg came to interpret Article 17 and Lucius D. Clay’s role as Military Governor.¹⁰ As a result, almost as soon as each Subsequent Nuremberg Trial ended, Clay was deluged with appeals for sentence reviews by the convicted men. In the case of the defendants in the *Einsatzgruppen* trial, twenty of the twenty-one convicted men filed appeals for sentence reviews almost immediately, little more than two weeks after they were sentenced on April 10, 1948. Only Gustav Nosske did not appeal his sentence at this time, but did so soon thereafter.¹¹

All of the petitions filed in behalf of the convicted *Einsatzgruppen* leaders were, in the main, a reiteration of issues of fact and law already established at the trial, and therefore the content of the petitions did not provide, theoretically at least, grounds for review. But these men were desperate, fighting for their lives, and filed petitions regardless of the conditions laid out for doing so. For example, Werner Braune’s appeal for clemency was

⁹ Letter from Robert H. Jackson to Howard C. Petersen, Assistant Secretary of War, 12 September 1946, RHJ Papers.

¹⁰ On the issue of sentence reviews see brief, re: Regulation No. 1 under Military Government Ordinance No. 7 as Amended by Military Government Ordinance No. 11, 8 April 1947, in National Archives and Record Administration Record Group 260 (Records of the United States Occupation Headquarters, from here forward simply USOH), OMGUS, Records of the Executive Office, The Office of the Adjutant General, Military Government Ordinances 1945-1949, box 640 ord No. 1-18, Ordinance No. 7 folder (from here forward simply NARA RG).

¹¹ *Nuernberg: United States of America v. Otto Ohlendorf et al. War Crimes Trials Records of Case 9* (Special List 42), compiled by John Mendelsohn (Washington, 1978), 176-178.

partially based on the argument that although he carried out the *Führerbefehl* to murder Soviet Jewry, he morally objected to it. The petition stated that Tribunal II did not take this “fact” into consideration. Of course Musmanno had dealt with this issue in the judgment, but he found the issue to be moot when a defendant made no effort to evade the order. At trial Braune had admitted he had made no attempt to evade or avoid the order.¹² Braune’s petition also claimed that the evidence presented at the trial “clearly established that refusal to obey a Hitler order would have meant certain death,” for him.¹³ Again, this issue had been dealt with extensively at trial where absolutely no concrete evidence was presented by the defense to prove this claim. In fact, as we have already seen in previous chapters, several of the defendants had admitted on the witness stand that refusal to carry-out an order, even an Hitler order, most frequently resulted in transfer, and not death as Braune’s petition held.

Ohlendorf’s appeal for clemency, filed in his behalf by Dr. Rudolf Aschenauer (later an active and vocal lobbyist to free war criminals), differed somewhat from the others, making a number of specious arguments that hardly warranted review let alone pardon.¹⁴ For instance, Ohlendorf’s petition included the argument that the prosecution had overestimated the number of murders the defendants had committed: the *Einsatzgruppen* had not killed one million people as the indictment charged, but only 450,000. This, in Aschenauer’s legal

¹² Petition to the Military Governor of the American Occupation Troops in Germany for Dr. Werner Braune, 26 April 1948, 2-3, in NARA RG 466 (Records of the United States High Commissioner for Germany, from here forward simply HICOG), Petitions for Clemency or Parole at Nuremberg, box 4 Bobermin-Creutz, Braune folder.

¹³ *Ibid.*

¹⁴ Klee intimates that Ashenauer’s role was more insidious than that of a lawyer for convicted war criminals. He believes that Aschenauer also helped filter money into the hands of former Nazis. See *idem*, *Persilscheine und falsche Pässe*, 78-80.

opinion, was a distortion of history and given one of the stated purposes of the trial was to create an historical record, should command a pardon for his client.¹⁵ Moreover, Aschenauer argued that the tribunal's judgment was faulty because it did not take into consideration the fact that the *Einsatzgruppen* had other tasks besides that of the *Führerbefehl*, such as record collection, security and intelligence work. Again, this represented a distortion of the truth and warranted pardon in his view.¹⁶ Inundated with petitions for sentence reviews, clemency and pardons such as these, Clay, who supported the war crimes trials, and his legal team set out to review the convicted's requests.¹⁷ The Military Governor would not announce the results of his reviews until a full year later in March 1949, by which time German opposition groups to the war crimes trials had organized themselves and were at the height of their campaign of pressure to discredit the American war crimes trials and force the American Military Government to pardon all German war criminals regardless of their crimes, including the leaders of the *Einsatzgruppen*.

Just as the *Einsatzgruppen* trial was wrapping-up in the spring of 1948, substantial German opposition to the American war crimes trials was developing. Serious opposition began when irregularities in the United States army's "Dachau Trials" were detected; in particular, with the biggest of the trials held at Dachau, the Malmédy trail. In May 1946, seventy-four former SS men were brought to the American prison at Dachau and were tried

¹⁵ Petition to the Military Governor of the American Occupation Troops in Germany for Otto Ohlendorf, 26 April 1948, 7-8, in NARA RG 466 (HICOG), Petitions for Clemency or Parole at Nuremberg, box 8, Ohlendorf folder.

¹⁶ *Ibid.*

¹⁷ Tom Bower, *Blind Eye to Murder. Britain, America and the Purging of Nazi Germany – a Pledge Betrayed* (London, 1995), 313.

by the United States Army for the murder of eighty-four American prisoners of war in Malmédy, Belgium during the Battle of the Bulge in 1944.¹⁸ Almost immediately following the conclusion of the Malmédy trial, German attorneys for the convicted men filed complaints which were sent to both Military Governor, Lucius Clay, as well as to several Republican senators in the United States. The complainants argued that the convictions in the Malmédy trial were gained unlawfully, through “trickery, threats of violence and other methods of coercion and duress.”¹⁹ The Americans could hardly ignore such serious accusations, thus both the Military Governor and the United States Senate held separate investigations into the conduct of the army’s trials. While these events might seem unrelated to the *Einsatzgruppen* trial – a judicial procedure carried out by a different American organization and under different laws – the army’s Malmédy trial is important because its effects were wide-ranging, impacting not only the army’s trials and sentences, but ultimately all of the Subsequent Nuremberg Proceedings and those convicted therein. Ironically, it was the Malmédy massacre that initially inspired Americans to conduct war crimes trials in postwar Germany to begin with, and now it was the trial of those involved in the massacre that would lead to the disrepute of the American war crimes trial program and ultimately

¹⁸ Justus D. Doenecke, “Protest over Malmedy: A Case of Clemency,” *Peace and Change* 2:4 (Spring, 1977), 28. See also, John Mendelsohn, “War Crimes Trials and Clemency in Germany and Japan,” in Robert Wolfe (ed.) *Americans as Proconsuls. United States Military Government in Germany and Japan, 1944-1952* (Carbondale, IL; 1984), especially 248-250.

¹⁹ Memorandum from James B. Costello to Theater Judge Advocate EUCOM, May 1948, in NARA RG 338 (Judge Advocate General), War Crimes Branch, Post-Trial Activities 1945-1957, box 9, Bishop Wurm folder. For a discussion of the problems of the army’s Malmédy trial see especially, Bower, *Blind Eye to Murder. Britain, America and the Purging of Nazi Germany*, 300-326.

bring the entire judicial process down. The investigations into the conduct of the Malmédy trial marks the beginning of the end of the punishment of Nazi war criminals by the United States, including the leadership of the *Einsatzgruppen*. With the Cold War setting-in and American political resolve waning, certain groups of German nationalists, led most vociferously by some high-ranking Catholic and Protestant bishops and German defense attorneys, recognized that the opportunity to strike was at hand.²⁰ This is precisely what they did, and with great tenacity.²¹

²⁰ On the issue of the German clergy's role in helping convicted war criminals compare especially, Klee, *Persilscheine und falsche Pässe* and Michael Phayer, *The Catholic Church and the Holocaust, 1930-1965* (Bloomington, 2000). Klee is far more critical of the bishops' behaviour regarding war criminals than Phayer. See also, Victoria Barnett, *For the Soul of the People. Protestant Protest Against Hitler* (New York, 1992); Frank Buscher, *The US War Crimes Trial Program in Germany, 1946-1955* (New York, 1989); Walter Bussmann, "Pius XII an die deutschen Bischöfe," *Hochland* 61 (1969), 61-65; Dieter Froitzheim, *Kardinal Frings* 2nd ed. (Cologne, 1980); Guenter Lewy, *The Catholic Church and Nazi Germany* (New York, 1964); Michael Phayer, "The German Catholic Church after the Holocaust," *Holocaust and Genocide Studies* 2:10 (Fall 1996), 151-167; Frederic Spotts, *The Churches and Politics in Germany* (Middletown, Conn., 1973); and Clemens Vollnhals, *Evangelische Kirche und Entnazifizierung 1945-1949. Die Last der nationalsozialistischen Vergangenheit* (Munich, 1989).

²¹ Ernst Klee points out that the Catholic and Protestant clergy became involved in the war criminals issue as the result of three incidents. The first incident was the removal on December 2, 1948, of an advent wreath from the Landsberg prison dining hall. The second incident concerned the removal of crosses from the graves of hanged war criminals that were replaced with anonymous numbers, and the final incident was the alleged transgressions in the Malmédy trial. *Idem, Persilscheine und falsche Pässe*, 77-78. See also letter from August Eckardt, Pfarrer, to Landesbischof Theophil Wurm, 20 February 1949, D1/293, NL Wurm, LKA.

Michael Phayer notes that originally the German Catholic clergy wanted Nazi war criminals punished, but that in late 1945, they realized that the Vatican opposed punishment of German war criminals and thus they felt they were "given the green light from Rome...[to] campaign to free imprisoned criminals and have the sentences of those condemned to death commuted to incarceration." See Phayer, *The Catholic Church and the Holocaust*, 138-139.

3. Opposition to the Nuremberg Judgments

The earliest and most vocal opponents of both the American army's trials as well as the Subsequent Nuremberg Proceedings, were some of the nationally-minded German clergy, a group one scholar considers to have been the "most effective helpers of National Socialist [war] criminals."²² Indeed, without the active and "pesky" lobbying of the German clergy, it is doubtful if any revision of sentences would have occurred.²³ Four of the most outspoken critics were the Catholic auxiliary bishop of Munich, Johannes Neuhäusler, who had been incarcerated in a concentration camp by the Nazis in 1941, a fact that he always made mention of when lobbying in behalf of convicted war criminals and a position that offered him a "moral advantage" when lobbying.²⁴ Theophil Wurm, bishop of the Evangelical Church of Württemberg, whose anti-Nazi pedigree was not as pure as Neuhäusler's and whose son was an early joiner of the Nazi party, was the most vocal opponent of the Evangelical Church.²⁵ Wurm also was instrumental in helping several of the convicted *Einsatzgruppen* leaders. The Catholic Cardinal of Cologne, Josef Frings, who had

²² Klee, *Persilscheine und falsche Pässe*, 7. See also, Daily Intelligence Digest # 133, "Clergy Continues to Favor Cause of Interned Nazis," 15 March 1946, in NARA RG 260 (USOH), OMGUS, Records of the Information Control Division, Records of the Opinion Survey Branch, box 145, Daily Intelligence Digest folder and letter from Bishop Theophil Wurm to Lord Justice Lawrence, 19 September 1946, D1/272, NL Wurm, LKA.

²³ Phayer, *The Catholic Church and the Holocaust*, 143.

²⁴ Bower, *Blind Eye to Murder*, 319.

²⁵ Klee, *Persilscheine und falsche Pässe*, 14-15 & 61-71 and Phayer, *The Catholic Church and the Holocaust*, 138-144. Wurm's son was found to be a follower by the denazification court in Wiesbaden and was sentenced to one year in prison. Letter from Bishop Theophil Wurm to Ambassador Murphy, 19 January 1949, D1/272, NL Wurm, LKA.

initially supported the punishment of war criminals, but changed his mind when he discovered the Vatican opposed punishment, was also an active lobbyist.²⁶ And finally, Hans Meiser, the Evangelical *Landesbischof* of Bavaria, whose links to Nazism were most pronounced of all the bishops, worked closely with Wurm as an extremely active lobbyist.²⁷ His actions were inspired by Neuhäusler and Wurm's tenacious lobbying, and he worked tirelessly to free all convicted war criminals by publicizing all rumours of maltreatment of prisoners at Landsberg, even if they were unfounded.²⁸ All four clergymen became involved in the debate over war criminals during the period of controversy surrounding the army's Malmédy trial and in turn, they solicited the support of other influential Catholic priests and Protestant pastors, German defense attorneys and some pro-German, American organizations to help in their battle against what they viewed as blind American vengeance.²⁹ To coordinate their lobbying efforts, in the spring of 1949, they established the *Komitee für kirchliche Gefangenenhilfe* (the Committee for Church Aid for Prisoners).

On the legal front, the German bishops employed the assistance of former Nuremberg attorneys to help in the campaign to discredit the war crimes trials. Dr. Rudolf Aschenauer, Otto Ohlendorf's attorney, was foremost among those active in the opposition movement. Aschenauer, a young and ambitious lawyer from Munich and former Nazi party

²⁶ Phayer, *The Catholic Church and the Holocaust*, 143.

²⁷ Klee, *Persilscheine und falsche Pässe*, 13.

²⁸ Spotts, *The Churches and Politics in Germany*, 8-11.

²⁹ Report on Documentary Statements Submitted by Bishop Wurm (sic) to the Secretary of the Army, May and September 1948, in NARA RG 338 (Judge Advocate Division), War Crimes Board, Post-Trial Activities 1945-1957, box 9, Bishop Wurm folder.

member, was a devout Catholic and had a close relationship with Bishop Neuhäusler as his legal advisor.³⁰ In March 1949, the German bishops worked with Aschenauer to establish the *kirchliche Gefangenenhilfe*, an organization whose main aim was to legally assist so-called destitute war criminals housed in Landsberg prison.³¹ The Protestant and Catholic churches financed the (welfare) organization and they retained Aschenauer and fellow attorney Georg Fröschmann (a personal friend of *Landesbischof* Meiser, former Nazi party member as well as a former member of the SA) as their principal attorneys whose job it was to offer legal advice to the Landsberg prisoners and file legal appeals in their behalf.³² The two lawyers officially began their work in May 1949. It was not long before Aschenauer's client list reached a ridiculous six hundred and eighty-three "worthy" but poor, convicted war criminals. By comparison Fröschmann had only one hundred and fifty clients.³³ Aschenauer

³⁰ Klee, *Persilscheine und falsche Pässe*, 78-79.

³¹ "Komitee für kirchliche Gefangenenhilfe," *Süddeutsche Zeitung*, 27 March 1950, Bestand 305, file 94 Kriegsgefangenen Allgemeines 1950, Bundesarchiv, Koblenz (from here forward simply B305/file number and name, BA), and Klee, *Persilscheine und falsche Pässe*, 79.

³² When the two attorneys decided to work together to assist Landsberg prisoners, Aschenauer reportedly told Fröschmann that "both the Catholic and Protestant Church would be only too happy to foot the bill if it was in behalf of the LANDSBERG prisoners." Confidential Memorandum from Special Agent Joe R. Cox to the Judge Advocate General, re: Rudolf Aschenauer and the Church Aid Society, 5 September 1950, 1-5, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, General Administrative Records 1942-1957, box 5, Aschenauer folder; and, letter from Evangelical Landeskirchenrat to Rudolf Weeber, Oberkirchenrat, 24 May 1949, D1/293, NL Wurm, LKA. See also Klee, *Persilscheine und falsche Pässe*, 79. For synopses of Aschenauer and Fröschmann's postwar activities, see the reports by the CIC, Internal Route Slip, 10 October 1950, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, General Administration Records 1942-1957, box 5, Aschenauer folder.

³³ Klee, *Persilscheine und falsche Pässe*, 80 and Letter from Dr. Rudolf Weeber, Oberkirchenrat to Frederick Libby, 11 February 1949, D1/293, NL Wurm, LKA. Bower

had little difficulty persuading many of the convicted men to become his clients, especially when he informed them his services were free of charge as the *kirchliche Gefangenenhilfe* would cover all their legal expenses. He was so successful at gaining clients precisely because of his backing by the churches as well as having some connections with sympathetic and influential US Senators and Congressmen. The work of the *kirchliche Gefangenenhilfe* helps explain why so many ex-Christian Nazis (re)embraced the church during this period.³⁴ In addition to his legal work, Aschenauer was busy producing several propaganda pamphlets one of which was *Zur Frage einer Revision der Kriegsverbrecher Prozesse* (The Question of a Revision of the War Crimes Trials), which was surprisingly similar in content and tone to the hundreds of letters written by the German bishops to American authorities.³⁵

Between 1948 and 1951, Neuhäusler, Wurm, Meiser, Frings and many others, actively lobbied the US army, the Military Governor, and later the High Commissioner, calling first for the establishment of an appellate court to review the army's Dachau Trials, and soon after the same for the Subsequent Nuremberg Trials.³⁶ Most importantly for the

states that Fröschmann had over three thousand Landsberg inmates on retainer at one point. *Idem, Blind Eye to Murder*, 320.

³⁴ *Ibid.*, 6-7.

³⁵ A copy of Rudolf Aschenauer, *Zur Frage einer Revision der Kriegsverbrecher Prozesse* (September 1949) can be found in NARA RG 338 (Judge Advocate Division), War Crimes Branch, General Administration Records 1947-1957, box 5, Aschenauer folder.

³⁶ For example see the statement by Wurm and Neuhäusler of May 1948, untitled, D1/293, NL Wurm, LKA, in which they outline their grievances concerning the trials. See also, letter from Landesbisofen Wurm, Meiser, Bender, Wüsemann, and Niemöller to General Lucius Clay, 20 May 1948, D1/289, *ibid.*; and, letter from Bishop Wurm to Charles Lafollette, 21 May 1948, D1/289, *ibid.*, in which he tells Lafollette that "My goal is to achieve a reexamination of all the past trials by a higher court, in which lawyers from neutral countries should be involved...I selected the press as a way to achieve this [because] we

fate of the convicted *Einsatzgruppen* leaders, they demanded sentence reviews for all the convicted men in Landsberg, the Bavarian prison which the Americans used to house and execute the convicted and condemned Nuremberg war criminals and where Neuhäusler was spiritual advisor.³⁷ Wurm, in particular, personally lobbied in behalf of several of the condemned *Einsatzgruppen* leaders, those such as Eugen Steimle and Martin Sandberger, who had been prominent and active members of the Evangelical church before the Nazi “seizure of power” when they renounced their faith in order to participate actively in the Nazi regime and its police organizations.³⁸ These clergymen took up the work of freeing some of the most notorious mass-murderers of the Third Reich because, as they convinced themselves, these men were not war criminals, but “decent human [beings],” and the trials, they wanted to believe, simply were not fair.³⁹ Not only were they vengeful and an

know from experience that official petitions do not always attain the desired result. The authorities only react when publicity is stirred.”

³⁷ On the issue of German opposition and Catholic bishops see Buscher, *The US War Crimes Trial Program in Germany*, 91-94.

³⁸ Walter Haensch wrote to Bishop Wurm directly begging for his assistance. He swore “before God and my conscience” that he was unfairly sentenced to death, because he had not killed anybody nor had he ordered any of his men to do so. Letter from Walter Haensch to Bishop Wurm, 13 May 1948 in NARA RG 238 (Records of World War II War Crimes from here simply WCR), Advisory Board on Clemency for War Criminals, Correspondence, box 10, Haensch folder. Wurm also took up the case of Eugen Steimle, whose wife had intervened on his behalf to get the bishop involved. Letter from Dr. Erich Meyer, Rechtsanwalt, to Frau Steimle, 12 April 1948, D1/311.6, NL Wurm, LKA, and letter from Dekan (signature illegible) to Rudolf Weeber, Oberkirchenrat, June 7 1949, in *ibid.* Frau Strauch, the wife of Eduard Strauch, had her minister, pastor O. Meiswinkel write to Wurm to ask for assistance, letter from Pfr. O. Meiswinkel to Landesbischof Wurm, 10 June 1948, D1/311.7, NL Wurm, LKA.

³⁹ Vermrek Landesbischof i.D. Wurm, 1 September 1950, “Mein Besuch in Landsberg zum 9. August 1950,” B305/148 Deutsche Kriegsverurteilte in Landsberg – Einzelfälle, BA, and letter from Theophil Wurm to Robert Kempner, 30 March 1948,

expression of victor's justice, but the laws under which the defendants were tried were *ex post facto* and, worst of all they argued, the Americans lacked the "moral authority" to try these men.⁴⁰ Nearly every complaint the bishops filed with American authorities was based on the word of the murderers themselves, and in not one instance did they produce any concrete evidence of maltreatment of the convicted war criminals or evidence for any of their other complaints for that matter.⁴¹ To this end, they initiated letter writing campaigns, lobbied American officials, and used the press effectively to call into question the jurisdiction and integrity of American war crimes policy, and especially convictions, in

D1/289, NL Wurm, LKA.

⁴⁰ By "moral authority," Wurm meant that the Americans had secured convictions and sentenced men to death on the basis of torture, extortion and other "criminal methods" and therefore had "degraded" the trials to nothing more than acts of vengeance. See letters from Theophil Wurm to Robert Kempner, 28 January and 5 May 1948 , D1/289, NL Wurm, LKA.

⁴¹For instance see "Complaint against the American War Crimes Trials," by Bishop Hans Meiser, 5 January 1949 in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post Trial Activities 1945-1947, box 11, Bishop Meiser folder in which Meiser accused Benjamin Ferencz, the chief prosecutor in the *Einsatzgruppen* trial, of threatening potential defense witnesses with the promise of extradition to the Soviet zone if they testified in behalf of a defendant. He was also accused of having defense witnesses dismissed from their jobs and of illegally searching witnesses apartments. Meiser also charged Ralph Wartenberg, the chief interrogator for the Subsequent Proceedings at Nuremberg, with deliberately lying, depriving defendants of sleep before they were interrogated, of altering affidavits, threatening defendants and other flagrant acts so as to extract confessions from the accused. All of this despite the defense attorneys claims of a fair trial and the defendants testimony denying they had been mistreated during their interrogations. Meiser did not produce one shred of evidence to substantiate his complaints. The judge advocate's office investigated all of Meiser's accusations and found them to be "grossly exaggerated and unfounded." One official could only lament of the unfounded accusations that "the Germans have forgotten all too soon." Letter from Colonel J.L. Harbaugh, Jr., Judge Advocate, to Colonel John M. Raymond, 18 January 1949 and memorandum to the associate Director Legal Division OMGUS, undated, in NARA RG 466 (HICOG), Prisons Division, Security Segregated Records, box 10, War Crimes Trial 1949 folder.

Germany. And, all during a period when the American political leadership was seriously concerned about reintegrating Germany back into the community of nations as a bulwark against communism.⁴²

While the Americans had absolutely no intention of creating an appellate court as the German clergy hoped, they were initially somewhat sympathetic and understanding of the bishops' attempts to assist their fellow countrymen, no matter how misplaced their support was for the convicted war criminals.⁴³ The misguided, but intense lobbying by the bishops reaped partial rewards almost immediately.⁴⁴ On July 30, 1948, the American Secretary of

⁴² For example, on December 6, 1948, Bishop Neuhäusler initiated a letter-writing campaign to the Military Governor, concerning the so-called appalling conditions and abuses of prisoners at Landsberg war criminals prison. Clay immediately ordered Telford Taylor to investigate. Taylor concluded in his report to Clay that while "prisons are not health resorts," conditions at Landsberg were, "given the... circumstances which prevail throughout Germany...generally satisfactory." Taylor's findings did not mollify the Catholic bishop who continued to complain of the unfair treatment of convicted war criminals. See Memorandum to General Lucius Clay from Telford Taylor, re: Inspection of War Criminal Prison No.1 (Landsberg), 3 June 1949, in NARA RG 466 (HICOG), Prisons Division, Administrative and Medical Records Landsberg, box 1, Nuremberg Subsequent Proceedings Medical Reports folder.

Wurm actively lobbied Clay about the war criminals issue as well, asking in particular for the creation of a legal body to review the foundations and the competency of the American courts and hence the verdicts they dispensed. Because Clay refused to establish an appellate court, Wurm, in consultation with some of the Nuremberg defense attorneys, embarked on a media campaign in an attempt to gain public support for his efforts. Various newspaper articles, D1/332, NL Wurm, LKA, and memorandum from Major Joseph L. Haefele to Theater Judge Advocate, 16 September 1948, re: Allegations in the Bishop Wurm File, in NARA, RG 338 (Judge Advocate General), War Crimes Branch, Post-Trial Activities 1945-1957, box 9, Bishop Wurm folder.

⁴³ "Complaint against the American War Crimes Trials," by Bishop Hans Meiser, 5 January 1949, in NARA, RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post Trial Activities 1945-1947, box 11, Bishop Meiser folder.

⁴⁴ Letter from John M. Raymond, Colonel, to Theophil Wurm, 7 June 1948, D1/290, NL Wurm, LKA.

War Kenneth C. Royall, a known opponent of the American war crimes trial program in Germany, announced he was ordering a stay of execution of all death sentences handed down in the army's Dachau Trials, at least until further review of the proceedings were carried out.⁴⁵ In the meantime, Royall appointed a commission which was to be headed by Justice Gordon Simpson, a judge of the Supreme Court of Texas, to investigate the charges of irregularities.⁴⁶ After investigating the accusations of corruption and reviewing one hundred and thirty-nine death sentences, the Simpson Commission, as the investigative body was referred to, recommended that twenty-nine of those sentenced to death by the army's Dachau tribunals have their sentences commuted to prison terms.⁴⁷ The Commission did not find that the Dachau Trials were unfair; they did however conclude that in some instances justice would be better served if some of the death sentences were commuted to life terms.⁴⁸ More importantly, the Commission recommended the establishment of a clemency and

⁴⁵ Letter from Landesbischofen D. Wurm and D. Meiser, Bischofen D. Wüstemann and D. Bender, and Kirchenpräsident D. Niemöller to Kenneth C. Royall, August 1948, D1/291 and file 272, NL Wurm, LKA, and "US Will Probe Dachau Trials," *Stars and Stripes*, 30 July 1948, D1/333, in *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Letter from Theophil Wurm to John Foster Dulles, 16 October 1948, D1/292, NL Wurm, LKA, and Bishop Theophil Wurm, "Memorandum by the Evangelical Church in Germany on the Question of War Crimes Trials before American Military Courts" (copy No. 2, 1949), 18-19, in NARA RG 238 (WCR), Advisory Board on Clemency for War Criminals, Office of the US High Commissioner for Germany 1947-1950, Correspondence and other Records, box 4, General folder (from here forward simply Memorandum by the Evangelical Church).

⁴⁸ Letter from Justice Gordon Simpson to Rudolf Weeber, Oberkirchenrat, 10 November 1948, D1/292, NL Wurm, LKA.

parole board to deal with all of the army's trials and those convicted in them.⁴⁹ Immediately following the Simpson Commission's decision, on October 15, 1948 executions – ten men every Friday – resumed at Landsberg prison.⁵⁰ Between October 1948 and February 1949, 104 men were executed at Landsberg.⁵¹ The Simpson report and its recommendations for the establishment of a clemency and parole committee, and the commutation of death sentences was not enough to placate the German bishops. Rather, as they claimed, these moves merely confirmed that all the army's trials were flawed just as they had suspected from the beginning.⁵²

To add fodder to their case, not long after the Simpson Commission rendered its decision, the verdict in Case XI of the Subsequent Nuremberg Proceedings (the United States of America v. Ernst von Weizsäcker et al.) was handed down and it was not unanimous. After eleven trials had been conducted at Nuremberg a dissenting opinion was finally registered. In von Weizsäcker's case, the presiding judge called into question his colleagues's judgment and ultimately the sentence of the former State Secretary of the

⁴⁹ Mendelsohn, "War Crimes and Clemency," 249-250.

⁵⁰ Letter from Theophil Wurm to John Foster Dulles, 16 October 1948, D1/292, NL Wurm, LKA, and letter from Rudolf Weeber, Oberkirchenrat, to Justice Gordon Simpson, 28 October 1948, D1/293, in *ibid*. When the executions resumed many of the Landsberg prisoners began a hunger strike. It lasted four days. Memorandum from Wade Fleischer, Colonel, to Colonel Harbaugh, 25 October 1948, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records Relating to War Criminal Prison No. 1 Landsberg, box 5, Landsberg 201 1948 folder.

⁵¹ Bower, *Blind Eye to Murder*, 315.

⁵² For example see letter from Theophil Wurm to John Foster Dulles, 18 October 1948, D1/272, NL Wurm, LKA, and letter from Bishop Neuhäusler to Lucius Clay, 19 October 1948, in NARA RG 466 (HICOG), Security Segregated Records 1945-1957, box 12, War Crimes Trials Landsberg and Dachau, Cases B-13 folder.

Foreign Office.⁵³ This judgment was more than enough evidence to convince the German clergy that along with the army's proceedings, all war crimes trials carried out by the United States, including the Subsequent Nuremberg Proceedings, were tainted.⁵⁴ It seemed that they would not be satisfied until every single war criminal from both the army's trials as well as the Nuremberg Proceedings, was released from prison. As one official in the Judge Advocate's office summed up the problem,

apparently it is the feeling...of these higher church officials that if one error is discovered to have been committed in one case, or if it is disclosed that one accused may have been sentenced upon insufficient evidence or to have received too severe a sentence, or if it is shown that one accused may have suffered some mistreatment while held in custody before trial, then all the trials are bad and must be held for naught. It is not enough that the one error has been corrected, that the accused unfairly convicted has been released, that the too severe sentence has been appropriately reduced, but because of such mistakes all of the convicted war criminals should be released.⁵⁵

In the logic of the clergy, if one judge in one trial found fault with the proceedings, surely the other trials must also be flawed.

The dissenting opinion in von Weizäcker's trial inspired a whole new round of intense lobbying by the German clergy. As a result of the repeated petitions coupled with Clay's desire to "free [his] successor from this thankless task," (he would be stepping down as Military Governor in July) the American Military Government's Legal Division

⁵³ Dissenting Opinion in Case XI, The United States of America v. Ernst von Weizsäcker et al., in *Memorandum by the Evangelical Church*, 41-49.

⁵⁴ Letter from Landesbischof Theophil Wurm to L.W. Goebel, President of the Evangelical and Reform Church, 23 February 1949, D1/293, NL Wurm, LKA.

⁵⁵ Internal Route Slip, Office of the Judge Advocate, re: Complaint against the American War crimes Trials by Bishop Meiser, 5 January 1949, in NARA RG 338 (Judge Advocate Division), War Crimes Board, Records of Post Trial Activities 1945-1957, box 11, Bishop Meiser folder.

recommended to General Clay that he review the Nuremberg sentences immediately in order to carry out the sentences as expeditiously as possible. Like Musmanno earlier, Clay was loathe to confirm any death sentence if there was any doubt whatsoever as to a defendant's guilt.⁵⁶ Thus he had always insisted on personally reviewing the cases of each condemned man. And review cases is exactly what he did in 1949 when, with the help of a team of attorneys, he found no basis whatsoever to grant clemency or mitigate the sentences of any of these mass murderers, and especially not because of the misguided, even egregious arguments put forward by the German clergy.⁵⁷ Instead, on March 4, 1949, Clay affirmed thirteen of the fourteen death sentences handed down in the *Einsatzgruppen* case.⁵⁸ Only Heinz Schubert's sentence was not confirmed as Clay was still considering commuting it to life imprisonment because of his "low rank, his subordinate position and his youth."⁵⁹ After

⁵⁶ Bower, *Blind Eye to Murder*, 309-310.

⁵⁷ Thomas Alan Schwartz, "John J. McCloy and the Landsberg Cases," *America and the Shaping of German Society, 1945-1955* (Oxford, 1993), 435-436; memorandum from John M. Raymond to Lucius Clay, 4 March 1949; and, memorandum from John M. Raymond to Lucius Clay, 11 March 1949, all in NARA RG 466 (HICOG), Bonn, General Records 1949-1952, box 15, 321.6 War Criminals 1949-1952 folder.

⁵⁸ Memorandum from OMGUS to US Chief of Counsel for War Crimes, 5 March 1949, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, General Administration Records 1942-1957, box 4, War Crimes 201 File vol. 4 folder; and, Press Release, Office of Military Government for Germany, 7 March 1949, in *ibid* RG 238 (WCR), Advisory Board on Clemency for War Criminals, HICOG Correspondence, box 3, General File Case No.9 folder.

⁵⁹ During the early phase of review of the *Einsatzgruppen* cases, Clay had expressed some interest in commuting Heinz Schubert's death sentence to life imprisonment. After consulting with his legal advisor, John M. Raymond, however, he changed his mind and signed the confirmation of the original sentence. Memorandum from John Raymond to Lucius Clay, 26 February 1949, Memorandum from John M. Raymond to Lucius Clay, 4 March 1949; and, memorandum from John M. Raymond to Lucius Clay, 11 March 1949, all in NARA RG 466 (HICOG), Bonn, General Records 1949-1952, box 15, 321.6 War

some reflection however, he rethought his position and soon thereafter affirmed Schubert's sentence. Despite Clay's affirmations, those sentenced to death in the *Einsatzgruppen* case nonetheless had their sentences stayed pending the results of petitions to the United States Supreme Court for writs of habeas corpus filed by Aschenauer and paid for by the *kirchliche Gefangenenhilfe*.⁶⁰ Ultimately, the Supreme Court, in a four-four decision, denied jurisdiction of the petitions, but not until June 1949, and by that time, the political climate in Germany and Europe was rapidly changing. At this time the Department of the Army, under Royall, stayed all pending executions in both the army's military trials as well as Nuremberg. Royall's decision to do this, as one scholar has noted, was the death knell for the war crimes trials in Germany as it "consciously handed the pro-German lobby in America and the Nazis in Germany an official licence to attack the whole war crimes trial program."⁶¹ To make matters worse, the Americans were in the process of replacing Clay with a new High Commissioner, John McCloy, whose outlook toward the war criminals question had changed significantly since his initial involvement in the formation of the IMT

Criminals 1949-1952 folder and memorandum to Lucius Clay, re: Review of the Sentences Imposed by United States Military Tribunal II, Sitting in Nuremberg, Germany, in Case No.9, circa February-March 1949, 29, in NARA RG 466 (HICOG), Prisons Division, War Criminal Case Files, box 4, Case 9 folder and Press Release from OMGUS, 7 March 1949, in NARA RG 238 (WCR), Advisory Board on Clemency for War Criminals, HICOG Correspondence, box 3, General File Case No.9 folder.

⁶⁰ When a petition is filed with the Supreme Court of the United States in a death sentence case, a stay is almost always automatically granted while the court is considering the petition. Memorandum from OMGUS to the Chief of Staff, United States Army, 6 February 1949, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, General Administration Records 1942-1957, box 4, War Crimes 201 Files vol. 4 folder.

⁶¹ Bower, *Blind Eye to Murder*, 311.

in 1945.⁶² McCloy would play a decisive role in reversing sentences handed down in the twelve Subsequent Nuremberg Proceedings and especially in the *Einsatzgruppen* case.

Not long after Clay affirmed all of the death sentences in the *Einsatzgruppen* case, the US Senate formed its own committee to investigate the army's Malmédy trial. Senator Raymond Baldwin of Connecticut was the committee's chairman.⁶³ Their aim was to examine the methods in which confessions were obtained by the prosecutors, to investigate all allegations of irregularities in the conduct of the trial and finally to consider whether or not any of the cases were improperly handled by the courts.⁶⁴ The committee would not complete its work until September, by which time the *Grundgesetz* (German Basic Law which outlawed the use of capital punishment) had been implemented and Konrad Adenauer had been elected the first chancellor of the new German Federal Republic. These political changes also brought about a change in American personnel and their attitudes toward the new Federal Republic and the entire war criminals issue. The American Military Government was replaced with the Office of the High Commission for Germany which was created in June 1949, three months before the Federal Republic came into being. The new head of the HICOG, as the High Commission was referred to, was John J. McCloy. The

⁶² Internal Route Slip, Headquarters, European Command, 3 June 1949, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, General Administration Records 1942-1957, box 4, War Crimes 201 File vol. 4 folder, and memorandum from OMGUS to Judge Advocate, 10 June 1949, in *ibid*, Records Relating to War Crimes Prison No. 1 Landsberg, box 6, 201-1949 folder. See also, Schwartz, "John J. McCloy and the Landsberg Cases," 434-436.

⁶³ Letter from George C. Dix, attorney, to Rudolf Weeber, Oberkirchenrat, 31 March 1949, D1/293, NL Wurm, LKA.

⁶⁴ Letter from Raymond E. Baldwin to Frederick J. Libby, 14 April 1949, D1/293, NL Wurm, LKA.

Baldwin Commission's work coupled with the changing political environment gave renewed hope to those campaigning to save the convicted war criminals from the hangman. More persistently than ever, beginning in March, but gaining full momentum in June 1949 when the HICOG was established, the Landsberg prisoners, aided now by Aschenauer and Fröschmann as well as many clergymen, family members, pro-German Americans, and average Germans flooded the American Military Governor and soon thereafter the High Commissioner with requests for clemency for the convicted men of Landsberg.

4. John J. McCloy and the War Criminals "Problem"

When McCloy replaced Clay in 1949 as the American representative in Germany sixteen Nuremberg prisoners remained on death row at Landsberg prison.⁶⁵ Included among these were all fourteen of those sentenced to death in the *Einsatzgruppen* case as well as Oswald Pohl, former head of the *SS-Wirtschafts und Verwaltungshauptamt* (WVHA), the main economic office of the SS in charge of the administration of the concentration camps, and Franz Eirenschmalz a colleague of Pohl's and defendant from the same trial at Nuremberg, Case 4.⁶⁶ These sixteen men were referred to as the "red jackets" owing to the distinctive red jacket each condemned man wore while awaiting his execution in Landsberg war crimes prison. In his new position as High Commissioner, McCloy's responsibility only extended to those tried by the Nuremberg Tribunals and not those convicted in the army's

⁶⁵ Nurembergers refers to those tried by tribunals at Nuremberg and Dachauers refers to those tried by the army's tribunals.

⁶⁶ Cable from HICOG Frankfurt to US Secretary of State, 5 October 1949, in NARA RG 466 (HICOG), Office of the Executive Director, Security Segregated General Records 1949-1955, box 28, 321.6 War Criminals folder.

Dachau Trials. All sixteen “red jackets” were under his jurisdiction whereas General Thomas Handy took over sole responsibility for the army’s cases whose number of death-row inmates was significantly higher.

McCloy’s attitude toward the war criminals issue differed significantly from that of his predecessor who had adopted an unwaveringly hard-line. The new High Commissioner believed, as did many Americans at this time, that in view of the expanding Soviet threat German-American relations needed to improve, for which the establishment of the Federal Republic provided the perfect opportunity.⁶⁷ Along with the endless stream of requests for clemency, McCloy was also under a tremendous amount of pressure by the new German government, representatives of which had written to him to warn that they intended “to propose an amnesty” for all those whose offenses were “committed in the years of political confusion and economic distress.”⁶⁸ This included all those arrested, tried and convicted under Control Council Law No. 10 – in other words, the Nuremberg convicted.⁶⁹ The amnesty, the letter stated, should extend to those who were fifty-six or older or twenty-one or younger, those in poor health, and those who were sentenced to ten years in prison or less.⁷⁰ The Germans also called for a general amnesty for anyone convicted under *ex post facto* law, and finally, for the establishment of a clemency board whose job it would be to

⁶⁷ Schwartz, “John J. McCloy and the Landsberg Cases,” 436.

⁶⁸ Letter from the German Federal Government to the High Commissioner, undated circa July-September 1949, B305/141/36-40 Deutsche Kriegsverurteilte im Landsberg 1949-1952, BA.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

examine all sentences. In effect, the Germans wanted nothing less than the amnesty of all war criminals. These measures, the Germans concluded, would not only go a long way in improving relations between the two nations, but more importantly amnesty would have an important and lasting “moral effect...among the [German] population” who uniformly rejected the American judicial process as it applied to its citizens in the immediate postwar period.⁷¹

Like Clay before him, McCloy had the “discretionary power and authority at any time to mitigate, reduce or otherwise alter, but not increase, the sentences (including death sentences) imposed by the Nuremberg Military Tribunals,” but not the guilt or innocence of any defendant which was considered final.⁷² According to policy laid out for the High Commissioner, under no circumstance were issues of “amnesty, pardon, clemency, parole, or release...[to] be delegated to the German authorities.”⁷³ From the very beginning of his tenure McCloy was not inclined to carry out the death sentences of the sixteen remaining condemned men in Landsberg, but nor was he inclined to grant amnesty to any or all of the war criminals.⁷⁴ That said he did realize that some solution to the war criminals problem was

⁷¹ *Ibid.* Many Germans believed that a general amnesty was “of great psychological importance.” For example, see letter from Gebhard Müller to Konrad Adenauer, 21 October 1949, B120/395 Nürnbergerprozesse, BA.

⁷² Memorandum from Mortimer Kollender, Acting Chief, Administration of Justice Division, to John McCloy, 11 October 1949, in NARA RG 466 (HICOG), John J. McCloy, Classified General Records 1949-1952, box 3, D(49) 271-292 folder.

⁷³ Policy Directive for the US High Commissioner for Germany (Secret), 17 November 1949, in NARA RG 466 (HICOG), John J. McCloy, Classified General Records 1949-1952, box 4, November D(49) 383-392 folder.

⁷⁴ As McCloy told Bishop Neuhäusler, “I have not committed the United States to a program of wholesale commutation of sentences of war criminals, and, as I have said, no

necessary, especially since such a broad spectrum of Germans, including the clergy, professionals, and officials of the Federal Republic, all called for a program of amnesty. Moreover, many Germans were of the opinion that even if justice had been served at the Subsequent Nuremberg Trials, it was inhuman to make the condemned men wait any longer to have their sentences carried out.⁷⁵ As Bishop Wurm stressed to McCloy, “none of the prisoners knows whether or not today is the last day of his life” and, thus, “the severity of the death sentence is increased to an unheard of degree and is at variance with all feelings of decency.”⁷⁶ McCloy vehemently disagreed with Wurm’s interpretation of suffering, but nonetheless was persuaded that some course of action was necessary if relations between the former enemies was to improve. Thus, he instituted a system of time credits for good conduct for those convicted by Nuremberg tribunals Cases 1 through 12. This system allowed time off of a convicted man’s sentence for good behaviour at the rate of five days per month. This new formula led almost immediately to the release from prison of six of the Nuremberg convicted (almost all from the trials of the economic leaders). The release of several high-powered economic leaders led many to criticize McCloy for his “unwarranted

general or partial amnesty is contemplated.” See letter from McCloy to Neuhäusler, 16 January 1951, D1/295, NL Wurm, LKA.

⁷⁵ In early 1950, Konrad Adenauer had written McCloy that “through article 102 of the Basic Law the death penalty in the Federal Republic of Germany was abolished....Under these circumstances it would be felt by the German people as particularly harsh, if nearly five years after the end of the war executions were still carried out on German soil by the American occupation powers. This feeling is all the more strong, when the condemned ones have spent such a long time under the heavy pressure of the uncertainty of their fate.” See letter from Konrad Adenauer to John McCloy, 28 February 1950, B305/142/14-15 Deutsche Kriegsverurteilte im Landsberg 1949-1952, BA.

⁷⁶ Letter from Bishop Theophil Wurm to John J. McCloy, 27 January 1950, D1/295, NL Wurm, LKA.

leniency,” especially those who had always maintained the criminal nature of the German economic elite during the Nazi regime.⁷⁷ While McCloy’s initiative of good time credits was no different than that granted to American citizens, it was the beginning of a “slippery slope” to freedom for most of those war criminals tried at Nuremberg.

In the early months of McCloy’s tenure, he thought a lot about a solution to the problem. One option was to “piggyback” on the army’s new clemency program. In November 1949, the army had created the War Crimes Modification Board to review clemency requests for the Dachau cases. On December 19, 1949, McCloy wrote to General Handy who was in charge of the army’s Modification Board, indicating his desire to expand the jurisdiction of the War Crimes Board to include the Nurembergers under his jurisdiction.⁷⁸ When the State Department learned of McCloy’s plan, Secretary of State Dean Acheson strenuously opposed the idea, not wanting the State Department to be involved in or tainted by the controversial Malmédy Trial. He also worried that to include the Subsequent Nuremberg Trials in the army’s clemency program, would only undermine the “legal basis and procedure” of the Pohl and Ohlendorf cases. He begged McCloy to

⁷⁷ It will be recalled that one of the main reasons the Subsequent Nuremberg Proceedings came into being was because of the case of Alfred Krupp who had escaped punishment at the IMT trial. Press Release, HICOG, 19 December 1949, in *ibid.*, box 5. D(49) 461-493 folder, and memorandum from General Thomas Handy, December 1949, NARA RG 238 (WCR), Advisory Board on Clemency for War Criminals, Office of HICOG 1947-1950, Correspondence 1950, box 1, Indexes folder; and, Schwartz, “John J. McCloy and the Landsberg Cases,” 438-439.

⁷⁸ List and synopsis of correspondence between McCloy, Handy and Colonel Gunn, undated, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post-Trial Activities 1945-1949, box 15, Clippings and Correspondence re Review of Sentences folder.

reconsider.⁷⁹ McCloy did acquiesce to Acheson, but he was nonetheless adamant; if he was forbidden from working under the army's Modification Board, he would establish his own clemency commission, he told Acheson. Obviously he had been giving the issue thought for quite sometime since he had told Cardinal Frings as early as December 1949, that in early 1950, "important lawyers would come from America to Germany, who would have the order to study the whole complex question [of war criminals] and prepare a practical solution."⁸⁰ Acheson accepted McCloy's demands for the establishment of a clemency review board when he realized how "strongly" McCloy felt about its necessity.⁸¹ The High Commissioner had explained that the entire "thorny" war criminals problem could not be resolved unless it was seen to be done through an impartial review process but more importantly, McCloy confessed, "my own conscience is involved and though I am quite prepared to make ultimate decision and accept ultimate responsibility I require the help of such a group."⁸² Thus, in February 1950, McCloy set out, with the help of the State Department, to establish a board of final review for all the convictions and death sentences handed out by tribunals in the

⁷⁹ Telegram from Dean Acheson to John McCloy, 8 February 1950, USHMM, RG 12.000 Benjamin B. Ferencz Papers, Drawer 24 War Crimes Trials, box 2 folder A, John J. McCloy file. See also, Schwartz, "John J. McCloy and the Landsberg Cases," 439-440.

⁸⁰ Der Bundesminister der Justiz 30 January 1950 Bericht, B305/141/203 Deutsche Kriegsverurteilte im Landsberg, 1949-1952, BA. One of McCloy's legal advisors had also told Rudolf Aschenauer that the High Commissioner intended to establish a clemency board. See also Vermerk, 14 February 1950, B305/142/1-2 in *ibid*.

⁸¹ Memorandum from Dean Acheson, Secretary of State, to John McCloy, High Commissioner, 22 February 1950, in NARA RG 466 (HICOG), Office of the Executive Direct, Security Segregated General Records 1949-1955, box 28, 321.6 War Criminals folder.

⁸² Memorandum to Dean Acheson, Secretary of State, from John McCloy, High Commissioner, 17 February 1950 in *ibid*.

Subsequent Nuremberg Proceedings.⁸³

The Advisory Board on Clemency or “Peck Panel,” as it was called, consisted of three “impartial” individuals: David W. Peck the chairman of the panel and the Presiding Judge of the New York Supreme Court’s Appellate Division, Conrad Snow, an assistant legal advisor in the State Department and Frederick A. Moran, the Chairman of the New York State Board of Parole.⁸⁴ The three men were considered impartial in that none of them had any relationship whatsoever to the Subsequent Nuremberg Trials, nor had any of them publically expressed any opinion about Nuremberg. The Peck Panel was not intended to function as an appellate court, despite Peck’s job as an appellate court judge in the United States. Rather, the panel’s principal task was to make recommendations for sentence reductions, clemency, and commutations of death sentences for the Nurembergers and thereby, McCloy hoped, “solve” the war criminals problem that now stood in the way of

⁸³ The creation of the HICOG Advisory Board on Clemency caused great unrest among the prisoners of Landsberg. Those tried by the army’s military tribunals felt cheated in that they would not be considered for clemency on the basis of “family considerations” as reportedly the Nuremberg convicted were. Internal Route Slip, Headquarters European Command, 25 July 1950, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records Relating to War Crimes Prison No. 1 Landsberg, box 6, Lbg. 201 1950 folder.

⁸⁴ Memorandum to Gerald Fowlie from John A. Bross, re: Clemency Committee Program, 18 May 1950, in NARA RG 238 (WCR), Advisory Board on Clemency for War Criminals, HICOG, Correspondence, box 2, Clemency Committee General folder; “Clemency Board Member Completes Preliminary Survey,” Press Release No. 312, 2 May 1950 in *ibid* RG 466 (HICOG), John J. McCloy, Classified General Records 1949-1952, box 13, D(50) 1273-1318 folder; Besprechung mit dem General Counsel von McCloy, Mister Bowie and Aschenauer, 1 April 1950, B305/142/25, Deutsche Kriegsverurteilte im Landsberg 1949-1952, BA; and, Schwartz, “John J. McCloy and the Landsberg Cases,” 441-442.

healthy German-American relations.⁸⁵ To make recommendations, the Panel had to review all of the judgments of the twelve Subsequent Nuremberg Trials, interview the war criminals personally, review their psychological profiles and family situations, and in doing so find reasons for mitigating sentences. McCloy made it clear to the panel that while he would use their recommendations as a basis for sentence modifications, the final word was his as he was under no obligation to abide by their recommendations.

The Advisory Board on Clemency began its work in the spring of 1950, when Frederick Moran traveled to Germany to carry-out some leg work for the panel, including reviewing the case files of some of the convicted war criminals.⁸⁶ While there, he also personally interviewed all of the Nuremberg-Landsberg prisoners, investigated their personal histories, character and backgrounds. Once this work was complete he returned to the United States to brief his colleagues on his findings. All three Board members returned to Germany in June to take up the task of reviewing cases. They officially began their work on July 11, 1950 in Munich.⁸⁷ During the next six weeks the Board speedily (some would argue carelessly) reviewed all petitions submitted by the war criminals, and there were a lot of

⁸⁵ Memorandum from Frederick Moran to Gerald Fowlie, Re:Neuro-psychiatric examinations, 12 July 1950, in NARA RG 238 (WCR), Advisory Board on Clemency for War Crimes, HICOG, Correspondence and Other Records 1950, box 2, Clemency Committee-General folder. The Panel did not have a mandate to increase sentences if they believed them to be too lenient.

⁸⁶ Report from the Advisory Board on Clemency for War Criminals, to John McCloy, 28 August 1950, in RG 12 BBF Papers, Einsatzgruppen Trial, Darmstadt, Clippings file, USHMM.

⁸⁷ *Ibid* and memorandum from John A. Bross to Wolfe, 16 May 1950, in NARA RG 466 (HICOG), Security Classified Records, Arrest-German Criminal Code, box 6, Clemency Advisory Board General folder. See also, Schwartz, "John J. McCloy and the Landsberg Cases," 442-443.

them – Eduard Strauch alone submitted twenty-two petitions – reviewed all of the judgments of the twelve Nuremberg tribunals (nearly 3,300 pages), interviewed one hundred and five of the petitioners personally, and heard oral arguments from as many as ninety attorneys.⁸⁸ The Panel was mandated to consider sentence disparities among the convicted as well as the physical condition and family situation of defendants, in deciding who should and should not receive sentence reductions, clemency, and commutations of death sentences. What the group was not allowed to do was question the jurisdiction of the tribunals, matters of fact or matters of law, nor were any provisions made for involving former prosecutors in the review process, despite Benjamin Ferencz’s offer to do so.⁸⁹ Rather their entire task was limited to issues of mitigation.⁹⁰

Even though the Board was (theoretically) limited in its scope of inquiry, it did give weight to the issues of the defense of superior orders and “situations analogous to combat conditions” as mitigating factors when considering those sentenced to death. But it simply refused to consider the issue of the long periods spent in confinement under sentence of

⁸⁸ Schedule for Board Meetings from Gerald Fowlie to Peck, Snow and Moran, 24 July 1950, in NARA RG 238 (WCR), Advisory Board on Clemency, HICOG, Correspondence and Other Records 1950, box 1, Research for the Board folder. Of the 105 petitioners, Rudolf Aschenauer represented seventeen, five of them from the *Einsatzgruppen* case (Ohlendorf, Braune, Schubert, Ott, and Klingelhöfer).

⁸⁹ In appellate courts prosecutors participate in the process. Ferencz was one of the only prosecutors still in Germany and had volunteered his services to the Peck Panel who turned him down. Staff Announcement No. 117, Establishment of Advisory Board on Clemency for War Criminals, 18 July 1950, in NARA RG 466 (HICOG), John J. McCloy, Classified General Records 1949-1950, box 17, July 1950 DC50 1789-1812 folder. See also, Letter from Benjamin B. Ferencz to Frederick Moran, 1 August 1950 and letter from Gerald Fowlie to Benjamin B. Ferencz, 7 August 1950 in *ibid*, box 2, Correspondence E213, 1 August - 20 September 1950 folder.

⁹⁰ Letter from Gerald Fowlie to Peck, Snow and Moran, 20 July 1950 in *ibid*.

death, the issue that most Germans were now routinely pointing to as a valid reason for pardon, “as a basis for commuting an otherwise deserved death sentence.”⁹¹ Even before the Advisory Board completed its review, Peck recommended that good conduct time should be increased from five days per month to ten days per month. This was immediately implemented and an additional eight convicted war criminals were released from prison including Frederick Flick, the head of the Flick corporation, and Otto Dietrich, the director of the IG Farben group, two important symbols of the Subsequent Nuremberg Proceedings.⁹² On August 28, 1950, after six weeks of work, an admittedly short period of time to review such vast quantities of material including the review of one-hundred and five cases, the Peck Panel submitted its recommendations to McCloy.⁹³

The Peck Panel’s report strongly supported the Nuremberg principles of individual responsibility and justice, but it also recognized that the convicted men were part of a larger Nazi “program” of criminality; and, each of the twelve trials, the panel concluded, represented a “segment” of this criminal and inhuman system.⁹⁴ The Panel also expressed its

⁹¹ Internal Route Slip, Headquarters, European Command, 4 August 1950, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post Trial Activities 1945-1957, box 2, Clemency Files 1950 folder.

⁹² Untitled article, *Die Neue Zeitung*, 17 August 1950, in *ibid* RG 238 (WCR), Advisory Board on Clemency, Correspondence, box 1, Clipping File on Committee folder.

⁹³ Report from the Advisory Board on Clemency for War Criminals to John McCloy, 28 August 1950, 1, in RG 12 BBF Papers, Einsatzgruppen Trial, Darmstadt, Clippings folder, USHMM. Unfortunately, no written record of the Board’s work exists since all of the proceedings were oral and no minutes were kept. Rules of Procedure in Clemency Board Hearings, 22 July 1950, in NARA RG 466 (HICOG), Prisons Division, General Records, box 36, War Crimes Clemency Board Operational History folder.

⁹⁴ *Ibid.*

dismay when it discovered that “the majority of the defendants still seem to feel that what they did was right.” Too much charity toward the perpetrators, the report warned, “would be a mockery. It would undo what Nuremberg has accomplished.”⁹⁵ Yet, in spite of these warnings and at the risk of making a “mockery” of Nuremberg, the members found many reasons to recommend sentence reductions. Their mandate was, after all, to temper justice with “charity and generosity.”⁹⁶ As such, they took into consideration every possible “mitigating circumstance,” and what resulted was some incredible recommendations for sentence reductions.⁹⁷ For instance, of the twenty *Einsatzgruppen* leaders sentenced to prison terms or death by Tribunal II at Nuremberg, the Peck Panel recommended sentence reductions for all except seven, in some cases drastically (see Figure 9.1).

⁹⁵ Peck Panel quoted in Bower, *Blind Eye to Murder*, 421.

⁹⁶ McCloy instructed them to be as charitable as possible. Rules of Procedure in Clemency Board Hearings, 22 July 1950, in NARA RG 466 (HICOG), Prisons Division, General Records, box 36, War Crimes Clemency Board Operational History folder.

⁹⁷ *Ibid.*

Figure 9.1**Recommendations of the Advisory Board on Clemency (Peck Panel), August 28, 1950⁹⁸**

Defendant	Original Sentence	Recommendation
Blobel, Paul	Death	Death
Biberstein, Ernst	Death	15 Years
Blume, Walter	Death	20 Years
Braune, Werner	Death	Death
Haensch, Walter	Death	15 Years
Klingelhöfer, Waldemar	Death	Death
Naumann, Erich	Death	Death
Ohlendorf, Otto	Death	Death
Ott, Adolf	Death	Death
Sandberger, Martin	Death	Death
Schubert, Heinz	Death	Time Served
Seibert, Willy	Death	Time Served
Steimle, Eugen	Death	15 years
Jost, Heinz	Life	10 years
Nosske, Gustav	Life	10 years
Radetzky, Waldemar von	20 years	Time served
Schulz, Erwin	20 years	10 years
Six, Franz	20 years	Time served
Fendler, Lothar	10 years	Time served
Rühl, Felix	10 years	Time served

The Advisory Board's recommendations to reduce and commute sentences of the *Einsatzgruppen* leadership was based on a number of factors, but the issue of "superior orders," which was continually promoted as a mitigating factor, was not one of them. The Board found that in the case of the *Einsatzgruppen*'s activities there was no credence to the claim that their tasks were military in nature. Just as Musmanno had found that their principal assignment was to execute the "political policy of genocide," so too did the Board

⁹⁸ Report from the Advisory Board on Clemency to John McCloy, 28 August 1950, in Record Group 12.000, Benjamin B. Ferencz Papers, Einsatzgruppen Trial, Darmsstadt, Clippings folder, USHMM.

and therefore superior orders could not be considered in mitigation in these cases.⁹⁹ Thus, the Board had to find other, more disingenuous reasons for mitigating the sentences of these mass murderers and to do so, in some cases, they extended their authority beyond its scope by considering the facts of the trial, even though they admittedly had no knowledge of them. For instance, in the case of Franz Six, the Board found that “the guilt of the defendant was not proved beyond a reasonable doubt,” and that he was convicted based solely on the issue of his membership in a criminal organization, this despite the fact that they neither reviewed the trial transcript nor any of the evidence submitted by the prosecution in reaching their decision. Moreover, the Board was impressed with Six’s personality, they found he made a “very favorable impression” in their discussions with him (it will be recalled that Six was extremely well educated and a university professor). He was very well-spoken and prison officials believed if he were to be released from Landsberg he would make an “excellent” citizen.¹⁰⁰ On this basis, and without probing very deeply into the case, the Board recommended that Six’s sentence of twenty years, be reduced to time served.¹⁰¹ The Board was willing to use just about any reason for mitigation as seen in the case of Gustav Nosske. They found that although he was certainly involved in a large number of murders, he had taken personal risk when he refused to execute *Mishlinge* in Dusseldorf upon his return from

⁹⁹ “Case No. 9,” Report of Peck Panel, circa September 1950, in NARA RG 466 (HICOG), Prisons Division, War Criminal Case Files, box 4, Case 9 folder.

¹⁰⁰ “Franz Six,” Report on the Advisory Board on Clemency for War Criminals part II, 1 September 1950, in NARA RG 466 (HICOG), Security Segregated Records of the Prison Division, box 6, Report of the HICOG Advisory Board on Clemency for War Criminals Part II folder.

¹⁰¹ “Franz Six,” Report of the Advisory Board on Clemency for War Criminals, 28 August 1950, in *ibid*, Security Segregated Records, box 8, War Crimes Trials 1950 folder.

the Soviet Union in 1943. Therefore they concluded that his sentence of life imprisonment should be reduced to ten years as he had demonstrated courage, at least once, against the Reich's murderous policies.¹⁰² The recommendation that Walter Blume's sentence of death be commuted to twenty years shows clearly how ridiculous the grounds were for mitigation. In deciding Braune's case the Board noted that they "simply" took the convicted war criminal's word as fact instead of investigating his case further. When Braune told the Board members that he had always objected to the *Führerbefehl*, but had to carry it out, they believed him. In their view, unlike in the view of the tribunal that convicted him, a thought was enough of a mitigating factor to recommend sparing his life.¹⁰³

While the Advisory Board on Clemency submitted its report to McCloy in late August 1950, the High Commissioner did not make any decision regarding their recommendations until January 1951. The Korean War had broken out in June and McCloy was duly convinced that now, more than ever, the US needed Germany as an ally against the burgeoning communist threat.¹⁰⁴ German opposition groups also took advantage of the changing political situation using the war criminals issue as a *quid pro quo* for the rearmament of Germany as protection against communism in Europe.¹⁰⁵ In fact, by late 1950 most Germans, even those who had been victims of Nazism, viewed the American war

¹⁰² "Gustav Nosske," Recommendations of the Advisory Board on Clemency, Einsatzgruppen, July 1950, in NARA RG 466 (HICOG), Administration of Justice Division, Classified Records 1947-1954, box 1, War Criminals folder.

¹⁰³ "Walter Blume," in *ibid.*

¹⁰⁴ Schwartz, "John J. McCloy and the Landsberg Cases," 444-445.

¹⁰⁵ *Ibid.*

crimes trials as an attack on German sovereignty and many German wrote the High Commissioner demanding clemency for those still in prison and convicted by US tribunals. Even Konrad Adenauer, the new German chancellor, personally requested that McCloy commute all pending death sentences.¹⁰⁶ It was under tremendous pressure, including threats of death, and during this time of political upheaval that McCloy began to consider the Advisory Board's recommendations. Not wanting to execute anyone over the Christmas holiday, McCloy waited until January 31, 1951 to announce his decisions regarding clemency and sentence modifications.

By all accounts, the Advisory Board's recommendations were incredibly merciful, perhaps even too much so. McCloy's closest legal advisor, Robert Bowie, expressed grave concerns about the "excessive" nature of forty-six of the ninety-three sentence recommendations worrying that they simply were not warranted, especially since the Peck Panel had not consulted any of the evidence used to convict these men when coming to their decisions.¹⁰⁷ But McCloy was under a tremendous amount of pressure to resolve the issue, an issue that was really unresolvable given that he "was attempting to make a decision that would satisfy the sense of justice among nations with very different understandings and experiences of World War II."¹⁰⁸ Weighing his options carefully, McCloy opted for leniency, taking "into account every factor which could justify clemency and resolved every doubt in

¹⁰⁶ *Ibid.*

¹⁰⁷ Memorandum from Robert Bowie to John McCloy, 31 October 1950, in NARA RG 466 (HICOG), Office of the Executive Director, Security Segregated General Records 1949-1955, box 28, 321.6 War Criminals folder.

¹⁰⁸ Schwartz, "John J. McCloy and the Landsberg Cases," 452.

favor of the convicted” men.¹⁰⁹ What resulted was the commutation of eleven of the sixteen death sentences and the reduction of sentences of nearly all of those convicted and sentenced to prison terms in the Subsequent Nuremberg Trials. Only five men did not have their death sentences commuted, four from the *Einsatzgruppen* trial including Ohlendorf, Blobel, Braune, and Naumann as well as Oswald Pohl, whose crimes were judged to be so heinous that even the High Commissioner had to admit that their death sentences were warranted. As McCloy stated in his press release on the subject,

The remaining five [death] sentences will be confirmed. In each of these cases the enormity of the crimes for which these men were directly responsible was such as to place clemency out of reason.¹¹⁰

As far as the High Commissioner was concerned, he had to be fair, not only to the defendants, but to the “concepts of law and justice,” and therefore these five men must “discharge their debt to society,” with their lives.¹¹¹ When Ohlendorf learned of McCloy’s decision to carry-out his death sentence, he was outraged. As far as the former leader of *Einsatzgruppe D* was concerned, McCloy’s decision was an injustice. Ohlendorf reasoned that thousands of members of the *Einsatzgruppen* had contributed to the murders in the occupied Soviet Union, not just those twenty-two who were tried and the fourteen who were convicted at Nuremberg. More important for his own future, he and three of his colleagues were to be the only ones to pay for the crimes of thousands with their lives. Ohlendorf

¹⁰⁹ Statements Regarding John J. McCloy’s Final Decisions on Requests for Clemency for War Criminals Convicted at Nuremberg, 31 January 1951, Paris Storey File, box 179, Subject file, Foreign Affairs, Harry S Truman Library, Independence, Missouri.

¹¹⁰ *Ibid.*

¹¹¹ Letter from John McCloy to Bishop Wurm, 14 February 1951, D1/295, NL Wurm, LKA.

believed that McCloy's decision made him a "martyr."¹¹² In the case of the other sixteen *Einsatzgruppen* defendants, McCloy showed even greater leniency than the Peck Panel, at least for those who had been sentenced to death (see Figure 9.2). Overall, the High Commissioner was satisfied with the results of the commutations, although years later he seemed to indicate some misgivings about his decisions, telling Benjamin Ferencz, that "if I had all the facts I now have, I might have reached a more just result," regarding the commutation of sentences for war criminals.¹¹³

¹¹² Ohlendorf cited in Hilberg, *Destruction*, 1079-1080 and Bower, *Blind Eye to Murder*, 422.

¹¹³ Letter from John J. McCloy to Benjamin Ferencz, 10 April 1980, USHMM, RG 12.000 Benjamin B. Ferencz Papers, John J. McCloy File, Drawer 24, box 2.

Figure 9.2**Comparison between the Recommendations of the Advisory Board on Clemency and John McCloy's Decisions**¹¹⁴

Defendant	Original Sentence	Advisory Board	McCloy
Blobel, Paul	Death	Death	Death
Biberstein, Ernst	Death	15 years	Life
Blume, Walter	Death	20 years	25 years
Braune, Werner	Death	Death	Death
Haensch, Walter	Death	15 years	15 years
Klingelhöfer, Waldemar	Death	Death	Life
Naumann, Erich	Death	Death	Death
Ohlendorf, Otto	Death	Death	Death
Ott, Adolf	Death	Death	Life
Sandberger, Martin	Death	Death	Life
Schubert, Heinz	Death	Time served	10 years
Seibert, Willy	Death	Time served	15 years
Steimle, Eugen	Death	15 years	20 years
Jost, Heinz	Life	10 years	10 years
Nosske, Gustav	Life	10 years	10 years
Radetzky, Waldemar von	20 years	Time served	Time served
Schulz, Erwin	20 years	10 years	15 years
Six, Franz	20 years	Time served	10 years
Fendler, Lothar	10 years	Time served	8 years
Rühl, Felix	10 years	Time served	Time served

5. Reaction to Sentence Revisions

Reactions to McCloy's sentence reductions were mixed. Former Nuremberg participants heavily criticized the High Commissioner for his "sweeping" clemency program, claiming the decisions were not only misguided, but overly generous. Many, such as former *Einsatzgruppen* prosecutor Benjamin Ferencz, found them simply

¹¹⁴ Series C, Final Decisions Regarding Requests for Clemency, undated in *ibid*, Classified General Records 1949-1952, box 24, D(51) 126 War Crimes folder.

incomprehensible given the nature of the crimes.¹¹⁵ Whereas initially at least, most Germans reacted favorably to his decisions, especially Konrad Adenauer who praised the High Commissioner's even handedness and "objective" decisions in this matter.¹¹⁶ But, as had been the case earlier, it was not long before many German nationalists renewed their public and vociferous lobbying for the commutation of death sentences for the remaining five Landsberg "red jackets."¹¹⁷ Between January 31 (when the sentence reductions were announced) and March 9, 1951, the High Commissioner received more than one thousand

¹¹⁵ For example, Telford Taylor, "The Nazis Go Free. Justice and Mercy or Misguided Expediency?" *The Nation*, 24 February 1951, in NARA RG 466 (HICOG), Bonn, General Records 1949-1952, box 12, 321.6 folder; letter from Hans Weigert to John McCloy, 5 March 1951 in *ibid*; and letter from Hans Frohlich, 2 March 1951 in *ibid*.

¹¹⁶ For example see summary of German editorials, 1 February 1951, in NARA RG 466 (HICOG), Classified General Records 1949-1952, box 24, D(51) 94-134 folder; letter from Karl Hartenstein, Council of the Evangelical Church of Germany, 2 February 1951 in *ibid*; letter from McCloy to Peck, 5 February 1951, in *ibid*; memorandum from Saliger to Settel, re: Press Reaction to Publication of Landsberg Decisions, 5 February 1951, in *ibid*, box 12, 321.6 folder. The only German newspaper to attack the so-called Landsberg decisions was the Stuttgart newspaper, *Christ und Welt*, whose editors had been extremely active in reporting favorable attitudes toward the Landsberg prisoners. See Review of German and Foreign Press Reaction to the Clemency Decisions on Landsberg War Crimes Cases, 10 February 1951 in *ibid*, box 24, D(51) 126 War Crimes folder. Public reaction was not nearly so favorable in the United States, where many Americans viewed McCloy's clemency program as nothing more than "political expediency." McCloy's sentence reductions particularly angered those who had participated in the Nuremberg trials. See Memorandum from Secretary of State to McCloy, 6 February 1951, in *ibid*, box 24, D(51) 55-93B folder and John J. McCloy interview with Benjamin Ferencz, 24 April 1984, USHMM, RG 12.000 Benjamin B. Ferencz Papers, Drawer 24, War Crimes Trials, box 2, J.J. McCloy Interview folder.

¹¹⁷ For example see the letter from Landesbischof Wurm to John McCloy, 10 February 1951, in NARA RG 466 (HICOG), Classified General Records 1949-1952, box 24, D(51) 126 War Crimes folder; letter from Wurm to McCloy, 12 February 1951, D1/295, NL Wurm, LKA; letter from Amtsstellen des Evangelical Anstaltspfarrers, Landsberg, to Landesbischof Meiser, 5 February 1951, in *ibid*; and, letter from Landesbischof Wurm to Weihbischof Neuhäusler, in *ibid*.

letters on the issue. Most of the writers complained that further sentence reductions were necessary and demanded that the five remaining “red jackets” be pardoned.¹¹⁸ Propaganda directed at the Americans also proliferated. One pamphlet referred to the case of Oswald Pohl as “Germany’s ‘Dreyfus Affair,’” and Pohl himself wrote an open letter titled, “I Accuse!”¹¹⁹ Even McCloy’s children and wife were threatened by an unidentified individual should he carry out the remaining death sentences.¹²⁰

In spite of all the pressure and opposition, and sincerely hoping to end the war criminals issue once and for all, McCloy announced that the five remaining “red jackets” would be executed on February 16, 1951.¹²¹ Germans opposed to McCloy’s decision sensed that time was running out for the condemned men. In order to have the executions stayed as soon as possible, the *Zentrale Rechtsschutzstelle* (the Main Office for the Legal Protection of War Criminals which was part of the Federal Republic’s Justice Department and headed by Hans Gawlik the former attorney for Erich Naumann) hired an American attorney, Warren Magee, paid for by the Bonn government, to work in the United States in behalf of the five condemned men. Magee immediately filed for writs of habeas corpus with the US Supreme

¹¹⁸ Analysis of Letters on the Landsberg Decisions, 9 March 1951, in NARA RG 466 (HICOG), Classified General Records 1949-1952, box 24, 126 War Crimes folder.

¹¹⁹ “Germany’s ‘Dreyfus Affair,’” and “I Accuse!” 23 February 1951 in *ibid*, War Crimes Branch, General Administration Records, box 4, War Crimes 201 folder.

¹²⁰ Telegram from McCloy to Department of State, 5 March 1951, in *ibid*, Classified General Records 1949-1952, box 25, D(51) 275- D(51) 296 folder.

¹²¹ Letter from McCloy to Handy, 13 February 1951, in *ibid*, box 25, D(51) 178-D(51) 224a folder.

Court on February 14, 1951, only two days before the five men were to be executed.¹²² But McCloy refused to issue a stay of execution, despite an “eleventh hour appeal” from Konrad Adenauer who personally asked the High Commissioner to wait until all of the legal issues had been resolved before executing the five convicted war criminals.¹²³ McCloy refused these pleas, having agonized over his decisions he was determined not to renege on his goal of resolving the war criminals problem once and for all. To execute these five men, he believed, would put the matter to rest. But hours before the “red jackets” were to be hanged, a message arrived from Secretary of State Dean Acheson warning that he “should not proceed with executions until further advised.”¹²⁴ Acheson’s decision to stay the executions set in motion a renewed and intense campaign to free the condemned men.

After Acheson’s announcement, the atmosphere surrounding the pending execution of the condemned Nurembergers became incredibly charged, causing a frenzy of activity by both the Germans and Americans.¹²⁵ The tension can easily be compared to that of a

¹²² According to the Geneva Prisoners of War Convention of 12 August 1949, prisoners of war who are sentenced to death are automatically entitled to writs of habeas corpus. The Landsberg defense attorneys tried to apply the modified Geneva Convention to the Landsberg condemned. See letter from Rudolf Aschenauer to Warren Magee, 20 February 1951, B305/137, *Deutsche Kriegsverurteilte im Landsberg 1951-1952*, BA, and letter from Frederick Wiehl to Krekeller, German General Consul, February 1951, in *ibid.*

¹²³ Letter from Konrad Adenauer to John McCloy, 13 February 1951, B305/147 *Deutsche Kriegsverurteilte im Landsberg, Einzelfälle, 1949-1950*, BA.

¹²⁴ Memorandum from Acheson to McCloy, 15 February 1951, in NARA RG 466 (HICOG), Classified General Records 1949-1952, box 25, D(51) 178-D(51) 224a folder.

¹²⁵ For example on February 16 members of the Württemberg-Baden Landtag got into a heated row over the issue, when Heinz Burneleit of the DVP stood up and asserted that to execute the Landsberg prisoners would constitute “legalized murder.” The SPD and CDU members stormed out in protest. Memorandum from Jim Kind to John McCloy, 16 February 1951, in *ibid.*, box 24, D(51) 126 War Crimes folder.

contemporary high-profile (American) death-row case, where a legal team uses every means possible to fight for an inmate's life and, as the date of execution approaches, the tension mounts. This is precisely what occurred after February 14, 1951. On the legal front Warren Magee, the American attorney hired to help the condemned Landsberg prisoners, filed petitions with the Supreme Court less than forty-eight hours before the condemned men were to be hanged on February 16. The petitions were turned down for lack of jurisdiction, but Magee immediately appealed the decision. The American lawyer soon realized he had an up-hill battle when, much to his surprise, the US Solicitor General, the Assistant Solicitor General, the Judge Advocate General of the Army and legal counsel for the State Department all showed up at the Court of Appeals to oppose his motion.¹²⁶ It was clear: the Americans were prepared to carry-out the executions of the remaining condemned men and, as far as they were concerned, the sooner the better. The German opposition was equally as determined not to allow this to happen.

Letters requesting clemency and stays of execution for the condemned men began to pour into McCloy's office.¹²⁷ Interestingly, most of the letters he received dealt with Oswald Pohl's case. A lesser number concerned the cases of Werner Braune and Erich Naumann. Ohlendorf had some support, although appeals in his behalf were based mostly on his

¹²⁶ Letter from Warren Magee to Dr. Hellmut Becker, 1 March 1951, B305/137, Deutsche Kriegsverurteilte im Landsberg 1951-1952, BA.

¹²⁷ Summary of Clemency Requests, 20 February 1951, in NARA RG 338 (Judge Advocate Division), Records of Post-Trial Activities, box 3, General Clemency folder. See also telegram, from Klaus Kuntze, "Bitte um Hinrichtungsstop Landsberg," telegram from Bochum, unnamed sender, "Hinrichtungsbegründung bodenlos," and telegram from Bochum, unnamed sender, "Gerechtigkeit wird zum mord," all sent 15 February 1951, in *ibid*, War Crimes Branch, Records Relating to War Crimes Prison No. 1 Landsberg, box 6, Landsberg 201 folder.

personality and not the general “unfairness” of McCloy’s clemency decision. Oddly, no one petitioned the High Commissioner in behalf of Paul Blobel who American officials surmised was “friendless.”¹²⁸ The majority of the letters received by the High Commissioner’s office were “strikingly similar” in content and tone, leading American officials to conclude that while it was “commendable” that Germans were “taking advantage of the democratic privilege of expressing their views on controversial issues,” they were not representative of the German population at large, but rather reflected the opinion of a certain segment of the population: the right and far right who persisted in believing that “the Landsberg inmates [were] victims of persecution and not criminals.”¹²⁹

Despite the tremendous amount of pressure McCloy refused to budge on the five remaining death cases. He firmly believed that to commute these death sentences would not only “further undermine the moral and legal principles established at the Nuremberg Trials,” but that to do would also “strike another blow at the prospects for a democratic Germany, provide the communists with a powerful propaganda weapon to use against us and make a mockery of American standards of justice and law.”¹³⁰

Those who supported the condemned men still held out hope that they could persuade the Americans to grant pardons, clemency, or reduce the sentences of these men.

¹²⁸ Letter from B. Rintels, Chief, Administration of Justice Division, to Colonel John Raymond, 16 March 1951, in *ibid* RG 466 (HICOG), Bonn, General Records 1949-1952, box 12, 321.6 folder.

¹²⁹ Analysis of Letters on the Landsberg Decisions, 19 March 1951 in *ibid*, Office of the Executive Director, Security Segregated General Records 1949-1955, box 28, 321.6 folder.

¹³⁰ Telegram from McCloy to Secretary of State, 22 March 1951, in *ibid*, box 12, 321.6 folder.

This should not be surprising given the tremendous success of the lobbyists. To this end, Magee filed appeal after appeal in courts of the United States hoping for a retrial for the condemned men. Many letters were written to the High Commissioner, including a petition for the pardon of the condemned men signed by nearly 610,000 people.¹³¹ Rudolf Aschenauer, still working for the Landsberg prisoners, filed several additional requests for clemency for Ohlendorf, Braune, Naumann and Blobel.¹³² With each failure the atmosphere surrounding the executions became more charged and the efforts of those involved more desperate. But when the US Supreme Court denied Magee's request for certiorari on May 22 and McCloy lifted the stay of execution ordering the commander of Landsberg prison to carry-out the death sentences in three days (May 25) hope quickly faded.¹³³

On May 23 Magee desperately sought a "declaratory judgment" on the Bonn constitutional provision which prohibited capital punishment in Germany, as well as requesting a permanent injunction against executions.¹³⁴ A stay of execution was not granted until the next day, May 24 however, when a sympathetic Washington judge agreed to hear

¹³¹ Letter from Frederick Libby to Princess Isenburg, 9 June 1951, D1/303, NL Wurm, LKA, and letter to the editor of the *Washington Post* from Frederick Libby, 4 June 1951, in *ibid*.

¹³² For example see letter from Warren Magee to Hans Gawlik, 6 April 1951 and letter from Hans Gawlik to Warren Magee, 12 April 1951, B305/137, Deutsche Kriegsverurteilte im Landsberg 1951-1952, BA and memorandum from Rintels to Bowie, 11 May 1951, in NARA RG 466 (HICOG), Prisons Division, Petitions for Clemency for War Criminals, box 24, Ohlendorf folder.

¹³³ Letter from McCloy to General Thomas Handy, 22 May 1951 in *ibid* RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post Trial Activities 1945-1957, box 13, Executions of War Criminals June 1951 folder.

¹³⁴ Memorandum from Acheson to McCloy, 23 May 1951 in *ibid*, Security Segregated Records 1945-1957, box 10, War Criminals Trials 1951 folder.

arguments on the “new status of Germany” and gave a five day reprieve to the condemned men who now had until May 29 to convince an American judge of the merits of their appeal.¹³⁵ On May 28, the day before the executions were to take place, Federal District Court Judge Walter M. Bastian extended the stay until 4 a.m. June 5 to give counsel for the condemned men time to file an appeal if one should prove necessary.¹³⁶ Indeed, on May 29 Bastian dismissed Magee’s motions noting that “the courts are not proper tribunals for consideration of these matters.”¹³⁷ Magee again filed an appeal. On June 4, the United States Court of Appeal denied further extension of the stay, affirming the lower court’s decision.¹³⁸ The final blow to the defense came later that day, when the Chief Justice of the Supreme Court of the United States, Fred Vinson, denied a further stay of execution thereby shutting down the possibility of all future appeals, and virtually assuring that the executions would take place.¹³⁹ With their legal channels exhausted and virtually no possibility of an additional

¹³⁵ “DC Judge Save 7 Nazis,” *Times Herald*, 25 May 1951, in *ibid*; record of telephone conversation between Colonel Raymond and Mr. Hulse, HICOG, 24 May 1951, in *ibid*, Classified General Records 1949-1952, box 24, D(51) 126 War Crimes folder; and, memorandum for the Record, by Thomas Handy, 25 May 1951, in *ibid* RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post-trial Activities 1945-1957, box 13, Executions of War Criminals June 1951 folder.

¹³⁶ Letter from Warren Magee to Hans Gawlik, 28 May 1951, B305/137, Deutsche Kriegsverurteilte im Landsberg 1951-1952, BA, and Letter from Magee to Gawlik, 29 May 1951, in *ibid*.

¹³⁷ Bastian quoted in “Court Rejects Plea for Nazis,” *Stars and Stripes*, 30 May 1951, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post-Trial Activities 1945-1957, box 15, Clippings folder.

¹³⁸ Telegraph from Acheson to McCloy, 4 June 1951, in *ibid* RG 466 (HICOG), Classified General Records 1949-1952, box 24, D(51) 126 War Crimes folder.

¹³⁹ Warren Magee sent a telegram to Gawlik on June 5 acknowledging the futility of the situation, B305/138, Deutsche Kriegsverurteilte im Landsberg, BA. See also letter from

stay, everyone recognized time had run out for the condemned men. Even Warren Magee said he “did not know what more he could do to keep them [the five Landsberg prisoners] from the gallows.”¹⁴⁰ On June 5, under the advice of Acheson, McCloy ordered that the death sentences of the five remaining Landsberg prisoners, convicted of war crimes at Nuremberg, be carried out expeditiously.¹⁴¹ This time the five “red jackets” would not escape the hangman. At McCloy’s request, preparations were made at Landsberg prison for the executions which would take place within forty-eight hours.¹⁴²

The night before the five men were to be hanged, their wives visited them for the last time, grateful for how well American authorities had treated them.¹⁴³ All the men were calm and seemed resigned to their fate.¹⁴⁴ After they had said their goodbyes, the five condemned men were hanged, in alphabetical order, between midnight and 1:43 a.m. on June 7, 1951, at

Magee to Gawlik, 8 June 1951 in which he explains in detail the events from May 29 to June 7, B305/137, *ibid*.

¹⁴⁰ Warren Magee quoted in transcription of telephone conversation between John McCloy and Thomas Handy, 5 June 1951, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post-Trial Activities 1945-1957, box 13, Executions of War Criminals June 1951 folder.

¹⁴¹ Letter from John McCloy to Thomas Handy, 5 June 1951, in *ibid* RG 466 (HICOG), Prisons Division, Security Segregated Records 1945-1957, box 12, War Crimes Trials Landsberg and Dachau Cases B-13 folder and cable from Acheson to McCloy, 4-5 June 1951 in *ibid*, box 11, Landsberg Prison Cables folder.

¹⁴² Report of Dr. Spengler, Landsberg Prison, 6-7 June 1951, B305/137, Deutsche Kriegsverurteilte im Landsberg 1951-1952, BA.

¹⁴³ *Ibid*.

¹⁴⁴ Reportedly Naumann said, “I am ready to die (Ich bin zu sterben bereit).” Braune expressed concern for his wife who he found offered him comfort in the last hours of his life. Ohlendorf was typically philosophical about his fate. There is no record of Blobel’s last hours. See *ibid*.

Landsberg prison.¹⁴⁵ Blobel was executed first just after midnight, followed twenty minutes later by Braune, then Naumann, Ohlendorf and Pohl.¹⁴⁶ Blobel and Braune went to their deaths maintaining that they could not be held accountable because they had just done their duty, whereas Ohlendorf called for the reconciliation of his people, and a change in direction hitherto taken by Germany.¹⁴⁷ Naumann simply said, the “time will come in which it will be shown whether (sic) my execution has been justified or not. Into Your hands, Lord, I deliver my soul.”¹⁴⁸ Reportedly his wife suffered a heart attack after his execution.¹⁴⁹ The men were buried immediately in unmarked graves so as to prevent any show of martyrdom in the future.

Needless to say, reactions to the Landsberg executions were mixed. Some Germans called the four year wait the prisoners endured “a crime against humanity” and others acknowledged that McCloy did everything humanly possible to temper justice with charity.¹⁵⁰ With the execution of the Landsberg prisoners, the war criminals issue lost much of its force, except with the most committed German nationalists who remained hopeful that

¹⁴⁵ Report of Execution of War Criminals, 8 June 1951, in NARA RG 466 (HICOG), Administration of Justice Division, Records of the Execution of War Criminals on June 8, 1951, box 1, F-133 folder.

¹⁴⁶ *Ibid.*

¹⁴⁷ Last words of Ohlendorf, Braune, Naumann and Blobel, 7 June 1951 in *ibid.*

¹⁴⁸ Last words of Erich Naumann, 7 June 1951, in *ibid.*

¹⁴⁹ “7 Nazi War Criminals Hanged,” untitled newspaper clipping, 8 June 1951, in RG 12 BBF Papers, Einsatzgruppen Trial, Darmsstadt, Clippings.

¹⁵⁰ For initial reactions to the executions see “First German Press Comments on Landsberg Executions,” 8 June 1951, in NARA RG 466 (HICOG), Bonn, General Records 1949-1952, box 12, 321.6 folder. For an analysis of British, French and American reactions see Schwartz, “John J. McCloy and the Landsberg Cases,” 449-452.

one day the Americans would pardon all of the remaining war criminals at Landsberg prison. McCloy had never intended the war criminals issue to become political, but this is precisely what occurred in the years that followed. His clemency program, as one historian has noted, “set in motion a process” whereby between June 7, 1951 and May 9, 1958 all of the remaining Landsberg prisoners were released from prison, including the remainder of the *Einsatzgruppen* leaders, in order to “appease Germany” and maintain good relations (see Figure 9.3).¹⁵¹

¹⁵¹ Schwartz, “John J. McCloy and the Landsberg Cases,” 453. John Mendelsohn agrees with Schwartz’s findings. See *idem*, “War Crimes and Clemency in Germany and Japan,” in *Americans as Proconsuls. United States Military Government in Germany and Japan, 1944-1952*, Robert Wolfe (ed.), (Carbondale, Illinois, 1984), 253.

Figure 9.3**Sentence Modifications of the Einsatzgruppen Leaders between April 10, 1948 and May 1958**¹⁵²

Name	Original Sentence	January 31, 1951 Sentence	Subsequent Actions
Biberstein, Ernst	Death	Life	Paroled February 1958
Blobel, Paul	Death	Death	Hanged June 7, 1951
Blume, Walter	Death	25 years	Paroled March 1955
Braune, Werner	Death	Death	Hanged June 7, 1951
Fendler, Lothar	10 years	8 years	Time served, released March 1951
Haensch, Walter	Death	15 years	Time served, released August 1955
Jost, Heinz	Life	10 years	Paroled January 1952
Klingelhöfer, W.	Death	Life	Paroled December 1956
Naumann, Erich	Death	Death	Hanged June 7, 1951
Nosske, Gustav	Life	10 years	Sentence commuted December 1951
Ohlendorf, Otto	Death	Death	Hanged June 7, 1951
Ott, Adolf	Death	Life	Paroled, May 1958
Radetzky, W. von	20 years	Time served	Released January 1951
Rühl, Felix	10 years	Time served	Released January 1951
Sandberger, Martin	Death	Life	Paroled February 1958
Schubert, Heinz	Death	10 years	Sentence commuted December 1951
Schulz, Erwin	20 years	15 years	Paroled January 1954
Seibert, Willy	Death	15 years	Paroled May 1954
Six, Alfred	20 years	10 years	Time served, released October 1952
Steimle, Eugene	Death	20 years	Paroled June 1954

¹⁵² This information comes from a variety of sources including the prison records of the convicted men. NARA RG 466 (HICOG), Prisons Division, Administration and Medical Records; Good Conduct Time Release Order of Walter Haensch, 26 August 1955, in *ibid*, box 4, Haensch folder; Telegram from McCloy, 11 January 1952 in *ibid*, Security Segregated Records 1949-1955, box 28, 321.6 War Criminals folder; Parole Supervisor Reports, 22-25 April 1955, in *ibid*, RG 338 (Judge Advocate Division) War Crimes Branch, Records of Post-Trial Activities 1945-1957, box 6, US Parole Officer Summaries folder; letter from Deforest Barton, Parole Supervisor, to the Chairman of the Mixed Board, 17 July 1957, B305/808, Eugen Steimle, BA; Supplemental Information, Martin Sandberger, undated 1958, B305/785, Martin Sandberger, BA; Personenliche Beobachtungen des Direktors of Walter Haensch, undated, B305/716, Walter Haensch, BA; and, Application for Parole and Clemency of Waldemar Klingelhöfer, 13 December 1956, B305/837, Sitzungen des Ausschusses 1956, BA.

6. 1951-1958

While McCloy did not grant clemency to the *Einsatzgruppen* leaders or any other Landsberg prisoners after January 31, 1951, he did implement a Christmas amnesty program in December 1951 and 1952 in which Gustav Nosske and Heinz Schubert, among others, were released after having their sentences commuted to time served.¹⁵³ After McCloy left Germany, the new High Commissioner James B. Conant, further attempted to appease the Germans. In accordance with Article 6 of the *Grundgesetz* and its agreements concerning a solution to the war criminals problem, on August 31, 1953, he approved of the creation of the Interim Mixed Parole and Clemency Board.¹⁵⁴ The Interim Board included one representative from each Britain, France, and the United States and two representatives from Germany.¹⁵⁵ While the Interim Board was forbidden from questioning the fairness of the Nuremberg tribunals that had tried the Landsberg prisoners, they could consider age, health, employment opportunities, and the condition of the prisoners family when determining issues of clemency and parole, a fairly good indication that the Americans were no longer

¹⁵³ Letter from Benjamin Ferencz to Telford Taylor, 17 December 1951, USHMM, RG 12.000 Benjamin B. Ferencz Papers, Drawer 11, Biographical Material, box 1, Correspondence 1945-1955 folder; and, memorandum, re: Terms of 1951 Christmas Clemency, to Hagan, 28 October 1952, in NARA RG 466 (HICOG), Security Segregated Records of the Prison Division, box 6.

¹⁵⁴ Letter from Hans Gawlik to Bishop D. Heckel, 2 July 1955, B305/134, Deutsche Kriegsverurteilte im Landsberg, BA.

¹⁵⁵ Edwin Plitt was the US member and later Spencer Phenix, Gustave Laroque the French member, and Sir Edward Jackson the British member. Hellmuth von Weber, Emil Lersch and Gottfried Kuhnt were the German members. The Mixed Board began its work on 11 August 1955. See Vermerk, B305/758, Adolf Ott, BA; and, Vermerk, "Kriegsverurteilte in der Bundesrepublik," B305/53, Bereinigung des Kriegsgefangenenproblems – Gemischte deutsche – alliierte Ausschüsse zu Überprüfung der Urteile, BA.

serious about punishing former Nazis for their crimes.¹⁵⁶ Between 1953 and 1955, the Interim Board granted parole or clemency to twenty-four Nurembergers and an additional 247 Dachauers.¹⁵⁷ These included Erwin Schulz, Willy Seibert and Eugen Steimle in January, May and June of 1954 respectively and Walter Blume, who they paroled in March 1955.

When Germany gained full sovereignty in 1955, the Interim Board became a permanent fixture. But now it included three German members instead of two, and was simply referred to as the Mixed Parole and Clemency Board. The Mixed Board began its activities on August 11, 1955.¹⁵⁸ The new board reviewed clemency and parole applications from the remaining Landsberg prisoners, of which there were only seven Nurembergers and thirty-four Dachauers left in prison.¹⁵⁹ Like their predecessors, but with only forty-one outstanding war criminals, the Mixed Board found a variety of reasons to release prisoners on parole and through acts of clemency.¹⁶⁰ Between 1955 and 1958, the Mixed Board “emptied Landsberg prison” one by one of the remaining war criminals.¹⁶¹ By 1958, only

¹⁵⁶ Mendelsohn, “War Crimes and Clemency in Germany and Japan,” 253.

¹⁵⁷ *Ibid*, 253-254.

¹⁵⁸ Foreign Service Despatch, US Embassy Bonn, re: Composition of Mixed Board on War Criminals in Western Allied Custody, 16 September 1955, in NARA RG 466 (HICOG), Office of the Executive Director, Security Segregated General Records 1949-1955, box 164, 321.6 folder.

¹⁵⁹ Mendelsohn, “War Crimes and Clemency in Germany and Japan,” 252-254.

¹⁶⁰ Letter from Hans Gawlik to Bishop D. Heckel, 2 July 1955, B305/134, Deutsche Kriegsverurteilte im Landsberg, BA; and, Schwartz, “John J. McCloy and the Landsberg Cases,” 453.

¹⁶¹ Letter from Konrad Adenauer to August Fischer, Präsidenten des Verbandes der Heimkehrer, 23 May 1957, B305/134, Deutsche Kriegsverurteilte im Landsberg, BA and

seven war criminals remained in Landsberg. Of these, Ernst Biberstein, Adolf Ott and Martin Sandberger, were the last three war criminals to be released from Landsberg prison, and even then they left with little trouble and no fanfare.¹⁶² May 9, 1958, the day Biberstein, Ott and Sandberger were freed, marked the end of the war criminals “problem” in Germany. By this time the Germans themselves were planning and organizing their own trials of Nazi war criminals. By then all of the former *Einsatzgruppen* leaders, men who had been convicted of the most atrocious crimes, including genocide, had been released back into German society to live out their lives in relative peace and security, to live as ordinary Germans.¹⁶³

Aufzeichnung (report number 204/515-12/1957), 28 June 1957, B305/53, Bereinigung des Kriegsgefangenenproblems – Gemischte deutsche – alliierte Ausschüsse zu Überprüfung der Urteile, BA.

¹⁶² Ott, Biberstein and Sandberger’s requests for parole in 1958 were filed by the German Foreign Office. Letter from Hardy Lee, Legal Officer American Embassy, Bonn, to the Chairman, Mixed Board, 20 February 1958, B305/758, Adolf Ott, BA, and letter from Deforest Barton, Parole Officer, to Chairman Mixed Board, 12 February 1958, in *ibid*.

¹⁶³ For instance, Eugen Steimle lived in Württemberg and worked from 1955 until he retired as a teacher of modern languages in a private boys school run by the Evangelical Church. Statement of Heinrich Gutbrod, Sponsor of Eugen Steimle, 13 May 1957, B305/808, Eugen Steimle, BA and letter from Eugen Steimle to Paul Gernert, 19 March 1955, in *ibid*. According to Klee, Steimle also taught history. Steimle died 9 October 1987, in Wilhelmsdorf. *Idem, Persilscheine und falsche passe*, 8. Walter Blume had more difficulty adjusting to life outside of prison than Steimle. Blume worked as a lawyer for a real-estate firm and was very bitter about his fate as a war criminal. Report of Parole Officer on Walter Blume, 22 April 1955, in NARA RG 338 (Judge Advocate Division), War Crimes Branch, Records of Post-Trial Activities 1945-1957, box 6, US Parole Officers summaries folder. Willy Seibert worked at a brokerage firm as an accountant after his release from prison, and lived out his life with his wife in Bremen. Report of Parole Officer on Willy Seibert, 25 April 1955 in *ibid*

7. Conclusion

In his book *The American War Crimes Trial Program in Germany*, Frank Buscher remarked that he was inspired to investigate the US war crimes trial program after looking at the original sentences of the *Einsatzgruppen* leaders and comparing those sentences to their release dates from prison.¹⁶⁴ In his view, the massive sentence reductions and early release of convicted war criminals back into German society was a good indication that the American program in general was a failure.¹⁶⁵ As part of that program and the resulting releases of the guilty from prison, should the *Einsatzgruppen* trial then also be seen as a failure? This raises the issue of what constitutes a successful war crimes trial. Is success or failure determined by who is selected for prosecution or by the number of individuals tried, or is it determined by the sentence a war criminal receives or by the one they serve? According to Buscher's criteria, the length of incarceration is one of the determining factors when assessing a war crimes trial's achievement. Certainly the prosecutors of the *Einsatzgruppen* trial would not disagree with Buscher. Undoubtedly the defense also saw the trial as a failure, not because of the lack of sentence enforcement, but rather because none of their clients were acquitted, and all but one man was sentenced to hefty prison terms and fourteen to death by hanging. Thus, perhaps the categories of success and failure are too restrictive here; after all, to measure success by lengthy prison terms alone is to ignore other, more positive accomplishments of the trial.

In the end, the *Einsatzgruppen* trial can be seen as both a success and a failure. The

¹⁶⁴ Buscher, *The American War Crimes Trial Program in Germany*, 3-4.

¹⁶⁵ *Ibid*, 2.

trial itself was as fair a hearing as these men would ever receive, and certainly no one would dispute that their treatment by the Americans was better than the Nazis ever gave their own enemies. Admittedly there were some procedural problems with this trial, as there were with all the Subsequent Nuremberg Trials. Perhaps the worst outrage, that which initially inspired Buscher's investigation into the United States war crimes trial program, was that the men who were found guilty of murdering one million innocent people were prematurely released from prison and allowed to live out their lives in relative peace and security, as "ordinary Germans." Certainly this is a great disappointment, indeed a failure, but the failure was not that of the planners of the trial, nor the prosecutors or judges, but rather of those who made policy afterwards. Had sentence enforcement been left to the participants of the trial these lengthy prison terms would have been carried out. That they were not, raises the issue of the necessity of political will for a sustained and successful prosecution and punishment of war criminals.

For the *Einsatzgruppen* trial to be truly successful, indeed, for any war crimes trial to be successful, it takes sustained political will. For instance, the reason Rudolf Hess remained in prison until his dying day was because the Nuremberg Charter stated that all participating parties had to consent to a prisoner's release. The Soviets repeatedly refused to release Hess from prison even though their former Allies frequently asked them to do so. But because they refused, Hess served his full sentence in Spandau prison, eventually dying there. In the case of the *Einsatzgruppen* commanders, American officials lost their political resolve at the height of the Cold War, exactly the same time that Germany regained a position of importance on the international stage. As a result, compromises were made and war criminals were released into German society. Thus, what Buscher sees as a failure of judicial

procedure, was in fact a failure of politicians to sustain the punishment which they or others once supported, but because of a changing political climate they now weighed as less important than their military and strategic alliances. Simply put, the lesson of Nuremberg is that international cooperation and sustained political will are the only way to carry out justice fully. This was the case with the IMT, the Subsequent Nuremberg Proceedings and for all other postwar judicial processes, and it remains true today.

Conclusion

The trial of Otto Ohlendorf and twenty-one other leaders of the *Einsatzgruppen* at Nuremberg in 1947 has been described as “the biggest murder trial in history.” While apt, this assessment was perhaps an understatement, not in the sense of the number of victims or defendants, but rather in terms of the significance of the trial. The systematic slaughter of more than one million human beings represented a crime of “such unprecedented brutality,” even presiding judge Michael Musmanno could not bring his mind to comprehend its magnitude.¹ In some ways, the *Einsatzgruppen* trial was itself nearly as novel as the crime with which the defendants were charged. One year earlier, Hermann Göring, Rudolf Hess, and the other former leaders of the Nazi regime had occupied the very same dock charged with crimes against humanity, but never before had defendants been called to answer for the crime of genocide, an offense so abhorrent that the term “genocide” had only been coined three years earlier to describe it.² The novelty of the charge and the immense challenge that Benjamin Ferencz and the other members of this team faced in prosecuting it has been lost on subsequent generations numbed to the phenomenon of mass murder by genocides in Cambodia, Rwanda, and Bosnia. Given the importance of the trial, we might expect that the

¹ Michael Musmanno, Opinion and Judgment of the Tribunal, 8 April 1948, *The United States of America v. Otto Ohlendorf et al.*, in National Archives Microfilm Publication M895, Record Group 238, roll 7, 3 (from here forward simply *Trial*, roll, page).

² In his opening statement to Tribunal II, John Glancy, one of the American prosecutors, stated that “the *Einsatzgruppen* trial deals mainly with the crime of genocide.” In *Trial*, roll 1, 3.

case against Ohlendorf and the others would have been carefully researched, well organized, and thoroughly prosecuted, it was in fact none of these things. Instead, the *Einsatzgruppen* trial was hastily prepared, badly planned and, therefore, poorly prosecuted. Those who would find fault with the way the case was handled would do well to remember that like so many of the other Subsequent Nuremberg Proceedings, the prosecutors and judges alike had entered uncharted legal territory, the traversing of which presented manifold problems that had to be overcome. It is with shedding light on these difficulties, then, as well as with explaining the complexities, the personalities of the participants, and the historical significance of the *Einsatzgruppen* trial, that this study has been concerned.

The Subsequent Nuremberg Trials were not part of a fixed or well-defined war crimes plan or policy. The *Einsatzgruppen* trial was, as were all the Subsequent Proceedings, the result of a last minute political decision made by President Truman in the autumn of 1946. At this time the Americans had already experienced an internationally prosecuted trial with their allies at the IMT proceedings and, they were unhappy with the experience. Robert Jackson, the American Chief Prosecutor, particularly disliked working with the Soviets, who in his view were not genuinely wed to the idea of democratic justice. Furthermore, given the expense of quadripartite prosecution coupled with the developing political situation, he feared that the Soviets might use a second internationally prosecuted trial for domestic propaganda purposes. This worried the American justice and thus in late 1946 he recommended to President Truman that the United States abandon international judicial cooperation and instead investigate, indict and prosecute war criminals on a zonal basis. Truman agreed, and in the winter of 1947, after the first Subsequent Nuremberg Trial had already begun, informed the French, the British and the Soviets that the United States would

henceforth prosecute war criminals independently of its former Allies.

The last-minute decision to hold zonal trials coupled with financial constraints and a changing political environment, meant that trial planning and organization was by necessity rushed. Under pressure himself, the head of the Office of Chief of Counsel for the Prosecution of War Criminals, Telford Taylor, could not possibly try all of the Nazi war criminals in US custody. As a compromise solution, Taylor proposed to try a representative sample of some elements of the Nazi regime. He especially targeted individual members of organizations who advanced criminal policies and engaged in criminal behaviour before and during the war. While this approach drew attention to high-ranking representatives from the SS, no individual would be indicted unless and until the requisite evidence was amassed against him – unlike what might have been expected after the IMT findings. In practice this meant that the roster of defendants was constantly changing as new evidence was unearthed.

Taylor's initial program of eighteen trials did not include either the general membership or the leaders of the *Einsatzgruppen*. This might seem surprising given Otto Ohlendorf's damning testimony at the IMT proceedings, where he frankly admitted that as leader of *Einsatzgruppe D* he had personally supervised the murder of 90,000 civilians in the occupied Soviet Union in 1941 and 1942. Certainly Ohlendorf's testimony on this subject was sufficient cause for Taylor to indict him in a catch-all trial of SS leaders from the Gestapo, SD and RSHA, which he intended to stage. But Ohlendorf's testimony was not enough to indict or prosecute the leadership cadre of the *Einsatzgruppen*. At the time Taylor was planning the Subsequent Nuremberg Proceedings, the existence of the *Ereignismeldungen UdSSR* or Operational Situation Reports of the *Einsatzgruppen* was not known. Without this crucial documentation it was unlikely that Taylor, or any of the

attorneys in his office, could possibly understand the nature or magnitude of the crime to which Ohlendorf had been party in the occupied Soviet Union. As one scholar has recently noted, “crimes that were not documented, or of which no document survived, were not likely to emerge at Nuremberg.”³ In other words, learning about their crime, even from a reliable participant, was not sufficient cause to indict members of these mobile security and killing units. Without the Operational Situation Reports of the *Einsatzgruppen*, no indictment would be filed against its leadership.

All of this changed, however, when the *Einsatzgruppen*'s Operational Situation Reports were accidentally discovered and analyzed. As fate would have it, the Americans discovered these reports before Ohlendorf was indicted on any charges whatsoever, thus providing Taylor with the opportunity to revise his initial trial plan. By combining the new documentary evidence with the oral testimony Ohlendorf had given earlier, Taylor felt confident enough to transform a catch-all trial of SS leaders into a trial that dealt specifically with the leadership cadre of the *Einsatzgruppen*. Because of Taylor's eleventh hour decision to indict these men in one trial, the prosecution team, which itself was relatively inexperienced and consisted of a number of attorneys culled from other trials, had little time to prepare its case. Moreover, the content of the Operational Situation Reports, the most damning evidence of Nazi criminality, led the prosecution to the mistaken conclusion that the trial would be straightforward, and thus no attempts were made to locate witnesses or to

³ Donald Bloxham, *Genocide on Trial. War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford, 2001), 63.

assess the role of the *Einsatzgruppen* in the larger framework of Nazism.⁴ As a result, the trial was neither prepared nor prosecuted as completely as it could have been.

Certainly, when Taylor and the Office of Chief of Counsel added the *Einsatzgruppen* leadership to its roster of trials, one of their specific aims was to prove, in a court of law and with procedures that were fair to the defendants, that these men were guilty of war crimes and crimes against humanity. Between September 15, 1947 and April 10, 1948, they did exactly that, and without the assistance of witnesses, being vastly outnumbered by defense attorneys, and with a judge whose rulings were scrupulously fair to the defendants. That the prosecutors won their case under these circumstances is a testament to the strength of the evidence against the accused and the poor showing by the defense, and not necessarily to the quality of the prosecution.

The prosecution's decision to rely almost exclusively on the Operational Situation Reports to prosecute, however, had ramifications at trial. Foremost was the prosecution's inability, perhaps even unwillingness, to prosecute the men of the *Einsatzgruppen* on the new charge of genocide – the systematic annihilation of an identifiable ethnic, racial or religious group – for which the defendants had been indicted. With only the Operational Situation Reports of the *Einsatzgruppen* as evidence, the prosecution had an incomplete picture of the extent of Nazi anti-Jewish policy, and all of the agencies and individuals involved in the killing process. Because of this structural limitation it was almost inevitable that the prosecutors would conclude that the *Einsatzgruppen* were the core of the Nazi

⁴ Generally speaking the Americans preferred to prosecute war criminals by document. This practice was started by Jackson at the IMT proceedings and continued in the Subsequent Proceedings.

system of murder. Furthermore, the word “genocide” had only been coined a few years earlier by a Polish lawyer, Raphael Lemkin, who had sought to give meaning to the Nazis’ systematic murder of Europe’s Jews. While Lemkin was in Nuremberg during the formulation of the indictment against the leaders of the *Einsatzgruppen*, the prosecutors of this trial did not possess a clear understanding of the crime, nor is there any evidence that they attempted to analyze or define it. At this early date, no one in the American offices had a clear picture of the nature and scope of Nazi criminality. To be sure, they knew that Jews had been murdered in great numbers, but mass murder was not genocide. Even after airing all the evidence in the *Einsatzgruppen* trial, the prosecutors and judges were unable to bring all of the threads together in a larger framework and give legal meaning to the novel charge of genocide. What emerged at trial instead was a more traditional prosecution of the crime of murder, an approach that ignored the complexities of the crime of genocide and one which overlooked the role of other important para-military and party organizations in the murder of Soviet Jewry.

The impact of lead defendant Otto Ohlendorf and presiding judge Michael Musmanno on the trial also cannot be underestimated. Before he was indicted and during his long period of incarceration, Ohlendorf spent many hours explaining the Nazi system to his British captors. Overconfident and arrogant, Ohlendorf openly divulged a considerable amount of information about the Third Reich’s criminal policies, all the while thinking that he would be spared trial himself. Yet when the British handed Ohlendorf over to the Americans in October 1945, his new captors took full advantage of his willingness to talk. Not only did the Americans indict the former head of *Amt III* of the RSHA for war crimes, they also used Ohlendorf as a witness to testify against his former superior Ernst

Kaltenbrunner at the IMT proceedings and later against German army officers in one of the Subsequent Trials.

It was at his own trial, however, that Ohlendorf made the greatest impression. Here he used his intelligence and charisma to direct the defense. The evidence suggests that Ohlendorf exercised a great deal of influence over the other defendants and that he encouraged them to testify as he did – that all of the *Einsatzgruppen* leaders received a general order to exterminate the Jews in the occupied Soviet Union prior to the invasion. This defense strategy was obviously designed to prove the mitigating factor of “superior orders.” During the trial itself, Ohlendorf was clever, displaying a quickness of mind that the other defendants lacked. Even the presiding judge and some of the attorneys recognized Ohlendorf’s intelligence and many were drawn to his magnetic personality. They found him curiously contradictory. On the one hand, they admired what they saw as his love for the truth – his seemingly genuine portrayal of his crimes – and the confident way he spoke to them. They found this at odds with the Ohlendorf who had admitted to directing the killing of 90,000 innocent human beings. Many found it difficult to comprehend that Ohlendorf could be both bright and engaging, yet at the same time unrepentant about his work on the eastern front. Ohlendorf’s testimony revealed that he was a committed “ideological soldier” of Nazism, who believed in the rightness of his task even if he abhorred the killing process. But the other defendants were neither as charismatic nor convincing as Ohlendorf on the witness stand, a factor that helped lead the presiding judge to dismiss superior orders as a defense, or even a mitigating factor, in sentencing.

In some ways Ohlendorf was typical of the men who led the *Einsatzgruppen*. Generally young, well-educated professionals, none of the defendants, with the possible

exception of Paul Blobel, looked the part of a cold-blooded killer. But the truth was that most of these men were deeply committed National Socialists. At trial they related how they had always abhorred bolshevism and longed for the day when Germany would be a racially unified and militarily powerful nation. The defendants also explained how this belief system translated into action: because they considered communism a Jewish plot, Soviet Jews were considered a threat to German security. It was therefore militarily necessary to eliminate this threat in order to protect the German state from bolshevism. Ultimately, this element of National Socialist ideology proved to be one of the most pertinent factors to emerge during the trial as an explanation for the criminal behaviour of these men. But the prosecutors never took full advantage of the opportunity to question the defendants about their motivation, even though it was one of the trial's stated aims. The reason for this was that the prosecutors were only interested in proving the defendant's guilt, not their reasons for perpetrating the crime. In other words, historical truth inevitably took second place to legal necessity, thus highlighting the divergent aims of law and history.

Otto Ohlendorf's impact on what Christopher Browning refers to as the "Nuremberg historiography" also cannot be underestimated. Through his testimony on the nature and timing of the *Führerbefehl*, the alleged order by Hitler to murder all Soviet Jews, Ohlendorf helped advance a particular view of the Holocaust that has since been classified as "intentionalist." In this case Ohlendorf's testimony about when and by whom the order to murder Soviet Jews was given represents the complex link between the actual event and its historical representation; that is, between the past and the present. Ohlendorf's contention that Hitler's decision to murder all Soviet Jews in the spring of 1941, before the invasion of the Soviet Union, significantly influenced historical interpretations of the origins of the

“Final Solution.” In recent years Ohlendorf’s version of events has been challenged by historians, highlighting the important and problematic relationship between trial testimony and historical writing.

In 1945 and 1946, when the planners of the Subsequent Nuremberg Proceedings were defining their objectives, they identified historical accuracy as an important goal to be achieved in this and all the Subsequent Trials. Through the courtroom they hoped to generate an accurate record of the crimes of the Nazi regime that would be recorded for everyone to see, study and learn from. They especially hoped that the Germans would reflect on the crimes the *Einsatzgruppen* had perpetrated in the east. But of course, with millions of documents – literally rooms full – and thousands of pages of trial transcripts, even if the record produced was historically accurate, to believe that the average person would undertake such a venture was ludicrous. While some people did follow the trials on the radio and in the newspapers, most Germans had more pressing issues to attend to in the immediate postwar years. To this day, more than half a century after the conclusion of the Subsequent Nuremberg Proceedings, even historians have not yet begun an exhaustive analysis of all the judicial proceedings carried out by the Americans between 1945 and 1949. This aside, to believe that a judicial proceeding can and will produce an accurate or complete historical record is misguided. That the planners of the trials expected to teach the Germans a lesson, was particularly misguided when they themselves did not fully understand the nuances and complexities of the Nazi system. Given the fragmented nature of trial testimony, the adversarial system itself, and the fact that evidence is always selective, it should not be surprising that a trial such as the *Einsatzgruppen* case fell short of producing an accurate or complete historical record. As has been amply demonstrated here in the example of

Ohlendorf and his testimony on the *Führerbefehl* to murder Soviet Jewry, historical accuracy is not necessarily a byproduct of judicial procedures.

After Ohlendorf, Michael Musmanno, the presiding judge appointed by President Truman to evaluate the evidence against the men of the *Einsatzgruppen*, was the second most important figure at trial. Musmanno was the only military man to sit on the bench of all the Nuremberg Proceedings. He was also a colourful personality, a showman who liked to use the courtroom to perform. A former defense attorney himself, Musmanno was instrumental in shaping the course and outcome of the trial. Musmanno was committed to the uniquely American legal tenet that an individual is innocent until proven guilty, and he adhered to this precept throughout the trial. In fact, his performance at trial won him the praise of the defense attorneys who appreciated his objectivity. A man of lesser character might well have turned the *Einsatzgruppen* trial into a mere show trial, but because of Musmanno's sense of fair-play he offered the defense every opportunity to prove the innocence of their clients.

In contrast to the many other trials at Nuremberg, which have been characterized as monotonous due to the reliance of US prosecutors on documentary evidence and not eyewitness testimony, the *Einsatzgruppen* trial could be described as expeditious, interesting, even lively. This was due in large part to Musmanno, who provided spirit, irony – sometimes even humour – and passion to what might have otherwise been a dull and somber legal proceeding. Moved to disbelief by the sheer horror of the defendants' crimes, Musmanno did his best during the cross-examination of the witnesses to personalize and bring to life the suffering of the victims and the inhumanity of the perpetrators. Moreover, given Musmanno's penchant for the dramatic, the judgment, written entirely by him, is far

more colourful and expressive than those handed down during the trials of other defendants. So while it is true that the victims of these crimes were physically absent from the trial, their voices were heard and their suffering was recorded nevertheless.

Of course, one of the trial's general aims, as with all criminal proceedings, was punishment of the guilty. In his final report on the Subsequent Proceedings in 1949, Telford Taylor stated that sentences became less harsh with the passage of time. But this was not the case in the *Einsatzgruppen* trial, at the conclusion of which more death sentences were handed down than in any other Nuremberg trial, including the original IMT proceedings. No one would dispute that fourteen death sentences, two life terms, and five sentences of incarceration ranging between ten and twenty years, were appropriate for men found guilty of mass murder. And although the sentences were not carried out, this does not diminish their severity. These sentences are a solid indication that the trial was a punitive success. The evidence proved the guilt of the defendants and the punishment, in this case, fitted the crime.

The trial of the *Einsatzgruppen* leaders ended with the issuing of sentences on April 8, 1948, but the legal process continued for ten more years until 1958, when the last three *Einsatzgruppen* leaders were released from prison. In the interim, much had changed politically and legally. The Cold War was already a decade old and American concerns about the prosecution of war criminals had given way to international political issues. Little by little, those who had been tried and were sentenced to prison terms by the Americans were released from prison, either through acts of executive clemency, or on parole. In the case of the *Einsatzgruppen* leaders, only four of the original fourteen death sentences were carried out, and then only in 1951, more than three years after the sentences had been issued. With the release of the last three *Einsatzgruppen* leaders from Landsberg Prison on May 9,

1958, the legal case against the *Einsatzgruppen* leaders was officially over.

To be sure, the main aim of the planners of the Subsequent Nuremberg trials was to render justice. But justice is a difficult concept to define. It means different things to different peoples and cultures and is probably best understood as a reflection of the society from which it emanates. In the case of Nazi Germany, justice would have meant summary execution, but in terms of the American ideals upon which the Nuremberg Proceedings were based, it meant utilizing an impartial judiciary to determine the innocence or guilt of individuals while employing the notion of innocent until proven guilty, a principle inherent in the American democratic legal system. Moreover, if justice is a reflection of the society from which it comes, in the early postwar years, a time of chaos and uncertainty, it is remarkable that the Americans were able to employ such a complicated and comprehensive program of justice. In 1945 and 1946, Telford Taylor and the Office of Chief of Counsel knew that, under the circumstances, it would be impossible to try every last war criminal, of which there were literally thousands. Thus, they set out to approximate democratic justice by trying what they saw as a representative sample of Nazi criminals. The twenty-four men they selected for prosecution, with the exception of a handful, were the leaders of the killing units. They were the men in charge of the battalions whose daily job was murder. In the context of the postwar world, the trial of the *Einsatzgruppen* leaders as one of the twelve Subsequent Proceedings, must be seen as the closest way of approximating justice that American authorities had at their disposal.

Important in its own right, the *Einsatzgruppen* trial must also be seen as part of a larger legal development. The trial of *Einsatzgruppen* personnel was part of a long process of identifying, prosecuting, and punishing war criminals that began after the war, and which

continues today. The subsequent trial in German courts of other *Einsatzgruppen* members made it clear that the twenty-two men convicted at Nuremberg represented but a fraction of all those who had participated in the genocide of the Jews on Soviet soil. Many of those who were not tried by the Americans were later tried by the Germans in their own war crimes trials, thus continuing the process begun in 1945 by the Americans and their Allies.

When the Americans terminated their involvement in the identification and punishment of Nazi war criminals they paved the way for Germany to come to terms with its own past, and bring to justice those Nazis who had escaped punishment in Allied courts. Germans had been trying Nazi war criminals on their own since 1945, when Allied authorities reenacted the 1877 German penal code and Control Council Law No. 10, which allowed the trial of Germans for crimes committed against Germans, provided that the trials were “authorized by the occupying authorities.”⁵ Both the British and the French permitted German trials to take place in their zones of occupation, whereas the Americans were far less willing to do so.⁶ Between 1945 and 1957, German courts prosecuted approximately eight hundred defendants under these laws, until 1958 when the Federal Republic put in place a central coordinating authority for the punishment of Nazi war criminals.⁷

⁵ Henry Friedlander, “The Deportation of the German Jews: Post-War German Trials of Nazi Criminals,” *Leo Baeck Institute Year Book* 29 (1984), 202 -203, and Control Council Law No. 10, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4 (Washington 1951, reprint, New York, 1997), xviii-xxi.

⁶ Adalbert Rückerl, *The Investigation of Nazi Crimes 1945-1978* (Heidelberg, 1979), 34.

⁷ On this issue see Rückerl, *The Investigation of Nazi Crimes*, 32-39. See also, “Schwerpunkte der Strafverfolgung in Westdeutschland 1945-1997,” in C.F. Rüter and D.W. De Mildt (eds.) *Justiz und NS-Verbrechen. Sammlung Deutscher Strafurteile Wegen Nationalsozialistischer Tötungsverbrechen 1945-1966*, <http://www.jur.uva.nl/junsv/>. The

That year, the Länder (states) of the German Federal Republic finally established the *Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen* (the Central Office of the Land/State Judicial Authorities for the Investigation of National Socialist Crimes) headed by Erwin Schüle.⁸ The head office of the *Zentrale Stelle* was located in Ludwigsburg, near Stuttgart in southwestern Germany. Here, legal authorities coordinated the investigations of non-military crimes committed by Germans against civilians during World War II, of which murder and manslaughter were the most frequently investigated crimes.⁹ Unlike at Nuremberg, those targeted for investigation were lower-ranking men from the units of the *Einsatzgruppen*, *Ordnungspolizei*, and other police units of the SS, SD and RSHA. None of the *Einsatzgruppen* leaders who had been indicted, tried and sentenced at Nuremberg in 1947 and 1948 were investigated in these later German trials, despite their premature release from prison, due to a law against double jeopardy.¹⁰ This fact had, as historian Jeffrey Herf has noted, “a profoundly negative impact on subsequent trials in German courts because higher-ranking officials who had been amnestied in 1951 offered

complete collection of National Socialist trial summaries is available under the same title, 22 volumes, University Press of Amsterdam, Amsterdam (1968-present). From here forward simply *Justiz und NS Verbrechen*.

⁸ Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge, MA; 1991), 215; Raul Hilberg, *The Destruction of the European Jews*, 3 vols. ((New York, 1985), 1087-1088 and Ruckerl, *The Investigation of Nazi Crimes*, 48-49. Ruckerl took over the directorship of the organization beginning in 1966.

⁹ *Ibid.*, 49.

¹⁰ The Transition Agreement of August 5, 1955, signed by the United States, Britain, France and the Federal Republic of Germany, prohibited the Germans from trying any individual already investigated and tried by the occupying authorities. This included all those tried by Military Tribunal II in the so-called *Einsatzgruppen* trial. *Ibid.*, 46-47.

testimony in trials in the 1960s against lower-ranking officials who bore less guilt.”¹¹ This practice caused great resentment among low-ranking Nazis who believed they were treated more harshly than their former superiors had been, and indeed it made the job of prosecution more difficult for the Germans. But complicity ran deeply into the ranks of the Nazi regime, and as the defendants at Nuremberg learned themselves, the *tu quoque* argument was not legally binding. In the end, what was begun at Nuremberg in 1947 – the trial of the *Einsatzgruppen* leadership – was partially completed in German courts with the rank and file members.

Seen from a still broader perspective, the legal proceedings at Nuremberg provided a legal foundation for the trial of war criminals in the future. We see the fruit of this process today at the Hague, and even more in discussions surrounding the creation of a permanent international court of justice. In many ways, through their successes as well as their failures, the Nuremberg Trials contributed to the development of international law and set new standards for just retribution. Therefore, in spite of their imperfections, the Subsequent Nuremberg Proceedings set a precedent. They contributed to the defining of new international standards for the behaviour of belligerents in times of war; they led to the United Nations definition of, and convention on, genocide; they went some way toward eliminating national boundaries as insulation from punishment; and most importantly, they

¹¹ Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge, 1997), 206. Several of the defendants from the *Einsatzgruppen* trial were interrogated by German officials for cases they were preparing against other *Einsatzgruppen* personnel. For instance, Walter Blume and Martin Sandberger were both interrogated by German officials in an investigation against Bruno Streckenbach, “Protokoll in der gerichtlichen Voruntersuchung gegen Bruno Streckenbach,” May 1971 and November 1972, 201 AR-Z 76/59, vols. 8 and 18, 9ff and 8667ff, Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen.

introduced the idea of universal jurisdiction for crimes against humanity and genocide. The Subsequent Nuremberg trials contributed fundamentally to international law by advancing the notion that individuals, and not abstract entities called states, were responsible for their criminal actions.

The American planners of the Subsequent Nuremberg Proceedings hoped to educate Germans about democratic justice and, in so doing, provide an historical record of the criminal policies enacted by Hitler's Third Reich. Today, Germany stands as a centerpiece of democracy in Europe. Whether or not the war crimes trials in general, or the *Einsatzgruppen* trial in particular, had anything to do with that success is difficult to determine. What is certain, however, is that the Subsequent Nuremberg Proceedings, including the *Einsatzgruppen* trial, exposed the insidiousness of National Socialism to the entire world. The inner workings of the twentieth century's worst genocide were laid bare for all to see, and this result alone gives the trials at Nuremberg immense historical significance. Each trial has its legacy and the *Einsatzgruppen* process is no different. However, in addition to the beneficial legal legacy, the trial of Otto Ohlendorf and his comrades also left the world with a troubling sense of the cruelty that human beings are capable of. Looking into the eyes of the arrogant Ohlendorf, the cold and callous Erich Naumann, or the distraught and psychologically crippled Paul Blobel, one recognizes the spark of human intelligence. These men were responsible for the deaths of untold numbers of innocent people; in a sense they pulled the trigger. The killers offered reasons and explanations for their behaviour during the trial, reasons that we might find ludicrous and unacceptable. But in the context of the Third Reich and its ideology we now know we cannot be so assuming. With the hindsight of almost six decades, the ultimate irony of the

Einsatzgruppen trial is that the monstrous criminals were given a human face, they were exposed as ordinary people alive in extraordinary times, and many of them did indeed, as it turns out, believe in the regime and its ideology for which they acted.

In the end, though the trial of the *Einsatzgruppen* leaders did not mete out perfect justice, it was, as were all the Subsequent Nuremberg Proceedings, important. As Michael Musmanno aptly concluded: Nuremberg may have been the home of the Nazi party, but it was also “its grave.”¹² Discrediting Nazism forever, Nuremberg provided an important and fitting closure to the criminal Nazi regime.

¹² Michael A. Musmanno, *The Eichmann Kommandos* (New York, 1961), 16.

BIBLIOGRAPHY

Archival Sources

National Archives and Records Administration, Washington, D.C.

Record Group 238, Records of World War II War Crimes

US Military Tribunal I-VI

Central Secretariat

Official Court Files (Originals)

Office of Chief of Counsel For War Crimes (OCCWC)

Interrogation and Other Records Received From Various Allied Military Agencies

Office File, 1945-1949

Interrogation Summaries

Correspondence and Other Records

Correspondence and Lists

Memoranda, and Other Records

Office File, SS Division

Correspondence, Memoranda, Reports, and Other Records

Correspondence, Reports, and Other Records, 1948-1949

Internee Personnel Records (201 files)

Correspondence, Memoranda, and Other Records

Memoranda, Reports, and Lists, SS Division

Correspondence, Reports, Petitions For Clemency, and Other Records Relating to Defendants in Subsequent Proceedings (HICOG)

Correspondence and Other Records

Schutzstaffel (SS) Series

Record Group 260, Records of United States Occupation Headquarters, World War II

Records of the United States Group Control Council (Germany) USGCC

Records Related to the Basic Preliminary Plan for Allied Control and Occupation of Germany 1944-1945

Daily Journal May-October 1945

Staff Studies, 1944-1945

Records of the Office of Military Government, US Zone (OMGUS)

Records of the Office of the Adjutant General

Military Government Ordinances and Related Records, 1945-1949

Records Relating to the Allied Control Council Laws, 1945-1948

Allied Control Council Directives and Related Records, 1945-1949

Records of the Office of the Chief of Counsel for War Crimes (OCCWC)

General Records of the Office of Chief Counsel for War Crimes

Records of the Administrative Division

Records Relating to Defendants and Internal Administration 1946-1949

Records of the Evidence Division

- Staff Evidence Analyses and Interrogation Summaries 1946-1948
- Records of the Special Projects Division
 - Records Relating to Witnesses, Defendants, and Documents, 1947-1949
- Records of the Publications Division
 - Records Relating to the Publication of Proceedings of US Military Tribunals at Nuernberg, 1948-1949
- Records of the Language Division
 - Daily Trial Reports, 1947-1948; Language Tests 1947-1948
- Records of the Central Secretariat of the Nuernberg Military Tribunals
 - General Records of the Office of the Secretary General
 - General Records, 1946-1949
 - Daily Trial Summaries, 1947-1948; Motions and Requests ("Case files"), 1947-1949
 - Clemency Pleas and Petitions, 1947-1949
- Records of the Marshal's Office
 - Records Pertaining to Defendants and Witnesses, 1947-1948.
- Records of the Defense Center
 - Administrative Records, 1946-1949
 - Records Relating to Witnesses and Documents, 1946-1949
- Records of the Office of the Director of Printing
 - Records Relating to Publication and Distribution of Official Trial Records, 1945-1949
- Records of the US Element of Inter-Allied Organizations
- Records of the Control Council
 - General Records 1945-1948
 - Records of the Coordinating Committee
 - General Records 1945-1948
 - Records of the Legal Directorate
 - General Records 1945-1948
- Record Group 466: Records of the Office of the US High Commissioner for Germany**
- Prisons Division: Security-Segregated Records of the Prisons Division
 - Petition for Clemency or Parole and Related Records on Persons Convicted by the US Military Tribunals at Nuremberg, 1947-1957
 - Administrative and Medical Records of Landsberg Prisoners, 1946-1957
 - HICOG Clemency Panels, 1950-1955
 - Clemency Panels, 1950-1955
- US Secretariat, Allied High Commission: Criminal Case Files, 1949-1955
- Records Relating to the Central Registry of War Crimes Suspects, (Crosscass)
- Administration of War Crimes Trials, 1945-1949
- Record Group 153: Records of the Judge Advocate General (Army)**
- War Crimes Branch
 - Nuremberg Administrative Files 1944-1949.

Record Group 338: The United States Army in World War II (HG USAREUR).

Judge Advocate Division

War Crimes Branch

Records Relating to post-trial Activities 1945-57

General Administrative Records, 1945-57

Records Relating to War Criminal Prison No. 1, Landsberg

Parolee Records; Executed Prisoner Records

Released Inmates Records

Record Group 94: The Adjutant General's Office

The Adjutant General's Office, World War II. Operation Reports

United States Holocaust Research Institute, United States Holocaust Memorial Museum, Washington, D.C.

Record Group 12.000, Benjamin B. Ferencz Collection 1919-1994

Record Group 06.002 War Crimes Investigation and Prosecution: Joseph Maier Collection, 1945-1976, Otto Ohlendorf Testimony, October 4, 1945

RG 06.002.05*01 Records Relating to International Military Tribunal; "An Approach to the Preparation of the Prosecution Against Axis Criminality" Telford Taylor Memo

RG 06.002.02*01 Records Relating to US Investigations and Prosecution: OCCWC Nuremberg, Germany. Preliminary Briefs of the Economic Division. Vol.1

Zentrale Stelle der Landesjustizverwaltungen Aufklärung von NS-Verbrechen. Ludwigsburg, Germany

415 AR 1310/63-E32 volume XLV

201 AR-Z 76/59 volumes. 2, 5, 6, 8, 9, 13, 16, 18

201 AR-Z 76/59 Sonderband I

201 AR-Z 74/59, volume 6

Bundesarchiv, Koblenz, Germany

Bestand 305, Bundesministerium. Records of the Zentrale Rechtsschutzstelle

Files: 1-89; 92-102; 119-120; 125-148; 395-396; 547-549; 662-665; 800; 830; 835-859

B305/681 Walter Blume
 B305/716 Walter Haensch
 B305/717 Walter Blume
 B305/736 Waldemar Klingelhöfer
 B305/758 Adolf Ott
 B305/785 Martin Sandberger
 B305/789 Willy Seibert
 B305/800 Erwin Schulz
 B305/808 Eugen Steimle
 3790/50 Walter Haensch
 4138/50 Gustav Nosske
 3041/50 Adolf Ott
 4135/50 Heinz Jost
 3103/50 Werner Braune
 2381/50 Paul Blobel
 2417/50 Ernst Biberstein
 3155/50 Waldemar Klingelhöfer
 3574/50 Erich Naumann
 3051/50 Franz Six
 2413/50 Otto Ohlendorf
 2450/50 Felix Rühl
 2399/50 Willy Seibert
 2488/50 Erwin Schulz
 2560/50 Martin Sandberger

Kleine Erwerbungen 66 Otto Ohlendorf (Nachlaß)

Nachlaß 120 Friedrich Grimm 1888-1959
 Files: 18, 22, 37, 78, 109, 114, 120, 124-125

R58 Reichssicherheitshauptamt (RSHA)

Files: 214-221; 218-221; 241, 272, 486, 544, 565, 574, 612, 623, 826, 830, 956, 982, 984, 991, 996

Bundesarchiv-Militärarchiv, Freiburg, Germany

Bestand N 642 Nachlaß des Rechtsanwaltes Dr. Rudolf Aschenauer
 Boxes 1-6, 11, 15, 29, 44, 46-47, 53, 55-57, 62, 65, 73

Landeskirchliches Archiv, Stuttgart, Germany

Bestand D-Nachlässe und Sammlungen: Bestand D1 Nachlaß Landesbischof D. Theophil Wurm

Files: 272, 278-279, 284-336

Auswärtiges Amt, Politisches Archiv, Bonn, Germany

Bestand 2, Büro Staatssekretäre, 1949-1967

Bestand 10, Politische Abteilung 2, 1949 and 1951-1958

Files: 2087-2107, 2114, 2118, 2209, 2214-2219, 2224

Library of Congress, Manuscript Division, Washington, D.C.

The Papers of Justice Robert H. Jackson

Gumberg Library, Duquesne University, Pittsburgh, Pennsylvania

The Papers of Justice Michael A. Musmanno. * NB much of this collection is not arranged or indexed and the majority of the files are as Musmanno left them in his original file system. Other documents found in this collection bear no identifying box or file and hence will be cited as loose documents.

Files:

955 FDR

1120 Albert Speer

1138 Lucius Clay

1170 Telford Taylor

1186 General William Glasford

1277 Nuremberg Sentences (missing)

1302 War Crimes Tribunal

1315 Nuremberg Opinions (missing)

1376 Hitler Documentary Film

1412 Hitler's Death

1437 Nuremberg: Biggest Murder Trial in History

1445 Nuremberg Correspondence

1477 Capital Punishment

1485 Eichmann Trial

1470 Truman

1553 War Crimes (missing)

1683 Superior Orders defense

1691 Einsatzgruppen

1812 Mark Clark

1825 Eichmann Kommandos

1904 War Criminal Trials

1905 Hannah Arendt
 2124 Eichmann Kommandos, reviews of
 2150 Nuremberg Clippings
 2292 Dachau
 2340 Navy
 2977 Fascists
 2953 Goebbels

Truman Presidential Library, Independence, Missouri

The Papers of Harry S Truman, White House Files:

Official File (OF)
 President's Personal File (PPF)
 Confidential File (CF)
 President's Secretary's Files (PSF)
 White House General File (GF)
 Alvin Rockwell Papers
 Eleanor Bontecou Papers
 John C. Young Papers
 George Elsey File
 Catherine Fite Lincoln Papers
 Charles C. Ross Papers
 J. Anthony Panuch Papers
 Samuel I. Rosenman Papers
 Tom C. Clark Papers
 Konrad Adenauer Oral History
 Josiah E. Dubois Oral History
 Lucius D. Clay Oral History
 Samuel I. Rosenman Oral History

Microfilm Collections

Merritt Collection on Public Opinion: Reports of the OMGUS Surveys, Germany 1945-1949. Urbana: University of Illinois, 1980.

Merritt Collection on Public Opinion: Reports of the HICOG Surveys, Germany 1949-1955. Urbana: University of Illinois, 1980.

National Archives Microfilm Publication M895 Records of the United States Nuremberg War Crimes Trials, United States of America v. Otto Ohlendorf et al. (Case 9), 38 rolls.

National Archives Microfilm Publication M1019 Records of the United States Nuremberg War Crimes Trials Interrogations, 1946-1949, 91 rolls.

National Archives Microfilm Publication M1270 Interrogation Records Prepared for War Crimes Proceedings at Nuremberg 1945-1947, OCCPAC Interrogations, 31 rolls.

Interviews

Benjamin Ferencz, April 24 and June 24, 1997

A.E. Lawson, November 2001

Published Primary Sources

Aschenauer, Rudolf. *Zur Frage einer Revision der Kriegsverbrecherprozess*. Nuremberg, 1949.

_____. *Landsberg*. Munich, 1951.

Arad, Yitzhak, Krakowski, Shmuel, and Spector, Shmuel, eds. *The Einsatzgruppen Reports. Selections from the Dispatches of the Nazi Death Squads' Campaign Against the Jews in Occupied Territories of the Soviet Union, July 1941-January 1943*. New York: Holocaust Library, 1989.

Baade, Fritz et al. eds. *Unsere Ehre heißt Treue: Kriegstagebuch des Kommandostabes Reichsführer SS, Tätigkeitsberichte der 1. Und 2. SS-Inf.-Brigade, der 1. SS-Kav.-Brigade und von Sonderkommandos der SS*. Vienna: Europa Verlag, 1965.

Biddle, Francis. "Prosecution of Major Nazi War Criminals." *United States Department of State Bulletin* 386:15 (1946): 954-957.

Cargas, Harry James, ed. *Voices from the Holocaust*. Lexington: University Press of Kentucky, 1993.

DeMildt, E.W. and C.F. Rüter-Ehlermann, eds. *Justiz und NS-Verbrechen: Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945-1966*. 22 volumes. Amsterdam: University Press of Amsterdam, 1968-present.

Documents on Germany, 1944-1961. Committee Print. Committee on Foreign Relations. United States Senate. 87th Congress, 1st Session. Washington: Government Printing Office, 1961.

Von Oppen, B. Ruhm, ed. *Documents on Germany Under Occupation, 1945-1954*. London: Royal Institute of International Affairs, 1955.

Foreign Relations of the United States. Germany and Austria, 1952-1954. Washington:

United States Government Printing Office, 1986.

Germany, 1947-1949: The Story in Documents. Department of State Publication 3556. Washington: United States Government Printing Office, 1950.

"German Bishops on War Crimes Trials." *The Christian Century* 66 (1949): 725-726.

Information Bulletin of the Office of the U.S. High Commissioner for Germany. February, 1951.

Gilbert, Gilbert M. *Nuremberg Diary*. New York: DA Capo Press, 1995 <1947>.

Jackson, Justice Robert. "Final Report to the President From Supreme Court Justice Robert H. Jackson." *United States Department of State Bulletin* 382:15 (1946): 771-776.

Kersten, Felix. *The Kersten Memoirs, 1940-1945*. Trans. Constantine Fitzgibbon and James Oliver. New York: The MacMillian Company, 1957 <1956>.

Klee, Ernst, Willie Dreßen, and Volker Riess, eds. *"The Good Old Days" The Holocaust as Seen by the Perpetrators and Bystanders*. New York: Free Press, 1988.

Kogon, Eugen, Langbein, Hermann and Rückerl, Adalbert, eds. *Nazi Mass Murder: A Documentary History of the Use of Poison Gas*. Trans. Mary Scott and Caroline Lloyd-Morris. New Haven: Yale University Press, 1993 <1983>.

Mantau, Sadila and Hans Heinz. *German Political Profiles*. Berlin: Terramare Office, 1938.

Marrus, Michael, ed. *The Nuremberg War Crimes Trial, 1945-1946. A Documentary History*. New York: Bedford Books, 1997.

McCloy, John. *The Challenge to American Foreign Policy*. Cambridge, MA: Harvard University Press, 1953.

Mendelsohn, John, ed. *Punishing the Perpetrators of the Holocaust: The Brandt, Pohl and Ohlendorf Cases*. Volume 17. New York: Garland, 1982.

_____, ed. *Punishing the Perpetrators of the Holocaust: The Ohlendorf and Von Weizsäcker Cases*. Volume 18. New York: Garland, 1982.

_____. *Trial by Document: The Use of Seized Records in the US Proceedings at Nuremberg*. New York: Garland, 1988.

_____. *Nuernberg. War Crimes Trials Records of Case 9: United States of America v. Otto Ohlendorf et al.* Washington: Government Printing Office, 1978 (Special List 42).

Merritt, Anna J., and Merritt, Richard L. *Public Opinion in Occupied Germany*. Urbana: University of Illinois Press, 1970.

_____. *Public Opinion in Semi-Sovereign Germany. The HICOG Surveys, 1949-1955*. Urbana: University of Illinois Press, 1980.

Musmanno, Michael A. *The Eichmann Kommandos*. London: Peter Davies, 1962 <1961>.

_____. *Verdict! The Adventures of the Young Lawyer in the Brown Suit*. New York: MacFadden Books, 1963 <1958>.

_____. *Ten Days to Die*. London: Peter Davies, 1951.

_____. *Black Fury*. New York: Fountainhead Publishers, 1966.

_____. *Columbus Was First*. New York: Fountainhead Publishers, 1966.

_____. *An American Replies to a Defamation of the Italians*. Florence: Il Campo Editore, 1965.

_____. *Across the Street from the Courthouse*. Philadelphia: Dorrance and Company, 1954.

Noelle, Elisabeth and Erich Peter Neumann, eds. *The Germans: Public Opinion Polls, 1947-1966*. Bonn: Allansbach, 1967.

OMGUS. *Official Gazette of the Control Council for Germany*. Berlin: Allied Secretariat, 1945-1948.

Report of the Military Governor. *Denazification. Cumulative Review*. Washington: Government Printing Office, 1948.

Report of the Subcommittee of the Committee on Armed Services, US Senate, 81st Congress, 1st session, October 13, 1945.

Schellenberg, Walter. *The Labyrinth: Memoirs of Walter Schellenberg*. Trans. Louis Hagen. New York: Harper and Row, 1956.

Smith, Jean Edward. *The Papers of General Lucius D. Clay: Germany 1945-1949*. 2 volumes. Bloomington: Indiana University Press, 1974.

Taylor, Brigadier General Telford. *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trial Under Control Council Law No. 10*. Washington: United States Government Printing Office, 1949.

_____. *The Anatomy of the Nuremberg Trials: A Personal Memoir*. Toronto: Little, Brown

and Company, 1992.

Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10. 15 volumes. Washington: United States Government Printing Office, 1951.

The German Press in the US Occupied Area, 1945-1948. Special Report of the Military Governor, November 1946.

Truman, Harry S. *Memoirs: Year of Decisions.* Garden City: Doubleday, 1955.

United Nations War Crimes Commission. *History of the United Nations War Crimes Commission and the Development of the Laws of War.* 1948.

US Office of Military Government for Germany. *Military Government Information Bulletin.* Berlin: 1945-49.

Secondary Sources (Books and Dissertations)

Adam, Uwe Dietrich. *Judenpolitik im Dritten Reich.* Düsseldorf: Droste Verlag, 1972.

Angrick, Andrej. "Die Einsatzgruppe D. Struktur und Tätigkeiten einer mobilen Einheit Der Sicherheitspolizei und des SD In der deutsch besetzten Sowjetunion." 2 volumes. PhD, Berlin: Technical University of Berlin, 1999.

_____, Martina Voigt, et al. "'Da hätte man schon ein Tagebuch führen müssen.' Das Polizeibatallion 322 und die Judenmorde am Bereich der Heeresgruppe Mitte während des Sommers und Herbstes 1941." In Helge Grabitz et al., eds. *Die Normalität des Verbrechens: Festschrift für Wolfgang Scheffler*, 325-385. Berlin: Edition Hentrich, 1994.

Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil.* New York: Viking, 1963.

Aronson, Shlomo. *Reinhard Heydrich und die Frühgeschichte von Gestapo und SD.* Stuttgart: Verlag-Anstalt, 1971.

Backer, John H. *Priming the German Economy: American Occupational Policies, 1945-1948.* Durham, NC: Duke University Press, 1971.

_____. *Winds of History: The German Years of Lucius Dubignon Clay.* New York: Van Nostrand Reinhold Company, 1983.

Banach, Jens. *Herdrichs Elite: Das Führerkorps der Sicherheitspolizei und des SD 1936-1945.* Paderborn: Ferdinand Schöningh, 1998.

Barnett, Victoria. *For the Soul of the People: Protestant Protest Against Hitler*, New York: Oxford University Press, 1992.

Bartov, Omer. *Murder in Our Midst*. New York: Oxford University Press, 1996.

_____, ed. *The Holocaust: Origins, Implementation, Aftermath*. New York: Routledge, 2000.

Battis, Ulrich, Günther Jakobs, Eckhard Jesse. *Vergangenheitsbewältigung durch Recht. Drei Abhandlungen zu einem deutschen Problem*. Berlin: Hrsg von Josef Isensee, 1992.

Bedau, Hugo Adam, ed. *The Death Penalty in America*. Garden City, NY: Anchor Books, 1964.

Benton, Wilbourn E. and Georg Grimm eds. *Nuremberg: German Views of the War Trials*. Dallas: Southern Methodist University Press, 1955.

Bergman, Werner and Rainer Erb. *Antisemitism in Germany: The Post-Nazi Epoch since 1945*. New Brunswick, NJ: Transaction Publishers, 1997.

Bird, Kai. *The Chairman, John J. McCloy: The Making of the American Establishment*. New York: Simon and Schuster, 1992.

Birn, Ruth Bettina. *Die Höheren SS-und Polizei führer: Himmlers vertreter im Reich und den besetzten Gebieten*. Düsseldorf: Droste Verlag, 1986.

Black, Peter. *Ernst Kaltenbrunner: Ideological Soldier of the Third Reich*. Princeton: Princeton University Press, 1984.

Bloxham, Donald. *Genocide on Trial. War Crimes Trials and the Formation of Holocaust History and Memory*. Oxford: Oxford University Press, 2001.

Boehling, Rebecca. *A Question of Priorities: Democratic Reform and Economic Recovery in Postwar Germany*. Providence, RI: Berghahn Books, 1996.

Borkin, Joseph. *The Crime and Punishment of I.G. Farben*. New York: Free Press, 1978.

Bower, Tom. *Blind Eye to Murder: Britain, America and the Purging of Nazi Germany—A Pledge Betrayed*. London: Andre Deutsch, 1981.

Bosch, William J. *Judgment on Nuremberg*. Chapel Hill: University of North Carolina Press, 1970.

Bracher, Karl Dietrich. *The German Dictatorship. The Origins, Structure and Effects of National Socialism*. Trans. Jean Steinberg. New York: Praeger Publishers, 1970.

Breitman, Richard. *The Architect of Genocide: Himmler and the Final Solution*. New York: Alfred A. Knopf, 1991.

_____. *Official Secrets: What the Nazis Planned, What the British and Americans Knew*. New York: Hill and Wang, 1998.

Brochhagen, Ulrich. *Nach Nuremberg: Vergangenheitsbewältigung und Westintegration in der Ära Adenauer*. Hamburg: Junius Verlag, 1994.

Broszat, Martin et al. *Anatomy of the SS State*. Trans. Dorothy Long and Marian Jackson. New York: Walker, 1968 <1965>.

Browder, George. *Hitler's Enforcers: The Gestapo and the SS Security Service in the Nazi Revolution*. New York: Oxford University Press, 1997.

_____. *Foundations of the Nazi Police State: The Formation of Sipo and SD*. Lexington: University Press of Kentucky, 1990.

Browning, Christopher. *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*. New York: Harper Collins, 1992.

_____. *Fateful Months: Essays on the Emergence of the Final Solution*. New York: Holmes and Meier, 1985.

_____. *The Path to Genocide: Essays on Launching the Final Solution*. Cambridge: Cambridge University Press, 1992.

_____. *Nazi Policy, Jewish Workers, German Killers*. Cambridge: Cambridge University Press, 2000.

Burstein, William. *The Logic of Evil. The Social Origins of the Nazi Party, 1925-1933*. New Haven: Yale University Press, 1996.

Burrin, Philippe. *Hitler et les Juifs: Genèse d'un génocide*. London: Edward Arnold, 1994.

Buscher, Frank M.. *The United States War Crimes Trial Program in Germany, 1946-1955*. New York: Greenwood Press, 1989.

Campbell, Bruce. *The SA Generals and the Rise of Nazism*. Lexington: University Press of Kentucky, 1998.

Cesarani, David, ed. *The Final Solution: Origins and Implementation*. London: Routledge, 1994.

Chalk, Frank. *The History and Sociology of Genocide: Analyses and Case Studies*. New

Haven: Yale University Press, 1990.

_____. *Definitions of Genocide and Their Implications for Prediction and Prevention*. Montreal: University of Concordia Press, 1988.

Charny, Israel, ed. *Toward the Understanding and prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide*. Boulder, CO: Westview Press, 1984.

Childers, Thomas. *The Nazi Voter: The Social Foundations of Fascism in Germany, 1919-1933*. Chapel Hill: University of North Carolina Press, 1983.

Conot, Robert. *Justice at Nuremberg*. New York: Harper and Row, 1983.

Cooper, Belinda, ed. *War Crimes: The Legacy of Nuremberg*. New York: TV Books, 1999.

D'Addario, Ray and Kastner, Klaus. *Der Nürnberger Prozeß. Das Verfahren gegen die Hauptkriegsverbrecher 1945-1946*. Nuremberg: A. Hoffmann, 1994.

Daum, Wolfgang. *Entnazifizierung in Landsberg am Lech: das Befreiungsgesetz vom 5. März 1946 und seine praktische Durchführung*. St. Ottilien: EOS-Verlag, 1996.

Davidson, Eugene. *The Trial of the Germans: An Account of the 22 Defendants before the International Military Tribunal at Nuremberg*. New York: Macmillan, 1966.

Dawidowicz, Lucy S. *The War Against the Jews, 1933-1945*. New York: Bantam Books, 1978.

Decoste, F.C. and Bernard Schwartz, eds. *The Holocaust's Ghost. Writings on Art, Politics, Law and Education*. Edmonton: University of Alberta Press, 2000.

De Mildt, Dick. *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany*. The Hague: Martinus Nijhoff Publishers, 1996.

Dimsdale, Joel E., ed. *Survivors, Victims and Perpetrators: Essays on the Nazi Holocaust*. Washington: Hemisphere Publishing Corporation, 1980.

Diner, Dan. *America in the Eyes of the Germans: An Essay on Anti-Americanism*. Trans. by Allison Brown. Princeton: Marcus Wiener, 1996.

Dinstein, Yoram. *The Defense of 'Obedience to Superior Orders' in International Law*. Leyden: A.W.Sijthof, 1965.

Douglas, Lawrence. *The Memory of Judgment. Making Law and History in the Trials of the*

- Holocaust*. New Haven: Yale University Press, 2001.
- Du Preez, Peter. *Genocide: The Psychology of Mass Murder*. London, New York: Byars, 1994.
- Eisenberg, Carolyn Woods. *Drawing the Line: The American Decision to Divide Germany, 1944-1949*. Cambridge: Cambridge University Press, 1996.
- Eser, Albin and George P. Fletcher, eds. *Justification and Excuse: Comparative Perspectives I*. The Max-Planck-Institute for foreign and International Criminal Law: Freiburg, 1987.
- Evans, Richard. *Rereading German History, 1800-1996: From Unification to Reunification*. New York: Routledge, 1997.
- Fein, Helen. *Genocide: A Sociological Perspective*. London: Sage, 1990.
- Ferencz, Benjamin. *Less than Slaves: Jewish Forced Labor and the Quest for Compensation*. Cambridge: Harvard University Press, 1979.
- Feuerlicht, Roberta Strauss. *Justice Crucified. The Story of Sacco and Vanzetti*. New York: McGraw-Hill, 1977.
- Fletcher, George P. *Basic Concepts of Criminal Law*. New York: Oxford University Press, 1998.
- Friedlander, Henry. *The Origins of Nazi Genocide: From Euthenasia to the Final Solution*. Chapel Hill: University of North Carolina Press, 1995.
- Friedlander, Saul, ed. *Probing the Limits of Representation: Nazism and the Final Solution*. Cambridge: Harvard University Press, 1992.
- Friedmann, Wolfgang. *The Allied Military Government of Germany*. London: Stevens and Sons Limited, 1947.
- Friedrich, Jörg. *Die kälte Amnestie: NS-Täter in der Bundesrepublik*. Frankfurt: Fischer, 1984.
- Froitzheim, Dieter. *Kardinal Frings: Leben und Werk*. Second edition. Cologne: Wieand, 1980 <1979>.
- Fromm, Erich. *Escape from Freedom*. New York: Avon Books, 1969.
- Gaddis, John Lewis. *The United States and the Origins of the Cold War, 1941-1947*. New York: Oxford University Press, 1979.

- Gerlach, Christian. *Krieg, Ernährung, Völkermord: Forschungen zur deutschen Vernichtungspolitik im Zweiten Weltkrieg*. Hamburg: Hamburger Edition, 1998.
- Giles, Geoffrey. *Students and National Socialism in Germany*. Princeton: Princeton University Press, 1985.
- Gimbel, John. *The American Occupation of Germany, 1945-1949*. Stanford: Stanford University Press, 1968.
- Ginsburgs, George and V.N. Kudriavtsev eds. *The Nuremberg Trial and International Law*. Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1990.
- Glees, Anthony. *Reinventing Germany: German Political Development Since 1945*. Washington: Berg, 1996.
- Glueck, Sheldon. *The Nuremberg Trial and Aggressive War*. New York: Alfred A. Knopf, 1946.
- Goldhagen, Daniel Jonah. *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*. New York: Alfred A. Knop, 1996.
- _____. "The 'Humanist' as a Mass Murderer: The Mind and Deeds of SS General Otto Ohlendorf." Unpublished Honors Thesis, Cambridge: Harvard University, 1982.
- Gordon, Sarah. *Hitler, Germans and the "Jewish Question"*. Princeton: Princeton University Press, 1984.
- Grabitz, Helge. *NS-Prozesse: Psychogramme der Beteiligten*. Heidelberg: F. Müller, 1985.
- _____. *Für Führer, Volk, und Vaterland-: Hamburger Justiz im Nationalsozialismus*. Hamburg: Ergebnisse, 1992.
- Hachmeister, Lutz. *Der Gegnerforscher: Die Karriere des SS-Führers Franz Alfred Six*. Munich: Verlag C.H. Beck, 1998.
- Hamerow, Theodore S. *On the Road to the Wolf's Lair: German Resistance to Hitler*. Cambridge: Harvard University Press, 1997.
- Hamilton, Richard. *Who Voted For Hitler?* Princeton, NJ: Princeton University Press, 1982.
- Harris, Whitney. *Tyranny on Trial: The Evidence at Nuremberg*. New York: Barnes and Noble Books, 1995 <1954>.
- Headland, Ronald. *Messages of Murder: A Study of the Reports of the Einsatzgruppen of the Security Police and the Security Service, 1941-1943*. Toronto: Associated University

Presses, 1992.

Heer, Hannes and Klaus Naumann, eds. *Vernichtungskrieg: Verbrechen der Wehrmacht 1941-1944*. Hamburg: HIS Verlags, 1995.

Henkys, Richard. *Die Nationalsozialistischen Gewaltverbrechen*. Stuttgart: 1964.

Herbert, Ulrich, ed. *National Socialist Extermination Policies: Contemporary German Perspectives and Controversies*. New York: Berghahn Books, 2000.

_____. *Best. Biographische Studien über Radikalismus, Weltanschauung und Vernunft, 1903-1989*. Bonn: J.H.W. Dietz, 1996.

Herbst, Ludolf. *Der Totale Krieg und die Ordnung der Wirtschaft*. Stuttgart: Deutsche Verlags-Anstalt, 1982.

Herf, Jeffrey. *Divided Memory: The Nazi Past in the Two Germanys*. Cambridge: Harvard University Press, 1997.

Heydecker, Joe, and Leeb, Johannes. *Der Nürnberger Prozeß: Bilanz der Tausend Jahre*. Cologne: Kiepenheuer and Witsch, 1959 <1958>.

Hilberg, Raul. *The Destruction of the European Jews*, revised and definitive edition. 3 volumes. New York: Holmes and Meier, 1985.

_____. *Perpetrators Victims Bystanders: The Jewish Catastrophe, 1933-1945*. New York: Harper Collins Publishers, 1992.

Hirschfeld, Gerhard ed. *The Policies of Genocide: Jews and Soviet Prisoners of War in Nazi Germany*. London: Allen and Unwin, 1986.

Höhne, Heinz. *The Order of the Death's Head: the Story of Hitler's SS*. Trans. Richard Barry. New York: Ballantine Books, 1972 <1966>.

Horowitz, Irving. *Genocide: State Power and Mass Murder*. New Brunswick, NJ: Transaction Books, 1976.

Jäger, Herbert. *Verbrechen unter totalitärer Herrschaft: Studien zur nationalsozialistischen Gewaltkriminalität*. Oltun: Walter-Verlag, 1967.

Jamin, Mathilde. *Zwischen den Klassen: Zur Sozialstruktur der SA-Führerschaft*. Wuppertal: P. Hammer Verlag, 1984.

Joughin, Georg Louis and Edmund M. Morgan. *The Legacy of Sacco and Vanzetti*. Chicago: Quadrangle, 1964 <1948>.

- Jung, Susanne. *Die Rechtsprobleme der Nürnberger Prozesse: dargestellt am Verfahren gegen Friedrich Flick*. Tübingen: J.C.B. Mohr, 1992.
- Kandane, Joseph B. and David A. Chum. *A Probabilistic Analysis of the Sacco and Vanzetti Evidence*. New York: J. Wiley, 1996.
- Kater, Michael. *The Nazi Party: A Social Profile of members and Leaders, 1919-1945*. Cambridge: Harvard University Press, 1983.
- Kelman, Herbert. *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility*. Yale: Yale University Press, 1989.
- Kempner, Robert M.W. *SS im Kreuzverhör. Die Elite, die Europa in Scherben brach*. Hamburg: F. Greno, 1987 <1964>.
- _____. *Das Dritte Reich im Kreuzverhör. Aus den unveröffentlichten Vernehmungsprotokollen des Anklägers Robert M.W. Kempner*. Munich: Bechtle, 1969.
- Klee, Ernst. *Persilscheine und falsche Pässe. Wie die Kirchen den Nazis halfen*. Frankfurt: Fischer Taschenbuch Verlag, 1992.
- Klee, Ernst and Willi Dreßen, eds. *"Gott mit uns" Der deutsche Vernichtungskrieg im Osten 1939-1945*. Frankfurt: Fischer Verlag, 1989.
- Klein, Peter, ed. *Die Einsatzgruppen in der besetzten Sowjetunion, 1941/42: die Tätigkeits- und Lageberichte des Chefs der Sicherheitspolizei und des SD*. Berlin: Edition Hentrich, 1997.
- Kochavi, Arieh J. *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*. Chapel Hill, NC: University of North Carolina Press, 1998.
- Koehl, Robert. *The Black Corps: The Structure and Power Struggles of the SS*. Madison: University of Wisconsin Press, 1983.
- Kogen, Eugen, Langbein, Hermann and Rückerl, Adalbert, eds. *Nazi Mass Murder: A Documentary History of the Use of Poison Gas*. Trans. Mary Scott and Caroline Lloyd-Morris. New Haven: Yale University Press, 1993.
- Kramer, Jorg D. *Das Verhältnis der politischen Parteien zur Entnazifizierung in Nordrhein-Westfalen*. Frankfurt: P. Lang, 2001.
- Krausnick, Helmut and Hans-Heinrich Wilhelm. *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942*. Stuttgart: Deutsche Verlags-Anstalt, 1981.

- Krippendorff, Ekkehart, ed. *The Role of the United States in the Reconstruction of Italy and West Germany, 1943-49*. Berlin: John F. Kennedy Institute, 1981.
- Kurthen, Hermann, Werner Bergmann and Rainer Erb. *Antisemitism and Xenophobia in Germany after Unification*. New York: Oxford University Press, 1997.
- Larres, Klaus and Panikos Panayi, eds. *The Federal Republic of Germany since 1949: Politics, Society and Economy Before and After Unification*. London: Longman Publishing Group, 1996.
- Leitz, Christian, ed. *The Third Reich*. Oxford: Blackwell, 1999.
- Lemkin, Raphael. *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington: Carnegie Endowment for International Peace, 1944.
- Levy, Guenter. *The Catholic Church and Nazi Germany*. New York: McGraw-Hill, 1964.
- Lichtenstein, Heiner. *Himmlers grüne Helfer: Die Schutzpolizei und Ordnungspolizei in "Dritten Reich."* Cologne: Bund Verlag, 1990.
- Lifton, Robert Jay and Eric Markusen. *The Genocidal Mentality: Nazi Holocaust and Nuclear Threat*. New York: Basic Books, 1990.
- Lipset, Seymour. *Political Man: The Social Bases of Politics*. Expanded and updated ed. Baltimore: Johns Hopkins University, 1981 <1960>.
- Lloyd-Bostock, Sally M.A. and Brian R. Clifford, eds. *Evaluating Witness Evidence. Recent Psychological Research and New Perspectives*. Toronto: Toronto University Press, 1983.
- Longerich, Peter. *Politik der Vernichtung: Eine Gesamtdarstellung der nationalsozialistischen Judenverfolgung*. Munich: Piper, 1998.
- Mackey, Philip English, ed. *Voices Against Death: American Opposition to Capital Punishment, 1787-1975*. New York: AMS Press, 1976.
- MacLean, French L. *The Field Men: The SS Officers Who Led the Einsatzkommandos – the Nazi Mobile Killing Units* Atglen, PA: Schiffer, 1999.
- Maguire, Peter. "Nuremberg: A Cold War Conflict of Interest." Unpublished PhD dissertation. New York: Columbia University, 1995.
- _____. *Law and War: An American Story*. New York: Columbia University Press, 2000.
- Manstein, Peter. *Die Mitglieder und Wähler der NSDAP, 1919-1933. Untersuchungen zu*

- Ihrer Schichtmässigen Zusammensetzung*. Frankfurt: Peter Lang, 1988.
- Maser, Werner. *Nuremberg: A Nation on Trial*. New York: Charles Scribner's Sons, 1977.
- McCloy, Donald R. and Benedit K. Zobrist eds. *Conference of Scholars on the Administration of Occupied Areas, 1943-1955*, April 10-11, 1970, at the Harry S. Truman Library. Independence, Mo: 1970.
- McInnis, Edgar, Richard Hiscocks, and Robert Spencer. *The Shaping of Postwar Germany*. London: Dent, 1960.
- Merritt, Richard L. *Democracy Imposed: U.S. Occupation Policy and the German Public, 1945-1949*. New Haven: Yale University Press, 1995.
- Melis, Damien van. *Entnazifizierung in Mecklenburg-Vorpommern: Herrschaft und Verwaltung 1945-1948*. Munich: R. Oldenbourg, 1999.
- Miale, Florence R. and Selzer, Michael. *The Nuremberg Mind. The Psychology of the Nazi Leaders*. New York: Quadrangle Books, 1975.
- Milgram, Stanley. *Obedience to Orders*. New York: Harper and Row, 1974.
- Milward, Alan. *The Reconstruction of Eastern Europe, 1945-51*. Berkeley: University of California Press, 1984.
- Mohler, Rainer. *Entnazifizierung in Rheinland-Pfalz und im Saarland unter französischer Besatzung von 1945 bis 1952*. Mainz: V. Hase und Koehler, 1992.
- Mosse, George. *The Crisis of German Ideology. The Intellectual Origins of the Third Reich*. London: Grosset and Dunlap, 1964.
- Müller, Ingo. *Hitler's Justice: The Courts of the Third Reich*. Trans. Deborah Lucas Schneider. Cambridge: Harvard University Press, 1991.
- Niethammer, Lutz. *Entnazifizierung in Bayern: Säuberung und Rehabilitierung unter amerikanischer Besatzung*. Frankfurt: S. Fischer, 1972.
- Ogorreck, Ralf. *Die Einsatzgruppen und die Genesis der Endlösung*. Berlin: Metropol, 1997 <1996>.
- Peterson, Edward. *The Many Faces of Defeat: The German People's Experience in 1945*. New York: Peter Lang, 1990.
- Phayer, Michael. *The Catholic Church and the Holocaust, 1930-1965*. Bloomington: Indiana University Press, 2000.

- Poliakov, Léon. *Harvest of Hate*, New York: Holocaust Library, 1979.
- Reichert, Olaf. "Wir müssen doch in die Zukunft sehen -": die Entnazifizierung in der Stadt Oldenburg unter britischer Besatz. Oldenburg: Isensee, 1998.
- Reitlinger, Gerald. *Die Endlösung: Hitlers Versuch der Ausrottung der Juden Europas 1939-1945*. Berlin: Colloquium Verlag, 1956 <1951>.
- _____. *The Final Solution: The Attempt to Exterminate the Jews of Europe*. Revised and augmented ed. New York: T. Yoseloff, 1968.
- _____. *The SS. Alibi of a Nation 1922-1945*. New York: The Viking Press, 1989 <1957>.
- Robinson, Jacob and Henry Sachs. *The Holocaust: The Nuremberg Evidence*. Jerusalem: Yad Vashem, 1976.
- Robson, Kenneth. *Papers of the International Military Tribunal and the Nuremberg Military Tribunal, 1945-1949*. South Hampton: University of South Hampton, 1993.
- Rossino, Alexander. "September 1939: The German Army and the Invasion of Poland." Unpublished PhD dissertation, Syracuse University: New York, 1999.
- Rotzenhart-Viehe, Verena. *The German Reaction to the American Occupation, 1944-1947*. Santa Barbara: University of California, 1980.
- Rücklerl, Adalbert. *The Investigation of Nazi Crimes 1945-1978: A Documentation*. Trans. Derek Rutter. Heidelberg: C.F. Müller, 1979.
- _____. *NS-Verbrechen vor Gericht: Versuch einer Vergangenheitsbewältigung*. Heidelberg: C.F. Müller, 1982.
- Russell, Francis. *Tragedy in Dedham: The Story of the Sacco-Vanzetti Case*. New York: Harper and Row, 1971.
- _____. *Sacco and Vanzetti: The Case Resolved*. New York: Harper and Row, 1986.
- Schabas, William A. *Genocide in International Law: The Crimes of Crimes*. Cambridge: Cambridge University Press, 2000.
- Schoeps, Julius H. *Ein Volk von Mördern? Die Dokumentation der Goldhagen-Kontroverse um die Rolle der deutschen im Holocaust*. Hamburg: Hoffmann und Campe, 1996.
- Schulzinger, Robert D. *American Diplomacy in the Twentieth Century*. 2nd edition. New York: Oxford University Press, 1990 <1984>.
- Schwartz, Thomas Alan. *America's Germany: John J. McCloy and the Federal Republic of*

- Germany*. Cambridge: Harvard University Press, 1991.
- Schwed, Roger E. *Abolition and Capital Punishment. The United States' Judicial, Political, and Moral Barometer*. New York: McGraw-Hill, 1983.
- Sereny, Gitta. *Albert Speer: His Battle with Truth*. New York: Vintage Books, 1995.
- Smith, Bradley. *Reaching Judgment at Nuremberg*. New York: Basic Books, 1977.
- _____. *The Road to Nuremberg*. New York: Basic Books, 1981.
- Smith, Jean Edward. *Lucius D. Clay: An American Life*. New York: Henry Holt and Company, 1990.
- Spotts, Frederic. *The Churches and Politics in Postwar Germany*. Middleton: Wesleyan University Press, 1973.
- Stachura, Peter D., ed. *The Nazi Machtergreifung*. London: Allen and Unwin, 1983.
- Stein, Harold, ed. *American Civil-Military Decisions: A Book of Case Studies*. Inter-University Case Program. University of Alabama Press, 1963.
- Straub, Ervin. *The Roots of Evil*. New York: Cambridge University Press, 1989.
- Streim, Alfred. *Die Behandlung Sowjetischer Kriegsgefangener im "Fall Barbarossa": Eine Dokumentation*. Heidelberg: C.F. Müller, 1981.
- Streit, Christian. *Keine Kameraden. Die Wehrmacht und die sowjetischen Kriegsgefangenen, 1941-1945*. Bonn: Verlag J.H.W. Dietz, 1991 <1978>.
- Tauber, Kurt P. *Beyond Eagle and Swastika: German Nationalism Since 1945*. 2 volumes. Middleton: Wesleyan University Press, 1967.
- Thayer, Charles. *The Unquiet Germans*. New York: Harper, 1957.
- Trankell, Arne. *Reliability of Witness Evidence: Methods for Analysing and Assessing Witness Statements*. Stockholm: Rotobekman AB, 1972.
- Tusa, Ann and John Tusa. *The Nuremberg Trial*. New York: Atheneum, 1983.
- Überschar, Gerd R., ed. *Der Nationalsozialismus vor Gericht: die alliierten Prozesse gegen Kriegsverbrecher und Soldaten*. Frankfurt: Peter Lang, 1999.
- Vila, Bryan and Cynthia Morris, eds. *Capital Punishment in the United States: A Documentary History*. Westport: Greenwood Press, 1997.

Vogt, Timothy R. *Denazification in Soviet-occupied Germany: Brandenburg, 1945-1948*. Cambridge: Harvard University Press, 2000.

Vollnhals, Clemens. *Evangelische Kirche und Entnazifizierung 1945-1949. Die Last der nationalsozialistischen Vergangenheit*. Munich: R. Oldenbourg, 1989.

Waite, Robert G.L. *Vanguard of Nazism: The Free Corps Movement in Postwar Germany 1918-1923*. Cambridge: Harvard University Press, 1952.

West, Rebecca. *A Train of Powder*. New York: Viking Press, 1965.

Willis, James F. *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*. Westport: Greenwood Press, 1986.

Woetzel, Robert K. *The Nuremberg Trials in International Law*. New York: Praeger, 1962 <1960>.

Wohl, Robert. *The Generation of 1914*. Cambridge: Harvard University Press, 1979.

Wolfe, Robert, ed. *Americans As Proconsuls United States Military Government in Germany and Japan, 1944-1952*. Carbondale, IL: Southern Illinois University Press, 1984.

Yahil, Leni. *The Holocaust: The Fate of European Jewry*. Oxford: Oxford University Press, 1990.

Young, William and David E. Kaiser. *Postmortem. New Evidence in the Case of Sacco and Vanzetti*. Amherst: University of Massachusetts Press, 1985.

Ziegler, Herbert. *Nazi Germany's New Aristocracy. The SS Leadership 1925-1939*. Princeton: Princeton University Press, 1989.

Ziemke, Earl F. *The U.S. Army in the Occupation of Germany 1944-46*. Washington, D.C.: Center of Military History, United States Army, 1975.

Ziller, Eric A., Harrower, Molly, Ritzler, Barry A., Archer, Robert P. *The Quest for the Nazi Personality. A Psychological Investigation of Nazi War Criminals*. Hillsdale, NJ: Lawrence Erlbaum Associates, 1995.

Secondary Sources (Articles)

Allen, William Sheridan. "Farewell to Class Analysis in the Rise of Nazism: Comment." *Central European History* 17 (1984): 54-62.

Anderson, Kenneth. "Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg

Trials." *Harvard Human Rights Journal* 7 (Spring 1994): 281-295.

Biddis, Michael. "Victors' Justice? The Nuremberg Tribunal." *History Today* 49 (October 1993): 40-46.

Birn, Bettina. "Guilty Conscience, Antisemitism and the Personal Development of Some SS Leaders." *Remembering for the Future: Working Papers and Addenda vol.II: The Impact of the Holocaust on the Contemporary World, 2083-2092*. New York: Pergamon Press, 1989.

_____. "Revising the Holocaust." *Historical Journal* 40 (1997): 195-215.

Boehling, Rebecca. "U.S. Military Occupation, Grass Roots Democracy, and Local German Government." In Jeffrey M Diefendorf, Axel Frohn and Hermann-Josep Rupieper, eds. *American Policy and the Reconstruction of West Germany, 1945-1955*, 281-306. Washington: Cambridge University Press, 1995.

Boehnert, Gunnar C. "The Third Reich and the Problem of 'Social Revolution': German Officers and the SS." In Volker R. Berghahn and Martin Kitchen, eds. *Germany in the Age of Total War*, 203-217. Totowa, NJ: Barnes and Noble Books, 1981.

_____. "The Jurists in the SS-Führerkorps, 1925-1939." In Gerhard Hirschfeld and Lothar Kettenacker, eds. *Der "Führerstaat": Mythos und Realität: Studien zur Struktur und Politik des Dritten Reiches*, 361-373. Stuttgart: Klett-Cotta, 1981.

_____. "An Analysis of the Age and Education of the SS Führerkorps, 1925-1939." *Historical and Social Research* 12 (1979): 4-17.

Bogart, Leo. "The Pollster and the Nazis," *Commentary* 92 (August 1991): 47-49.

Breitman, Richard. "Himmlers's Police Auxiliaries in the Occupied Soviet Territories." *Simon Wiesenthal Center Annual* 7 (1994): 23-39.

_____. "Himmler and the Terrible Secret among the Executioners." In Yehuda Reinharz and George Mosse, eds. *The Impact of Western Nationalism: Essays Dedicated to Walter Laqueur on the Occasion of his 70th Birthday*, 77-97. London: Sage Publications, 1991-1992.

Brow, Peter. "Nuremberg Remembered." *Contemporary Review* 267 (November, 1995): 257-260.

Browder, George. "The SD: The Significance of Organization and Image." In George L. Mosse, ed. *Police Forces in History*, 205-229. Beverly Hills, CA: Sage Publications, 1977 <1975>.

_____. "The Numerical Strength of the Sicherheitsdienst des RFSS." *Historical Social*

Research 28 (1983): 30-41.

Browning, Christopher. "A Reply to Martin Brozat Regarding the Origins of the Final Solution." *Simon Wiesenthal Center Annual* (1984):113-132.

_____. "German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony." In Saul Friedlander, ed. *Probing the Limits of Representation: Nazism and the 'Final Solution,'* 22-36. Cambridge: Harvard University Press, 1992.

_____. "Daniel Goldhagen's Willing Executioners." *History and Memory: Studies in Representation of the Past* 1:8 (Spring/Summer, 1996): 88-108.

Büchler, Yehoshua. "Kommandostab Reichsführer-SS: Himmler's Personal Murder Brigades in 1941." *Holocaust and Genocide Studies* 1 (1986): 11-25.

Burton, John T. "War Crimes" During Operations other than war: Military Doctrine and Law 50 Years After Nuremberg Tribunal." *Military Law Review* 149 (Summer 1995): 199-206.

Buscher, Frank M. and Michael Phayer. "German Catholic Bishops and the Holocaust, 1940-1952." in *German Studies Review* 3: 11 (October 1988): 463-486.

Bussmann, Walter. "Pius XII an die deutschen Bischöfe." *Hochland* 61 (1969): 61-65.

Cassel, Douglas W., Jr. "Judgment at Nuremberg: A half-century Appraisal." *The Christian Century* 112 (December 6, 1995): 1180-1183.

Childers, Thomas. "Who, Indeed, Did Vote for Hitler?" *Central European History* 17 (1984): 45-53.

Clifford, Brian R. "The Relevance of Psychological Investigation to Legal Issues in Testimony and Identification." *The Criminal Law Review* (1979): 153-163.

Crespi, Leo P. "The Influence of Military Government Sponsorship in German Opinion Polling." *International Journal of Opinion and Attitude Research* 4 (1950): 151-178.

Daniel, Aubrey. "The Defense of Superior Orders." *University of Richmond Law Review* 7 (1973): 477-509.

Daniell, Raymond. "'So What?' Say the Germans of Nuremberg." *The New York Times Magazine* (December 2, 1945): 5-6.

Doeneke, Justus D. "Protest over Malmedy: A Case of Clemency." *Peace and Change* 2: 4 (1977): 28-33.

Douglas, Lawrence. "Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal." *The Yale Law Journal* 2:105 (November 1995): 449-480.

_____. "Wartime Lies. Securing the Holocaust in Law and Literature." In F.C. Decoste and Bernard Schwartz, eds. *The Holocaust's Ghost: Writings on Art, Politics, Law and Education*, 15-25. Edmonton: University of Alberta Press, 2000.

Eser, A. "Defenses in War Crimes Trials." In Yoram Dinstein and Mala Tabory, eds. *War Crimes in International Law*, 251-274. The Hague: Martinus Nijhoff Publishers, 1996.

Fahy, Charles. "Legal Problems of German Occupation." *Michigan Law Review* 47 (November 1948): 11-22.

Ferencz, Benjamin. "Nurnberg Trial Procedure and the Rights of the Accused." *Journal of Criminal Law, Criminology and Police Science* 39 (July-August 1948): 144-151.

Fischer, Conan. "The Occupational Background of the SA's Rank and File Membership During the Depression Years, 1929 to Mid-1934." In Peter D. Stachura ed. *The Shaping of the Nazi State*, 131-159. New York: Barnes and Noble Books, 1978.

Förster, Jürgen. "The Wehrmacht and the War of Extermination Against the Soviet Union." *Yad Vashem Studies* 14 (1981): 413-447.

Fox, John P. "The Final Solution: Intended or Contingent?" *Patterns of Prejudice* 3:18 (1984): 27-39.

Fratcher, William Franklin. "American Organization for Prosecution of German War Criminals." *Missouri Law Review* 13 (1948): 45-75.

Freedman, Abraham E. "The Dissenting Opinions of Justice Musmanno." *Temple Law Quarterly* 30 (1957): 250-262.

Frei, Norbert. "'Vergangenheitsbewältigung' or 'Renazification?'" The American Perspective on Germany's Confrontation with the Nazi Past in the Early Years of the Adenauer Era." In Michael Ermarth, ed. *America and the Shaping of German Society, 1945-1955*, 47-59. Providence: Berg Publishers, 1993.

Friedlander, Henry. "The Judiciary and Nazi Crimes in Postwar Germany." *Simon Wiesenthal Center Annual* 1 (1984): 27-44.

Friedlander, Henry. "The Deportations of the German Jews: Post-War Trials of Nazi Criminals." *Leo Baeck Institute Year Book* (1984): 201-206.

Gardner, Lloyd C. "America and the German 'Problem,' 1945-49." In *The Politics and Policies of the Truman Administration*, 113-149. Barton J. Bernstein, ed. Chicago:

Quadrangle, 1970.

Gerlach, Christian. "Die Wannsee-Konferenz, das Schicksal der deutschen Juden und Hitlerspolitische Grundsatzentscheidung, alle Juden Europas zu ermorden." *Werkstattgeschichte* 18:6 (November 1997): 7-44.

Gilbert, Gustav M. "The Mentality of SS Murderous Robots." *Yad Vashem Studies on the European Jewish Catastrophe and Resistance* 5 (1963): 35-41.

Goldhagen, Daniel Jonah. "The Evil of Banality." *The New Republic* (July 13 & 20, 1992): 49-52.

Grabitz, Helge, "NS-Prozesse heute." *Zeitschrift für Rechtspolitik* 15 (1982): 14-16.

_____. "Problems of Nazi Trials in the Federal Republic of Germany." *Holocaust and Genocide Studies* 3 (1988): 209-222.

Griffith, William. "Denazification Program." *Annals of the American Academy* 267 (January 1950): 68-76.

Grosman, Brian A. "Testing Witness Reliability." *The Criminal Law Quarterly* 5 (1962-1963): 318-327.

Hammond, Paul. "Directives for the Occupation of Germany: The Washington Controversy." in Harold Stein, ed. *American Civil Military Decisions*, 311-464. Birmingham: University of Alabama Press, 1963.

Harris, Whitney R. "Justice Jackson at Nuremberg." *The International Lawyer* 3:20 (Summer 1986): 867-896.

Headland, Roland. "The Einsatzgruppen: The Question of Their Initial Operations." *Holocaust and Genocide Studies* 4:4 (1989): 401-412.

Heinemann, Isabel. "'Another Type of Perpetrator': The SS Racial Experts and Forced Population Movements in Occupied Regions." *Holocaust and Genocide Studies* 3:12 (Winter, 2001): 387-411.

Hellendall, F. "Nazi Crime before German Courts: The Immediate Post-War Era." *The Wiener Library Bulletin* 3:24 (1970): 14-20.

Herbert, Ulrich. "Rückkehr in die Bürgerlichkeit? NS-Eliten in der Bundesrepublik." In Bernd Weisbrod, ed. *Rechtsradikalismus in der politischen Kultur der Nachkriegszeit: Die verzögerte Normalisierung in Niedersachsen*, 157-173. Hanover: Hahn, 1995.

Herz, John. "The Fiasco of Denazification." *Political Science Quarterly* 63 (1948): 569-94.

Hilberg, Raul. "Sources and Their Usage." In Michael Berenbaum and Abraham J. Peck, eds. *The Holocaust and History: The Known, the Unknown, the Disputed, and the Reexamined*, 5-11. Bloomington: Indiana University Press, 1998.

Hockett, Jeffrey D. "Justice Robert A. Jackson, The Supreme Court, and the Nuremberg Trial." *The Supreme Court Review* (1990): 257-299.

Janowitz, Morris. "German Reactions to Nazi Atrocities." *The American Journal of Sociology*. 52 (1946): 141-146.

Jones, Priscillia Dale. "British Policy towards German Crimes against the Jews, 1939-1945." *Leo Baeck Institute Year Book* 36 (1991): 339-366.

Kahn, Leo. "Achievement and Failure at Nuremberg." *Weiner Library Bulletin* 3-4: 25 (1972): 21-29.

Kater, Michael. "Problems of Political Reeducation in West Germany, 1945-1960." *Simon Wiesenthal Center Annual* 4 (1987): 99-105.

_____. "The New Nazi Rulers: Who Were They?." In Charles S. Maier, Stanley Hoffmann, and Andrew Gould, eds. *The Rise of the Nazi Regime: Historical Reassessments*, 41-44. Boulder, CO: Westview, 1986.

Katz, Fred E. "Implementation of the Holocaust: the Behavior of Nazi Officials." *Society for Comparative Study of Society and History*: 510-529.

Kempner, Robert M.W. "Cross Examining War Criminals." *Yad Vashem Studies on the European Catastrophe and Resistance* 5 (1963): 43-68.

Kitterman, David H. "Those who Said No: Germans who Refused to Execute Civilians During World War II." *German Studies Review* 2:11 (May 1988): 241-254.

_____. "Otto Ohlendorf: Gralshüter des Nationalsozialismus." In Ronald Smelser and Enrico Syring, eds. *Die SS: Elite under dem Totenkopf*, 379-393. Paderborn: F. Schöningh, 2000.

Kramer, Helmut. "Kriegsverbrechen, deutsche Justiz und das Verjährungsproblem - Amnestie durch die legislative Hintertür." In Wolfram Wette and Gerd R. Ueberschär, eds. *Kriegsverbrechen im 20. Jahrhundert*, 493-506. Darmstadt: Primus, 2001.

Kranzbuhler, Otto. "Nuremberg Eighteen Years Afterwards." *DePaul Law Review* 16 (1964-1965): 333-347.

Krausnick, Helmut and Jürgen Förster. "The Wehrmacht and the War of Extermination against the Soviet Union." *Yad Vashem Studies* 14 (1981): 7-34.

Kwiet, Konrad. "Auftakt zum Holocaust: Ein Polizeibatallion im Osteinsatz." In Wolfgang Benz et al., eds. *Der Nationalsozialismus: Studien zur Ideologie und Herrschaft*, 191-208. Frankfurt: Peter Lang, 1993.

Lemkin, Raphael. "Genocide." *American Scholar* 2:15 (1946): 227-270.

Lippman, Matthew. "The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany." *Indiana International and Comparative Law Review* 1: 3 (Fall 1992): 1-100.

Longerich, Peter. "Vom Massenmord zur 'Endlösung'. Die Erschließungen von jüdischen Zivilisten in den ersten Monaten des Ostfeldzuges im Kontext des nationalsozialistischen Judenmords." In Bernd Wegner, ed. *Zwei Wege nach Moskau. Vom Hitler-Stalin-Pakt zum 'Unternehmen Barbarossa'*, 249-260. Munich: Piper, 1991.

_____. "Policy of Destruction: Nazi-Anti-Jewish Policy and the Genesis of the 'Final Solution'." Joseph and Rebecca Meyerhoff Annual Lecture, 1-30. Washington: United States Holocaust Memorial Museum, 2001.

Lowenberg, Peter. "The Psychohistorical Origins of the Nazi Youth Cohort." *American Historical Review* 76 (1971): 1457-1502.

Lozowick, Yaacov. "Rollbahn Mord: The Early Activities of Einsatzgruppe C." *Holocaust and Genocide Studies* 2:2 (1987): 221-241.

Luban, David. "The Legacies of Nuremberg." *Social Research* 54 (Winter, 1987): 779-829.

Madden, Paul. "Some Social Characteristics of Early Nazi Party Members, 1919-1923." *Central European History* 1:15 (1982): 34-56.

_____. "Generational Aspects of German National Socialism, 1919-1933." *Social Science Quarterly* 63 (1982): 445-464.

Mallmann, Klaus-Michael. "Die Türöffner der 'Endlösung'." In Gerhard Paul and Klaus-Michael Mallmann, eds. *Die Gestapo im Zweiten Weltkrieg*, 437-463. Darmstadt: Primus, 2000.

Mann, Michael. "Were the Perpetrators of Genocide 'Ordinary Men' or 'Real Nazis'? Results from Fifteen Hundred Biographies." *Holocaust and Genocide Studies* 3:14 (Winter, 2000): 331-366.

Marrus, Michael R. "History and the Holocaust in the Courtroom." In Gary Smith and Florent Brayard, eds. *Vom Prozeß zur Geschichte: Die juristische und historische Aufarbeitung der Shoa in Frankreich und Deutschland*, 1-35. (Berlin: Forthcoming, 2002).

_____. "The Nuremberg Trial: Fifty Year After." *The American Scholar* 66 (Autumn 1997): 563-570.

_____. "The History of the Holocaust: A Survey of Recent Literature." *Journal of Modern History* 59 (March, 1987): 114-160.

_____. "The Holocaust at Nuremberg." Paper originally presented at conference "Political Justice in Europe in the Aftermath of World War Two." Institut für Wissenschaften vom Menschen. Vienna: November, 1995, revised February 1996.

_____. "The Nuremberg Doctors' Trial in Historical Context." *History and Medicine* 73 (1999): 107-123.

Mätthaus, Jürgen. "What about the 'Ordinary Men'? The German Order Police and the Holocaust in the Occupied Soviet Union." *Holocaust and Genocide Studies* 2:10 (Fall, 1996): 134-150.

_____. "A Case of Myth-Making: The 'Führer Order' During the Einsatzgruppen Trial, 1947-1948." Unpublished article, United States Holocaust Memorial Museum, Center For Advanced Holocaust Studies, 1-20.

Mendelsohn, John. "Trial by Document: The Problem of due Process for War Criminals at Nuernberg." *Prologue* 4:2 (Winter, 1975): 227-34.

_____. "War Crimes Trials and Clemency in Germany and Japan." In Robert Wolfe, ed. *Americans as Proconsuls: United States Military Government in Germany and Japan*, 226-259. Carbondale: Southern Illinois University Press, 1984.

Michael, Robert. "Theological Myth, German Antisemitism, and the Holocaust: The Case of Martin Niemoeller." *Holocaust and Genocide Studies* 1: 2 (1987): 105-122.

Müller-Hill, Benno. "The Idea of the Final Solution and the Role of Experts." In David Cesarani, ed. *The Final Solution: Origins and Implementation*, 62-72. New York: Routledge, 1996 <1994>.

O'Brien, Edward J. "The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood." *Military Law Review* 149 (Summer 1995): 275-291.

Okroy, Michael. "Vor 50 Jahren in Nürnberg: Der Einsatzgruppenprozess und Paul Blobel." *Tribüne, Zeitschrift zum Verständnis des Judentums* 142 (2. Quartal, 1997): 21-32.

Ophir, Adi. "Between Eichmann and Kant: Thinking on Evil After Arendt." *History and Memory* 2:8 (Fall/Winter, 1996): 89-136.

Peskett, John S. "Forty Years On--Looking Back at Nuremberg." *History* 72 (February,

1987): 62-68.

Phayer, Michael. "The German Catholic Church After the Holocaust." *Holocaust and Genocide Studies* 2:10 (Fall, 1996): 151-167.

Podgers, James. "Remembering Nuremberg." *American Bar Association Journal* 79 (October, 1993): 88- 92.

Robinson, Jacob. "The International Military Tribunal and the Holocaust: Some Legal Reflections." *Israel Law Review* 1:7 (Winter, 1972):1-13.

Robinson, Paul H. "Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine." In Albin Eser and George P. Fletcher, eds. *Justification and Excuse: Comparative Perspectives*, 659-743. New York: Transnational Juris Publications, Inc., 1987.

Rossino, Alexander. "Nazi Anti-Jewish Policy During the Polish Campaign: The Case of the Einsatzgruppe von Woysch." *German Studies Review* 24:1 (February, 2001): 35-54.

Sacher, Abram. "The Nuremberg Trials and the Trials that Came After." *The Redemption of the Unwanted*, 115-144. New York: St. Martins' Press, 1983.

Schwartz, Thomas Alan. "John J. McCloy and the Landsberg Cases." In *American Policy and the Reconstruction of West Germany, 1945-1955*, 433-455. Washington: Cambridge University Press, 1995.

_____. "Reeducation and Democracy: The Policies of the United States High Commission in Germany." In *America and the Shaping of German Society, 1945-1955*, 443-454. Oxford: Berg Publishers, 1993.

Smith, Arthur. "Life in Wartime Germany. Colonel Ohlendorf's Opinion Service." *The Public Opinion Quarterly* 36 (Spring, 1972): 7-23.

Snydor, Jr., Charles W. "On the Historiography of the SS." *Simon Wiesenthal Center Annual* 6 (1989): 249-262.

Sowade, Hanno. "Otto Ohlendorf: Non-Conformist, SS leader, and Economic Functionary." In Ronald Smelser and Rainer Zitelmann, eds. *The Nazi Elite*, 155-164. New York: New York University Press, 1993.

Spector, Steven B. "Judicial Activism in Prose: A Librarian's Guide to the opinions of Justice M.A. Musmanno." *Law Library Journal* 86 (Spring 1994): 311-321.

Stachura, Peter D. "Who Were the Nazis? A Socio-Political Analysis of the National Socialist Machtübernahme." *European Studies Review* 11 (1981): 293-324.

Stark, Jared. "The Task of Testimony: On 'No Common Place': The Holocaust Testimony of Alina Bacall-Zwirn." *History and Memory* (1999): 37-61.

Stokes, Lawrence. "The German People and the Destruction of the European Jews." *Central European History* 6 (1973): 167-191.

_____. "Otto Ohlendorf, the Sicherheitsdienst and Public Opinion in Nazi Germany." In George L. Mosse, ed. *Police Forces in History*, 231-261. Beverly Hills: Sage Publications, 1977.

Streim, Alfred and Helmut Krausnick. "Helmut Krausnick to Alfred Streim and Alfred Streim Replies to Helmut Krausnick." *Simon Wiesenthal Center Annual* 6 (1989): 311-347.

_____. "Zur Eröffnung des allgemeinen Judenvernichtungsbefehls gegenüber den Einsatzgruppen." In Eberhard Jäckel and Jürgen Rohwer, eds. *Der Mord an den Juden im zweiten Weltkrieg: Entschlussbildung und Verwirklichung*, 107-119. Stuttgart: Deutsche Verlags-Anstalt, 1985.

_____. "Zum Beispiel: Die Verbrechen der Einsatzgruppen in der Sowjetunion." In Adalbert Rückerl, ed. *NS-Prozesse Nach 25 Jahren Strafverfolgung: Möglichkeiten-Grenzen-Ergebnisse*, 65-106. Karlsruhe: C. F. Müller, 1971.

_____. "The Tasks of the Einsatzgruppen." *Simon Wiesenthal Center Annual* 4 (1987):309-328.

Steiner, John M. "The SS Yesterday and Today: A Sociopsychological View." In Joel E. Dimsdale, ed. *Survivors, Victims and Perpetrators: Essays on the Nazi Holocaust*, 405-442. Washington: Hemisphere Publishing, 1980.

Streit, Christian. "Wehrmacht, Einsatzgruppen, Soviet POWs and Anti-Bolshevism in the Emergence of the Final Solution." In David Cesarani, ed. *The Final Solution: Origins and Implementation*, 103-118. New York: Routledge, 1996 <1994>.

Sydnor, Charles W. Jr. "On the Historiography of the SS." *Simon Wiesenthal Center Annual* 6 (1989):249-262.

Waller, James. "Perpetrators of the Holocaust: Divided and Unitary Self Conceptions of Evildoing." *Holocaust and Genocide Studies* 1:10 (Spring, 1996): 11-33.

Wechsler, Herbert. "The Issues of the Nuremberg Trial." *Principles, Politics, and Fundamental Law*. Cambridge: Harvard University Press, 1961.

Weindling, Paul. "From International to Zonal Trials: The Origins of the Nuremberg Medical Trial." *Holocaust and Genocide Studies* 3:14 (Winter, 2000): 367-389.

Westermann, Edward R. "'Ordinary Men' or 'Ideological Soldiers'? Police Battalion 310 in Russia, 1942." *German Studies Review* 1:21 (February, 1998): 41-68.

Wolfe, Robert. "Putative Threat to National Security as a Nuremberg Defense for Genocide." *Annals of the American Academy of Political and Social Science* 450 (1980): 46-67.

_____. "Flaws in the Nuremberg Legacy: An Impediment to International War Crimes Tribunals' Prosecution of Crimes against Humanity." *Holocaust and Genocide Studies* 3:12 (Winter, 1998): 434-453.

Wright, Quincy. "The Law of the Nuremberg Trial." *American Journal of International Law* 41 (1947): 38-72.

_____. "War Criminals." *American Journal of International Law* 39 (1945): 257-285.

Yahil, Leni. "Historians of the Holocaust A Plea for a New Approach." *The Weiner Library Bulletin* 1: 22 (1967-1968): 2-5.

Zukier, Henri. "The 'Mindless Years'? A Reconsideration of the Psychological Dimensions of the Holocaust, 1938-1945." *Holocaust and Genocide Studies* 2:11 (Fall 1997):190-212.

Zeck, William Alan. "Nuremberg: Proceedings Subsequent to Goering et al." *North Carolina Law Review* 26 (1948): 350-389.