

SWORD AND SWASTIKA¹REVIEWED BY LIEUTENANT COLONEL H. WAYNE ELLIOTT²

In July 1938 General Ludwig Beck wrote of his fellow generals in the German army, “[t]heir duty of soldierly obedience finds its limit when their knowledge, conscience and responsibility forbid the execution of an order.”³ Seven years later, World War II in Europe at an end, the limits of soldierly obedience were at the core of the war crimes trials taking place in Germany. The trials dealt with the individual guilt of the top Nazi leadership. But there were broader questions which the Nuremberg Tribunal could not really answer. What had gone wrong in Germany? How had a group of sociopaths like the Nazis managed to take charge of such a sophisticated country? What was the role of the German military establishment in the Nazi accession to power? Could it have been prevented?

Fifty years have now passed since the end of World War II. *Sword and Swastika* was written by Telford Taylor in 1952 and published the same year. Taylor was the chief American prosecutor at the “subsequent proceedings,”⁴ the American trials which followed the trial of the highest ranking Nazis before an international tribunal. At the end of the trials, he left active duty as a Brigadier General and went on to become an accomplished professor of law at Columbia University. He has written several books. His 1992 book, *Anatomy of the Nuremberg Trials*, is an in-depth exploration of the international trial of the top German leadership.

It is impossible to study war crimes and their punishment without a firm understanding of the events which culminated in the trials at Nuremberg. The German generals and Nazi officials who are the subjects of *Sword and Swastika* are no longer household names. Nonetheless, their perception of duty unquestionably had an impact on world history. It was at the core of both the prosecution and defense cases in the post war trials. These largely forgotten generals played a major, though for them undesired, role in the development of international criminal law. Few today

1. TELFORD TAYLOR, *SWORD AND SWASTIKA, GENERALS AND NAZIS IN THE THIRD REICH* (Barnes and Noble 1995); 413 pages, \$9.98 (hardcover).

2. Judge Advocate General's Corps, U.S. Army (retired); Former Chief, International Law Division, The Judge Advocate General's School, Charlottesville, Va.; B.A., The Citadel; J.D., University of South Carolina; LL.M., S.J.D., University of Virginia.

3. TAYLOR, *supra* note 1, at 358.

4. The “subsequent proceedings” were the trials held for the second tier of the Nazi leadership before American courts in occupied Germany. There were twelve such trials.

would argue that the soldier can not be held criminally responsible for obvious violations of the law of war simply because a superior officer ordered them.⁵

The conflict in the former Yugoslavia has again focused attention on war crimes. The renewed attention paid to war crimes and the desire to commemorate the post war trials led to republication of *Sword and Swastika* in 1995. As Telford Taylor wrote in the preface, "we are scanning here a past which is part and parcel of the present."⁶ That is as true today as when it was written almost forty-five years ago. An international tribunal has been established at The Hague to try war criminals from the conflict in Yugoslavia. Because of the huge number of violations of the law of war in Yugoslavia, the court "should aim at higher officials who have guided or at least benefited from the atrocities that anger the world."⁷ Several generals from the war in Yugoslavia have been indicted for their part in war crimes. One general was actually taken into custody.⁸ It can be expected that as trials get underway for this latest crop of war criminals many will plead, "I was only following orders." That prospect makes this book once again worthy of study and review.

Sword and Swastika is actually about two periods in post World War I Germany. First, the fifteen years from the end of the war until Hitler's assumption of power. During those fifteen years the German army's attention was devoted to maintaining itself as a viable military force. Like many peacetime armies it was confronted with manpower, supply and equipment problems. But, unlike most armies, the solution to these problems often had to be undertaken in secret. At the same time that the army was fighting for its material existence, its leadership, schooled in the pre-

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5. The United States Army manual on the law of war sets out the rule: The fact that the law of war has been violated pursuant to an order of superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.

U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 497 (July 1956).

6. TAYLOR, *supra* note 1, at 7.

7. James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J.I.L. 639, 651 (1993).

8. The general was Djordje Djukic. William Drozdiak, *U.N. Indicts Bosnian Serb General*, WASH. POST, Mar. 2, 1996, at A14. He was released by the Tribunal because of his failing health and died in May 1996.

war image of the Prussian soldier, strove to maintain the historic role of the officers corps as the custodian of the German *geist* (spirit). The use of the word *sword* in the book's title is an indication of the importance of the army during this period.

After Hitler's assumption of power in 1933 and his renunciation of the Treaty of Versailles⁹ in 1935, rearmament could be public. The army was the obvious beneficiary of the renunciation and might have resumed its historic place in German society. But the army's second function in German society, custodian of the *geist*, was now in the firm control of a new group, the Nazis. That period from 1933 to end of World War II is the *swastika* in the title.

For the German general staff the genesis of World War II was World War I. The surrender of the German government in 1918 astonished many German soldiers and officers. They believed that the war might yet have been brought to a successful conclusion or at least a peace more in keeping with German objectives might have been negotiated. The Treaty of Versailles placed severe restrictions on the German military establishment. The Treaty's provisions concerning the payment of war reparations also had devastating economic consequences for Germany. Article 231 of the Treaty placed responsibility for the war squarely, and solely, on Germany.¹⁰ That provision "provoked instant, vehement, and lasting resentment"¹¹ by the German people. The German people often referred to the treaty as the "*Diktat*" of Versailles, a description which implied that it was more in the nature of a unilateral decree by the allies than a mutually arrived at international agreement. The perceived unfairness of the treaty became the rallying cry for many of the fledgling political parties in post war Germany and at the forefront of the hostility toward the treaty was a small political party in Bavaria—the Nazis.

The German military was directly impacted by the Treaty. It restricted the German army to no more than 100,000 men, of which no more than 4000 could be officers.¹² However, the mandated reduction in size had an unintended benefit for the German army. With millions of World War I soldiers from which to choose, the German General Staff¹³ was able to select soldiers of real quality. These would form the core of

9. Treaty of Versailles, 28 June 1919, 2 BEVANS 43, 13 AM. J.I.L. (Supp) 151 (1919) [hereinafter Treaty]. The United States did not ratify the Treaty of Versailles.

10. *Id.* art. 231.

11. A. LENTIN, GUILT AT VERSAILLES xi (1984).

12. Treaty, *supra* note 9, art. 160.

German military leadership during the years between the wars and the nucleus of the German army in World War II.

In spite of the various attempts to get around the Treaty's provisions, it remained a legal document of major consequence. The German army judge advocate issued an opinion that the Treaty was the "law of the Reich" and its provisions were "binding on all members of the Reich."¹⁴ Officers who endeavored to violate the terms of the Treaty could be indicted for "culpable violation of their official duties."¹⁵ As a result, the rearmament of Germany was clandestine. The general staff could not publicly admit that there were on-going efforts to rebuild the German forces.

On 2 August 1934, Field Marshal Paul von Hindenberg died. Hindenberg was a hero of World War I and served as *Reichspräsident* at the time of his death. Hindenberg personified the *ancien régime* and his death "marked the true birthday of the Third Reich."¹⁶ Adolf Hitler, then the Chancellor, promptly also assumed the office of *Reichspräsident* and power was consolidated in one "*Führer*." Soon thereafter, all members of the military were required to take a new oath, not to the State, but to Hitler personally. In the oath each soldier swore "unconditional obedience to Adolf Hitler."¹⁷ That oath would be cited as a defense in many of the post war trials.

Yet, the oath alone does not explain why professional soldiers would fall sway to the demands and ravings of a former World War I corporal from Austria. At least one reason was that after 1935 rearmament was not only open, but continuous. German industry hummed with activity. Rearmament meant riches for many Germans, and a return to prosperity for even more. With that came a welcomed respect for the career soldiers who seemed at least partly responsible for the renewed defense spending. Also, to the delight of many general officers, the Führer avoided interfering in

13. Technically there was no "General Staff." Such a staff was prohibited by the Treaty of Versailles. The Germans, in effect, simply changed the name of the staff to the *Truppenamt* (Troops Office). TAYLOR, *supra* note 1, at 37. For ease of understanding, this review will use the term "General Staff."

14. *Id.* at 55.

15. *Id.*

16. *Id.* at 87. Hitler performed masterfully at the funeral which was held at Tannenberg, site of Hindenberg's greatest victory in World War I. Hitler concluded his eulogy with a Teutonic flourish: "And now enter thou upon Valhalla." JOHN TOLAND, ADOLF HITLER 375 (1976).

17. TAYLOR, *supra* note 1, at 87-88.

internal personnel matters and was quite willing to let the general staff run the military. As long as rearmament continued at a quickened pace, the Fuhrer would defer to the general staff on military matters.¹⁸ However, the rebuilt army came with a cost. Gradually, the Nazi influence began to infiltrate the German officer corps.

The German army's reduced size meant that it had less and less of an impact on the German people. It was simply too small to play its historic role of providing society's elite guard. In 1935 Hitler reinstated compulsory military service and expanded the force structure. The young men conscripted into the Army in the late 1930s had already been indoctrinated; many had been members of the Hitler Youth. The Party, not the army, would be the social center of the people. There was no doubt who served as the new protector of the German *geist*.

It was difficult to deny Hitler's successes. He had rearmed the military and in doing so expanded the economy. The renunciation of the *Diktat* caused him to be seen as a realist who would not let treaties stand in the way of a greater Germany. Hitler was accomplishing what many of the generals hoped for—a Germany which once again was the dominant player on the continent. In short, the leadership of the military establishment disagreed with the Fuhrer only on methods and timing, not on the goal.

However, as war became more likely, many generals grew increasingly reluctant in their support of Hitler. Yet, Hitler appeared to many to be a political, or even a strategic,¹⁹ genius. The rest of Europe stood impotent when German troops marched into the Rhineland, Austria, and Czechoslovakia. Each time, Hitler had correctly predicted the response, or lack thereof, of the world. In the case of Czechoslovakia in 1938, General Beck had predicted a long and costly fight. Beck's pessimism led to his removal as Chief of Staff. Generals who shared Beck's opinions were gradually

18. *Id.* at 115-16.

19. In 1960 Rudolph Hess, then confined at Spandau Prison for war crimes, in a discussion with Albert Speer, also confined for war crimes, quoted German Field Marshal Werner von Blomberg (1878-1946) as having said before the war, "I must say without jealousy that the Fuhrer is the best man Germany has, the greatest strategist alive at this time. In the area of strategy the Fuhrer is absolutely a genius." ALBERT SPEER, SPANDAU 347 (1976). Few would have agreed with that assessment a few years later.

removed from the rolls. In their place came younger men, much more amenable to Hitler's ideas.

The Fuhrer set his sights on Poland in 1939. Many generals again predicted war, arguing England and France were unlikely to stand by silently again. But, by then it was too late. Hitler would no longer listen to those who predicted dire consequences for Germany. "Wolf" had been cried too often. He expected that neither England nor France would actually be willing to go to war over Poland. However, if they did, Germany would probably quickly bring them to the negotiating table. In any event, many Germans and some of the generals believed that Polish territory was rightfully German. Neither the generals, nor Hitler, wanted a generalized European war. But once the process started, it could not be slowed, much less stopped. Millions would die in the ensuing conflagration.

Sword and Swastika is an amazing account of the German military staff and its relations with the Nazis. Much of the information in the book was culled directly from German official documents which made their way into the prosecution's case at Nuremberg. Still more came from the memoirs and diaries written by many of the generals after the war. What emerges is a picture of an army steeped in history and tradition, suddenly, and in their view unfairly, subjected to the mercies of the World War I victors. The Nazis capitalized on the situation. In other circumstances many of the old-line German generals would not have deigned to share a drink with the Nazi leadership, much less power and prestige. The Nazis were often seen as nothing more than street brawlers, a perception which, especially in the early years, was quite accurate. Nonetheless, those same generals came to appreciate the determination displayed by the Nazis. Devotion to the "Fatherland" gradually gave way to the reluctant recognition that the Nazis knew how to use power and the skillful use of that power was crucial to the reemergence of a powerful military establishment. In the process, the Fatherland and the Fuhrer became one and the same.

Were these men weak? The book really does not lead one to that conclusion. Some stood up to Hitler, especially early in his tenure. As time went by and Hitler consolidated his control over the Party, the army, and society, fewer and fewer officers openly challenged him; those who did were usually retired from the active rolls. Hitler was a master at playing

one person against another and, at the same time, leaving each with the impression that he had won the Fuhrer's ear and respect.

When *Sword and Swastika* was first published, it was reviewed in the Harvard Law Review.²⁰ At the time, many feared a return to power in Germany by ex-Nazis. The reviewer wrote that *Sword and Swastika* focused attention on the question, "How did the spirit and mechanism of German aggressive militarism propagate itself in the fifteen years between Armistice Day and the accession of Hitler?" The reviewer then wrote that this book should be on the "must" list for anyone who wants to think straight about NATO and its strategy vis-a-vis Russians and Germans.²¹ The reviewer considered the reaction of the German military to the rise of Hitler to be a useful backdrop in thinking about how NATO might meet a Soviet threat and the role a rearmed Germany might play in NATO. However, so much has changed. The Soviet Union no longer exists and few expect a resurgence of Nazism in Germany. Yet, this book might still find its way to the "must list;" not because it is a predictor of what might be, but because it vividly recounts what was.

The German ship of state in the early 1930s was about to embark on a voyage to destruction from which it is only now returning. The captain of that ship was always Adolf Hitler, the passengers were the German people and all the victims of World War II. The question remains. Should the German general staff be considered part of the crew or just first-class passengers? *Sword and Swastika* simply can not answer that question. The reader must decide. Taylor's skillful wielding of his pen makes gathering the background facts easy and enjoyable. No one, however, can make the answer simple.

General Beck, quoted in the first paragraph of this review, challenged Hitler's plans for the conquest of Czechoslovakia and Poland. He retired from the active army just before the beginning of the war. For Beck, at least, he found the limits of his soldierly duty. To stand idly by while Hitler unleashed his terror on the German people was too much. In 1944 Beck was involved in the plot to assassinate Hitler. When the plot failed, Beck committed suicide. Hitler's propaganda ministry reported the General's death with a terse statement that General Beck "is no longer among the living."²² *Sword and Swastika* reminds today's soldier and lawyer that failure to define the limits of soldierly obedience, and to adhere to those limits,

20. W. Barton Leach, *Sword and Swastika*, 66 HARV. L. REV. 1542 (1953).

21. *Id.*

can have dire consequences. General Beck is dead, but the issue of soldierly obedience is still very much alive.

22. DON McCOMBS & FRED L. WORTH, *WORLD WAR II, STRANGE AND FASCINATING FACTS* 49 (1983).