"THE MURDERERS AMONG THEM" — GERMAN JUSTICE AND THE NAZIS

Fritz Weinschenk*

INTRODUCTION

Ever since the end of World War II, little known and discussed outside Germany, and in the shadow of Nuremberg and the other Allied trials, German prosecutors and judges have labored to mete out justice to the "murderers in their midst." This paper intends to present a brief overview of this chapter in German history and will examine whether the German successor regime successfully adjudicated the crimes of its predecessor.

I. LIMITED JURISDICTION

(a) Zero Hour

In May, 1945, after the sacrifice of many millions of lives, the victors had no intention of leaving the adjudication of those who had brought about and directed this carnage to their peers. The necessity for an international tribunal was overwhelming. The German judicial establishment, which had been a willing, indeed, eager, helper of the Nazis as an instrument of terror was deeply distrusted. The world still remembered the discouraging experience

* Attorney, Hamburger, Weinschenk, Molnar & Fisher; Doktor Juris, Mainz University (Germany); B.S. City College; J.D. New York University School of Law; American Representative to German Courts and Prosecutors in Nazi-crimes cases including Auschwitz and Majdanek trials.

1. "A nation which voluntarily lives together with known mass murderers would lose its face, not only abroad, but before itself": delegate Dr. Jaeger of the CDU/CSU in the Bundestag debate on the statute of limitations for murder, 236th session, on June 11, 1969; quoted in "Zur Sache, zur Verjaehrung nationalsozialistischer Verbrechen," part II, p. 394.

2. The dismal role played by German jurists in the Third Reich has been the subject of a huge quantity of literature and media comment. See BERND RÜHTERS, ENTARTETES RECHT (1988.) See also INGO MUELLER, FURCHTBARE JURISTEN (1987).
after World War I, when German courts, required by the Versailles Treaty to try German war criminals, made them into national heroes instead. Consequently, wherever Allied troops occupied German soil, all Nazi laws and institutions were suspended. The courts were closed and superseded by Allied military government court or courts-martials. A German role in the upcoming Nuremberg trials of the twenty-two top-level Nazis was ruled out except as defense counsel.

But in the months following the May, 1945 surrender, it soon became obvious that the German judicial system had to be revived to some extent. In October, 1945, the Allied Control Council formally abolished the Nazi judicial system and substituted a substantive and procedural framework of laws based on due process and internationally accepted norms under which the German courts were henceforth required to operate. In the fall of 1945 the German judicial system started to function again, albeit with limited facilities and strictly circumscribed jurisdiction.

Despite their limited authority, prosecutors found themselves overwhelmed when they opened for business. All the pent-up injustices and grievances of the Nazi era came to the forefront: Gestapo torturers and informants, “hold-out” fanatics, Kristallnacht arsonists and pre-war murderers were accused by their victims.

---

3. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, 12-20 (1992). The German courts not only acquitted notorious war criminals, but also gave extremely lenient sentences to right wing assassins of prominent socialists and communists. Hitler himself received a five-year sentence for his attempted armed overthrow of the government, which he used, while in a hotel-like prison, to write MEIN KAMPF.

4. Germany was divided into the French, American, British and Soviet zones of occupation. Although each occupier was autonomous in his zone, the Allied Control Council (ACC), a quadripartite body located in Berlin, issued laws binding on all zones.

5. ACC proclamation No. 3, dated October 20, 1945, followed by the more detailed ACC law No. 4 on October 30, 1945. See MICHAEL RATZ, DIE JUSTIZ UND DIE NAZIS, 21-24 (1979).

6. Jurisdiction over Allied and stateless persons was reserved exclusively to Allied courts. The Germans had jurisdiction over crimes committed by Germans against other Germans.

7. In the closing days of the war a number of serious crimes were committed by fanatical Nazis who sought to prevent the populace from surrendering to the Allies.

8. November 9-10, 1938, known as “Kristallnacht,” saw the officially sanctioned burning and looting of Jewish stores, homes and 177 synagogues throughout the Reich. The first German “Kristallnacht” case was tried in the District Court Darmstadt against three
On December 20, 1945, The Allied Control Council promulgated Law No. 10 ("ACC-Law No. 10"), which was to govern all further Nazi prosecutions in German courts. This law was closely modeled on the Nuremberg Charter. It not only provided for a wide range of penalties for war crimes and crimes against humanity, but also criminalized mere membership in certain organizations held criminal by the Nuremberg tribunal without considering individual guilt. The law aroused almost immediate and vociferous protest by the Germans. Jurists with impeccable anti-Nazi credentials claimed that parts of ACC-Law No. 10, especially the “crimes against humanity” provisions, constituted ex-post facto laws prohibited by international norms, German substantive law and prior Allied laws. Nevertheless, ACC-Law No. 10 continued to be effective until after the founding of the Federal Republic, when it was finally voided by supervening German law in 1955.

In spite of these limitations, and while trials of Nazi-doctors, jurists, diplomats, generals and others were being conducted by the Allies, the German courts made a serious beginning with an accounting for Nazi crimes.

(b) Denazification

While the Russians and their German sycophants punished tens of thousands, many of them innocent, without any semblance of due process in their zone of occupation, the Western Allies, primarily the Americans, felt that the legions of big and little Nazis, who had furnished the backdrop to the party rallies and the manpower for the party-apparatus should be ‘adjudicated’, but in a more civilized manner. However, to determine the guilt of the legions of party-hacks would take “hundreds of courts and years of hearings.” Therefore, the occupiers devised a process of penaliz-

---

9. RATZ, supra note 5, at 24; TAYLOR, supra note 3, at Appendix A (text of the charter on which Law No. 10 was based).
10. They were the SS, SD, Gestapo and the Political Leadership Corps.
11. Among them were Dr. Adolf Arndt, later a leading jurist in the Bundestag, and Professor Noll, a leading anti-Nazi.
12. ACC Proclamation No. 3, Art. II; Ratz, supra note 5, at 22.
14. TAYLOR, supra note 3, at 278.
ing membership in the Nazi party or its branches. In a role reversal, the Allies imposed the job onto the unwilling Germans who would have preferred to let the Allies handle this unpopular task. Through lengthy questionnaires which required disclosure of all pertinent information on Nazi activities, individuals were classified as "major offenders," "minor offenders," "followers," or "exonerated" by a board, which usually rubber-stamped the recommendations of the examining "prosecutor."

The Denazification program soon became a major problem. Although the vast majority of Germans — at least on the surface — agreed with the Allied aims of Denazification and demilitarization, it was the method, not the goal, that became the subject of protests from all parts of the political spectrum. "Justice" depended on the zone in which the respondent resided: a defendant who might draw lengthy internment as a "major offender" in one zone, might only be a "follower" who received a nominal fine in another zone. Falsification of questionnaires, influence-peddling, and graft became routine. The heavily incriminated figures who were living underground easily slipped through the net.  

Both as a re-education tool and a penal measure, the Denazification program was a total failure. This "paper revolution" achieved the opposite of what it intended: it turned the masses away from the hoped-for democratic beginnings and invited comparisons to the lawlessness of the Nazi era. By 1950, the Denazification program had come to an end. But the gross perpetrators among the Nazi criminals, including the Holocaust perpetrators, had been neither identified nor held to account for their crimes.

II. Unlimited Jurisdiction

(a) Decline

In Europe and elsewhere a turn of events had reversed past enmities and created an entirely new situation. The "iron curtain" had descended on Europe; in Asia the United States was fighting in Korea, and a showdown with communism seemed inevitable. A free and prosperous West Germany was as desirable as a Commu-

15. It was revealed in the later trials that most defendants had managed to come through denazification undetected and unscathed, even in cases where their background was revealed.
nist Germany was unthinkable. The upcoming economic miracle, the *Wirtschaftswunder*, had been facilitated by the 1948 currency reform, and Germany was on the way to becoming a full partner in the family of nations. Under those conditions, the Germans, as well as influential circles in the United States and Europe, were satisfied that the Nazis had been "taken care of" and that there was no further need for "war crimes trials." When the time came in 1950 to resurrect the German army, the Germans insisted on the release of all "war prisoners" still in Allied hands. In an amnesty wave, heavily incriminated figures (even those who had been condemned to death by Allied military courts and had thus far avoided execution) were released. The amnesty of major Nazi criminals was to have important repercussions on the German Nazi trials later on.

It was generally believed that the Nazis had been sufficiently punished, and that the nation had atoned. But neither was true. History turned out quite differently.

(b) Revival

From the very day the Nazi regime was ousted, and in contrast to the broad masses, political and social forces among the Germans recognized the magnitude of the evil that had been brought about and the urgent need for dual atonement: aid to the victims and prosecution of the perpetrators. Although the public perception was that Nazi prosecution had become a dead letter, some circles in politics, the media and the judicial establishment were deeply concerned about seeking the justice which had eluded the Germans after World War I.

On May 23, 1949, the German constitution was adopted by the representatives of the states (Länder) of West Germany. On September 15, 1949, the newly-constituted national legislature, the "Bundestag," elected Dr. Konrad Adenauer as the first Chancellor of the Federal Republic. Although the Western Allies still retained control of some governmental prerogatives, the judicial apparatus

---

16. The difference between "war crimes" and "crimes against humanity" was still not yet generally recognized. All Holocaust crimes were popularly conceived as being "war crimes."

17. Defendants sentenced by the Allies had no criminal records as far as the Germans were concerned, since Allied criminal judgments were a nullity under German law. Nevertheless, they could not be retried because of the prohibition as against ex-post facto treatment contained in the Paris agreements. RÜCKERL, supra note 13, at 130-132.
was able to function on a national level again, instead of being bound by local and state limitations.

Three seminal events determined the fate of the Nazi prosecutions in the young republic. Firstly, in 1953, the Bundestag passed a comprehensive indemnification statute for victims of Nazi persecution all over the world.\(^{18}\) Applicants for benefits were compelled to give detailed information concerning their persecution. Since prosecutors had access to this material, a huge amount of information became available.

Secondly, in September 1955, Chancellor Adenauer visited Moscow in an attempt to cement diplomatic relations between Bonn and the post-stalinist U.S.S.R.\(^{19}\) He accomplished the release of about 15,000 German prisoners of war still in Soviet hands. Among the returnees were numerous non-amnestied suspects as well as individuals sought as material witnesses.

A watershed third event occurred in May, 1956. Since 1949-50, many heavily incriminated Nazis, believing the Nazi prosecutions to be at a standstill, emerged from hiding. Among them was a former SS-“Oberführer” (Brigadier General), one Fischer-Schweder, who shed his alias to sue for restoration of his civil service status. When this case was mentioned in the press, a reader reported to the local prosecutor that this man, the police chief of Tilsit, Lithuania, had participated in mass executions of Jews. After a careful and systematic investigation, this individual was arrested, tried and sentenced to 12 years in the penitentiary.\(^{20}\) The case created an uproar in the national media and led to a nation-wide re-consideration of Nazi criminality. It soon became apparent that this case represented only the tip of the iceberg in the unravelling of the vast mass-exterrnative called the “Holocaust.”

---

18. BUNDESVERGAENZUNGSGESETZ ZUR ENTSCHAEDIGUNG DER OPFER DER NATIONALSOZ.VERFOLGUNG, September 18, 1953, BGBI I, at 387. See LUDOLF HERBST and CONSTANTIN GOSCHLER, WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND, 41 (Munich, 1989).
19. Stalin had died on March 5, 1953.
III. CONSOLIDATION AND CENTRALIZATION

(a) The Ludwigsburg “Zentralstelle”

German prosecutors, like their American counterparts, are organized on a city-state basis. They are dutybound to prosecute any person accused of committing a criminal act, whether in their jurisdiction or elsewhere. As in the United States, federal prosecutors exist to perform special tasks, but Holocaust-related crimes are strictly a matter for the local district attorneys who answer to the Justice Ministry of their state.

It soon became clear that the local prosecutors lacked the financial means, expertise, manpower, and overview to prosecute the mass crimes committed in the East. How, for example, could a prosecutor in Darmstadt prosecute a commander of the concentration camp Auschwitz who happened to be found in his jurisdiction?

In response to this problem, the heads of the ministries of justice of the several states founded a joint task force, called “Zentralstelle” or “Central Office.” The Central Office commenced surveying entire complex projects on a national scale, such as “Operation Reinhard,” (code name for the extermination of the Jewish population in Northern and Central Europe), the activities and personnel of the “Einsatzgruppen,” which followed the German armies in the East, crimes against humanity committed in the West, and others. Hundreds of thousands of documents, photos, and affidavits were collected and evaluated. Places, names, and events were cross-indexed (the computer had not yet arrived), and investigators were sent all over the world to comb archives and interview witnesses. The results were ready-made dossiers which were transmitted to the various local prosecutors in whose jurisdiction the suspects were located for indictment and trial. The Central Office can be compared to the office of an American Special Prosecutor, but without the authority to try cases. The activities of the Central Office, which still exists today, are strictly investigatory.


22. The actual name is “Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen” translatable into “Central Office for the Investigation of National Socialist crimes.” Its location is in Ludwigsburg, and its personnel exceeded 25 judges, prosecutors and investigators, plus historians and linguistic experts.
The efforts of the Central Office quickly brought results. In 1959, the first year of its existence, the Central Office initiated over 400 investigations, among them the Auschwitz, Belzec, Sobibor, Treblinka and Chelmno cases. Twenty-one major cases, almost all with multiple defendants, were tried between 1960 and 1965, resulting in the conviction of almost all defendants.\(^23\)

(b). *The Statute of Limitations*

The penal statute which applies to all Nazi-crimes is the German criminal code of 1871, which was never abrogated during the Nazi years. Neither the Nuremberg charter nor any other post-war genocide statute could be applied in a German trial because of the *ex-post facto* prohibition.\(^24\)

The German criminal code provides that the statute of limitations is determined by the term of punishment generally prescribed for a crime. Thus, any crime punished by a 5 to 10 year term of imprisonment carries a limitation of 10 years. A crime punished by imprisonment of over 10 years carries a limitation of 20 years.\(^25\)

The running of the statute is interrupted by any act of either the court or the prosecutor relative to the defendant, such as the issuance of a summons, a deposition, or a subpoena.\(^26\)

The statute of limitations on all Nazi crimes commenced running in May, 1945, when the Nazi regime collapsed. Accordingly, the five year limitation for all misdemeanors ("Vergehen") committed up to 1945 expired in May 1950. In May 1955, the ten-year statute expired on all felonies ("Verbrechen") except murder, manslaughter and aggravated assault, which carry ten-year terms.\(^27\) In May, 1960, the statute of limitations for all crimes carrying a 15-year limitation threatened to expire. This would include manslaughter, assault with fatal results, false imprisonment and robbery. In order to avoid the expiration of the statute of limitations, the Social Democratic minority in the *Bundestag* submitted a draft law which would have extended the commencement of the running

\(^23\) RÜCKERL, *supra* note 13, at 148-149.


\(^26\) Id. at 605.

of the statute of limitations from May 1945 to May 1950. The draft law was voted down by a large majority on a date when the statute of limitations had actually already expired. Henceforth, only aggravated murder, which then had a 20-year statute of limitations, could be prosecuted against perpetrators who were previously unknown and had not been subject to a tolling act by the prosecutor or court.

Thirty-five years later, the then director of the Central Office, Chief District attorney Alfred Streim, stated in an interview: “What we have done was only an attempt to come to grips with the past legally. There were too many obstacles on the road to success. The biggest was the running of the statute of limitations for manslaughter. A great many accused could not be prosecuted anymore.”

The Bundestag was confronted with the statute of limitations question three more times. In 1965, the 20-year statute for the only remaining prosecutable crime, aggravated murder, threatened to expire. In effect, this would have “amnestied” all as yet undiscovered perpetrators. However, this time circumstances had changed. The Eichmann trial in Israel, the work of the Central Office, and new revelations emanating from evidence received abroad, primarily Poland and the Soviet Union, all had an effect. Moreover, a new generation of judges and prosecutors, children during the war, were coming to the forefront as the post-war generation in Germany came of age. Unburdened by questions about their past, these jurists brought an entirely different spirit to the Nazi prosecutions from their predecessors. The new desire to come to grips with the

28. The SPD, then a minority, argued in vain that the Statute of Limitations was procedural, not substantive in nature, and that from 1945 to 1949 the German legal system was not a functioning entity. All parties were in agreement that the statute could not commence running before 1945, since Nazi crimes were naturally not recognized as “crimes” by those who committed them, and since the then judicial system would not have prosecuted them.

29. May 24, 1960. At the time the Bundestag voted, the statute had actually already expired (May 8, 1960).


31. The East German Democratic Republic refused its cooperation but released files on individuals when it became politically useful to do so. After the fall of the wall it was discovered that the East German secret police, the “Stasi,” had withheld massive information on Nazis which could have been invaluable in their prosecution.
Holocaust and the feelings of individual and collective guilt\textsuperscript{32} were reflected in the political arena as well.

In late 1964, the \textit{Bundestag} ordered the Federal Minister of Justice to render a comprehensive report on the status of the Nazi prosecutions. On November 20, 1964 the \textit{Bundestag} issued a worldwide appeal to all nations and agencies which still had evidence of Nazi atrocities to submit such evidence to the Central Authority. On February 24, 1965, the Minister of Justice rendered his report to the \textit{Bundestag} which concluded: "It cannot be ruled out that unknown crimes of significance or unknown perpetrators in important positions may yet become known after May 8, 1965."

On March 10, 1965, in a deeply emotional and moving debate, the \textit{Bundestag} discussed the various draft proposals before it and finally decided by a great majority to extend the statute of limitations for murder by 5 years, to January 1, 1970, adopting the argument of the Social Democrats that had been rejected five years before. When the statute again came up for debate in 1969, it was extended by 10 years to 1980, and in 1979 the statute for murder and genocide was entirely abolished.\textsuperscript{33}

IV. TOWARD THE MASS TRIALS

(a) 1965 - 1979

From 1965 to the end of 1969 the West German criminal courts tried 361 persons for Holocaust-related murders. Of this number, 223 defendants were convicted and sentenced, 63 of them to life terms.\textsuperscript{34}

Some of these proceedings involved the most terrible of the murder factories in the East: Chelmno, Belzec, Sobibor, Treblinka, Auschwitz (three trials), and Mauthausen. Camps inside Germany were Natzweiler, Sachsenhausen (five trials), and Flossenbuerge. Defendants accused of involvement in the Warsaw ghetto, the "Ein- satzkommandos" 2, 4a, 6, 7a (three trials), 8 (two trials), 9, 11b, and police battalions 1005 (two trials) were tried, as were members of

\textsuperscript{32} ALEXANDER AND MARGARETE MITSCHERLICH, DIE UNFAEHIGKEIT ZU TRAUERN (2d ed., Munich, 1968). This work is the foremost analysis of the psychological relationship of the Germans to the Holocaust and its consequences.

\textsuperscript{33} On July 16, 1979, the Bundestag passed the 16th amendment to the Penal Law, finally abrogating the statute of limitations for genocide. \textit{Supra} note 1.

\textsuperscript{34} RÜCKERL, \textit{supra} note 13, at 192.
the security service, the “SD,” for their activities in Saloniki, Bel-
grade, Lemberg, Tarnopol, Stanislau, Kolomea, Przemysl, Tarnow, Cracow (Krakau), Mielec, Rzeszow, Cholm, Gorlice, Byalistock, Mogilew, and Den Haag. Still other trials involved personnel of police battalions 101, 306, 309, the “protective police” ("Schutzpolizei") in Tschenstochau, Lublin-Komarow, and various other places in Latvia. Members of the “Jewish section” of the Reich Head Security Office (RSHA), participants in the euthanasia program, and defendants accused of crimes against prisoners of war were also tried.36

From 1970 to 1979 West German prosecutors initiated an additional 13,624 investigatory proceedings. During that period, 119 trials against 219 defendants resulted in 137 convictions, of which 32 were life sentences. Some of these cases involved personnel of the concentration camps at Dachau, Mauthausen, Ravensbrueck, and several branch-camps of Auschwitz, the ghettos of Riga, Radom, Bilgoray, Opatow, Kolomea, Bobruik, Minsk, Ploinsk, Zamosc and Babi-Yar near Kiev. Other cases involved the activities of the SS-command in Lublin concerning the deportation of Jews to Treblinka. More members of the Jewish department of the RSHA were tried, as were members of the Latvian “auxiliary police,” for their activities in Riga and its surroundings. Still other trials involved the members of the 1st SS-infantry brigade, the police in Kielce and Czenstochau37 and the murder of prisoners of war.

Chief District Attorney Adalbert Rueckerl, for many years the director of the Central Office, stated that the average time involved from the opening of the investigation to sentence was between 5½ to 7½ years.38

The tremendous effort made by the investigatory and prosecutory branches resulted in nothing more than a modest “bottom line” of convictions. Was this an echo of the post-World War I conservatism of the judiciary, or the result of the incongruity of adjudicating a 20th-century mass crime with a 19th-century penal

35. The events in Cracow are accurately portrayed in Spielberg's film "Schindler's List."
36. Many of the judgments in these trials are available in a twenty-two volume collection. Supra note 20.
37. RÜCKERL, supra note 13, at 202.
38. Id. at 201.
law? In order to answer that question it is necessary to examine the reasons behind the disparity between effort and result.

(b) The Applicable Penal Law of Germany

Since 1960, Nazi perpetrators could only be tried for murder, since prosecution for all other crimes was barred by the statute of limitations. Under those circumstances, was it possible to bring to justice the still considerable number of unpunished perpetrators of the "greatest crime in history?"

The German penal code, which was valid law throughout the Nazi period, contains no degrees of a crime as do most American statutes. Homicide is punished as either murder ("Mord") pursuant to § 211, manslaughter ("Totschlag") pursuant to § 212, or a lesser form of manslaughter (killing under extreme emotional stress).³⁹

³⁹ StGB, § 211 was German law throughout the Nazi period and is still current law.

Any homicide under circumstances not meeting the requirements of § 211 is not murder. The statute qualifies both the motive of the perpetrator and the manner of performance of the act. In Nazi cases, this would mean that if the prosecutor does not prove both the motivation and the manner of commission, the defendant is free, since prosecution for all crimes except murder has been barred since 1960 (unless the running of the statute of limitations was interrupted by a judicial act).

It would seem that any participant in the horrendous crimes in the East would qualify as murderer under § 211. However, the level of proof necessary for a conviction mandates that the defendant is shown to have acted on base motives by stealth, cruelty or inherently dangerous means. German law has no provision comparable to the American rule, which requires "proof beyond a
reasonable doubt" in criminal cases.\textsuperscript{41} Rather, the court must decide according to its own conviction, freely arrived at from the evidence ("freie Beweiswürdigung").\textsuperscript{42} Although the German courts are not bound by strict rules of evidence or the burden of proof, it is still not easy, and sometimes even impossible, to meet the requirements of § 211 to convict participants in a previously unheard-of industrial murder enterprise: the guard on the watch tower, the orderly in the office, or the railroad worker at the switch may be too far removed from the crux of the event. Even Eichmann pictured himself as a mere cog in a vast enterprise without will or influence.

\textit{(c) The Defenses}

The presentation of a prima facie case against Holocaust murderers requires a huge effort. The prerequisites of § 211 of the German Penal Law must be proven as to each and every defendant individually, by documentary and oral evidence, and supported by expert testimony. The activities of each defendant are bound up in a series of ghastly events whose horrors often defy human imagination and make it extremely difficult to maintain the objectivity required by due process. These activities must be carefully dissected from the jumbled mass of information and evidence, and assessed apart from the whole.

Once a prima facie case has been made, the prosecution must deal with the defenses.\textsuperscript{43} On the facts, the prosecutors met with "a rubber-fence of excuses and a stone wall of silence" from the accused and those of their comrades who were subpoenaed to testify as witnesses.\textsuperscript{44} Then, again, witnesses from the ranks of the victims were frequently traumatized, repressed, and uncertain about persons and events which they experienced under unimaginable fear and pressure.

\textsuperscript{41} Proof beyond reasonable doubt has for centuries been a prerequisite in criminal cases under common law and is mandated under the U.S. Constitution as a "historic...content of 'due process.'" \textit{See} In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970).
\textsuperscript{42} STPO, \textit{supra} note 21, at § 261.
\textsuperscript{43} Since most defendants purportedly did not have the means to retain counsel, they were furnished with assigned counsel at public expense. In lengthy trials, where one counsel was deemed insufficient (other engagements, vacations etc.), two attorneys were assigned to each defendant.
\textsuperscript{44} RÜCKERL, \textit{supra} note 13, at 238.
Under the law, the most prevalent defense was the reliance on superior orders. It was argued that disobedience to orders in a military regime like Germany would amount to immediate danger to life and limb, and thus, constitute a defense to murder under the German Criminal Code.\textsuperscript{45} Furthermore, the German Military Code, which was valid law until 1945 and is applicable to all cases of defendants who served in the military, including the SS, cleared all subordinates for offenses committed on superior orders, unless the subordinate exceeded the scope of that order or was aware that the order intended a criminal act.\textsuperscript{46}

To succeed in these defenses, the defendant has the burden of demonstrating to the court that he was unaware of the criminal nature of the orders he received. In the case of the SS, such a showing was almost impossible, since the members of that fanatic elite were constantly being told by their leaders that the elimination of the Jews was a task willed by the Fuehrer and a basic part of the Nazi credo. They were told that they were “above the law,” and that those who carried out this task were protected from ordinary prosecution.\textsuperscript{47} It was, therefore, a foregone conclusion that every SS member knew of the illegality of his actions. Furthermore, the courts found it inconceivable that anyone - SS or not - dispensing Zyklon - B gas into the gas chambers or whipping a human being to death could possibly believe he was acting in “compliance with a legal order.” The courts, therefore, turned these defenses down regularly except in rare instances.\textsuperscript{48}

Another defense was the plea that the defendant before the bar was only an accessory ("Gehilfe") and not a principal ("Taeter"). If the co-defendant was indeed only a "Gehilfe," his punishment would be less than that of the "Taeter."\textsuperscript{49}

\textsuperscript{45} § 52 and § 54 (now § 35) of the Penal Code (StGB) provide that a present threat or compulsion excuses a crime if the perpetrator did not contribute to the duress by his own acts, and did not or could not have known that the threatening danger was avoidable or erroneously assumed. Dreher and Tröndle, \textit{supra} note 25, at 218.

\textsuperscript{46} “Militaerstrafgesetzbuch” § 47 (MStGB), ("Code of Military Justice").

\textsuperscript{47} The vast amount of expert testimony and literature on this topic is best summarized in an excellent study. \textit{See HERBERT JÄGER, VERBRECHEN UNTER TOTALITÄRER HERRSCHAFT}, 44-71 (Frankfurt, 1982).

\textsuperscript{48} \textit{Id.} at 120, Götz, \textit{supra} note 27, at 142.

\textsuperscript{49} § 49 of the StGB prescribes imprisonment “not under three years” for an accessory, where the crime carries a life term. DREHER AND TRÖNDLE, \textit{supra} note 25, at 312.
The distinction between principal and accessory in German statutory and decisional law at the time of the mass trials in the '60s and '70s was a gray area. Although a defendant might be prima facie a "murderer" pursuant to § 211 of the German Penal Law, the defendant could still get away with a relatively light sentence by arguing that under the facts he blindly followed the leadership of the "Taeter" without evidence of his own animus, zeal, or initiative. However, if the prosecution could show that the defendant acted on his own initiative, with sadism, cruelty, or other attributes, indicating that he adopted the aims and goals of the "Taeter" as his own, he was not an accessory, but a co-principal.

This vague, subjective standard gave the courts too much leeway and permitted them to circumvent the strict sentencing prescriptions for principals. Many of the so-called "lenient" judgments (see [d] infra) were a result of this loophole in the German Penal Law, which has meanwhile been closed.50

(d) "Lenient" Judgments

German judgments in criminal cases contain the findings of fact, conclusions of law, verdict, sentence, and a biographical statement on the background of each defendant (akin to the probation report in U.S. courts) in an all in one, usually lengthy, document. Judgments in multiple defendant cases are hundreds of pages long - the judgment in the Majdanek case is more than 300 pages long.

Until the founding of the Federal Republic, stiff sentences, including life-sentences, were the rule. Beginning with the multiple defendant trials in the '60's, judgments became perceptibly milder. Defendants who had been convicted of murdering thousands of innocent men, women and children received prison terms comparable to those of "recidivist thieves,"51 or "burglars."52 Waves of derisive media reports ("a mockery of the victims," "a national shame," "a blot on West German justice," "why trials at all?" etc.) and protests from abroad were followed by protests from religious bodies

50. The German literature on this still disputed question is too voluminous and diverse to be cited here.
52. DIETER OPPITZ, STRAFVERFAHREN UND STRAFVOLLSTRECKUNG BEI NS-GEWALTVERBRECHEN (1979). This monumental work examines the sentencing practices of German courts from 1946 to 1975 by examining 542 final judgments.
and leaders, bar associations, and politicians. On March 13, 1963, the Council of Protestant Churches in Germany issued a memorandum criticizing the discrepancy between ordinary sentences and those in Nazi-crimes cases. The standing committee of the German Bar Association issued a report which is introduced as follows:

The prosecution and judicial punishment of National Socialist crimes of violence is the subject of intense public debate. A series of judgments has provoked criticism and caused apprehension that the punishment for these crimes does not meet the gravity of the wrong.

But the courts were apparently not influenced by this public debate, and mild judgments, while not the rule, still persisted in egregious instances.

Was this a repetition of the World War I experience? Was the judiciary saturated with ex-Nazis or nationalist right wingers? Or was the judiciary insensitive or immune to the horrors they themselves had recognized as the truth?

The literature is overwhelmingly in agreement that it would be totally wrong to ascribe this perceived 'mild' treatment of Nazi criminals to Nazi or right-wing sympathies of any kind, except in very few instances. As was pointed out, the German judiciary already consisted largely of post-World War II baby boomers. Public utterances of members of the judiciary at bar meetings and other occasions indicate that the judges pointed to a number of factors which they could not remedy, but for which they were being blamed:

1. The problems of proof, including the difficulties with witnesses whose recollection of their past experiences during great emotional stress had dimmed; witnesses who confused one event for another, and witnesses who suppressed certain events entirely.


2. The fact that the superiors of many of the defendants, who had been amnestied by the Allies, were living in freedom and testifying in the trials of their subordinates as witnesses or "experts."

3. The fact that difficult calls on evidentiary controversies were used by the media to impugn the sincerity and veracity of the judges.

4. The fact that sentences, which seemed 'mild' to the uninformed observer in the context of the accusation, were mandated by the law based on the fair and impartial evaluation of the evidence.

In essence, the judiciary resented fingerpointing which sought to hold them responsible for the failure of a nation to expiate its sins. In commenting on the effect of the trials, the presiding judge of the Braunschweig Court of Appeals stated: "[The prosecutions] did not genuinely achieve a reckoning with the past...which was manifestly impossible to achieve through criminal justice."\(^\text{55}\)

V. Conclusion

For five decades, more than four times the duration of the Third Reich, the Germans have investigated and tried those who perpetrated the greatest crime in history. As of February, 1996, 106,178 preliminary investigations resulted in the confirmed convictions of 6,494 defendants. Of these 6,494 defendants only 6,200 defendants received prison terms. In 1995, some 35 preliminary investigations were still pending in the Central Office. The files on 5,570 persons are still open at this time.\(^\text{56}\) Meanwhile, the German judicial system has been burdened with the additional task of dealing with the criminal remnants of the former German Democratic Republic.\(^\text{57}\)

German commentators readily concede that these proceedings did not achieve the 'closure' which the nation so ardently wants to attain. The utter brutality of just one murder in Auschwitz cannot be reenacted, pictured, understood, or atoned for in the courtroom, no matter how many trials are held. Closure is not attainable by

\(^{55}\) RUDOLF WASSERMAN, ZEITGESCHICHTE UND POLITISCHES BEWUSSTSEIN, 227 (Bernd Hay and Peter Stinbach eds., 1986).


\(^{57}\) The influence of the Nazi adjudications on the proceedings against GDR-criminals is itself an engrossing topic, which would by far exceed the scope of this paper.
way of criminal justice. In this, the German Nazi-trials are no differ-
ent from other similar criminal proceedings the world over.

In summary, it can be said that the German efforts to try its
own criminals may have been sufficient, but the results were mea-
ger. This was due in great part to an unfortunate constellation of
factual and legal events and circumstances which prevented a more
adequate response from the outset.

The key problem is basically a conflict of interest: no one can
be the judge of his own case, or for that matter, the case of his
father. If the judicial establishment is composed of survivors of the
prior regime sailing under the new flag, the result is predictable. If
the judicial establishment is composed of people who abolished the
preceding regime by violence, you will have a purge or bloodbath.
In order to try the deeds of a predecessor regime in a due process
manner, a new set of jurists is required. However, by the time they
are capable of taking over, it will probably be too late.

The only adequate answer to the adjudication of genocide

The only adequate answer to the adjudication of genocide
crimes - certainly in the light of the German experience - appears to
to be an international criminal tribunal. Whether this solution is via-
ble in the light of Serbia and Rwanda remains to be seen.