

Nazis Before German Courts: The West German War Crimes Trials

A little Jewish girl, whom I estimated to be ten or twelve years old, emerged from the stopped train. She came over to me and asked me for water . . . she spoke of a spoonful of water . . . I gave her my cup. While she was drinking, the leader of the transport, an SS-officer wearing a four-star insignia, appeared behind me. He first struck the watercup out of the girl's hand with his horsewhip, and then proceeded to whip the girl. The father of the girl forced his way out of the train and begged the SS-officer for mercy on his knees. The SS-officer unholstered his revolver and killed the father by shooting him in the neck. The girl was thrown onto the train, the corpse of the father after her. The SS-officer cursed me out as a Jew-lover, he said I was unworthy of being a German civil servant. . . .

(From the testimony of a German railroad official stationed in Zwierzynieg, near Lemberg, Poland, in November 1942, contained in *Collection of Documents and Affidavits concerning Nazi Crimes*, Ludwigsburg, 1967, page 76/7).

Over thirty years—more than twice the duration of the “Third Reich”—have passed since the first liberators rode through the gates of Auschwitz, Dachau, Bergen-Belsen, Treblinka, Buchenwald, Stutthof, Mauthausen, Dora I, Kaiserwald, Gours, Sonthofen and the nameless places where the nameless thousands rest in the indignity of their mass graves. Those who will never forget the stench of rotting corpses and the incredible unreality of the gas-chambers are now a middle-aged minority. In a new Germany, in which the traces of the “Thousand Year Reich” have long disappeared, the population, a majority of whom were either children or not born in 1945, gazes upon the old newsreels on the television screens as if they depicted events on a distant planet.

Yet the judicial apparatus of the Federal Republic of Germany is still coping with the crimes and criminals of that long “bygone” era. While the excesses of Algeria, Korea, Greece, Cuba, Chile, My Lai, the prisons of Hanoi, Belfast, Bangladesh, Biafra, Munich and Lod have passed from public view, the German Nazi crimes trials are steadily grinding on.

For men of justice everywhere, transgressions against humans and groups of humans, under whatever label, and with whatever justification, committed by

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the “true believers” and their uniformed puppets, has been the object of grave and extended study. Many times, the men of justice have themselves been the victims of the transgressors. It must be said that the national effort of the German judicial system to render a final account in the matter of the perpetrators of the Nazi crimes, no matter how long the time-span, or what the cost, is a solemn recognition of the gravity of an historically unparalleled violation of the human ethic, a unique reply to a unique provocation.

A glance at the daily press will convince anyone—if anyone needs convincing—that, despite man’s mastery over the environment, the “dogs of war” are not chained, and the fanatics are not neutralized. On the contrary: neither the United Nations nor individual governments, neither social and psychological scientists nor politicians and religious leaders, have been able to make the necessary inroads leading to the reduction and elimination of the madmen in our midst. It is therefore incumbent on those charged with the administration of justice to examine the German experience for the essence of its results: is it possible to adjudicate mass criminality fairly, in an orderly, legal manner conforming to international norms and notions of “due process of law,” decades after the events?

Unfortunately, some lawyers, possessed of the organs of power, created the bad “laws” that orchestrated the score of the Third Reich. Of the leading administrators in the top-echelon of the Nazi party and apparatus, a number were lawyers,¹ not to speak of those members of the judiciary who permitted—and lent themselves—to the Nazi tampering with the judicial system, which theretofore had been exemplary. On the other hand, it must be remembered that there were those jurists who opposed at the bar and died at the gallows, the camps, or the firing squad. Germans will remember that for a Freisler, the prosecutor in the “treason” trials of July 1944, there was also a von Dohnanyi and a Wirmer—two of the many lawyers who paid with their lives for “speaking up.” Neither can we deny recognition and respect to those of the German legal profession who—through the post-war years—pursued their goal through weary, heart-rending, and trying months, years—in some instances decades of tireless effort in the face of popular disdain, emotional storm, and political obstacles.

I. The Development

At the end of World War II, thousands of members of the “Allgemeine SS” who had been in charge of the concentration camps and had performed general punitive and surveillance duties, as well as thousands of members of various

¹DAS ZWOELFJAHRIGE REICH, Richard Grunberger, Vienna, 1971, Chapter 8, pp. 124-135, for an excellent summary of the law and lawyers under the Nazis.

types of police units, together with hundreds of thousands of members of the "Waffen-SS," the fighting arm of the SS, the "SD," the spying-branch of the SS, the dreaded "Geheime Staatspolizei"—the Gestapo, and various other units were at large all over Europe. The investigation, arrest, and trial of these individuals, either by courts-martial or by administrative adjudication was up to the Allies in their respective zones of operation. In the American zone it was the Counter Intelligence Corps of the Army, the Special Branch of the Military government, the Criminal Investigation Division, Air Force and Navy Intelligence, and the War Crimes Screening Sections, that were primarily concerned with the mission. Understaffed, overworked, and hindered by Allied separatism, these organizations were nevertheless comparatively successful until their attention and energies were diverted by the cold war. The Nuernberg trials were only the tip of the iceberg of Allied accomplishments in the face of many obstacles. Between 1945 and 1950 the courts of the Allies tried between 50,000 and 60,000 Germans for war crimes.² Of 806 death sentences, 486 were carried out.

Gradually, the German judicial system revived and was given increasingly broader jurisdictional powers by the Allies, until the "Enabling Treaty" of March 30, 1955, by which the Federal Republic attained full judicial powers free of Allied control, passed the prosecution of war crimes and crimes against humanity solely to the German courts, prosecutors, and police³.

German activities with respect to adjudication of World War II crimes up to the "Enabling Treaty" were hampered by lack of space, funding, personnel, and power. Prior to the currency reform of 1948, starvation and lack of living essentials were forbidding obstacles. Prosecutions, for the most part, were based on denunciations of Germans by other Germans or displaced persons. Nevertheless, in 1948/49 the number of prosecutions was quite substantial⁴. In those years, the lower courts tried cases, which thereafter reached the newly constituted German appellate courts, chiefly the German Federal Supreme Court, the "Bundesgerichtshof." A number of basic decisions endeavoured to close the gaps left by the Allied Nuremberg judgments and made the law which was to govern the post-war German concept of war crimes and crimes against humanity⁵.

²NS-PROZESSE, Dr. Adalbert Rueckerl, editor, Karlsruhe, 1971, (hereinafter cited as "Rueckerl"), p. 19.

³"Ueberleitungsvertrag," (*Transition Statute*) German Federal Gazette, vol. II, p. 405.

⁴Detailed statistics are contained in the report of the Minister of Justice, to the President of the Bundestag of February 26, 1965, rendered on the occasion of the debate concerning the statute of limitations.

⁵Thus, for a detailed definition of the illegality of the Nazi system, see the judgments of May 20, 1948, (St S 3/48), May 25, 1948 (St S 1/48) and November 9, 1948 (St S 71/48) of the Supreme Court of Appeals for the British zone. The decision of the BGH (Federal Supreme Court) in 3 St R 701/53 established clearly that the Jewish deportations had no relationship to the conduct of the war or military necessity. A detailed analysis of these decisions would transcend the scope of this article.

After the war, there arose a ground swell of German public opinion whose tenor was to disregard, forget, minimize, and rationalize. The Allies, so the argument ran, tried the vanquished as victors in Nuernberg, a “kangaroo court” whose outcome was predictable. The overwhelming mass of Germans, so ran the rationale, was “clean” and ignorant of the horrors that had been committed. What about the air raids on Dresden, Hamburg, Leipzig and Schweinfurt? At any rate, what was done had to be done in prosecution of the war effort against “partisans”—every nation adopts ruthlessness in wartime. It is, so went the rationalization, a legitimate part of the right of self-defense, of which the Allies were just as guilty as the Germans.

This conflict erupted into the legal sphere, and both sides found advocates. The first trials evolved around the murder of the storm-troop leader Roehm in 1934, the trials of the “Einsatzgruppen,” the flying death squads in Poland, and the trials of certain military commanders who issued summary execution orders against members of the German armed forces in the last days before the surrender in 1945 for “cowardice before the enemy.”

In these cases, the defense argued that by virtue of the enabling law of 1933 Hitler had become the supreme head of the German state. His orders, from the decision to execute the stormtrooper Roehm in 1934 to the so-called euthanasia order of September 1, 1939, the notorious final solution of the Jewish question (“Wannseebefehl”) and the “Night and Fog” decree, had become the “law of the land”—rightly or wrongly—and beyond individual scrutiny or power of refusal. The individuals following these orders, therefore, acted—perhaps in error—at any rate, in pursuit of what they had to consider orders by “legal” authority. Both army and civil service had sworn allegiance to Hitler personally. Theirs was not to question or scrutinize, but to “follow orders to the end.” There are a number of decisions to this effect⁶.

The overwhelming majority of the German legal establishment, including the highest court of the Federal Republic, the “Bundesgerichtshof,” emphatically discarded this reasoning. A German writer of great reputation in this field, in discussing the legality of the “euthanasia orders” of Hitler, which ordered the “elimination” of “useless mouths” and “biological garbage,” put it this way:

. . . . even if they had not been secret, these laws would nevertheless have been illegal. They would have been a gross violation of the higher-ranking norms of natural law. One may dispute the Natural Law, its jurisdictional and substantive limitations as one wishes. We are, at any rate, all agreed, that laws commanding murder violate the Natural Law and are void.⁷

Today, no one in Germany, not even the proponents of the “Notstand” or “duress” defense, which will be discussed below, doubts the illegality of the

⁶OLG Kiel, SJ2 47,323.

⁷Prof. Dr. Juergen Baumann, “Rechtmaessigkeit von Mordbefehlen,” 31NJW 1398 (1964).

Hitler decrees and the Nazi tampering with the criminal justice system (protective custody, administrative trial, people's courts, judicial subservience, presumptive guilt, and the entire police-state apparatus).

The hardening of East-West conflicts, culminating in the Berlin airlift and the Korean action in 1950, brought about a change in Allied policy toward war crimes in Germany. Cautiously at first, but with accelerated tempo, the Allies began to grant pardons to high-ranking, heavily implicated Nazi functionaries. The desire to obtain German cooperation in the cold war was undoubtedly a consideration. The result was that these individuals were able to go free, protected from later German prosecution by the terms of the "Transfer Agreement" which barred German retrials of cases adjudicated by the Allies as "double jeopardy."

Public opinion, which believed the Nazi bigwigs to have been sufficiently prosecuted by the Allies, and which was tired of war, brutality and horror, was set against a repetitive recount of the horrors of the camps, the atrocities and slaughters in the German courtrooms. "Numerous deeply implicated criminals, who had not yet been discovered, began to breathe easier."⁸

Around 1955 the situation changed drastically. Sparked by the unmasking of a Nazi-criminal who had brashly entered public life, an investigation of the activity of a unit of the "Einsatzgruppen" in the area of the German-Lithuanian border region, involving the killing of thousands of Jews, resulted in a trial of ten defendants in Ulm, who were convicted and received harsh sentences.⁹ These and other circumstances—some of them accidental—brought about the realization in the German judicial and prosecutorial establishment that Nuernberg, the Allied efforts, and the past German efforts had only scratched the surface. The administration reacted. On November 6, 1958, the Attorneys General (Ministers of Justice) of the several states (Laender) of the Federal Republic, by joint proclamation, founded the "Central Office for the Investigation of Nazi Crimes." This office, which took up its activities on December 1, 1958 in the city of Ludwigsburg, obtained personnel, logistic support, documentation, and jurisdictional authority from the several "Laender." Its task was and still is

to collect the entire attainable material concerning Nazi crimes, to catalogue, and to evaluate the same; . . . to work out facts and events delimited by place, time, and probable perpetrator; and to establish which persons involved can still be prosecuted. . . .¹⁰

Once the Central Office has initiated, conducted and concluded its preliminary investigation, the file, findings and exhibits are transmitted to the

⁸"Rueckerl," *supra*, p. 20.

⁹"Rueckerl," *supra*, p. 21.

¹⁰Pamphlet: "Zentrale Stelle der Landesjustizverwaltungen," dated September 15, 1967, p. 3.

district attorney who has jurisdiction of the court-prosecution of the defendants. The function of the "Central Office" is comparable to that of the federal "special prosecutor" or similar special state prosecutors.

Starting off with a staff of fifty prosecutors and magistrates, and fifteen detectives, the jurisdiction of the Central Office was substantially enlarged in 1964 and 1965.¹¹ As a result of this intensification, the German courts adjudicated a total of 71 proceedings, during the years 1968 to 1970, more than one-third of the number of proceedings completed during the previous nine years¹². From its inception to 1974, the Central Office investigated 3,000 cases, which resulted in 9,000 proceedings against individuals. With life-sentences in 108 cases, over 1,200,000 records and over 300,000 evidential documents were sifted, evaluated, stored and indexed¹³. It is estimated that the work of the Central Office will extend to 1980, the year when the statute of limitations will have run out. Until then, the work-load is inexhaustible.

Parallel to the work of the Ludwigsburg Central Office, however, the prosecutorial staffs, magistrates and courts of the several states are carrying on their own investigations, proceedings, and, of course, trials. In a recent broadcast, chief prosecutor Dr. Rueckerl stated that in 1974, approximately 4,000 persons were standing accused of Nazi crimes in the Federal Republic. He added:

These proceedings will continue, probably to the end of this decade. . . .the People's Republic of Poland has announced that it will submit the files of 2,000 cases involving crimes not yet prosecuted. . . .to the judicial authorities of the Federal Republic in the near future. . . .¹⁴

A critical evaluation of the published data, statistics and surveys emanating from West Germany and elsewhere leads to the conclusion that, by and large, the core of the Nazi criminals has been prosecuted, in many instances successfully. After the responsible actors in command positions, the judicial apparatus has reached up to the "desk-murderers," the Eichmann-type bureaucrats, and down to the "squad-leaders," the rank and file—often entire units. There are two classes of criminals who have escaped prosecution: the ideologists, and the foreign, non-German helpers of the Nazis, mostly those of Eastern European background. Various factors, aside from the passage of time, have combined to make their prosecution and conviction highly unlikely—ever. Of the former group, an expert in modern German penal law, Prof. Adolf Arndt, in a lecture before the National Jurist's Association in 1968, said:

¹¹Pamphlet, *supra*, p. 3-4.

¹²"Rueckerl," *supra*, Statistical Annex, p. 197.

¹³New York German-language weekly "Aufbau," June 28, 1974.

¹⁴Reported in *Aufbau*, October 12, 1974.

. . . . Aside from the acting perpetrators, the accessories and helpers, possibly also the desk-murderers are held to account, but not the ideologists. This is an almost unbearable conflict.¹⁵

II. Questions of Evidence and Procedure

The investigations and courts-martial surrounding the Song My and My Lai crimes took place almost immediately after the event, while the evidence was still fairly recent. Nevertheless, only one single conviction resulted.¹⁶

The crimes now being prosecuted in West Germany date back, for the most part, to a period from 1940 to 1945, or even earlier.

Although hard work, diligence, patience, skill and large-scale financing have produced remarkable results, the circle of witnesses, the available documentation, and thereby the chances of obtaining convictions are steadily shrinking. The above-mentioned chief prosecutor, Dr. Adalbert Rueckerl, has stated:

The question of proof has, in the meantime, become more and more urgent. The percent-share of proceedings which are either discontinued for lack of proof or end in acquittals, is constantly increasing. One must count on the fact that in a few years, most likely prior to the tolling of the statute of limitations on December 31, 1979, the point will be reached at which—apart from exceptions—convictions of those Nazi perpetrators still alive will fail on account of insurmountable difficulties of proof.¹⁷

In the investigation of Nazi crimes, especially in the East, the Ludwigsburg office has proceeded on a new basis: the systematic combing out of Nazi crimes by area, unit, and time. Proceeding on the theory that—where one proven crime took place, others of like nature must have taken place fairly closely in time and space, the Ludwigsburg office commenced a systematic survey of the areas occupied by German troops during World War II. Prosecutor Rueckerl commented on the problems involved in this task as follows:

The novel approach requires investigations broader in scope than one was used to up to then in individual cases. Countless persons must be questioned, and relevant archives must be researched to feel one's way to the identity of the perpetrators. All this requires, aside from energy and adaptability, a considerable measure of specialized historical know-how, from the investigator in charge.¹⁸

The German criminal process comprises four principal stages: the "Vorverfahren," or preliminary proceeding, consisting of the investigation by the pro-

¹⁵Prof. Adolf Arndt in a lecture, "Penal Law in an Open Society," held before the "Deutsche Juristentag," quoted in the magazine *Spiegel*, January 22, 1973, p. 51.

¹⁶N.Y. Times, December 26, 1974, p. 15. The conviction was reversed in September 1974, and appeals are still pending, although the army has announced that it no longer seeks confinement for Lt. Calley, regardless of the outcome of the appeals.

¹⁷"Rueckerl," *supra*, p. 24.

¹⁸"Rueckerl," *supra*, p. 25. Chance and accident are unfortunately often the handmaidens of justice. For example: In the case against the SS-leaders of a small branch-camp of Auschwitz, called "Guenter-Grube," wallmurals painted by a prisoner on a whim of the SS had been painted over after the war, but were restored. This evidence was invaluable for purposes of credibility.

secutor into the facts and circumstances of the alleged crime—this stage is roughly identical to the American “grand jury” and the French “juge d’instruction” system, resulting in a finding that a crime has most likely been—or has not been—committed.

The next step, the “Zwischenverfahren,” or intermediate proceeding, is the reading of the charge to the accused, and his motions in respect thereto—roughly equivalent to the American arraignment and plea.

The main stage, the “Hauptverfahren,” is the trial itself, conducted in felony cases with judges and jury sitting together. Although the few jurors are subordinate to the judges, and although their functions are entirely different from Anglo-American practice, it is remarkable that in the end-result the jurors under both systems have the same effect on the outcome of the trial—the infusing of general human experience, and a non-juristic evaluation of the facts. The “Hauptverfahren” ends in an “Urteil,” a judgment, by the court.

The last stage is the “Vollstreckungsverfahren,” the execution of the sentence, or the exoneration.¹⁹

Crimes against humanity, both in the preliminary and trial stages, require a vast amount of intensive preparation. The prosecutor’s proof usually fills the shelves and file cabinets of several rooms—resembling the volume of evidence in an American anti-trust case or other similar large-scale litigation.

German criminal procedure usually regards the oral testimony of witnesses as less potent than documentation, for which no foundation need be laid. Rueckerl points out²⁰ that in Nazi-crimes trials there are no “neutral” witnesses: the only knowledgeable sources of oral evidence are either pursuers or victims. While witnesses from the ranks of SS or police have an obvious motive to minimize, distort, or falsify, the victims suffer from unavoidable trauma—no matter how objective they try to be—from psychic breakdowns, and from loss of memory caused by suppression of lived-through scenes too horrible and painful to preserve. In addition, the remoteness of the events increases the unreliability of oral testimony. “It is, therefore, foreseeable that oral proof in Nazi trials will lose in

¹⁹Peters-Preisendanz, *STRAFGESETZBUCH*. Berlin, 1971, pp. 654-659. The German trial—like the United States criminal trial—is governed by a large body of mandated procedural details, such as the public, prohibition against adjournments for more than 10 days after commencement, etc. the right to be heard, a prohibition against barring the public, prohibition against adjournments for more than 10 days after commencement, etc. Violations of these rules—as in the Anglo-American practice—lead to reversals or remands. As of January, 1975, the reform of German Penal Law and procedure has eliminated the “examining magistrate,” the examination of the evidence by a judge, similar to the French “juge d’instruction” institution. However, in respect to war crimes proceedings, the revision has not resulted in any substantial changes.

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²⁰“Rueckerl,” *supra*, p. 26ff.

weight more and more rapidly, and will sink to the level of insignificance within the foreseeable future," says Dr. Rueckerl.²¹

Evidence comes from many sources. The passion for documentation on the part of the Nazi perpetrators has left thousands of official records all over Europe. Such evidence has been and still is emanating from Poland, the Soviet Union, Israel, France, Belgium, Holland, Norway, Luxemburg, Czechoslovakia, Yugoslavia, Greece, the United States Documents Center in Berlin, which contains the personnel records of thousands of Nazi functionaries, the United States materials in the Pentagon, the National Archives and in Alexandria, Virginia, which have been made available to German judicial personnel; and the documents of the restitution, indemnification and equalization boards, the Red Cross, the Documentation Center in Arolsen, and some unlikely sources, such as business records of certain German firms. Individuals like Simon Wiesenthal deserve mention here. Their efforts should not be overlooked. Only the authorities of the German Democratic Republic (East Germany) have been among those who refused cooperation and have leaked selected evidential material to the West when it seemed politically opportune to do so.²²

Confessions—in European criminal law and practice—play a quite different role than they do in Anglo-American practice. In Western European criminal cases, defendants not infrequently give uncoerced, lengthy, and partly exultatory "confessions," either to explain themselves, or to curry favor with the court.²³ Who can ever forget the "confession" of Gestapo head Kaltenbrunner in front of the newsreel cameras at the conclusion of the Nuernberg trials?

²¹"Rueckerl," *supra*, p. 27.

²²The East German regime has not publicized any war crimes trials nor has it responded to West German requests for cooperation to any but a selective, apparently politically motivated, extent. It has, however, sent emissaries to West German proceedings in a few cases, utilizing the provisions of the German penal code permitting victims of crime to join the prosecutor as co-plaintiff ("Nebenklager"). Thus, East German attorneys have turned up as "Nebenklager" in West German proceedings.

The Soviets and Poles have—especially of late—been vastly more cooperative. The author has been informed by West German prosecutors that their—often extensive and prolonged—investigations in Poland and the Soviet Union were logistically and administratively well supported. Senior magistrates, officials of the ministries of justice, etc., were made available, and testimony and evidence were secured promptly, with great energy, exactitude, and under strict maintenance of proper procedure. Thus, the Poles have carefully preserved the entire Auschwitz complex (now "Oswiechim") not only for memorial, but also evidentiary purposes. The head of the Polish Commission for Nazi crimes, Czeslaw Pilichowski, declared in an interview with the West German magazine *Spiegel*: We are not interested in revenge. . . .if we are approached in concrete, specific cases, we will supply all material available to us. . . ." Mr. Pilichowski denied that the Polish authorities were slow in their evaluation or politically oriented in selecting the evidence supplied to the West Germans. *DER SPIEGEL*, vol. 27, No. 1, January 1, 1973, p. 40.

²³To prevent the recurrence of Third Reich excesses, and to conform to general practices among civilized nations, the German Code of Criminal procedure prescribes strict safeguards for the taking and use of confessions, and the treatment and interrogation of the accused. See: Pieck, *The Accused's Privilege against Self-Incrimination in the Civil Law*, *AM. J. COMP. L.* 4, pp. 589 ff.

However, the motive to "cleanse oneself" by confession has been supplanted by tendencies fostered by the propaganda of small but vociferous extreme right-wing groups, which picture the Nazi accused as "victims" rather than criminals. Furthermore, it is an invariable practice of the defendants to attribute the crimes to deceased colleagues or superiors.²⁴

On the average, the duration of a Nazi-crime proceeding, from its preliminary stage to judgment and through appeals, is from three to seven years. In some cases, difficulties of proof, delays of various kinds, changes in prosecutorial or defense personnel and consequent familiarization of new counsel with the tremendous amount of material, and other factors²⁵ prolong the proceeding even more. It is therefore not surprising that—more and more—the final resolution of these crimes is, in the words of Dr. Rueckerl, a "biological" one: death or incompetency of the defendants.²⁶

III. The Defenses

Most of the defendants in the Nazi-crimes cases are accused of murder under section 211 of the German Penal Code. This section defines a "murderer" as one who

kills a person out of lust, to satisfy his sexual urge, for avarice, or for other base motives, by stealth or cruelty or by any means endangering others or to facilitate or hide another crime.²⁷

Section 212 defines and punishes homicide under circumstances not amounting to murder under section 211. Nazis cannot be prosecuted under this section, since the statute of limitations on section 212 expired on May 8, 1960.²⁸ However, any procedural step by the prosecutor or magistrate within the time

²⁴"Rueckerl," *supra*, p. 30. In the proceeding against the Gestapo chief of Warsaw, Hahn, who is accused of the supervision of the Warsaw Ghetto destruction and—among others—the deportation of 400,000 Jews to the Treblinka death camp, was so bold as to describe his relationship with his Berlin superior, Heydrich, as follows: "Occasionally, we played ping-pong together," quoted in *Aufbau*, *supra*, November 22, 1974, p. 5. Hahn's conduct led to unruly scenes in the courtroom. He was attacked and slightly injured by an enraged visitor during a recess. On July 4, 1975, the court found Hahn guilty of mass-murder and sentenced him to life-imprisonment. *New York Times*, August 29, 1975, page 4, col. 1.

²⁵The danger of error in law and fact, the monotonous repetition of horrors for months and years, and the magnitude and quantity of the evidence pose great stresses for judges, jury, and counsel on both sides. Judges have taken their lives or have fallen ill, apparently because of the stress. *Aufbau*, *supra*, on January 3, 1975 reported the suicide of Judge Kupke in Frankfurt as a result of stress in the retrial of FASOLD and others.

²⁶"Rueckerl," *supra*, p. 33.

²⁷"Petters-Preisendanz," *supra*, p. 378.

²⁸The statute of limitations for "accessories" or homicides under section 212 is fifteen years calculated from May 8, 1945. See the decision of the Bundesgerichtshof (Supreme Court) in "People against Stoebner and others," 5 St R 100/69 (1970), and cases cited there. By decision of the Bundestag after a—at times acrimonious—debate, the statute of limitations for murder under section 211 has been extended to December 31, 1979. See: *New York Herald Tribune*, Paris edition, January 20, 1968, p. 3.

limit, such as the filing of a report or the opening of a file will toll the statute and will make continued prosecution possible, even though the statute has run.

For "211" cases, the prosecutor must therefore prove facts sufficient to convince the court that the defendant personally committed the acts alleged "for base motives," *i. e.*, out of racial hatred, or sadistic perversion.

Such proof is difficult. So-called desk-murderers, bureaucrats who ordered mass exterminations, are guilty of aggravated murder under Paragraph 211 only if it is clearly shown that they were actors, not mere conduits or transmitters. The defense of "respondeat superior," which has been paraphrased by the synonym "I only followed orders," led to dismissals against persons who—knowing of the criminal nature of the work they were doing—only passed on and followed orders without themselves engaging in heinous acts. "Follower of orders" would have been guilty under the accessory ("Beihilfe") or homicide ("Totschlag") statutes. Both of these crimes are beyond the statute of limitations (see footnote 26). It follows that in any case in which the prosecutor is unable to prove heinous, sadistic acts of the defendant, the judgment must be one of "not guilty."

Nevertheless, in many cases the high-up "desk murderers" (or "headquarters murderers") of the Eichmann type have not escaped, since as "order givers" not takers, or conduits, they fit into the pattern of Paragraph 211.²⁹

Besides pleading alibis as to time, place, and person (identification problems are—after thirty years—substantial), the defendants invariably raise the defense of "Notstand" (duress).³⁰ This defense is based on the widespread belief in the "iron discipline" of the SS, the Gestapo, and other organs, and the "probability" that disobedience or refusal to carry out illegal orders would have had the immediate result of landing the dissenter among the ranks of the victims.

Indeed, this defense goes to certain bases in the nature and make-up of the Nazi regime and its relationship to the German people. Disobedience to orders in violation of oath, duty and fealty is deeply repugnant to the German character, and the Nazis exploited this. The so-called betrayal of 1918 had been one of the most popular and productive themes of Hitler. Even when the criminal-

²⁹A compendium of twenty-two major trials as of summer 1967 shows that at least 18 were directed against defendants in "desk" jobs, among them an official of the Foreign Office (Rademacher), a supervisor of a Gestapo training school (Rosenbaum), an SS-chemist (Widmann), and other police and Gestapo officials. One proceeding concerned the killing of 4 British officers who sought to escape (Schmidt-Schuetze), and one proceeding involved the murder of a Russian woman (Christ). "*Zusammenstellung von Hauptverhandlungen wegen NS-Gewaltverbrechen*," *Zentrale Stelle der Landesjustizverwaltungen, Ludwigsburg*, July 26, 1967.

³⁰Paragraphs 52 and 54, Penal Code, to the effect that acts done under the influence of irresistible force or threats of unavoidable danger to life or limb, are a defense to a crime, and excuse the threatened actor. "Petters-Preisendanz," *supra*, pp. 194 ff., SCHWARZ-DREHER, *THE GERMAN PENAL CODE*, annot. 27th edition, Munich, 1965, comments to Par. 51 ff.

ity of the regime and the inevitability of defeat of Germany became obvious beyond doubt, the opponents in key positions to uproot the regime were still unable to overcome their scruples. How, then, argues the defense, could the brain-washed SS-robots be expected to react differently? Joachim C. Fest, outstanding among Hitler's many biographers, writes:

The dilemma, which the active opponents of the regime in Germany were faced with, had to do with an almost inextricably complex entanglement of motives, inhibitions, and weaknesses. Naturally, problematic traditions and educational principles played a role, they formed the background of the conflict. But—while national and moral duties almost always coincided for the European (non-German) resistance, these norms (in the case of Germans,) sharply collided for many in an insoluble conflict.³¹

It is therefore not surprising that the defense of "moral, legal, educational, and traditional" brainwashing throughout childhood and adulthood to the inviolability of orders, no matter what, and the "unthinkable" act and consequences of a refusal, skilfully and almost consistently proffered by defense counsel, strung both prosecution and courts to the quick. Neither is it surprising to find that this question was examined in and out of court at great length, exhaustively both in quantity and quality, and in extreme detail.

It was proven that despite intensive defense efforts *not one instance could be conclusively established where any German was punished—even moderately—for refusing or circumventing participation in atrocities.* The tremendous quantity of historical and legal material available on this question can be roughly summarized as follows:

There are many indications that the personnel of the "Allgemeine SS," the "SD," the "Einsatzgruppen," the "Gestapo," and the various other organs of the Nazi terror knew that they were engaged in criminal enterprises, dictated by the fanatical aims of the Nazi movement. From the street-fights of 1923 to the Roehm execution of 1934, and finally to the mass extermination of six million Jews there is a direct thread of extralegal gangsterism, which regards legality as a hindrance, an inconvenience, and anathema to the aims of the Nazi movement. In the so-called Lemberg case, in which the perpetrators of the killings of thousands of Jews in the Lemberg area were tried, an expert called by the court, Dr. Hans Buchheim, testified that his historical studies of all available sources had not turned up one count-martial, disciplinary proceeding, or even demotion in cases where individuals shirked from participating in atrocities.³²

The Ludwigsburg Central Prosecutor, by painstaking examination,³³ found

³¹JOACHIM C. FEST, *HITLER, EINE BIOGRAPHIE*, Ullstein Verlag Frankfurt, 6th ed., 1974, page 955.

³²Testimony of Prof. Dr. Buchheim in the so-called *Lemberg* case, 12 Js 1464/61-K 55/65, vol. 256, p. 2 ff.; testimony given on April 5, 1966.

³³"Zum Problem des sog. Befehlsnotstandes im NSG-Verfahren" memorandum issued by the Ludwigsburg Central Office, dated February 29, 1964.

that of dozens of alleged cases in which individuals claimed duress in being forced to take part in atrocities, not one could be substantiated to any degree of certainty. The Ludwigsburg study concludes that:

. . . damages to life and limb as a certain or highly probable consequence of refusal to carry out a criminal order must be generally discounted, . . . the refusal to carry out an illegal command did not constitute a "present danger to life and limb" and therefore an objective state of duress did not exist. . . .³⁴

The German Supreme Court has consistently turned down this defense in many decisions.³⁵ The tenor of the German decisions closely parallels American judicial thinking on this subject.³⁶

A total of over 50,000 cases has now been disposed of. Despite some reports to the contrary, very few of the Nazis in responsible places have, as was pointed out, escaped adjudication in one form or another, either by the Germans, the Western Allies, or the judicial authorities of the "Eastern bloc."³⁷

Under its own rules, West Germany is the proper jurisdiction for trying all persons accused of crimes committed within the German borders of 1938, the areas under direct German administration from 1939 to 1945, and crimes committed by Germans or foreigners under German command. Some incriminated individuals have sought cover in the Near East, Africa, South America and the United States and Canada. The authorities of the Federal Republic have taken steps in such cases to have these persons extradited or repatriated.³⁸ The Bun-

³⁴*Ibid.*, p. 78.

³⁵BGH, 4 St R 156/51; BGH 4 St R 417/54, and see cases collected and commented by Hinrichsen, in "Rueckerl," *supra*, pp. 136-7.

³⁶See T. TAYLOR, *NUERNBERG AND VIETNAM*, Bentam, 1971, Chapter 2, pp. 12-57 for a discussion of the American law.

³⁷As an example, an analysis of the fate of the commanding echelon of the notorious "Einsatzgruppen," the flying death-unit of the SS, reveals that of 52 commanding personnel only a single individual has not been apprehended:

Executed: 7
Cases pending: 7
Died of other than penal causes: 15
Incompetent to stand trial: 2
Life sentences: 5
Prison terms: 6
Pardoned by the Allies: 9
Fate not established: 1
Total: 52

(taken from: Alfred Streim: "Die Verbechen der Einsatzgruppen in der Sowjetunion," in "Rueckerl," *supra*, pp. 102-106.

³⁸The case of Hermine Ryan-Braunsteiner, a Queens housewife accused of atrocities committed as guard in the concentration camps of Ravensbrueck and Maidanek, who was extradited to Germany, received a great deal of coverage by the media. Mrs. Ryan stipulated voluntarily to denaturalization, and was thereupon extradited to Germany under the German-American Extradition Convention of April 26, 1931 (18 U.S.C. 3184, Treaty Series, No. 836). Under this treaty which survived the Third Reich and is still in force, murder is an extraditable offense. Mrs. Ryan has meanwhile been indicted together with 8 others in the Duesseldorf Court of Assizes (N.Y.

destag has just ratified a treaty with France permitting extradition of persons previously tried in France *in absentia*, who could not heretofore be either extradited from Germany, or retried there.³⁹

IV. Conclusion

German—specifically West German—adjudication of the crimes of the Nazi era has now spanned three decades and has dealt with thousands of individuals. Its documentation fills whole buildings and its financial commitment approaches the billions.

Like the Allied proceedings after World War II, the German program has its obvious—and serious—drawbacks:

1. Heavily incriminated Nazi bigwigs, saved from the gallows and pardoned after relatively short prison terms, now prospering through pensions, booksales, and business connections, are testifying as immune witnesses in the trials of their own former subordinates, faced with long terms in prison;

2. Disparities in chance survival of evidence will tie one individual into an “aggravated murder” pattern, while his comrade—with the same assignment, the same unit, and—probably—the same degree of guilt—will walk away free, because the evidence as to him happened to be insufficient;

3. The trials have taken too long. Prosecutors and judges alike are caught in the cross-fire of cries of “too much” and “not enough.” While voices within and without Germany demand an end to the dragging, increasingly fruitless proceedings against the remnants of the Third Reich,⁴⁰ others demand renewed efforts to rectify unrequited wrongs.⁴¹ It is a tragedy, deeply disturbing to an objective observer bent on adherence to the notions of due process and fairness, that there is much merit on both sides of this controversy.

4. Many of the prosecutors and judges will rate the value of the trials as deterrent or pedagogic rehabilitation of the perpetrators to be nil. Anyone who

Times, February 17, 1975). Other investigations of possible war-criminals hiding in the United States are presently being conducted, see: *New York Law Journal*, September 24, 1971, p. 1. German authorities have been less successful with the notorious and heavily incriminated Dr. Mengele, who performed selections and illegal human experiments in Auschwitz. This man, one of the last “big” war criminals, has been protected from extradition by the Paraguayan dictator, Alfredo Stroessner. Reports of his death have remained unverified.

³⁹Report of DPA (German News Service), quoted in *Aufbau*, February 14, 1975, p. 5.

⁴⁰See, for example, report of *New York Times* correspondent Craig R. Whitney, “After 30 years, trials of Nazis drag on,” *New York Times*, August 29, 1975, page 1, col. 4, quoted *supra*, footnote 23.

⁴¹At the repeated urging of organizations of Nazi victims and other spokesmen in the United States and elsewhere, new leads pertaining to Nazi atrocities are constantly being pursued. Thus, the U.S. Immigration Service has requested the German authorities to cooperate in the investigations of approximately 50 alleged war criminals residing in the United States, most of them of Eastern European background. *New York Times*, August 29, 1975, page 4, col. 6. The German authorities have many times stated that any promising lead will be investigated fully.

has read some of the "confessions" of the accused will be overcome by the curious admixture of unrequited hate, baseness, arrogance and moronic insensibility which affirms the validity of Hannah Arendt's often-quoted words "banality of evil."

These problems, however, cannot substantially derogate from this vast national undertaking. Apart from establishing the truth about the Nazi crimes beyond reasonable doubt through the orderly methods of judicial inquiry, these trials have served notice on the "true believers"—from one corner of the earth to another—who defile human dignity by their acts of insanity, that there now exist precedents for the adjudication of genocide, crimes against humanity, and violation of the human ethic, and that somewhere, sometime, it might be their turn.

