

GERMAN JUSTICE ON TRIAL: THE JUSTICE CASE*WILLIAM F. MEINECKE JR.[†]

I. Introduction

Good morning. It is my privilege to talk to you this morning about the *United States v. Altstoetter* (the Justice Case).¹ As you know, I work at the United States Holocaust Memorial Museum. I have been there for about thirty years, since 1992, and my academic area of expertise is actually German law in Weimar and Nazi Germany. I did a dissertation that was a collective biography of the German supreme court in Weimar and Nazi Germany and a master's thesis that was on continuity and change in the German Administration of Justice from its establishment in 1879 to 1979, when it underwent fundamental reform. For the museum, I am a German specialist. My area of expertise there is Nazi state policy formation and implementation.

Today, we are going to talk about the German Justice Case. It is one of the subsequent Nuremberg proceedings targeting officials in the Administration of Justice for Nazi crimes. If we look at it, we see that it is just one of a series of trials held before an American military tribunal under the auspices of the International Military Tribunal (IMT). That meant that

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¹ *United States v. Altstoetter* (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 4, 1947).

they followed the same rules of evidence and criminal procedure as agreed to at Nuremberg for the major war crimes trials.²

Each of these twelve cases targets a particular aspect of German society, whether it be German industry (e.g., the Flick Case, the I.G. Farben Case) or concentration camps (e.g., the Pohl Case).³ Like in the IMT (i.e., the trial for major war criminals), the Justice Case relied on adversarial justice to establish the facts. This was authorized by Control Council Law No. 10, which authorized the military commanders in each of the occupation zones of Germany (i.e., the United States, Great Britain, France, and the Soviet Union) to hold trials for lesser war criminals.⁴ Those tried at Nuremberg were the major war criminals; this is the second tier of war criminals.

The way the American military approached the case was to look at various sectors of German society, especially German professionals, industrialists, and civil servants, and to try them for secondary offenses. It is important to note here that they were bound by the agreement that set up the IMT⁵ and, like the IMT, it relied on adversarial justice to establish the facts in this case. This means that there were German lawyers acting as defense attorneys for those accused of a crime. The American prosecutors represented the international interest. Here, we had Brigadier General Telford Taylor as chief of the prosecution in the Justice Case, and the judges were civil judges from American courts.⁶ In this case, these were mostly from the State Supreme Court in Ohio, as well as a former Attorney General

² See INT'L MIL. TRIBUNAL: NUREMBERG, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 19–23 (1947) (establishing rules of procedure and evidence).

³ See *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, LIBR. OF CONG., https://www.loc.gov/tr/frd/Military_Law/NTs_war-criminals.html (July 16, 2010), for the records and allied documents of the twelve subsequent proceedings.

⁴ Control Council Law No. 10, art. III, reprinted in 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 308–10 (1945).

⁵ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

⁶ BRIGADIER GENERAL TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 34–35 (1949).

of the State of Ohio.⁷ In addition to that, there was a judge from the court of appeals in Texas.⁸ They were to try this case and establish the facts in the case.

The problem is who would face trial.⁹ You can see there are almost 150,000 potential people who could be tried in the Justice Case.¹⁰ The German justice system was actually very large and extensive. The National Socialists' League of Law Guardians was a Nazi organization of jurists with about 100,000 members, any one of whom could have been charged.¹¹ I think that, like at the IMT, they decided that responsibility should be greatest where authority is the greatest.¹² Looking at the leaders of the justice system was problematic because most of them were not available for trial.

The first Justice Minister under Hitler, Franz Gürtner, was Justice Minister from 1933 to 1941,¹³ when he died of natural causes. The last Minister of Justice, Otto Thierack, was Minister of Justice from 1942 to 1945.¹⁴ He was captured by the British and committed suicide in British captivity. The Chief Justice of Germany (i.e., the presiding judge of the German supreme court), Erwin Bumke, committed suicide in Leipzig in April 1945 as American forces entered the city.¹⁵ The head of the chief Nazi court, the People's Court in Berlin, was Roland Freisler, who was killed in an American bombing raid. When an American bomb struck the court building, it knocked down a balcony, under which Freisler was crushed.¹⁶ And Hans Frank, who was the Reich law leader of the Nazi Party, was

⁷ United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Members of the Tribunal, at 13 (Dec. 4, 1947).

⁸ *Id.*

⁹ TAYLOR, *supra* note 6, at 50.

¹⁰ This figure includes members of the National Socialists' League of Law Guardians, as well as all judges, lawyers, and prosecutors active in Germany and Austria under the Nazi regime.

¹¹ MICHAEL SUNNUS, DER NS-RECHTSWAHRERBUND (1928–1945) (1991).

¹² See generally TAYLOR, *supra* note 6, at 73–85 (discussing the process used to select defendants).

¹³ EKKEHARD RITTER, FRANZ GÜRTNER: POLITISCHE BIOGRAPHIE EINES DEUTSCHEN JURISTEN 1881–1941, at 217–19 (1976).

¹⁴ DER VOLKSGERICHTSHOF: HITLERS POLITISCHES TRIBUNAL 22–25 (2004).

¹⁵ INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 39–41 (Deborah Schneider trans., 1991).

¹⁶ DER VOLKSGERICHTSHOF: HITLERS POLITISCHES TRIBUNAL, *supra* note 14, at 26–28.

convicted in the trial of major war criminals at Nuremberg and executed¹⁷ not for his duties or his actions as Reich law leader, but because of his actions as Governor General of occupied Poland.¹⁸

Who were the American jurists going to try? They were left with those to whom they had access that were in the American zone of occupation, which governed who they were going to try on one hand. On the other hand, the level of responsibility of the jurists to whom they actually had access. Of the defendants that were charged in the Justice Case,¹⁹ you see there were members of the Ministry of Justice. The highest ranked official there was Frank Schlegelberger, who was the number two man in the Ministry of Justice from 1931, well before the Nazi rise to power, to his retirement in 1942.²⁰ He was State Secretary in the Ministry of Justice and then, after Gürtner's death in 1941, he was acting Minister of Justice until his retirement in 1942.²¹ He was the highest-ranked official in the Ministry of Justice.

The other defendants were judges on the People's Court in Berlin and the special courts. Both are regarded as political courts, as Nazi courts—especially the People's Court in Berlin, which was dominated by lay judges who were political appointees appointed by the Ministry of Justice.²² So, it was only a minority of professional judges that staffed the court. The special courts, again, like the People's Court in Berlin, had expedited procedures

¹⁷ United States v. Göring, 1 Trial of the Major War Criminals Before the International Military Tribunal, Sentences, at 365 (Oct. 1, 1946).

¹⁸ *Id.* at 296–98.

¹⁹ The following individuals were indicted: Josef Altstoetter, Wilhelm von Ammon, Paul Barnickel, Hermann Cuhorst, Karl Engert, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg, Guenther Nebelung, Rudolf Oeschey, Hans Petersen, Oswald Rothaug, Curt Rothenberger, Franz Schlegelberger, and Carl Westphal. United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Indictment, at 15–26 (Dec. 4, 1947).

²⁰ Eli Nathans, *Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, 18 L. & HIST. REV. 281, 285 (2000).

²¹ *Id.* at 293–95.

²² Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens [Law Amending the Provisions of Criminal Law and Criminal Procedure], Apr. 24, 1934, RGBL at 341 (Ger.); see IM NAMEN DES DEUTSCHEN VOLKES: TODESURTEILE DES VOLKSGERICHTSHOFES 34, 41 (Heinz Hillermeier ed., 1980).

and rules of evidence, and there was limited appeal from those courts.²³ It was meant to be really quick justice, “*Schlagartig*” as the Germans say, to try political opponents, especially of the Nazi regime.²⁴

What I find fascinating here is that all of the judges on the People’s Court and Hermann Cuhorst, who was the presiding judge of the Special Court in Stuttgart, were all found not guilty in the Justice Case for lack of evidence.²⁵ The only judges who were found guilty were the presiding judge of the Nuremberg Special Court, Oswald Rothaug, and his co-justice, Rudolf Oeschey.²⁶ I think, in part, that was because those other judges followed the normal rules of criminal procedure under the Nazi regime and applied the law as it was so-called normal under the Nazi regime, whereas Rothaug and Oeschey violated the norms, even under a Nazi German state, in their proceedings. We will talk more about that in a few minutes, but I think they could be viewed, especially Rothaug, as an example of German justice run wild.

I want to focus on just two of the defendants: the highest ranked defendant, Franz Schlegelberger, State Secretary of the Ministry of Justice, acting Minister of Justice in 1942; and Judge Oswald Rothaug, who was a state prosecutor who became the Special Court judge at Nuremberg in 1937 and was promoted in 1943, when he was sent to the People’s Court in Berlin. I think it was mainly his actions as a Special Court presiding judge that are at issue in the Justice Case.

Notice the age difference between the two men. There was a good twenty years between Schlegelberger and Rothaug.²⁷ Schlegelberger was by no means a Nazi. He was a very high rank in the Administration of

²³ Verordnung über die Bildung von Sondergerichten [Ordinance on the Formation of Special Courts], Mar. 21, 1933, RGL I at 136 (Ger.); NATIONALSOZIALISTISCHES HANDBUCH FÜR RECHT UND GESETZGEBUNG 1478 (Hans Frank ed., 1937).

²⁴ Verordnung über die Bildung von Sondergerichten [Ordinance on the Formation of Special Courts], Mar. 21, 1933, RGL I at 136 (Ger.).

²⁵ United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 985 (Dec. 4, 1947).

²⁶ *Id.*

²⁷ The SD reports referred repeatedly to the dichotomy between younger jurists, who enthusiastically embraced Nazism, and older jurists with a pre-Nazi perspective on justice. See MELDUNGEN AUS DEM REICH: DIE GEHEIMEN LAGEBERICHTE DES SICHERHEITSDIENST DER SS 1938–1945 (Heinz Boberach ed., 1984).

Justice: the State Secretary. He was the number two man in the Ministry of Justice as early as 1931. He had the normal education and professional appointments that are required for an appointment to the Ministry of Justice,²⁸ as Rothaug had the normal education and experience for his appointment as a Special Court judge in 1937.²⁹ Neither were political appointees without qualification.

II. Franz Schlegelberger

Schlegelberger was asked by Hitler to join the Nazi Party in 1938, so he reluctantly did.³⁰ He was a jurist of the old school. He agreed that the state should be based on law and the state's action should be governed by legislation. He was regarded by the tribunal as a rather tragic figure because he got involved in Nazi criminology almost against his will.³¹

Judge Rothaug, on the other hand, was much younger—and this was typical of people in the Ministry of Justice: the younger ones tended to be more enamored of Nazi ideology—and he was committed to Nazi ideology.³² He reveled in the trial of Jews and Poles, both groups considered racial inferiors by the Nazi German state. He then faced trial. We can see that regardless of the two counterpoints, the experience was roughly the same in the trial.

The charges, like at the main proceedings at the IMT in Nuremberg, were conspiracy, war crimes, crimes against humanity, and membership in a criminal organization.³³ I think we can discount count four because none of the defendants were high-ranking members of the SS, the SD, or the SA. Maybe if the tribunal had said that the Academy for German Law was a criminal organization or the National Socialists' League of Law Guardians was a criminal organization that count would be more important, but it is not so important here.

²⁸ *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 126–29.

²⁹ *Id.* at 154–58.

³⁰ Nathans, *supra* note 20, at 281–304.

³¹ *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1081–87.

³² *Id.* at 1143–56.

³³ *Id.* at 15–26.

With respect to count one, the defense attorneys argued that the IMT did not authorize a charge of conspiracy in the commission of war crimes and crimes against humanity.³⁴ In the main proceedings, it was conspiracy in fighting an illegal war. The tribunal agreed with them and largely discounted count one by throwing it out.³⁵

I do not want to speak about war crimes. I think that is the charge that most opens the proceedings to criticism, especially from the Germans, who argue that that is evidence of victors' justice (i.e., that only the defeated are charged with war crimes).³⁶ Instead, I want to focus on crimes against humanity because that has really withstood the test of time. Even today, most Germans regard the charge of crimes against humanity as legitimate and as a serious infraction committed by the Nazi German government.³⁷ They accept that as a fair charge.

Just to remind you, this is the definition of a crime against humanity used by the IMT at Nuremberg:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.³⁸

³⁴ *Id.* at 955 (“It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.”).

³⁵ *Id.*

³⁶ Some German jurists regarded the IMT as victors' justice. *E.g.*, ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES, at xv (Patricia Heberer & Jürgen Matthäus eds., 2008).

³⁷ Even in December 1945, more than 80% of Germans believed the Nuremberg trials to be a fair and just trial of Nazi leaders. *See* PUBLIC OPINION, 1935–1946, at 1035–36 (Hadley Cantril ed., 1951).

³⁸ Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, 287–88.

The Justice Case focused on the portion of the charge of crime against humanity that alleged “persecution on political, racial and religious grounds.”³⁹ That will be the focus when looking at the professional duties of Schlegelberger on one hand in the Ministry of Justice and Rothaug on the other, as chief presiding judge of the Special Court in Nuremberg.

I also want to point out this portion of the charge because it has serious implications for the Justice Case: “whether or not in violation of domestic law of the country where perpetrated.”⁴⁰ What this in effect did was prevent a defense by the judges that they were just following the law. That was not an excuse that led to exoneration. The tribunal, like the IMT, held representatives of the government responsible, especially where responsibility and power is highest and they must be held responsible. Similarly, they could not claim some superior orders, even though it was from the German state, because the IMT limited the superior orders defense in that the defendant had to show that the orders or laws that they were following were something with which they personally disagreed. The burden of proof was on the defendant,⁴¹ and there was just no evidence of that.⁴²

The Einsatzgruppen were members of the SS and the SD, as well as the German Security Police, assigned to kill Jews behind the front during the invasion of the Soviet Union.⁴³ It also included German nationals who were

³⁹ United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Indictment, at 23 (Dec. 4, 1947).

⁴⁰ Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, 287–88.

⁴¹ American intelligence teams developed categories of individuals subject to automatic arrest, including all judges and prosecutors, as well as members of Nazi organizations above a certain rank. DIRECTIVE TO COMMANDER-IN-CHIEF OF UNITED STATES FORCES OF OCCUPATION REGARDING THE MILITARY GOVERNMENT OF GERMANY (May 10, 1945), reprinted in U.S. DEP’T OF STATE, DOCUMENTS ON GERMANY: 1945–1985 at 15, 20–21 (4th ed. 1985).

⁴² There might have been some indication of this for Schlegelberger, but not at all in the case of Rothaug. Section 104 of the Weimar Constitution stated that judges were subject only to the law. The Nazi German state never revoked this clause of the constitution. Judges were expected to ignore directives about court decisions.

⁴³ *Einsatzgruppen: An Overview*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/einsatzgruppen> (last visited June 8, 2021).

deported from Germany to ghettos in the occupied eastern territories.⁴⁴ Many of them were killed, especially in Riga and Kaunas (Kovno), where they were killed along with native Jews.

Let us look at the charges against Franz Schlegelberger. The tribunal argued that he had infringed on judicial independence and that he constantly justified and legalized ex post facto the arbitrary actions of Hitler as the chief executive of the German state.⁴⁵ He put the law and justice at the service of the politics of the Nazi regime.⁴⁶ He drafted, enforced, and validated racial legislation that targeted the Jews and Poles as members of an inferior race.⁴⁷

Significantly, he turned over those defendants who had been convicted in German courts but whose sentences Hitler regarded as insufficient.⁴⁸ He turned them over to the police for execution. There were dozens of defendants. The example cited at the tribunal was the experience of Markus Luftglass, a Jewish merchant who was charged with stealing and hoarding large numbers of eggs.⁴⁹ The Special Court in Katowice sentenced him to two-and-a-half years for theft.⁵⁰ Hitler read about that in the newspaper—this was typically how he found out about these things—and he was outraged. He informed Schlegelberger that the sentence was unacceptable and that he had to increase the criminal penalty.⁵¹ Within a week, Schlegelberger arranged for Luftglass to be turned over to the secret state police, Geheime Staatspolizei (i.e., the Gestapo), for execution, and he was summarily shot.⁵² No legal proceedings necessary, no legal order necessary—simply turned over to the police for execution.

⁴⁴ *German Jews During the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/german-jews-during-the-holocaust> (last visited June 8, 2021).

⁴⁵ *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1081–87 (Dec. 4, 1947).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ MÜLLER, *supra* note 15, at 174–82.

⁴⁹ *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 429–31.

⁵⁰ *Id.*

⁵¹ *Id.* See ADOLPH HITLER: MONOLOGE IM FÜHRERHAUPTQUARTIER: 1941–1944, at 140–42, 271–72, 347–52 (Werner Jochmann ed., 1980), for Hitler’s growing frustration with the Ministry of Justice.

⁵² *Id.*

Luftglass was just one of dozens of people treated the same way. Hitler was outraged at the sentence and Schlegelberger fixed it by transferring the defendant to the police. Eventually, he decided that it would be best if the Ministry of Justice could deal with that on its own. Part of the innovation that Schlegelberger applied is something called the *Nichtigkeitsbeschwerde*, or invalidating appeal, where a prosecutor was empowered to take a case directly to the supreme court if a lower court's sentence was considered especially lenient.⁵³ The supreme court could either send the case back to the lower court with directions to have a harsher penalty or it could impose a death sentence itself. That became the standard legal means by which the courts overturned decisions that the Nazi German state deemed too lenient.⁵⁴

Schlegelberger's defense was innovative. He said, "I was defending the normative state." It was the German Jewish émigré jurist Ernst Fraenkel who argued in exile that Germany, under the Nazis, had become what he called a "dual state," where the normative state (based in law) existed side by side with a police state (based on the executive whims of Adolph Hitler and the leaders of the Nazi Party).⁵⁵ Schlegelberger was caught in the middle because the police, as agents of the executive, were constantly threatening to usurp the jurisdiction and the functions of the judicial system, and Schlegelberger found himself fighting a rearguard action against the police so that he could maintain what could be saved in the rule of law.⁵⁶

Schlegelberger made concessions to avoid a greater evil. He said that he could not resign because, if he did, Hitler would appoint a hardcore Nazi ideologue as Minister of Justice and the situation would be much worse, with many more thousands of people being killed.⁵⁷ He was in an impossible position where he was defending the normative state as best as he could and could not resign because that would be abdicating responsibility, probably to a hardcore Nazi. We now know that Schlegelberger was right. When he retired, Hitler appointed a hardcore Nazi ideologue as Minister of Justice,

⁵³ Verordnung über die zuständigkeit der Strafgerichte, die Sondergerichte undsonstige strafverfahrensrechtliche Vorschriften [Ordinance on the Jurisdiction of Criminal Courts, Special Courts and Other Provisions of Criminal Procedure Law], Feb. 21, 1940, RGBL I at 405 (Ger.).

⁵⁴ MÜLLER, *supra* note 15, at 129–33.

⁵⁵ ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (Edith Lowenstein & Klaus Knorr eds., E.A. Shils trans., Oxford Univ. Press 2010) (1941).

⁵⁶ Nathans, *supra* note 20, at 281–304.

⁵⁷ *Id.*

Otto Thierack.⁵⁸ One of the first things he did was make a deal with the SS and the police (i.e., Heinrich Himmler) for the systematic transfer of prisoners from prisons run by the Ministry of Justice to concentration camps, where they were specifically going to be worked to death (i.e., extermination through work).⁵⁹ Clearly, Schlegelberger saw the writing on the wall.

The tribunal rejected this idea that Schlegelberger was fighting a rearguard. Actually, they said that by making a series of compromises, he involved the Ministry of Justice in Nazi criminology step by step.⁶⁰ In German, there is a proverb: “Once you begin to say yes, it is hard to say no.”⁶¹ By agreeing to compromise on a whole series of principles, it became more and more difficult for Schlegelberger to make a stand. Even the concessions that he made to the Nazi regime ended up involving the Ministry of Justice deeply in Nazi criminality. The Ministry of Justice was indeed a means for exterminating the Jewish and Polish populations not just in Germany but also in the occupied territories of Germany and in Europe.

Schlegelberger was sentenced by the tribunal to life in prison for war crimes and crimes against humanity.⁶² He was released because of ill health in 1950,⁶³ yet he managed to live until the 1970s, dying at the age of 94.⁶⁴ How ill could he really have been? There was some issue there. Also

⁵⁸ Stephen J. Sfekas, *A Court Pure and Unsullied: Justice in the Justice Trial at Nuremberg*, 46 UNIV. BALT. L. REV. 457, 495–69 (2017). Hitler discussed his vision for a National Socialist administration of justice with his newly appointed Nazi minister of justice, Otto Thierack. ADOLPH HITLER: MONOLOGE IM FÜHRERHAUPTQUARTIER: 1941–1944, *supra* 51, at 299–304.

⁵⁹ OFF. OF U.S. CHIEF OF COUNS. FOR PROSECUTION OF AXIS CRIMINALITY, 3 NAZI CONSPIRACY AND AGGRESSION 467–70 (1946).

⁶⁰ United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1081–87 (Dec. 4, 1947); MÜLLER, *supra* note 15, at 270–73.

⁶¹ One of the conclusions of the Seminars for Judicial Professionals at the Holocaust Museum in Washington, D.C., is that if a judge or prosecutor waits until his or her only choice is to submit or resign, they have waited too long to take a stand in defense of professional ethics. See *Judiciary*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/outreach-programs/judiciary> (last visited June 9, 2021), for a description of these seminars.

⁶² *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1200.

⁶³ Nathans, *supra* note 20, at 300.

⁶⁴ Mathias Reimann, *Franz Schlegelberger (Der Unrechtsstaat III)* by Eli Nathans, 39 AM. J. COMPAR. L. 459, 460 (1991) (book review).

disgusting is that the West German government recognized him as a legitimate civil servant, even under the Nazi regime, so that upon his release from American custody, he began to receive a state pension as a high civil servant of some 3,000 German marks per month.⁶⁵ The average pay in Germany, at the time, was about 500 German marks per month.⁶⁶ He also got a cash payment of 160,000 German marks that accumulated while he was in American custody.⁶⁷ Put that against the 100,000 Reichsmarks that Hitler paid him to retire quietly,⁶⁸ and I think it was pretty clear where Schlegelberger's loyalties lay.

III. Oswald Rothaug

Taking a look at Rothaug, the charges of the tribunal are that he often appeared in court drunk, that his court proceedings were often like show trials, and that he gave long diatribes about the dangers of the Jewish and Polish races as subhuman types that threatened ordinary Germans.⁶⁹ In particular, the tribunal cited the Katzenberger case, in which he lacked all decorum. The Katzenberger "race defilement" case involved a violation of the second Nuremberg law, the Law for the Protection of German Blood and German Honor,⁷⁰ where an elderly Jewish man, Leo Katzenberger, head of the Jewish community in Nuremberg, was charged with committing racial defilement (i.e., having a sexual relationship) with a young woman named Irene Seiler.⁷¹ This was in 1942 when he comes to trial.⁷² It was first looked at by the state court, which was going to dismiss it for lack of evidence, and Rothaug intervened and said, "No, transfer it to the Special Court and I will see that he is prosecuted and found guilty."⁷³

⁶⁵ Harry Reicher, *The Jurists' Trial and Lessons for the Rule of Law*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 175, 178 (Herbert R. Reginbogen & Christoph J. M. Safferling eds., 2006).

⁶⁶ *Id.*

⁶⁷ MÜLLER, *supra* note 15, at 208.

⁶⁸ *Id.*

⁶⁹ *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1154–58 (Dec. 4, 1947).

⁷⁰ Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and Honor], Sept. 15, 1935, RGBL I at 1145 (Ger.).

⁷¹ *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 650–53.

⁷² *Id.*

⁷³ *Id.* at 1143–56.

Not only was he intervening in the normal procedure of the courts, but he was also working from the assumption that Katzenberger was guilty, and that was not proper decorum for a judge. He then worked very closely with the prosecutor. His *ex parte* discussions with the prosecution⁷⁴ about how the case should proceed and how they were going to find Katzenberger guilty—and not just find him guilty but have him executed, which is an uphill battle because the maximum penalty was just two-and-a-half years' confinement.⁷⁵

How was he going to have Katzenberger found guilty of race defilement and executed? That was a novel idea that Rothaug hits upon. Basically, what he did was violate the normal rules of criminal procedure by insisting that Katzenberger and his so-called paramour be tried together rather than Seiler being tried for perjury first.⁷⁶ This was to prevent Seiler from testifying on behalf of Katzenberger that he never had a sexual relationship with her.⁷⁷ There was no evidence of a sexual relationship between the two; there was just rumor and innuendo. They were tried together so that Irene Seiler was muzzled.

Secondly, he paired a violation of the Law for the Protection of German Blood and German Honor, the second Nuremberg law, with a violation of the Ordinance Against Public Enemies.⁷⁸ This was a decree that was passed by the Reich Defense Council in September 1939, which authorized judges to increase criminal penalties, up to and including death, in cases where the judge determined that the defendant used the conditions of war to further their crime.⁷⁹ This was absolute novelty, and most of the judges and prosecutors in Germany would reject this out of hand because Rothaug said the conditions of war were that Seiler's husband had been drafted into

⁷⁴ *Id.* at 86–87.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Article 4 stated, “Anyone who intentionally commits a criminal offense, taking advantage of the exceptional circumstances caused by the state of war, will be punished with penitentiary for up to 15 years, with lifelong penal servitude or with death, if this is required by Sound Popular Judgment (*Gesundes Volksempfinden*) because of the particular reprehensibility of the crime”. *Verordnung gegen Volksschädlinge* [Ordinance Against Public Enemies], Sept. 5, 1939, *RGBL I* at 1679 (Ger.).

the Army and was away fighting at the front.⁸⁰ The absence of her husband facilitated Katzenberger and Seiler's having a sexual liaison. That was rejected out of hand; that was ridiculous.

In any case, the trial was very unseemly. Again, he gave long diatribes about the dangers of the Jewish menace to German society. There were high-ranking Nazi officials present in the courtroom. I think there were serious charges here, especially since he was part and parcel of this whole idea that Jews should be subject to a harsher kind of justice and a harsher kind of proceeding.

His defense was quite novel. He said, "I was just a small cog in the vast machinery of justice. Yes, I was presiding judge of the Special Court in Nuremberg but, by 1942, there were more than seventy such courts. Why are you picking on me and not looking at all the justices of the special courts?" He said that he only ever applied valid law, which is technically true, and that he followed the case law established by the Reich Supreme Court, the *Reichsgericht*. He also said that he submitted several decisions where the Supreme Court summarily overturned a lower court decision with a too-lenient sentence and substituted a death sentence as evidence that he was part and parcel of the mainstream interpretation of the law and that he was not doing something exceptional.⁸¹ He agreed that he was on the harsher side of things, but he insisted that it was still legal because you could have the swing between a more lenient judge and a harsher judge but both remained within the law. He said he was harsh not because he was prejudiced against Jews or Poles, but because he was a patriotic German who fervently supported Germany during the war.⁸² He said that he was always careful and dispassionate and that all he ever did was apply the law.⁸³

The Nuremberg proceedings rejected that out of hand and said that from the evidence, it was clear that the trial, as presided over by Rothaug, lacked all of the essentials of legality—that Rothaug, by the way he

⁸⁰ WILLIAM F. MEINECKE JR. & ALEXANDRA ZAPRUDER, U.S. HOLOCAUST MEM'L MUSEUM, LAW, JUSTICE, AND THE HOLOCAUST 40–50 (2014), <https://www.ushmm.org/m/pdfs/20140711-ljh-booklet-2nd-Edition.pdf>.

⁸¹ *Alstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 341–416.

⁸² *Id.* at 750–51.

⁸³ *Id.* at 341–416.

conducted his court, was just a cog in the machinery of persecution that the justice system in Germany had become by 1942.

Leo Katzenberger was found guilty of race defilement without evidence, based solely on innuendo and rumor, and executed by beheading.⁸⁴ Rothaug was rewarded for his service at Nuremberg by being promoted to the People's Court in Berlin.⁸⁵ I think there was a lot of personal self-serving involved in Rothaug's actions. He wanted to draw attention from the Nazi Party. He wanted to show that he would take a tough stance against Jewish and Polish defendants and from that, he got a promotion. He was not just a small cog in the machinery of justice. In fact, the court ruled that he was part and parcel in the whole process of genocide.⁸⁶

"Genocide" was a word not used by the IMT at Nuremberg with the major war criminals. It was a term coined by Raphael Lemkin to really explain the experience of his family members, who were Polish Jews. He coined the word "genocide" (i.e., the murder of an entire people) to describe that experience.⁸⁷ Here, the term was used extensively, as the tribunal points out that both Schlegelberger and Rothaug were, for different intentions and reasons, involved in the crime of genocide.⁸⁸

Unfortunately, Rothaug was released in 1956, in part because of political considerations by the new High Commissioner of Germany, John McCloy.⁸⁹ He agreed with the other Western Allies that in order to have a viable defense against Soviet expansionism, you had to include the Germans.⁹⁰ The Germans were anxious to put the crimes of war behind them and they wanted to focus on the future. In fact, there was a movement in Germany called "*Stunde Null*" ("zero hour"), where they say the new Germany begins from this moment; we are going to forget the past and

⁸⁴ *Id.* at 373.

⁸⁵ *Id.* at 1151–56.

⁸⁶ *Id.* at 1155.

⁸⁷ *Coining a Word and Championing a Cause: The Story of Raphael Lemkin*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/coining-a-word-and-championing-a-cause-the-story-of-rafael-lemkin> (last visited May 21, 2021).

⁸⁸ *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1085, 1155.

⁸⁹ Frank M. Buscher, *The U.S. High Commission and German Nationalism, 1949–52*, 23 CENT. EUR. HIST. 57, 57–75 (1990).

⁹⁰ *Id.*

just look to the future.⁹¹ As part of that whole movement, in order to integrate Germany into the Western defense infrastructure, McCloy quietly pardoned or facilitated the release of most of their criminals tried by the American tribunal in the subsequent Nuremberg proceedings.⁹²

It is interesting to note that Rothaug was able to avoid prosecution by German courts. Here, I am absolutely convinced that a German court, using German law, would have found Rothaug guilty of violation of paragraph 336 of the German Criminal Code, “judicial perversion of justice” (also called “judicial murder”),⁹³ just for his character or behavior in the proceedings against Leo Katzenberg. It was every bit of scandalous as that paragraph indicates: he skewed the law, he misused judicial discretion in order to increase criminal penalties, and he mischaracterized the evidence to find Leo Katzenberg guilty and execute him.

In any case, Rothaug was able to avoid trial by German courts and German law by citing double jeopardy, saying that he was already tried for these crimes by the American military tribunal and that to try him again would be a violation of this basic principle of the rule of law. Sadly, he avoided domestic prosecution.

IV. Conclusion

I would like to end by talking about efforts by the Allies—the Western Allies, especially—in restoring the rule of law in Germany.

All persons are equal before the law.

No person, whatever his race, nationality, or religion, shall be deprived of his legal rights.

⁹¹ See generally GERMAN HIST. INST., *STUNDE NULL: THE END AND THE BEGINNING FIFTY YEARS AGO* (Geoffrey J. Giles ed., 1997).

⁹² Buscher, *supra* note 89.

⁹³ Paragraph 336 included crimes committed in office and paragraph 339 of the Reich Criminal Code included: “A judge who deliberately does not apply an applicable law, because he holds a different result for fair, politically opportune or more appropriate for other reasons has committed a perversion of justice.” *Strafgesetzbuch für das Deutsche Reich* [Criminal Code for the German Reich], May 15, 1871, RGBL I at 127 (Ger.).

Rights of the Accused: No person shall be deprived of life, liberty, or property without due process of law.

Criminal responsibility shall be determined only for offences provided by law.

In any criminal prosecution, the accused shall have the rights recognized by democratic law, namely, the right to a speedy . . . trial[,] to be informed of the nature and cause of the accusation[,] to be confronted with witnesses against him[,] to have process for obtaining witnesses in his favor[, and] to have the assistance of counsel for his defence. Excessive or inhuman punishments or any not provided by law will not be inflicted.⁹⁴

This comes from a publication from the American Occupation Government of Germany, and it discusses their efforts to restore the rule of law in Germany. Partly, this comes from the Control Council Law No. 1, which named specific laws that were based on racial ideology or were political in nature and simply said that these Nazi laws were invalid and must be removed from the legal codes.⁹⁵

In October 1945, Control Council Proclamation No. 3 reestablished the court system in Germany, as it existed under the Court Organization Act of 1924.⁹⁶ Since there was no united government of Germany, it would be without the supreme court. Basically, it reestablished the district court, the state court, and the state superior court, which would be the highest court in occupation zones.⁹⁷ It also reestablished the rules of criminal procedure and civil procedure, the criminal code, and the civil code, as they existed before the Nazi rise to power.⁹⁸

⁹⁴ OFF. OF MIL. GOV'T FOR GER. (U.S.), STATUS REPORT ON MILITARY GOVERNMENT OF GERMANY: U.S. ZONE 29 (1946).

⁹⁵ Control Council Law No. 1, *reprinted in* 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 101–130 (1945).

⁹⁶ Control Council Proclamation No. 3, *reprinted in* 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 138–139 (1945).

⁹⁷ *Id.*

⁹⁸ *Id.*

The only legacy of the Nazi period was actually in the people staffing the courts, most of whom had been lawyers, judges, and prosecutors under the Nazi regime. Even the new Chief Justice of Germany in 1950, Hermann Weinkauff, had been a supreme court justice under the supreme court in Nazi Germany.⁹⁹ That legacy still existed.

If anything, the legacies of the Justice Case are the production of a record of Nazi criminality and the justice system, the idea that judges could no longer ignore the human consequences of the laws that they apply, and that they have to really struggle and think about the effect on humans that the application of the law has.

Thank you very much.

⁹⁹ *The Presidents of the Federal Court of Justice*, BUNDESGERICHTSHOF, https://www.bundesgerichtshof.de/EN/People/PremiersPresidents/premiersPresidents_node.html (last visited June 9, 2021).