

Michael Bryant

The Death Camp as a Criminal Organization

Theories of Systemic Criminality in Nazi Death Camp Trials, 1945–2015

For all its fragility and imperfection, the capacity of the mind to register its perceptions and relay them accurately and intelligibly has been essential to the success of the trials of Nazi perpetrators. This was no less true in proceedings conducted decades after the events at their center as it was for trials of accused Nazi perpetrators immediately after the war. In an interview Dieter Ambach, the prosecuting counsel in the mammoth West German Majdanek trial (1975–1981), affirmed the critical role of witness testimony:

“Question: Do you think the statements of witnesses are still vital for a trial dealing with crimes that lie so far in the past? Is it reasonable to examine witnesses 20 or 30 years after the event [they are alleged to have experienced]?”

Ambach: Yes, that is highly reasonable. Because the events we inquired about were of such a horrible nature that they were seared into the minds [of the witnesses], so that after many years they were retrievable. We proved relatively quickly the crimes and the charges. There were around 120 different charges in the indictment. *The difficulty was to connect certain persons with these events.*”¹

The emphasised final sentence in the preceding quotation underscores the centrality of eyewitnesses to proving illegal acts against individual criminal

1 “... aber wir haben wenigstens den Beweis geführt, was diese Leute alles verbrochen hatten ...”. Interview mit Dieter Ambach, Anklagevertreter im Düsseldorf Majdanek-Prozess, in: Claudia Kuretsidis-Haider / Irmgard Nöbauer / Winfried R. Garscha / Siegfried Sanwald / Andrzej Selerowicz (eds.), *Das KZ Lublin-Majdanek und die Justiz: Strafverfolgung und verweigerte Gerechtigkeit: Polen, Deutschland und Österreich im Vergleich*, Graz 2011, p. 227. (Translation: Michael Bryant, emphasis added.)

defendants. In death camp cases like the Majdanek trial, witnesses were particularly crucial because the documentary evidence connecting specific perpetrators to specific crimes was thin. Hence the prosecution called 215 former prisoners from the Majdanek camp to testify (all together 250 witnesses from 10 countries testified at the 474-day trial, making it the longest trial in German history). The Frankfurt Auschwitz trial (1963–1965) yielded a similar statistic: 211 erstwhile inmates testified against their former tormentors.² Although the outcomes of these death camp trials were mixed, without eyewitness testimony not a single defendant would ever have been indicted, much less convicted.

To the sane non-legal mind, the demand of the law for proof of a concrete criminal act in death camp cases may seem inexplicable. Shouldn't service as a guard in a death camp be enough to convict? Why require live eyewitness testimony afflicted with all the flaws and infirmities of human recollection when we know that a suspect participated in atrocities, albeit in unverifiable measure? Here the sane non-legal mind parts way with established criminal law and the flow of postwar German history. Modern criminal law is the byproduct of the Enlightenment, which laid down stringent conditions the authorities would have to satisfy before a person could be convicted of an offense. Among these were the demands that criminal laws be clearly written, that the accused should be able to confront her accusers and examine the evidence against her, and that she was immune to punishment in the absence of a law prohibiting her conduct (*nulla poena sine lege* – no punishment without a law). Another aspect of Enlightenment criminal jurisprudence was the related idea of individual criminal responsibility (*nulla poena sine crimine*). Before the state could prosecute and punish, it must first prove convincingly that the accused committed an illegal act defined as such by law. The requirement of a provable criminal act (*actus reus*, or *konkreter Einzeltatnachweis* in German) rejected the archaic principle of collective responsibility – a principle which, in the hands of powerful European monarchs in the early modern period, had led to despotic excess.³ To counteract arbitrary government power, Enlightenment reformers insisted

2 Überlebende als ZeugInnen vor Gericht am Beispiel des Düsseldorfer Majdanek-Prozesses und seiner filmischen Dokumentation, in: *Ibid.*, p. 293.

3 Before the French Revolution, punishment in France was sometimes meted out not just to the offender but to his family. This problem was addressed by the National Assembly in the Law of January 21, 1790: "Neither the death penalty nor any infamous punishment whatever shall carry with it an imputation upon the offender's family," since "the honor of those who belong to his family is in no wise tarnished." This law captures the Enlightenment idea that collective punishment should be impermissible.

that an accused could be punished only after proof that he personally and intentionally committed a criminal act.

For this reason, the demand of West German law after 1949 that Nazi perpetrators could be convicted of murder only when proven to have committed a homicidal act was the expression of a modern, liberal legal order. That the requirement of an *Einzeltat* worked in favor of Nazi murderers, however ironic, does not vitiate the essential modernity of the rule. The *Bundestag* might have chosen a different path in the early years of the Federal Republic; it could have passed a law enabling the judiciary to convict a special class of criminals, i. e. Nazis involved in genocide during the war, on a theory of organizational criminality honed at Nuremberg and in the US Army trials of concentration camp guards at Dachau. That it did not meant that German judges and prosecutors who faced Nazi killers in the postwar era were equipped only with the conventional tools of criminal law – tools ill-suited to the singularities of Holocaust-related atrocities.⁴

That is, until 2011. In a criminal trial of former Sobibor guard John Demjanjuk⁵, widely expected at the time to end in an acquittal, a Munich court convicted the former Cleveland auto worker of aiding and abetting murder, despite lack of evidence that Demjanjuk had himself committed a homicidal act within the camp. In the aftermath, state prosecutors across Germany reopened cold cases and indicted elderly former death camp guards, including two ex-Auschwitz guards convicted in 2015 and 2016 on a theory of liability crafted at the Demjanjuk proceeding.⁶ The alacrity with which other trial courts in Germany swiftly adopted the Munich *Landgericht*'s reasoning in Demjanjuk may be without precedent in German legal history. Although this trend is too late to salvage the numerous cases rendered stillborn by the old rule, it signifies a noteworthy departure in German law from the procedural status quo, aligning

4 Already in the early 1980s, Henry Friedlander diagnosed the “political cowardice of the Bundestag” in failing to pass laws to avoid the structural limitations of traditional German law in dealing with Holocaust crimes; see, e. g., idem, *The Judiciary and Nazi Crimes in Postwar Germany*, Simon Wiesenthal Center Annual 1 (1984), p. 38. Jurist Gerhard Werle made the same point in a 1992 law review article, arguing that the “cleanest means” of enabling punishment of Nazi killers would have been “an explicit addendum to the Basic Law.” Gerhard Werle, *Der Holocaust als Gegenstand der bundesdeutschen Strafjustiz*, NJW 40 (1992), p. 2535.

5 With regard to the Demjanjuk case see also the contribution of Dick W. de Mildt in this publication.

6 Former Auschwitz Guard Convicted in One of Germany's Last Holocaust Trials, *The Telegraph*, June 17, 2016, <http://www.telegraph.co.uk/news/2016/06/17/former-auschwitz-guard-sentenced-to-five-years-in-prison/> [Download: 22.1.2017].

the German legal system more closely with recent developments in international criminal law.

How did German courts come to discard the *Einzeltat* requirement in death camp cases? According to Holocaust scholar Lawrence Douglas, the direct cause of this change was the Munich *Landgericht*'s acceptance of the legal theory developed by German investigator Kirsten Götze and advanced by the Munich prosecutor, Thomas Walther, that Demjanjuk's mere presence in the death camp was decisive to proving his guilt. Once Demjanjuk's assignment as a guard to Sobibor was established by means of his Trawniki identity card, Götze reasoned, the lack of evidence of a specific criminal act committed by him became legally irrelevant. Rather, the burden of proof shifted from the prosecutor to the defense, which then could only avoid conviction by showing Demjanjuk had not facilitated through his actions the camp's sole purpose – the mass extermination of Jews. In other words, during his five and a half months at Sobibor, Demjanjuk *must have* participated in genocide as an accomplice of the Nazis. The accused's inability to meet this burden ensured his conviction.⁷

Prof. Douglas is undoubtedly right about the direct cause of this adoption of an "atrocities" paradigm in favor of the older "conventional murder" model.⁸ Elsewhere in his consideration of the Demjanjuk trial, he suggests other, more contextual factors – the kind of factors once described by legal scholar Leo Katz as "mere conditions"⁹ – which contributed to the change, such as the end of the Cold War and the passing of a compromised generation of former Nazis holding influential positions in the Federal Republic. Ultimately, whatever the

7 Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial*, Princeton 2016, pp. 156 f.

8 The "atrocities paradigm" achieved its supreme expression at Nuremberg, where the Allies created new categories of criminal liability (crimes against peace, war crimes, and crimes against humanity) and special courts – i. e., the International Military Tribunal, among others – to address Nazi misdeeds. The postwar West Germans, by contrast, spurned the atrocities model in favor of ordinary criminal courts and the conventional German Penal Code. Douglas, *The Right Wrong Man*, p. 161. See also Werle, *Der Holocaust als Gegenstand*, p. 2533. While not using the terminology of the "atrocities paradigm", Werle portrays in these terms the question of how Nazi crimes would be judged, asserting that the West German government's decision to prosecute Nazi crimes on the basis of German law as it existed during the war was misconceived. Instead, Werle insists, the Germans should have followed the Allied approach, even at the risk of incurring the stricture that they were applying retroactive law (see, for example, his discussion in *ibid.*, pp. 2533, 2535).

9 Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law*, Chicago 1987, pp. 236 ff. The distinction between "causes" and "conditions" – or, in the language of the law, "causes in fact" and "proximate causes" – relates to "circumstances that cause a certain consequence [i. e., "causes"] and circumstances that are merely necessary to its occurrence [i. e., "conditions"]". *Ibid.*, p. 305.

long-term conditions that gradually enabled change, the breakthrough came when German courts ceased to view Nazi genocide as an ordinary crime and approached it instead “as a special challenge [...] demanding legal innovation [...]”¹⁰ The innovation was investigator Götze’s theory of “functional participation,”¹¹ holding that unspecified participation as a guard in a death camp was *ipso facto* proof of complicity to murder.

In fact, as Prof. Douglas recognizes, the theory of “functional participation” (or at least some version of it) is not truly innovative as a theory of criminal liability. While its roots lay in the Anglo-American doctrine of conspiracy as this notion was applied to Nazi crimes at Nuremberg, numerous legal systems before 1945 had condemned participation in criminal associations. The British India Act No. 30 (1836) prescribed a life prison term at hard labor for anyone “proved to have belonged to a gang of thugs.” Article 266 of the French Penal Code (1944) likewise threatened with hard labor anyone who “affiliates with a combination formed, or participates in an alliance established for the purpose [of preparing or committing felonies] [...]”. Germany’s efforts to combat criminal associations date back to the German Penal Code of 1871, which criminalized “participation in an organization, the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged.” In the late 1920s, Weimar courts branded the German Communist Party a criminal organization, meting out sentences not only to its leaders but to the lowest echelons of the group, including a delivery boy and a courier. We sometimes forget that, more than two decades before the IMT at Nuremberg, the Weimar judiciary had characterized the Nazi Party as a criminal organization.¹²

At Nuremberg the notion of a “criminal organization” was closely linked with the theory of conspiracy. Both were the handiwork of Lt. Col. Murray Bernays, a lawyer in the War Department’s Special Projects Office. Drawing on US conspiracy law like the “Smith Act” (1940), which criminalized member-

10 Douglas, *The Right Wrong Man*, p. 10–15; idem, *Ivan the Recumbent, or Demjanjuk in Munich: Enduring the “last great Nazi war-crimes trial”*, *Harper’s Magazine*, March 2012, p. 52. (“That this belated understanding [of the exterminatory process] should coincide with the passing of the generation of the perpetrators is as ironic as it is unsurprising.”)

11 Douglas, *The Right Wrong Man*, p. 156.

12 See the discussion of these and other laws in UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, Buffalo 2006, pp. 304 ff.; *The Criminal Conspiracy in Japanese War Crimes Trials*, NARA, RG 0153, Entry 135, Box 0106, pp. 27 ff. Robert Jackson, the chief of the US prosecution team at Nuremberg, cited these and other precedents to support extending the law of conspiracy to the crimes of the major Nazi war criminals.

ship in any group advocating the violent overthrow of the government, Bernays argued that Nazi perpetrators could be charged not only with substantive offenses like war crimes but with membership in criminal organizations, the very purpose of which was to commit such acts.¹³ Bernays's conspiracy idea surfaced in Robert Jackson's subsequent Report to the President (June 6, 1945), in which he announced his intention "to establish the criminal character of several voluntary organizations which have played a cruel and controlling part in subjugating first the German people and then their neighbors." The charge of conspiracy/criminal organizations was subsequently incorporated into the Charter of the IMT, Articles 6 (Common Plan or Conspiracy) and 9 (criminal organization). When the IMT issued its indictment on October 6, 1945, it listed the 24 named defendants as well as six Nazi organizations: the *Reich* Cabinet, the Leadership Corps of the Nazi Party, the SS, the SD, the Gestapo, the SA, and the General Staff/High Command of the German military.¹⁴ In addition to war crimes, crimes against peace, and crimes against humanity, the defendants were charged with membership in one or more of these criminal organizations.

In his addresses to the IMT, Jackson expounded the four elements of collective criminality embodied in the conspiracy/criminal organizations charge. First, the members of the organization had to be bound together by "a collective, general purpose" or "a common plan of action." Second, the members must have joined voluntarily. Third, the aims of the organization were to commit acts listed as crimes in the IMT Charter, Art. 6. Fourth, it must be proven the members knew of the organization's criminal aims. Once the IMT had declared a Nazi organization to be criminal and each of the four elements had been proven against a defendant, the burden of proof shifted to him. He was now presumed guilty, although this presumption could be rebutted by proof negating one or more of the four elements.¹⁵

The IMT largely followed Jackson's framework of labeling certain Nazi organizations as "criminal" and convicting the accused for membership in them.¹⁶ However, the IMT judges insisted that membership alone would not be

13 John F. Murphy, Norms of Criminal Procedure at the International Military Tribunal, in: Georg Ginsburgs / V. N. Kudriavtsev, *The Nuremberg Trial and International Law*, Dordrecht 1990, p. 63; Bradley Smith (ed.), *The American Road to Nuremberg: The Documentary Record, 1944–1945*, Stanford, pp. 10 f.

14 International Military Tribunal, Indictment, reproduced in Michael R. Marrus (ed.), *The Nuremberg War Crimes Trial 1945–46: A Documentary History*, Boston–New York 1997, p. 58.

15 UN War Crimes Commission, *History*, pp. 305 ff.

16 The IMT declared as criminal only four of the six organizations proposed in the indictment: the Leadership Corps of the Nazi Party, the SD, the Gestapo, and the SS.

sufficient to convict a defendant. Rather, defendants could be convicted only when “they were personally implicated [as members of the organization] in” the crimes identified in Article 6. Absent this showing, defendants would be found not guilty. The proof requirement of an illegal act despite proven membership in a criminal organization would be enforced in both the IMT and proceedings before the US National Military Tribunal that followed, resulting in occasional acquittals.¹⁷

The ideas of group criminality and vicarious liability that underpinned the Allies’ approach at Nuremberg were interpreted quite differently by other courts after 1945. To a striking degree, these non-Nuremberg proceedings more closely anticipate the rationale in the 2011 Demjanjuk case, raising the intriguing yet unverified prospect that Götze and Walther were reaching back to these earlier trials for inspiration in drafting their own theory of functional participation. As the Allies were prosecuting the major war criminals at Nuremberg, the U.S. Army was conducting a parallel series of military commission trials centered at the former Dachau concentration camp near Munich. Most of these trials dealt with breaches of the Law of War committed at the major German concentration camps. What is notable about these trials is that the military prosecutors and judges devised a theory of liability independent of the Nuremberg proceedings. Rather than charge their defendants – most of who were concentration camp guards – with conspiracy, the military commissions charged them with participation in a “common design” to mistreat prisoners in the camp. The “common design” was the *sine qua non* of the prosecutor’s case at the Dachau “parent” case in November 1945: according to the chief prosecutor in his closing argument, “If there is no such common design then every man in this dock should walk free [...]. [T]he test to be applied is [whether a defendant] [...] did by his conduct, aid or abet the execution of this common design and participate in it?” At trial, the prosecution portrayed the Dachau concentration camp as a system engineered to inflict harm on the prisoners – a system implemented and enforced by all members of the camp staff. The prosecution could prove the guilt of a former guard through evidence that his duties necessarily involved him in promoting the common design of harassment and maltreatment of the prisoners. In effect, the Dachau parent case (as well as the subsequent Mauthausen parent case, held from March 29 – May 13, 1946) established a rule to be followed in all subsequent military commission trials – namely, that being a guard at a Nazi concentration camp created a rebuttable presumption

17 See, e. g., US v. Oswald Pohl et al. (the WVHA case), in which defendants Rudolf Scheide and Leo Volk were acquitted despite membership in the SS.

of guilt. Although not explicitly described as such, the Dachau trials held that concentration camps like Dachau, Mauthausen, Buchenwald, etc. were criminal organizations, the members of which were presumed to have committed war crimes *because that was their job*.¹⁸

The common design schema at the Dachau trials was not a synonym for the conspiracy doctrine at Nuremberg. The latter required evidence of the accused's meeting with his confederates to pursue an illicit purpose. Such direct contact among co-conspirators is far easier to prove when the accused is a high-ranking official serving in a position that generates a paper trail. Low-ranking concentration camp guards, by contrast, rarely leave paper trails probative of their involvement in a conspiracy; hence, that doctrine was deemed early on to be ill-matched to their crimes. Instead, the common design theory was adopted because it did not require evidence of a meeting; it required only, in the words of Black's Law Dictionary from which the idea was taken, proof of a "community of intention between two or more persons to do an unlawful act."¹⁹ Proof of assignment to the camp as a guard was enough.

The American Army was not the only national judicial body experimenting with the criminal organizations idea. In the postwar trials of top Nazi officials conducted by "Poland's Nuremberg," the Supreme National Tribunal (in Polish, *Najwyższy Trybunał Narodowy*, or NTN), Polish judges embraced a theory of systemic criminality that closely resembles the Army's "common design." In August 1944, the "Lublin Committee," the provisional government of Poland after Soviet liberation, issued a decree to authorize prosecution of Nazi perpetrators in Poland. An amended version of the decree (revised in December 1946) reflected the influence of the London Charter's criminal organizations charge. The new Article 4 provided that participation in a "criminal organization" established by Germany or its allied states was punishable by a prison

18 Quoted in UN War Crimes Commission, Case No. 60 – The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and thirty-nine Others, Law Reports of Trials of War Criminals, vol. XI, London: His Majesty's Stationery Office, 1949, p. 12. For a recent analysis of the US military commission cases tried at Dachau, see Tomas Jardim, *The Mauthausen Trial: American Military Justice in Germany*, Cambridge 2012.

19 Quoted in UN War Crimes Commission, p. 14. The "special findings" of the military commission in the Mauthausen case emphasized the inherently criminal nature of the concentration camp system, holding inter alia that "any official, governmental, military or civil, [...] or any guard, or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, [...] is guilty of a crime against the recognized laws, customs and practices of civilized nations and the letter and spirit of the laws and usage of war, and by reason thereof is to be punished." Quoted in *ibid.*, p. 15. See also Jardim, *Mauthausen Trial*, p. 182.

term of not less than three years or even the death penalty. § 2 of Article 4 defined as criminal any such organization which “aimed to commit crimes against peace, war crimes, or crimes against humanity,” or which used these crimes in the pursuit of other goals. As interpreted by NTN judges, Article 4 criminalized the same bodies which the Nuremberg IMT had done: the SS, SD, Gestapo, and the leadership of the NSDAP (the *Gauleiter*, *Kreisleiter*, *Ortsgruppenleiter*, and *Amtsleiter*). Thus, when the NTN held its trial of former Auschwitz commandant Rudolf Höss in Warsaw (March 1947), the indictment charged him inter alia with membership in two criminal organizations, the NSDAP and the SS.²⁰ In the Höss trial, the Poles remained within the parameters of Nuremberg’s definition of Nazi criminal organizations. By the time of the “2nd Auschwitz trial” in December 1947, however, the NTN sitting in Cracow struck off in a boldly innovative direction, declaring that the system of German concentration camps was itself a criminal organization. In their verdict, the NTN judges acknowledged they had enlarged the IMT’s definition of criminal organizations yet insisted they had the right to declare Nazi organizations criminal independently of the IMT’s judgment, so long as their definitions did not contradict the IMT’s findings. Insofar as the IMT in its verdict had referred to the camps as an instrument for committing war crimes and crimes against humanity, the subsequent declaration by another court that the administration and personnel of the camps amounted to a criminal organization did not contradict the IMT’s position.²¹

Given the prevalence of the “atrocities paradigm” at Nuremberg, the Dachau trials, and the Polish NTN, why didn’t the West Germans adopt it in their own Nazi prosecutions? The simple answer to this complex question is summed up in the words of the presiding judge in the Frankfurt Auschwitz trial, Hans Hofmeyer, who described the proceedings as “dealing here with a normal crim-

20 USWCC, Case No. 38: Trial of Obersturmbannführer Rudolf Franz Ferdinand Höss, Law Reports, p. 18. During the trial, the NTN judges focused on Höss’s membership in the SS inasmuch as Höss was not deemed to have been a member of the leadership corps of the NSDAP – the only echelon of the Nazi Party branded as criminal at Nuremberg.

21 Ibid., pp. 18–24. For recent scholarship on the NTN, see Alexander V. Prusin, *Poland’s Nuremberg: The Seven Court Cases of the Supreme National Tribunal*, *Holocaust and Genocide Studies* 24, n^o. 1 (September 2010), pp. 1–25; Michael J. Bazyler / Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust*, New York–London 2014, pp. 108 ff.; Włodzimierz Borodziej, “Hitleristische Verbrechen”: Die Ahndung deutscher Kriegs- und Besatzungsverbrechen in Polen, in: Norbert Frei (ed.), *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, Göttingen 2006, pp. 412 ff.; Kuretsidis-Haider et al. (eds.), *KZ Lublin-Majdanek und die Justiz*.

inal trial, may it have a [remarkable] background.”²² The Germans, in other words, believed that ordinary German criminal law and procedure would be adequate for their prosecutions of Nazi perpetrators. From late 1951 onward, when West German courts were vested with full jurisdiction over Holocaust-related offenses, death camp personnel would be charged with murder²³ either as principals or as accomplices. Guilt would not be attributed to them based on their membership in organizations – like the Nazi death camps – devoted to the genocide of European Jews. Rather, guilt or innocence would be determined by proof of individual acts of homicide within the camps. Particularly in death camp cases in which there was a paucity of documentary evidence,²⁴ this meant that eyewitness testimony clearly and reliably connecting individual defendants with homicidal crimes would be decisive.

Remarkably, German courts in the 1960s occasionally flirted with an expansive interpretation of criminal liability. In its 1964 review of the appeals filed by former guards at the Kulmhof camp, the German Supreme Court (*Bundesgerichtshof*, or BGH) set forth a rationale bearing an uncanny resemblance to the theory of functional participation in the Demjanjuk trial:

According to the findings, [...] solely through their membership the defendants had supported the killing of the victims by the *Sonderkommando* [at Kulmhof], which had been formed expressly to eradicate the Jewish population of Poland [...]. The kind of tasks entrusted to them in the implementation of individual [acts of killing] is therefore – at least in this context – without significance.²⁵

By 1969, however, the BGH had recanted its earlier sympathy with functional participation. In its review of appeals from the Frankfurt Auschwitz trial,

22 Quoted in: Thomas Horstmann / Heike Litzinger, *An den Grenzen des Rechts: Gespräche mit Juristen über die Verfolgung von NS-Verbrechen*, Frankfurt/M. 2006, p. 9. As Gerhard Werle affirms, the West Germans’ decision to charge Nazi crimes as violations of German law was based on the familiar maxim, “Was damals Recht war, kann heute nicht Unrecht sein” (“What was law at the time cannot be illegality today”). Werle, *Holocaust als Gegenstand*, p. 2533.

23 Sec. 211, German Penal Code.

24 Due in part to efforts by the camp staff to destroy documentation in the waning months of the war; see, e. g., Interview with Dieter Ambach, in Kuretsidis-Haider et al. (eds.), *Das KZ Lublin-Majdanek und die Justiz*, p. 218.

25 BGH, Judgment of November 25, 1964, 2 StR 71/64, quoted in Thilo Kurz, *Paradigmenwechsel bei der Strafverfolgung des Personals in den deutschen Vernichtungslagern?*, *Zeitschrift für Internationale Strafrechtsdogmatik* 3 (2013), p. 122 (translation by the author). See also the discussion and citation to other German cases sympathetic to functional participation in Douglas, *The Right Wrong Man*, p. 155.

the high court in effect held that mere presence at Auschwitz as a guard was not enough to convict; an individual homicidal action by the defendant had to be proven.²⁶ In the wake of this verdict, West German courts followed the BGH's evidentiary rule until 2011.

Well before the Supreme Court's reaffirmation of the *Einzeltat* requirement in 1969, German courts were already grappling with the Nazi death camps using the tools of West German domestic law. In the 1964 trial of eight former staff members of the Belzec death camp, seven were acquitted because their defense of duress could not be refuted by surviving witnesses. (The only defendant convicted, Josef Oberhauser, was found guilty only because he enjoyed command authority within the camp.) Far more successful were the Auschwitz and Treblinka trials. The Frankfurt Auschwitz trial (1963–1965, twenty-two defendants) ended in a conviction rate of 77,3 %, including six defendants sentenced as perpetrators of murder to life-long prison terms. The Düsseldorf Treblinka trial (1964–1965, fourteen defendants), buoyed by powerful and consistent eyewitness testimony, achieved a conviction rate of 90 %, sending four of the accused to prison for life.

The outcomes of the Kulmhof, Sobibor, and Majdanek trials were uneven but on balance disappointing. Between 1962 and 1965, four trials of some thirteen camp guards from the Kulmhof death camp were held in the Bonn *Landgericht*, leading to a 50 % acquittal rate and no life-long prison sentences among the convicted (all were considered accomplices rather than principals). The *Landgericht* Hagen convicted six of the eleven former Sobibor guards in 1966; among the convicted, only Karl Frenzel was deemed a principal (*Täter*) and given a life sentence.²⁷ The *Landgericht* Düsseldorf acquitted four of the twelve Majdanek accused in 1979; in 1981 the court convicted seven of the remaining defendants and acquitted the eighth. Only Hermine Ryan received a life prison term, while her co-defendants were given anywhere from three to twelve years. In view of the enormous amount of time and effort invested in the trial, many German observers, including the prosecutors, were crestfallen with the result. A banner was unfurled outside the courtroom after the verdicts

26 BGH, Judgment of February 20, 1969, 2 StR 280/67, reprinted in: C. F. Rüter / Dick W. de Mildt, *Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945–1999*, Vol. XXI, Serial Number 595b, Amsterdam 2012.

27 Michael Bryant, *Eyewitness to Genocide: The Operation Reinhard Death Camp Trials, 1955–1966*, Knoxville 2014.

were announced, bearing the motto “The Majdanek Trial. A Picture of Misery of Judicial Praxis.”²⁸

Wherever in these trials an accused was acquitted, the cause was failure to prove a specific criminal act committed by the defendant. Eyewitness testimony, while nearly always a necessary condition for convicting ex-guards in death camp trials, was not always sufficient: acquittals occurred even in the midst of trials bolstered with hundreds of witnesses as in the Majdanek and Auschwitz cases. This was also the evidentiary standard during the first decade of the 2000s, when the Demjanjuk case was being assembled for prosecution. In 2003, the head of the “Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes“ (German: *Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen*) Ludwigsburg, Kurt Schrimm, wrote about Demjanjuk: “Guard: Trawniki, Okzow, Majdanek, Subobir [sic!], and Flossenbürg; proffered documents do not support an allegation of individual criminal wrongdoing.”²⁹ Several years later, shortly before the trial began, a leading Dutch expert on Nazi trials puzzled over why the Germans would prosecute a former death camp guard without proof he had committed a homicidal act, and predicted Demjanjuk’s acquittal. Both Schrimm and the Dutch expert knew that no German court in the past half-century had accepted the theory that service in a death camp was enough to convict an accused guard of murder.³⁰

And yet, it did. By 2011, the German judiciary was ready to accept the logic of the atrocity paradigm in favor of the ordinary crime model that had dominated previous death camp trials. Lawrence Douglas tends to vacillate on the reason for this *volte face*. In an article published on the trial in Harper’s magazine, he opined that the German judiciary’s “belated understanding” of the “simple, terrible logic of the exterminatory process” coincided “with the passing of the generation of the perpetrators” – a fact “as ironic as it is unsurprising.”³¹ Similarly, in his monograph on the trial, Douglas suggests that the disappointing results of West German prosecutions of Nazi crimes, particularly in the 1950s, were due at least in part to the “bad faith” of German jurists.³² However, elsewhere in his book, he derides the critical view as “naïve” and “crudely de-

28 Claudia Kuretsidis-Haider, Majdanek und die deutsche Justiz, in: Kuretsidis-Haider et al. (eds.), *Das KZ Lublin-Majdanek und die Justiz*, pp. 172 f.

29 Quoted in Douglas, *Right Wrong Man*, p. 152.

30 *Ibid.*, p. 160.

31 Douglas, *Ivan the Recumbent, or Demjanjuk in Munich*, p. 52.

32 *Idem*, *The Right Wrong Man*, p. 176.

terministic.”³³ For Douglas, a structuralist approach to Nazi trials in German courts best explains the state of German law, both before the Demjanjuk trial and afterward. “[The change] never would have happened without the stubborn exertions of the OSI and the Central Office” [two offices deeply involved in the Demjanjuk investigation]. This view, however, begs the question of why German judges – and not just in Munich – should have been so receptive to these “stubborn exertions” that they were willing to overturn decades of settled law and risk being reversed on appeal.

The point is not that Douglas is wrong; I think his thesis is quite defensible. The point is that it is only part of the story. Undoubtedly the research of OSI and Central Office officials affected the outcome. The passing of a generation closely connected to the events of World War II assuredly played a role (according to one poll done in 1964, 63 % of men and 76 % of women in West Germany opposed trials of accused Nazis).³⁴ I would like to suggest a further factor that may have contributed to the change registered in the Demjanjuk verdict: the openness of German law to external legal standards that have increasingly altered the very nature of the German legal system.

Since the emergence of the Federal Republic out of the Allied Trizone in 1949, German civil, criminal, and administrative law³⁵ have been at the crossroads of European and international legal principles. In the late 1950s, as the West Germans were reengaging with Nazi trials, the European Economic Community (EEC) was established, firmly anchored by France and Germany as founding members. Thereafter the EEC formed an executive authority, the Commission, which implemented community policies; a Council of Ministers, which passed community law; a European Parliament, at its origin a consultative body consisting of delegates from the national legislatures of member states; and the European Court of Justice (ECJ), which decided cases and resolved disputes involving community law. In landmark verdicts issued in 1963

33 Ibid., p. 256.

34 Horstman / Litzinger, *An den Grenzen*, p. 21.

35 Due to space constraints, my discussion will focus chiefly on EU and international legal standards relevant to criminal trials. For further reading on the influence of EU civil law on the German legal system, see the analysis of the 2002 Reform of the German Civil Law Code (BGB) in: Mathias Reimann, *The Challenge of Recodification Worldwide: The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations*, 83 *TUL. L. REV.* 880-915 (2009). For the EU’s influence on German administrative law, see Georg Nolte, *General Principles of German and European Administrative Law: A Comparison in Historical Perspective*, *The Modern Law Review* 57 (March 1994), pp. 191–212.

and 1964, the European Court of Justice asserted the supremacy of EEC law over the domestic law of community nations.

The two foundational principles of the European Court of Justice are the doctrines of “direct effect,” which states that EU treaties and legislation are directly binding on the citizens of member states regardless of their national law, and “supremacy,” holding that EU law prevails over the law of member states that might conflict with it. Although both of these principles have at times brought the ECJ into sharp disagreement with German courts, the German legal system has overall been remarkably deferential to EU law. Similarly, the Germans have adapted their law when necessary to the requirements of the European Convention on Human Rights and its interpreter, the European Court of Human Rights (ECtHR) in Strasbourg. The Germans have been so amenable to the substantive concerns of the European Convention that, in the two years preceding the Demjanjuk verdict, the ECtHR rendered adverse judgments against Germany in only a handful of instances. One reason for Germany’s success in defending these cases before the ECtHR is the civil rights filtering process under German law: the Federal Constitutional Court (FCC), Germany’s preeminent authority on the Basic Law, reviews constitutional complaints before they reach Strasbourg for decision. In 2010 and 2011, the FCC found not one case in which basic rights had been violated – a remarkable fact indicative of the degree to which German courts at all levels have internalized European standards of basic rights.³⁶

Similar trends respecting the interpenetration of German and international criminal legal standards are observable. One of the areas of German law suggestive of international influence is the role of the victim in the criminal trial. As a German legal expert described it in a 2011 article, we are witnessing the dawning of the “era of the victim” in German criminal procedure – an era in which concerns to integrate the victim of crime into the trial process, as well as to seek restitution for victims’ losses, increasingly displace the previous emphasis on rehabilitating the offender.³⁷ The emergence of justice for victims as a priority of the criminal trial has tracked parallel developments in international criminal law. The Statute of the International Criminal Court (ICC), Art. 68 (3),

36 Sebastian Müller / Christoph Gusy, *The Interrelationship between Domestic Judicial Mechanisms and the Strasbourg Court Rulings in Germany*, in: Dia Anagnostou (ed.), *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy*, Edinburgh 2013, pp. 27–44.

37 Christoph Safferling, *The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?*, *International Criminal Law Review* 11 (2011), pp. 183–215.

explicitly enjoins the Court, “where the personal interests of the victims are affected,” to “permit [victims’] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.”³⁸ The ICC Appellate Chamber has interpreted Art. 68 (3) to guarantee victim participation as early as the investigation stage of the case.³⁹ We might debate the causative direction in this convergence of international and German national law pertaining to victims’ rights – that is, whether the Germans acquired the new emphasis from international law or vice-versa. Regardless, it seems clear that the affinity, far from being accidental, has arisen from a genuine interaction of international and German procedural norms.

The receptivity of German law to outside influence, be it from Strasbourg or The Hague, may help account for the stunning decision in the Demjanjuk trial. If memes beyond German law have been transformative of it, why not the idea of a “joint criminal enterprise?” Joint criminal enterprise doctrine (sometimes referred to as the “common purpose doctrine”) is a new wine skin containing vintage wine – namely, the “common design” construct of Nazi war crimes trials of the post-war era.⁴⁰ The modern reincarnation of “common design” as JCE occurred on the cusp of the new century, when the International Criminal Tribunal for Yugoslavia’s Appeals Chamber reviewed the case of Duško Tadić, a member of a Serbian paramilitary force accused of killing five Bosniak civilians. The trial court had acquitted him for lack of evidence that he had directly participated in the murders of the five villagers. In its decision reversing Tadić’s acquittal, the ICTY Appeals Chamber revived the notion of a “common criminal purpose” from post-World War II trials. The Appeals Chamber classified “common purpose” into three types: (1) cases in which all of the accused, possessing the same criminal intention, acted in accordance with a common design; (2) concentration camp cases (e. g., Dachau and Belsen), in which the defendants, all members of the camp hierarchy, “acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war

38 Article 68, Protection of the victims and witnesses and their participation in the proceedings, Rome Statute of the International Criminal Court, https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [accessed July 29, 2016].

39 ICC Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, 01/04 – 01/06, Decision on victims’ participation, 18 January 2008, para. 108.

40 International criminal law scholars Beth Van Schaack and Ronald Slye trace JCE to “the post-WWII period involving concentration camps and other institutions.” Beth Van Schaack / Ronald Slye, *International Criminal Law and its Enforcement: Cases and Materials*, New York 2010, p. 815. They might have added the theory of systemic criminality adopted by the NTN trials in Poland.

crimes”; and (3) cases in which one of the accused commits an act outside the common design that is nonetheless a foreseeable result of carrying the plan into effect. Thus, while no individual acts of homicide could be proven against Tadić, the Appeals Chamber insisted he should have been convicted of war crimes and crimes against humanity. The evidence proved that he intended to support the criminal purpose of removing the non-Serb population from the Prijedor region. In carrying out this plan, the killings of non-Serbs was foreseeable (JCE #3, above).⁴¹

ICTY indictments in the aftermath of the Tadić appeal until 2004 were studded with allegations of JCE. As much as 64 % of all indictments filed mentioned JCE, while others accusing defendants of acting “in concert” have been glossed to implicate JCE doctrine, thereby raising the percentage to 81 %.⁴² The stringent criteria for proving rape as a crime against humanity have enticed prosecutors at both the ICTY and International Criminal Tribunal for Rwanda (ICTR) to categorize rape and sexual violence as instances of JCE #3 – thereby enabling conviction even where an individual act of rape has not been proven. As scholar David Crowe notes, the ICTR judges have made frequent use of JCE doctrine as it has emerged from ICTY trials, characterizing JCE as a “mode of liability” rather than a crime itself.⁴³

JCE #2 relating to international crimes committed in concentration camps bears a striking resemblance to the Demjanjuk court’s theory of functional participation. Sobibor, of course, was not a concentration camp, but the single-minded purpose of the death camp – to murder every last Jew stepping foot within its precincts – lends an *a fortiori* cogency to treating Sobibor like a joint criminal enterprise. Service as a concentration camp guard would inevitably involve you in mistreating prisoners; however, because concentration camps were not given over solely to the purposes of genocide, a concentration camp guard could not be presumed to have been an accomplice to murder without proof of an individual criminal act. On the other hand, if you worked as a guard at a death camp like Sobibor, in the performance of your duties you must neces-

41 Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement (July 15, 1999), reproduced in *ibid.*, pp. 817–827.

42 Allison Marston Danner / Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of international Criminal Law, 93 Calif. L. Rev. 75 (2005), p. 107, cited in *ibid.*, p. 831.

43 David M. Crowe, War Crimes, Genocide, and Justice: A Global History, New York 2014, p. 357. For the ICTR’s construal of JCE, see the verdicts in Nchamihigo (ICTR-01-63-T) and Mpambara (ICTR-01-65-T).

sarily have supported the criminal design of the Nazis to exterminate the Jews. Q. E. D.

The Munich *Landgericht's* judgment does not refer to JCE under international law as a factor in its consideration.⁴⁴ So far as I know, neither Thomas Walther, Kirsten Götze, nor the *Strafkammer* judges have recounted the intellectual and historical foundations underlying their theory of functional participation. In the final analysis, it hardly matters. The permeability of modern German law to European and international conceptions is not an immediate cause of the Demjanjuk bombshell; it is more akin to Leo Katz's "mere conditions" behind historical events. Nonetheless, it helps explain why German judges would decide in 2011 to change course. On the view I'm advancing here, the minds of German jurists were conditioned by the broad, cosmopolitan environment in which German law has existed since the rise of the EEC in the 1950s. Consciously or not, German jurists are influenced by these categories and concepts, and from time to time these ideas effect a change in the substance and procedure of German law. The Demjanjuk verdict was one such occasion. In 2011 the Federal Republic of Germany arrived at the view held as long ago as 1945 that the worst of the Nazis' crimes was a criminal plan to annihilate Europe's Jewish population. Participation in carrying out such a design by necessity involved criminal wrongdoing of the worst, most heinous kind. With its verdict in Demjanjuk, Germany ceased to be a country on its own *Sonderweg*, its own peculiar path, using the limited tools of ordinary law to deal with extraordinary crimes. For the first time, the atrocity paradigm flashed like a meteor over a Nazi trial in a modern German court. There is moral grandeur in this turn, even if it occurred far too late fully to satisfy the thirst for justice.

44 The reader will note that JCE appears only in the case law of the ICTY and ICTR; neither of the Statutes establishing the two bodies mention it. Neither does the ICC recognize JCE doctrine; rather, it adopts the theory of "co-perpetration" (in German, *Mittäterschaft*). Van Schaack / Slye, *International Criminal Law*, p. 835.