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Ongoing German prosecution of World War II Nazi war crimes*

Bringing Nazi war criminals to justice today raises vexing legal, moral and personal questions. Former war crimes prosecutor Judge Konstantin Kuchenbauer of the Munich Higher Regional Court believes that if we don't wish to forfeit the justification to investigate and prosecute future war crimes and genocide, we must continue to investigate and prosecute the war crimes of the past.

I. Introduction

The National Socialist (hereinafter "NS") war crimes of World War II were committed more than 60 years ago. However, the investigation and prosecution of such crimes still continues in Germany to the present day.

From 1945 through January 2005 public prosecutors investigated 106,496 war crime suspects, of which 6,498 were found guilty and sentenced as follows:¹

Death penalty 13

Life imprisonment 167

Imprisonment 6,201

Fine 115

Warning according to the law applicable to juveniles 1

No punishment 1

One of the most famous Nazi hunters, *Simon Wiesenthal*, stated at his retirement in 2003: "My job is done. I found the mass murderers I was looking for. I survived all of them. Those whom I didn't look for are too old and sick today to be pursued legally."²

On the other hand, in July 2002 the *Simon Wiesenthal Center* began its "Operation last Chance" campaign to bring Nazi war crime suspects to justice. *Dr. Efraim Zuroff*,³ director of the Center's Israel office, stressed once more: "... despite numerous obstacles much can still be achieved in bringing Nazi war criminals to justice . . ."⁴

Therefore one may ask: Is it still possible to find and secure evidence, to find witnesses and suspects and to prefer public charges

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1 Letter of the Central Office Ludwigsburg of 24 May 2006 to the author.

2 BBC News, 18 Apr. 2003, <http://news.bbc.co.uk/1/hi/world/europe/2959591.stm> (last visited 23 Dec. 2007).

3 *Efraim Zuroff*, *Occupation: Nazi Hunter: The Continuing Search for the Perpetrators of the Holocaust* (1994).

4 *Efraim Zuroff*, Too Late? 45 *Shalom Magazine*, Apr. 2006 (<http://www.shalom-magazine.com>, last visited 16 Jan. 2008) (hereinafter: *Zuroff*, *Shalom Magazine*); *Efraim Zuroff*, Can Nazi War Criminals Be Prosecuted in the 21st Century? 41 *Justice* 12 (2005).

against suspects 85 to 90 years old? Should we even continue to investigate these crimes?

This article reflects on the difficulties in practice of prosecuting these crimes and will attempt to provide answers to those questions.⁵

II. Legal foundations

1. The principle of mandatory prosecution

The principle of mandatory prosecution is based on Section 152 subsection (2) of the German Code of Criminal Procedure (StPO).⁶ If there are sufficient factual indications for a crime of murder, German public prosecutors have no legal discretion but to open an investigation. However, they are not required to research history without probable cause; it is not their function to clear up history but rather to prosecute crimes.

How can we obtain such factual indications for a crime of murder? Some examples:

- A newspaper article reported on massacres perpetrated by the 16th SS Division in St. Anna and Marzabotto, Italy, in 1943, and a suspect living near Munich was mentioned. We started investigations in cooperation with our Italian colleagues. Meanwhile public charges had been preferred and some of the German accused had been sentenced in absentia.
- In 1999, a witness who had seen a TV report concerning *Anton Malloth*, a former guard of the "Kleine Festung Theresienstadt," went to a Czech police station and gave a statement against him. We received the written statement and started investigations.

2. Statute of limitations

The prosecution of murder in Germany was previously limited to 20 years after the commission of the crime. In March 1965 a very serious debate was held in the Bundestag (German Federal Parliament) on whether or not to ban the prosecution of NS murder crimes by statute of limitations. The Bundestag found a compromise: the beginning of the period of limitation was fixed at 31 December 1949. On 26 June 1969 the previous period of limitation was extended to 30 years. Finally on 3 July 1979 it was abolished altogether. Today, in Germany the investigations of only the crimes of murder and, since 2002, certain crimes against International Law – including genocide, crimes against humanity and war crimes – are not precluded by a statute of limitations.⁷ The law also

5 See: *Die juristische Aufarbeitung der NS-Vergangenheit in der DDR und der Bundesrepublik Deutschland* (Ministerium der Justiz des Landes Sachsen-Anhalt et al. ed., 2004); *Nuremberg Forty Years Later: The Struggle against Injustice in Our Time* (Irwin Cotler ed., 1995); *Allan A. Ryan, Quiet Neighbors: Prosecuting Nazi War Criminals in America* (1984); *Alan S. Rosenbaum, Prosecuting Nazi War Criminals* (1993); *Probleme der Verfolgung und Ahndung von nationalsozialistischen Gewaltverbrechen II* Deutscher Juristentag, Verhandlungen des 46. Deutschen Juristentages in Essen 1966 C 7-65 (1967); *Zuroff*, supra note 3.

6 *Strafprozeßordnung [StPO]* [German Code of Criminal Procedure] as promulgated on 7 Apr. 1987, *Bundesgesetzblatt [BGBl.] [Federal Law Gazette]* I p. 1074, 1319, section 152 subsection (2): "Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offences, which may be prosecuted, provided there are sufficient factual indications..."

7 *Strafgesetzbuch [StGB]* [German Penal Code] as promulgated on 13 Nov. 1998, *BGBl.* I p. 3322, section 78 subsection (2): "Serious criminal offences under Section 211 (murder) are not subject to a statute of limitations"; *Völkerstrafgesetzbuch [VStGB]* [German Code of Crimes against International Law] *BGBl.* I p. 2254, section 5: "The prosecution of serious criminal offences pursuant to this act and the execution of sentences imposed on their account shall not be subjected to any statute of limitations."

distinguishes between the crimes of manslaughter and murder. A person who kills another human being but without being a murderer commits the crime of manslaughter. A murderer is one who kills another human being for certain reasons or in a certain way, such as for base motives, treacherously or cruelly.

This means in practice that all crimes committed during World War II that are not murder (for example, manslaughter, rape, bodily harm and pillage), may no longer be prosecuted.

III. Agencies

In Germany different agencies investigate and prosecute NS World War II crimes.

1. Public prosecutors and police units

The investigations of such crimes cannot be undertaken by regular public prosecutors or regular police units. These crimes are unusual in that normally there is no murder weapon, no fingerprints or even the *corpus delicti*. One must investigate the structure of the combat unit and determine who ordered the mission or the killing of the civil population, as well as ascertain the political and historical background.

Thus to investigate these crimes properly, specialization is required: not only juridical but also historical skills; language skills; experience in conducting research in foreign archives; a sense of understanding of these crimes; and a knowledge of contemporary history.

To be successful in clarifying these crimes the public prosecutors must work closely with the relevant police units.

2. Central Office for the Investigation of National Socialist War Crimes

The Central Office for the Investigation of National Socialist War Crimes⁸ (hereinafter: “Central Office”) was established by the state ministers and senators of justice of the Federal Republic of Germany on 1 December 1958, and is headquartered in Ludwigsburg, in the state of Baden-Württemberg.

At first its competence was restricted. The Central Office could only investigate NS crimes of violence committed beyond Germany’s borders and crimes against the civil population; regular war actions and crimes committed in concentration camps were excluded. In 1964/1965 crimes committed within Germany were added as well as investigations concerning the National Socialist Party and the highest offices of the “Third Reich” plus certain crimes against prisoners of war.

The Central Office is not a public prosecution authority but rather a special office that assists the law enforcement bodies. Its officials cannot apply for search or arrest warrants nor can they prefer public charges. It is their task to collect and evaluate all available evidence related to Nazi crimes in Germany and abroad.

Having collected evidence, the Central Office passes its files to the appropriate public prosecution office to initiate criminal proceedings. The public prosecutors must inform the Central Office about important results of their investigations and their final conclusion – termination of the case or preferring public charges.

IV. International co-operation

In order to successfully investigate Nazi crimes, German prosecutors are dependent on international cooperation as most of the crimes that are now being investigated were committed abroad.

The best way to achieve cooperation is not only via a formal request for international legal assistance, but also by directly contacting colleagues abroad, by traveling abroad, and by interviewing the witnesses there.

There are a number of specialized offices abroad with which the German prosecutors cooperate, including the U.S. Office of Special Investigation, the Scotland Yard War Crimes Unit and the Chief Commission for the Prosecution of Crimes against the Polish Nation.

To investigate successfully, we must also rely on sources of information from non-governmental human rights organizations such as the *Simon Wiesenthal Center*, which produces the “Annual Report on Worldwide Investigation and Prosecution of Nazi War Criminals” and which, as noted above, has initiated the “Operation last Chance” for the purpose of finding the last NS war crime suspects.

V. Finding and securing evidence

The investigation of NS War Crimes relies on the following types of evidence:

1. Plea of guilty

This type of evidence is only a theoretical one. To the best of my knowledge no Nazi war crime suspect has ever confessed his atrocities. When we confronted suspects with overwhelming evidence, they denied they were even present at the scene or, if they admitted to being present, they minimized the significance of their actions or claimed they had been acting under orders.⁹

2. Witnesses

The German legal system permits both eyewitnesses and – in contrast to the Anglo-American law system – hearsay witnesses. This is a very important, but also a problematic type of evidence.

On occasion a witness independently contacts the police or the public prosecutor’s office and provides a statement. In other cases we can examine older court records concerning the same massacre or the same combat unit to find witnesses. We can also search in the newspapers or similar media.

Most of the witnesses are very old and suffer from various diseases. They have difficulty in recalling events that occurred decades ago. Usually they remember the central issues of a crime but not the details. On the other hand jurists, for sound legal reasons, need the facts in detail.

For some witnesses it is a psychological problem to recall the past, to bring to mind once again the massacres and cruelties; long lasting interrogations are a physiological burden for the witnesses as well. Sensitive skills are required to motivate them to provide their statement. One must be very patient and build up an atmosphere of confidence.

Most of the witnesses that we located for the *Malloth* and *Niznansky* cases (see below) lived abroad and were infirm. German law requires witnesses to appear in court and give their statement during the main hearing. This means organizing their travel to Germany accompanied by relatives, physicians and policemen. If their appearance in person is impossible, the court can ask for legal assistance and interview them abroad or order an interrogation via audio conference. We did both in the *Niznansky* case.

If a witness has passed away, we can use earlier written statements given to the police, the public prosecutor or the court as evidence. Problems may arise if these statements were made in a jurisdiction

⁸ Willi Dreßen, Die Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung von NS Verbrechen in Ludwigsburg, 6 Dachauer Hefte 85 (1990).

⁹ See Allan A. Ryan, supra note 5, at 336.

whose legal system is quite different from ours, such as a communist one. Such statements must be checked very carefully to determine whether or not they had been created in a legal way. Merely the suspicion that the witnesses might have been influenced for political reasons could, in certain circumstances, affect the strength of the evidence, but there is no legal reason to reject the evidence completely. There is no consensus that evidence collected in countries of the former Eastern Bloc is per se secondary evidence.

We had no single case where eyewitnesses gave a false statement. But we must assess the credibility of a witness very carefully because it is accepted that witnesses may be wrong and lose their way. On the other hand, we had some indications that witnesses close to the perpetrators contacted each other to coordinate their statements.

3. Documents

Documents might be the best evidence we have. But it is very difficult to find the relevant documents that may be dispersed around the world in different archives. Starting our search in Germany we first contact the archive of the Deutsche Dienststelle¹⁰ and the Berlin Document Center.

Since the fall of the Iron Curtain in 1989/1990, it has become much easier to search archives in the countries of the former Soviet Bloc, where a veritable treasure trove of evidence may be found. Unfortunately these archives are sometimes poorly organized.

We sometimes find new documents. The United States has declassified millions of documents in accordance with the Nazi War Crimes Disclosure Act 1998. In February 2003 the Vatican opened secret Nazi files, and in April 2006 Germany opened the huge International Tracing Service archive of Nazi records at Bad Arolsen relating to concentration camp inmates.

Other sources of documents include those found during a search of the domicile of suspects or witnesses based on a search warrant, which may include diaries, photos and letters from one veteran to another. Other useful evidence includes the records of former court hearings, for example the Nuremberg War Trials and the succeeding trials.

4. Historical Experts

The prosecution of Nazi war crimes cannot be successfully undertaken without the help of historical experts.¹¹ However, we must realize that history and justice differ in their evaluation and use of evidence. While prosecutors and judges are interested in using evidence to prove the guilt or innocence of a suspect, historians interpret and analyze events. The *modus operandi* is different as well. If jurists cannot prove a suspect's guilt, they must invoke the principle of *in dubio pro reo* ('Giving the defendant the benefit of the doubt'); historians, however, can describe a truthful or possible narrative of historical events.

Public prosecutors and judges should give historians exact and detailed instructions, for example to search archives and to analyze documentary evidence, to authenticate documents or to assess the credibility of witnesses or of the suspect in the light of historical circumstances. The judge is not bound to accept the expert's statement; it is his task to verify the expert's conclusions.

¹⁰ See http://dd-wast.javabase.de/frame_e.htm

¹¹ See *Erich Haberer*, *History and Justice: Paradigms of the Prosecution of Nazi Crimes*, 19 *Holocaust and Genocide Studies* 487-519 (2005).

5. Scene of the crime

To document the scene of the crime is very important in the investigation of ordinary murder prosecutions. However, in our cases, it is very difficult after decades to locate the exact place where the crime was committed, and we must consider that the surroundings may have changed. We thus must use old real estate registers, old photographs or the detailed descriptions of a witness.

VI. Investigations against Anton Malloth and Ladislav Niznansky

1. Anton Malloth

Anton Malloth, born in 1912, was a former guard of the Kleine Festung Theresienstadt (a section of the Theresienstadt concentration camp) from 1940 until January 1945. Thousands of European Jews died there and thousands more passed through on their way to Auschwitz or other extermination camps.

In 1948 *Malloth* was sentenced in absentia to death by the People's Court of Leitmeritz, Czechoslovakia, for murder and various other crimes that he committed in and around the "Kleinen Festung."

In late 1948 *Malloth* was arrested in Austria based on a warrant of arrest filed by Czechoslovak authorities, but he was released because there had been insufficient evidence for his extradition. Because his place of residence was not known, the Austrian law enforcement bodies closed the case of *Anton Malloth* in 1963.

In Germany, the Dortmund Public Prosecution Office investigated *Malloth* for suspicion of murder in 756 different cases. This investigation lasted for more than 20 years, starting in 1970, but in 1999 that office finally closed the case because of lack of evidence.

In 1988 *Malloth* was deported from Italy to Germany, after which he lived in a Munich nursing home.

In late 1999 we received a statement from a Czech witness, via legal assistance, that *Malloth* without any reason shot a harvester in a cauliflower field in September 1943.

We interrogated several witnesses in the Czech Republic, searched archives, took photos of the scene of the crime and investigated two more crimes inside the "Kleinen Festung." *Malloth* was suspected of having, in January 1945, ordered two inmates to disrobe and of ordering two other inmates to pour water over them so as to kill them slowly by freezing. Finally *Malloth* was suspected of having slain another inmate with a wooden club for having not stood properly during an inspection.

On 25 May 2000 *Malloth* was arrested based on a warrant of the Munich District Court and on 12 December 2000 we preferred public charges to the Regional Court Munich I for two crimes of murder and one crime of attempted murder. On 23 April 2001 the main hearing began and on 30 May 2001 *Malloth* was convicted of both murder and attempted murder and jailed for life. In the case of killing by freezing he was acquitted for factual reasons because a prosecution witness could not precisely describe whether *Malloth* ordered the execution or only stood nearby during this cruel event.

On 21 February 2002 the German Federal Court of Justice rejected *Malloth's* appeal of law and the Regional Court's verdict was upheld. *Malloth* died at the end of October 2002; some days earlier, he had been set free.

2. Ladislav Niznansky

Ladislav Niznansky, born in 1917, was a former Slovak army captain who at first supported the Slovak National Uprising in 1944; after his capture by German troops he changed sides and took

charge of the Slovak section of an anti-partisan Nazi unit named Edelweiß.

In 1962 the Slovak District Court Banska Bystrica convicted *Niznansky* of the January 1945 shooting and killing of villagers of Ostry Grun and Klak, two small communities in the Slovak mountains, and of 18 Jews found hiding in three bunkers in a forest near the Slovak village of Ksina. The court sentenced him to death in absentia.

In the 1960s the Public Prosecution Office Munich I opened an investigation against *Niznansky* because of both massacres, but terminated the case because of lack of evidence. In 2001 we received an inquiry from the Slovak authorities about *Niznansky* and reopened the case. *Niznansky*, meanwhile, had become a German citizen in 1996.

We traveled once to the Czech Republic and three times to Slovakia to interview several witnesses, to search archives and to examine the scene of the crime.

In January 2004 the District Court Munich filed a warrant of arrest against *Niznansky* and he was arrested. On 3 March 2004 public charges were preferred in the Regional Court Munich I. The main hearing started on 9 September 2004, lasted 46 days and concluded on 19 December 2005. During the main hearing *Niznansky* was released because a witness for the prosecution gave a contradictory statement. Although the public prosecution office demanded life imprisonment, he finally was acquitted for lack of sufficient evidence.

VII. Significant problems and lessons learned from the investigations

- It is still possible to investigate NS crimes, to find and secure evidence, to prefer public charges and to get suspects sentenced. It might be difficult, but we have a moral and legal obligation to attempt to do so.
- To prosecute NS crimes is a full time job. One must investigate not only at home but abroad. One must ask for international legal assistance and contact foreign governments. One must learn how to associate with journalists and the media and one must interview very old witnesses. A highly motivated and skilled team of investigators is essential.
- Most of the crimes were committed abroad. To read foreign documents and interview foreign witnesses cannot be done without the help of translators and interpreters. This caused several problems as it is very difficult to properly interview a witness if you are not able to speak directly with him or her.
- If the suspects are in pre-trial detention, they usually argue that they are unable to be held for medical reasons. During the main hearing they often claim that they are medically incapable of withstanding the proceedings. Thus medical experts must be called in to examine them.
- Normally you cannot expect a plea of guilty.
- There are problems not only in finding evidence but also in presenting the evidence to the court. To motivate old and infirm witnesses to come to court, especially from abroad, demands great skill. One must develop a system to care for these people. Some of the witnesses were anxious because they did not understand court procedures. This means that the witnesses must be prepared, but not influenced. If you cannot motivate them to appear in court you could propose an audio or video conference or an interrogation in their homeland.

- There is an increasing problem of whether to use evidence whose source is in a former communist country. This evidence should not be rejected out of hand; rather, each piece of evidence must be examined carefully to determine whether it was improperly influenced.

- Another factor must not be underestimated: The courts no longer have practical experience in handling these cases.

- The investigations and the main hearing will attract worldwide media attention. This attention may help in bringing forth additional evidence, but could just as well endanger the main hearing, especially by influencing lay judges.

- Finally, it is a very heavy psychological burden for all persons involved in the criminal proceedings to investigate and prosecute these crimes of murder.

VIII. Should we continue investigating the last Nazi war criminals?

These crimes were committed more than 60 years ago. It may be very difficult to find evidence to prefer public charges. There may no longer be any reason to prosecute and sentence very old men or women. Public opinion may no longer take interest in these crimes. Yet these arguments are not convincing. Why?¹²

- The principle of mandatory prosecution exists in Germany. If there is sufficient factual indication for a crime we must investigate; murder is not exempt due to a statute of limitations.

- Advanced chronological age alone is not an acceptable reason to terminate our investigations¹³. However, if the perpetrators are not able to defend themselves or if they cannot withstand the main hearing due to medical infirmity, the case must be terminated.

- We have two reasons for punishment: first, to prevent the perpetrators from committing crimes again and to reintegrate them into the civilian community; and second, to dissuade others from committing comparable crimes. Neither reason is relevant in the case of NS war crimes.

That is because we have an obligation not only to the victims, but also to their survivors to do whatever is in our power to hold their murderers accountable.¹⁴ It is very important for the survivors and witnesses not to be silenced, but to give them the opportunity to be heard by a prosecutor and participate in a tribunal.

We have not only a moral, but also a legal obligation to restore justice. Justice is not a matter of time, not a matter of a chronological age, not a matter of how difficult it might be to find evidence. Justice under these circumstances is to bring the Nazi criminals to court, to make their crimes public and to demonstrate that they are personally responsible for their crimes. Last but not least, justice requires that these criminals be punished by a sentence commensurate with their personal guilt.

- If we do not wish to forfeit the justification to investigate and prosecute future war crimes and genocide then we must investigate and prosecute the war crimes of the past.

12 For some aspects see *Zuroff*, Shalom Magazine, supra note 4.

13 See id.

14 See id.