**Conference on Transitional Justice**

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**The National Practice of Criminal Prosecution: Germany**

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Germany had to face twice during the last century a situation where it was called upon to deal with the consequences of a dictatorial regime that had caused wide-spread injury not only to its own population but also far beyond its borders. In 1945, the Nazi regime was defeated by an alliance mainly by Western democratic countries and, above all, the Soviet Union. In 1990, the GDR regime could not maintain itself after its main supporter, the Soviet Union, had given up its imperialist claims to dominate the countries of central and Eastern Europe.

**A. Dealing with the Past in 1945**

**I. Prosecution by the Allied Powers**

1) The Main Nuremberg Trial

The victorious Allied Powers concluded in August 1945 an Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis. By so doing, they rendered a great service to Germany because the German judiciary had been totally destroyed, in moral and political terms, by the Nazi dictatorship. The Agreement led to the establishment of the International Military Tribunal at Nuremberg. It is well known that the principles underlying the functioning of that Tribunal have become the model for all later international criminal tribunals. It was a revolutionary step to hold that a person may become criminally responsible directly under international law. At that time, no precedents existed. It was hard to contend that there existed a corresponding rule of international customary law. Nonetheless, the judges were of the opinion that the intensity of the atrocities committed required criminal prosecution at all costs. Their ground-breaking judgment stands today as a *rocher de bronce*, not challenged any longer.

A deliberate choice was made. Only the top leadership was indicted (24 persons). Likewise, some organizations deemed to have carried out criminal activities were also indicted, in particular the Nazi Party, the SS and the SA, two Nazi core organizations. Some of the leaders, and even the most influential ones, could not be indicted because they were either dead or irretrievable: Adolf Hitler, Josef Goebbels and Heinrich Himmler. Judgment was delivered on 1 October 1946. Of the 24 personal accused, 19 were convicted. 12 received death sentences, 3 were acquitted. Likewise, some of the organizations were convicted – which was a novelty in criminal law not repeated with the current international criminal tribunals.

Fair trial was largely secured. The accused were defended by counsel of their own choosing. The four judges were provided by the four Allied Powers.In their majority, they were unchallengeable lawyers of international reputation. However, grave doubts hovered over the Soviet judge, who had participated in general purges in the Soviet Union with huge numbers of death sentences. No neutral judge was included – which also leaves a small stain of bias on the work of the Tribunal. But to dismiss it as victors’ justice is utterly unjustified.

2) The Subsequent Nuremberg Trials

In the American zone of occupation, many more trials followed against persons of lower rank between 1946 and 1949. There were proceedings

Against German industrialists;

Against members of the German Foreign Office;

Against members of the medical profession;

Against German lawyers;

Against Operation Units (*Einsatzgruppen)*;

And others.

According to official reports, more than 5,000 convictions were pronounced, among them 806 death sentences, of which 486 were carried out.

3) Proceedings in Foreign Countries

Additionally, numerous trials were held in foreign countries where crimes had been committed during the time of occupation: Poland, Soviet Union, France. It has been reliably reported that in particular in the Soviet Union there could be no question of any respect for the rule of law. Many times, an accused was sentenced to 25 years of forced labour in a proceeding which lasted only five minutes.

**II. Prosecution by the Authorities in West Germany**

1) West Germany, since 1949 the Federal Republic of Germany, enacted no amnesties. Such measures of clemency would have appeared highly objectionable. Additionally, one should recall that Germany was still placed under Allied authority. It had not yet recovered its full sovereignty. The founding of the Federal Republic of Germany in 1949 was only a first step. It is significant the enactment of the Basic Law in 1949 required the consent of the Three Western Powers.

Additionally, no arguments could have been found to support an amnesty. A deep-going clean-up was necessary within the German political class. In the Potsdam Agreement of August 1945, the Allied Powers had formally laid down their conviction that “German militarism and Nazism will be extirpated”. This was a policy line which became de facto binding for the whole of Germany.

2) The start of proceedings against alleged Nazi perpetrators was slow. The German people were to some extent of the view that the main culprits had already been convicted and sentenced. No systematic research operations were undertaken. It is significant that Hans Globke, who had been one of the commentators of the ill-famed Nazi statutes on racial discrimination, enacted after the Nazis had come to power, was appointed by Federal Chancellor Konrad Adenauer head of the Chancellor’s Office in 1953 (he served in that capacity until 1963). Globke bore indeed heavy responsibility. After his retirement, he wished to settle in Switzerland. But the Swiss Government denied him the right of entry, declaring him an undesirable alien.

3) Nonetheless, official statistics provide impressive numbers of investigations carried out and convictions pronounced during the early fifties of the last century.

4) A culmination point was in 1958 the Ulm trial against ten members of an operationunit (“Einsatzgruppe”) called after the city of Tilsit where they had carried out murderous activities against Jews of the Memel region and in Lithuania. All of them were convicted and sentenced, but only to modest penalties. According to a rather curious jurisprudence of the Supreme Federal Court, they could only be convicted on account of assistance to murder and not as murderers. That jurisprudence held that only persons who act on their own initiative and volition can be characterized as perpetrators. Whoever follows orders or instructions, can only be held to account for assisting and abetting. Daniel Goldhagen has described the history of one of those “Einsatzgruppen”, which were composed of people who in their earlier life had never been involved in any kind of atrocities.

5) The Ulm trial had the effect of a wake-up call. The Ministers of Justice of the German Laender agreed in November 1958 to establish a central office for the clarification of the Nazi crimes (Zentralstelle der LandesjustizverwaltungenzurAufklärungnationalsozialistischerVerbrechen). Until that time, data had been dispersed in the different bureaucracies of the Laender. Now it was possible to focus in a more substantiated manner on the allegations which were brought forward from many sources. The Office commenced its activity on 1 December 1958.

6) But there was a need for someone pressing ahead and investing all of his energy in some model prosecution. That person was State Attorney General Fritz Bauer of Hessen, who conducted the investigations in the Auschwitz case before the Frankfurt Court of First instance from 1963 to 1965. That trial found an incredible echo in all of the German media. The accused were guards of the concentration camp of Auschwitz. Many Germans realized for the first time what measure of brutality had obtained in German concentration camps and to what infernal status of lawlessness the Polish people had been subdued. Daily reports conveyed the message to anyone who had just the slightest interest in the Nazi past. Here again, the difficulty was that those 22 men could only be indicted on account of assistance to murder.

7) Statistics show the following picture:

Until 1996, roughly 106,000 persons had been investigated. The number of convictions (until 2010) stands at 6,498 persons, 13 of which were sentenced to death (before the Basic Law in 1949 introduced a general ban on the death penalty). 169 persons were sentenced to life-long prison sentences, 6,201 persons received lighter sentences of deprivation of freedom.

The Munich InstitutfürZeitgeschichte has established statistics which show even higher numbers.

7) No general rules on other sanctions were established. But in particular for public service the general requirement applied that any applicant must be loyal to the new democratic constitution, the Basic Law. Thus, Carl Schmitt, the famous German constitutionalist, who had unconditionally supported the Nazi regime during its first years, was never against hired by a German university. He withdrew to a small town in the Sauerland which become a kind of Mecca for a small group of conservative thinkers, fascinated by the wsealth of original ideas he had displayed in his writings.

**III. Denazification**

1) In the Potsdam Agreement, the Allied Powers had agreed on “denazifying” Germany. Accordingly, after they had occupied the defeated Germany, they started operations of denazification. The Americans were particularly eager in that regard. Persons in a position of responsibility had to go through that process. Originally, in 1945 and 1946, more than 180,000 persons were arrested at different times in special detention centres. They all had to give an account of their past, filling in a form with 131 questions. Afterwards, the vetting procedure was continued by German authorities (*Spruchkammern*). Those proceedings raised a lot of anger because fairness could not be observed generally. Many people succeeded in getting from their friends manipulated exculpatory letters for white-washing purposes.

2) In the Soviet zone of occupation denazification was combined with a ruthless fight against any dissident voices, any “capitalist” or large land owner (“Junker”). Arbitrariness pervaded the whole system. People’s assets were confiscated on groundless charges, many died in the concentration camps which were continued as soon as the former inmates had been liberated. One may speak of a campaign of lawlessness and injustice.

**B. Dealing with the Past in 1990**

**I. General**

1) The situation in Germany was entirely different in 1990 from the situation that had obtained in 1945. The GDR Parliament, after the fall of the wall in Berlin, had voluntarily decided to join West Germany. Separate statehood was given up. The population of the GDR was not overwhelmed. In fact, the terms of accession to the FRG were negotiated in a Treaty on Unification of 31 August 1990 where the criteria for criminal prosecution were laid down. The main proviso was that essentially any conduct was to be assessed on the basis of the law of the extinct GDR. There was to be no retroactive application of West German law.

2) Accordingly; there could be no prosecution on political grounds just because someone had supported the socialist regime.

3) However, the authorities of the GDR had committed grave violations of fundamental human rights which had never been sanctioned in the GDR – which was not a State embracing the rule of law. Its guiding criterion was “socialist legality”, which means that in cases of doubt the political will of the Government would prevail.

4) The test cases were the investigations because of the deaths caused at the wall in Berlin or at the boundary dividing the two Germanies. Hundreds of persons had been killed by the border guards when fugitives from the GDR attempted to reach the territory of the FRG by climbing over the wall – which was extremely difficult. There was not just a wall of three or four metres of height. The boundary was a broad strip with walls and barbed wire on both sides, extending 50 up to 100 metres into the eastern territory. Between the two walls, sand had been spread so that every step became visible. In Berlin, this strip was illuminated day and night. Police patrols controlled the strip with their dogs.

5) Public prosecutors brought indictments not only against some of the directly involved border guards, but also against the last Minister of Defence of the GDR, his substitute and the last General Secretary of the GDR, EgonKrenz. All of them were convicted, but received only light sentences, ranging from five years and six months to seven years and six months of prison. After their conviction, they appealed not only to the German Constitutional Court, but also to the European Court of Human Rights.

6) This was a matter of principle. Did the conviction of the accused violate Article 7 of the European Convention on Human Rights, the provision which prohibits any retroactive punishment? The accused insisted that they had acted in full conformity with their national legislation. However, the Strasbourg Court did not share their views (judgment of 22 March 2001). Three arguments appear to have been determinative for the judges:

a) It was true that the GDR statutes had explicitly stated that any attempt to unlawfully cross the border had to be prevented even by the use of firearms. Therefore, legal justification was present. But the Court found that the brutality of the language used in the relevant instructions given to the border guards (“arrest border violators [Grenzverletzer] or annihilate them [vernichten] and protect the State border at all costs”)indicated an obsessive will to disregard human dignity.This seemed to be irreconcilable with Article 19 (2) of the Constitution:

Respect for and protection of the dignity and liberty of the person [Persönlichkeit] are required of all State bodies, all forces in society and every citizen.

The practice had obviously not been in conformity with the official proclamations.

b) The Court recalled that the GDR had committed itself under the International Covenant on Civil and Political Rights for which human life stands at the top of the hierarchy of values.

c) The Court pointed out furthermore that legitimate confidence in the non-retroactivity of criminal statutes is justified only in the relationship between States embracing the rule of law.

d) Lastly, the Court came to the conclusion (para. 87):

 The Court considers that a State practice such as the GDR’s border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as “law” within the meaning of Article 7 of the Convention.

7) This is an important statement for the upholding and maintenance of the rule of law. A dictatorship cannot arrange for itself a nice exit when it has to leave power, besieged by the democratic forces of the country concerned. Thus, the Court was honest. It did not say that there was no problem at all since the accused had been convicted and sentenced in full accord with the letter and the spirit of the law of the GDR. In contrast, it disqualified that law, holding that statutes which contradict the essence of human life and dignity cannot be counted as a legal rule in the sense of Article 7 of the European Convention on Human Rights.

8) No special laws were enacted with regard to the former inhabitants of the GDR, who had become full-fledged citizens of the new FRG: Criminal investigations were carried out in accordance with the offences listed in the GDR Penal Code, for instance on account of mistreatment and torture in the GDR detention centres for political opponents of the regime. But the numbers of convictions were extremely low. No spirit of vengeance pervaded the judiciary of the new enlarged Germany. However, regarding leading positions in the public administration, people were vetted as to their democratic credentials – a process which has still not come to its end. In particular, informal collaborators of the secret service of the GDR (*Stasi*) were regarded with the utmost suspicion. I am not going to dwell on this issue any further because there are other participants much more knowledgeable than me on that issue.