Zeitschrift: Traverse : Zeitschrift für Geschichte = Revue d'histoire

Herausgeber: [s.n.]

Band: 11 (2004)

Heft: 1

Artikel: Truth and its consequences : reflections on political, historical and legal "truth" in West German Holocaust trials

Autor: Pendas, Devin O.

DOI: https://doi.org/10.5169/seals-25743

Nutzungsbedingungen

Die ETH-Bibliothek ist die Anbieterin der digitalisierten Zeitschriften auf E-Periodica. Sie besitzt keine Urheberrechte an den Zeitschriften und ist nicht verantwortlich für deren Inhalte. Die Rechte liegen in der Regel bei den Herausgebern beziehungsweise den externen Rechteinhabern. Das Veröffentlichen von Bildern in Print- und Online-Publikationen sowie auf Social Media-Kanälen oder Webseiten ist nur mit vorheriger Genehmigung der Rechteinhaber erlaubt. Mehr erfahren

Conditions d'utilisation

L'ETH Library est le fournisseur des revues numérisées. Elle ne détient aucun droit d'auteur sur les revues et n'est pas responsable de leur contenu. En règle générale, les droits sont détenus par les éditeurs ou les détenteurs de droits externes. La reproduction d'images dans des publications imprimées ou en ligne ainsi que sur des canaux de médias sociaux ou des sites web n'est autorisée qu'avec l'accord préalable des détenteurs des droits. En savoir plus

Terms of use

The ETH Library is the provider of the digitised journals. It does not own any copyrights to the journals and is not responsible for their content. The rights usually lie with the publishers or the external rights holders. Publishing images in print and online publications, as well as on social media channels or websites, is only permitted with the prior consent of the rights holders. Find out more

Download PDF: 26.03.2026

ETH-Bibliothek Zürich, E-Periodica, https://www.e-periodica.ch

TRUTH AND ITS CONSEQUENCES

REFLECTIONS ON POLITICAL, HISTORICAL AND LEGAL "TRUTH" IN WEST GERMAN HOLOCAUST TRIALS

DEVIN O. PENDAS

Carlo Ginzburg has famously argued that, while the paths of the judge and the historian have diverged somewhat since the decline of political and the rise of social history, they nonetheless intersect on the question of "proof".[1] Ginzburg's concern, then, is with the parallel processes – legal and historiographic – of discerning causation from what he elsewhere refers to in explicitly juridical language as "clues".[2] And yet, as he himself notes, such clues gain meaning only from the interpretive schema into which they are placed, what Ginsburg calls "working hypotheses".[3] Such interpretive schemata determine not only which clues will "count" in establishing chains of causation but also which *consequences* matter as well. Just as every complex event likely has multiple causes, so too does every cause have multiple consequences; chains of causation are therefore never innocent, never "simply there" to be discovered. Despite Ginzburg's legitimate critique of the hypostatization of "representation" among post-modernists, the fact remains that such "working hypotheses" help to determine not only which causes are sought but also what consequences will be drawn from these.[4] Very often, these causal chains are as implicated in contemporary political debates as they are in juridical assessments or historiographical interpretations. Thus law, as a method for discerning or, perhaps more accurately, for generating truth, offers accounts of causes and effects that are always embedded in interpretive schemata. Many, though certainly not all of the conflicts in trials then manifest themselves as conflicts over the appropriate interpretive schema to be applied to an agreed upon set of "facts". Thus, these different and competing interpretative schemata can properly be viewed as being, implicitly or explicitly, simultaneously legal, historical and political. There is, in this sense, then no purely legal framework of interpretation at work in trials; they are not autopoetic in Niklas Luhmann's sense of that term.[5]

Nowhere does this over-determination of both causes and consequences by interpretive schemata become more apparent than in the varied, often mutually contradictory interpretations of the Nazi past that emerged in West German

Holocaust trials. In this article, I will consider the implications of one such interpretive schema in West German Holocaust trials; namely the assumption of a legal continuity between the Third Reich and the Federal Republic of Germany (FRG). Few issues have been more juridically challenging or politically *brisant* than this. The basic question was deceptively simple. Was there a continuity of sovereignty from the German Empire through the Third Reich down to the FRG? This was not merely a theoretical question. It was of profound importance for Holocaust trials because, depending on how it was answered, it might or might *not* be possible to prosecute Nazi crimes at all. Beyond this central practical matter, the various interpretations of the legal continuity issue each also carried with them disparate and conflicting political and historical implications for the nature of the Third Reich and of the FRG. To examine these in detail, I will take evidence from the largest and most public West German Holocaust trial, the Frankfurt Auschwitz Trial of 1963–1965.

To put it briefly, three major positions emerged on the issue of legal continuity. First, there was the official position, adopted by the court and reflecting the dominant legal practice in the FRG, which held that there was a formal and substantive legal identity between the German Empire, the Third Reich and the FRG. Politically and historiographically, this position implied that the Nazi regime had been an *Unrechtsstaat* but one that left intact an underlying substratum of the *Rechtsstaat* upon which a new, democratic state could be reestablished. Second, there were the positions adopted by the defense in the Auschwitz trial, which argued on the one hand that the legal continuity between the Third Reich and the FRG meant that Nazi perpetrators could not be prosecuted because that would mean in effect the state was punishing them for carrying out its own orders. On the other hand, the defense argued that the Third Reich had, in effect, been an independent, sovereign state, with its own legal order. Consequently, the FRG represented a new state. The implication was that therefore, it was improper to prosecute Nazi crimes at all, since West German courts had no jurisdiction. The political implication was that there was, in effect, no connection whatsoever between the free and democratic FRG and the totalitarian Third Reich and, consequently, no need for West Germans to concern themselves overly much with the history of the Nazi regime. Finally, there was an East German interpretation, which took the legal interpretation of continuity and transformed it into a political one, arguing that there was in fact a good deal more continuity between the Third Reich and the FRG than merely that of formal law, that, indeed, the two states represented a continuation of the same governing elites and even the same basic, monopoly capitalist and imperialist policies.

LEGAL CONTINUITY

During the period from 1945 to roughly 1955, German courts had been constrained by the provisions of Allied Control Council Law No. 10 (20 December 1945) to prosecute most Nazi crimes not under German law but under international law as manifested in the legal authority granted by the occupying powers by virtue of Germany's unconditional surrender.[6] This meant primarily that Nazi crimes were prosecuted as crimes against humanity, a fact which caused considerable consternation among German jurists who felt that this legal innovation represented a violation of the principle *nulla poena sine lege* (no punishment without prior law).[7] Consequently, as German courts regained full legal autonomy *(de facto* in 1950, *de jure* in 1955), they ceased prosecuting Nazi crimes as crimes against humanity and began prosecuting them under ordinary statutory law. The legal provisions of CC Law No. 10 were formally annulled by the Bundestag on May 30, 1956 in the *1. Gesetz zur Aufhebung des Besatzungsrechts* and thereafter, per Article 103 of the *Grundgesetz* and § 2 StGB, Nazi crimes could only be prosecuted under laws in force at the time of their commission. This meant that Nazi crimes had to be prosecuted under ordinary statutory law *(Strafgesetzbuch),* primarily (after 1960 exclusively) for *Mord* (§ 211 StGB).

In order for such prosecutions under ordinary statutory law to proceed, it had to be assumed that Nazi crimes were illegal under German law at the time of their commission and that West German courts had jurisdiction over such crimes. In other words, it was necessary to assume a continuity of sovereignty between the Third Reich and the FRG. And this was precisely one of the guiding assumptions of West German constitutional theory. In one of the earliest authoritative commentaries on the *Grundgesetz,* Hermann von Mangoldt was able to assert: "Als die unbestritten herrschende Auffassung des Inlandes wie des Auslandes kann heute die Theorie gelten, dass Deutschland ununterbrochen als Staatswesen weiterbestanden hat."[8] Similarly, at the time of the Auschwitz Trial, Egon Schunck and Hans De Clerck maintained: "Vorübergehendes Fehlen der Staatsgewalt (z. B. hinsichtlich des Deutschen Reiches seit 1945) oder vorübergehende Ausübung der Staatsgewalt durch einen fremden Staat (etwa im Falle der kriegerischen Besetzung), erst recht ein blosser Wechsel der Staatsform, berühren dagegen den Fortbestand des Staates nicht."[9] This continuity of state sovereignty was not taken by German judges to mean, however, a continuity of specific state form, much less that the Weimar Constitution of 1919 continued in existence, nor did it mean that specific Nazi laws would not be declared null and void (as indeed, many were) but it did mean that subsidiary statutory laws, in particular criminal and civil

law, had remained in effect through out the period 1933–1945.[10] On this basis, then, Nazi crimes could be tried in West German courts under statutory criminal law as it had existed under the Third Reich.

DEFENSE ARGUMENTS

Perhaps not surprisingly, defense attorneys in Holocaust trials on occasion tried to challenge this prevailing interpretive schema in the – admittedly improbable – hope of bringing an end to Nazi trials altogether. Thus, in the Auschwitz trial, Hans Fertig argued that the court had authority over these crimes not for geographic or criminological reasons but merely on the basis of "German jurisdiction".[11] Jurisdiction in the legal sense, however, was a function of the state. The jurisdiction of the courts extended, temporally, personally and factually, only as far as the power of the sovereign state. But what were the temporal boundaries of the FRG's sovereignty? Certainly, this extended at least as far back as the passage of the Basic Law. Whether this sovereignty extended back before 1945 depended on how one evaluated the relationship between the FRG and the Third Reich. Fertig pointed out that according to the consensus view legal authority was presumed to transcend the 1945 divide.[12]
But the crucial question, according to Fertig, was whether this jurisdiction in fact applied to *all* crimes committed prior to 1945, particularly to those with which his clients were charged.
"Was der Angeklagte Klehr in Auschwitz getan hat und getan haben soll, tat er nicht als Privatperson. Er tat es vielmehr als SS-Mann im Rahmen eines hoheitlichen Zwangsdienstverhältnisses und kraft der auf ihn delegierten Staatsgewalt. Er tat es somit [...] kraft derselben Staatsgewalt, kraft der Sie hier zu Gericht sitzen. Die Staatsgewalt, die dem Angeklagten hier den Prozess macht, ist identisch mit der Staatsgewalt, die Auschwitz schuf und die dem Angeklagten die Handlungen, die Gegenstand dieses Prozesses sind, befahl, ja noch mehr, die dem Angeklagten für seine Handlungen sogar das Kriegsverdienstkreuz verlieh. Die Staatsgewalt setzt sich also durch diesen Prozess mit ihrem eigenen früheren Verhalten in Widerspruch, sie macht sich praktisch selbst den Prozess."[13]
It was clearly absurd, according to Fertig, for the state to put itself on trial. To do so was not an act of law but an abuse of law.
He asked the court to imagine a personified state that, at one moment, gave an order, then at a later moment said, because you obeyed my order, I will now punish you. "Es ist offensichtlich, dass das nicht geht."[14] That "widersprüche jeder Ordnung des Rechts, die dadurch geradezu auf den Kopf gestellt wür-

de".[15] Therefore, Fertig concluded, the court did not have jurisdiction in these cases.

"Die Tatsache, dass ein Gesetz formell weiterbesteht", Fertig stated, "also nicht ausdrücklich aufgehoben bzw. geändert worden ist, ist also kein absoluter Beweis dafür, das dieses Gesetz als Gesetz auch tatsächlich noch gilt."[16] One could, of course, appeal to principles of natural law. Such an argument rendered these killings a violation of principles of justice. "Eine Rechtsverletzung ist jedoch nicht *eo ipso* strafbar."[17] He urged the court to have the "courage" to draw the proper consequences from this fact, even if this meant that "für gewisse Kreise als ergebnislos erscheint".[18]

Fertig argued, in effect, that the defendants' crimes were not *punishable* under German law. At least one attorney went even further, however. Rather than merely claim that the law had not been enforced, Hans Knögel argued that Nazi law had, contrary to current legal interpretation, in fact been legally valid in the first place. In other words, however abhorrent they might be from a moral point of view, the "crimes" with which the defendants were charged had not been *crimes* in any sense at all.

Knögel argued that prior to the Third Reich, Germany had been a *Rechtsstaat,* one where the state found its limitations in the law, where right and law *(Recht* and *Gesetz)* were identical and where both imposed limitations on state authority. All this changed, however, when the Nazis seized power. There was no longer any separation of powers, the legislative authority of the representative assembly had been abolished altogether, and all state power was bound up in the person of the Führer. There was no longer any clear distinction between law and administrative orders.[19]

According to the (Bundesgerichtshof) BGH, legal norms were not invalid simply because they originated in a dictatorship.[20] Nonetheless, Knögel admitted, the BGH maintained that many of the rules and regulations passed by the Nazi regime had not constituted law, because they had violated the "naturrechtlichen Forderungen oder allgemein gültigen Sittengesetze der christlich-abendländischen Kultur".[21] But, Knögel asked rhetorically, is "die Nichtigkeit einer Anordnung wegen Verletzung fundamentaler Prinzipien aller Kulturvölker ausreichend [...] um eine Bestrafung der Tötung fortbestehen zu lassen?"[22] Clearly, from a positive law standpoint, the one in which Knögel and his compatriots on the court had been trained, the answer had to be no. The law was what was contained in legal statutes, nothing more, nothing less, and the Nazi state had legally ordained the murders at Auschwitz, thus rendering them legal.

What the defense here argued was, in effect, for the application of a different interpretive schema, a different "working hypothesis" to the actions of the accused in Auschwitz.[23] As I have already indicated, such an interpretive

schema was not, could not be, purely legal; it carried with it considerable political and historiographic implications as well. The defense made what were effectively two somewhat distinct arguments. They argued, first, that West German courts did not have jurisdiction over Nazi crimes and, second, that these crimes had not actually been criminal at all because Nazi law had legalized the actions in question.[24]

In legal terms, the first argument, that West German courts did not have jurisdiction, took the standard legal interpretation of continuous German sovereignty and used it to argue that there should be no Nazi trials at all because the FRG *was* the Third Reich. Politically, however, this did not mean that the defense was arguing that the FRG was a neo-fascist restoration – quite the contrary. The fact that the FRG was a liberal, democratic state meant that it had to acknowledge its responsibility for Nazi crimes and, in so doing, exonerate individual perpetrators who had acted as state agents. The second argument was a standard form of legal positivism, which implied in political terms that law was *amoral,* that it was not grounded in any ethical or normative vision, merely in the de facto power of the state. Presumably, then, the democratic form of the FRG was to be treated likewise as incidental, a historical accident that was not intrinsically preferable to any other form of state organization. In the context of the Cold War confrontation with the GDR this was a particularly subversive argument. It was, in effect, even if unconsciously, a conservative argument against the Hallstein doctrine and the FRG's claim to speak on behalf of all Germans, including those in the East.

JUDICIAL ARGUMENTS

It was to be expected that the court would reject these arguments on the part of the defense, as indeed presiding judge Hans Hofmeyer did in his oral verdict on August 19, 1965. "Diese Rechtsauffassungen", Hofmeyer concluded, "sind irrig."[25] On the one hand, the German Reich had been a continuous state entity since 1871, one whose criminal laws had remained in effect throughout its history. Hofmeyer here reasserted the dominant continuity thesis. This might seem to confirm the defense's critique – that a state could not pass judgment on its own earlier actions – but this was not the case, according to Hofmeyer. "Dem Nationalsozialismus stand zwar die umfassende Macht des deutschen Reiches zur Verfügung, diese aber setzte ihn nicht in die Lage aus Unrecht Recht zu machen."[26] Even National Socialism was subordinate to the "core of law".

This was particularly true of the so-called Final Solution. This was based on a criminal order, originating with Hitler and passed on to the SS through

Himmler. Himmler knew this order to be illegal, as indicated by a memorandum he drafted (no date given), in which he noted, among other things, that he had suffered greatly because of this order but that it was an opportunity for the SS to demonstrate its "loyalty" to the Führer.[27] What is more, Hofmeyer added, Himmler's subordinates in the SS were also aware that this order was illegal, as the defendants had themselves indicated during the trial. If the defendants nonetheless obeyed these criminal orders, it was because of their ethic of "unquestioning obedience".

It was true that in a totalitarian dictatorship, the dictator could prevent any criminal investigation into such activities. But this did not make them legal; it only meant that the defendants had acted under the assumption that they would not be held accountable for their actions, which was not the same thing. But this raised the question – repeatedly posed by the defense – as to why the courts in the Third Reich had not in fact investigated this criminality, if indeed it had been illegal all along.

Hofmeyer here took the opportunity to defend the conduct of the German judiciary, and by implication himself, under the Third Reich.[28] "Die NSDAP und ihre Gliederungen hatten die Macht in der Hand, der Justiz ihren Willen aufzuzwingen."[29] The courts, he asserted, had stood under a direct threat from Hitler. (He cited as evidence, the *Reichstagsbeschluss* of April 25, 1942, which gave Hitler the power to punish any German, regardless of official position, if they failed to carry out his orders, as well as a speech by Hitler to the Reichstag, in which Hitler said that the task of the courts was to serve the nation, not the law, and that he would remove from office any judge who did not understand this.)[30] The fact that Hitler had not just been the head of state but also the *Oberster Gerichtsherr* (supreme judge) had effectively terminated the separation of powers in Germany and eliminated the independence of the judiciary. Since most courts were not, however, willing to act only in accordance with state policy, despite these threats from Hitler, he had used his authority as *Oberster Gerichtsherr* to simply prevent political crimes from coming before the courts at all. Since courts can only judge crimes brought before them, the fact that, for instance, none of the crimes that were committed in Auschwitz were ever indicted during the Third Reich (because Hitler would not allow it), explained why the courts had never passed judgments on them. In short, far from representing a craven moral surrender, the courts' failure to investigate Nazi crimes during the Third Reich was reinterpreted by Hofmeyer as a form of principled "inner emigration".

It is worth noting that – without the slightest trace of irony – Hofmeyer here effectively replicated precisely the kind of defensive tactics he disallowed when practiced by the defendants in the trial; namely, the defense by higher

orders *(Befehlsnotstand)*. He argued that the courts essentially operated under a form of duress, because Hitler would have punished any efforts on their part to prosecute SS crimes. In addition, he shifted the blame for their crimes of omission onto others. The courts *would have* passed judgment, if only the prosecutors had brought indictments; the prosecution, in turn, would have brought indictments if only they had not been prevented by Hitler's overweening power from doing so. Neither the courts nor the prosecutors had *approved of* Hitler's actions, but they had been powerless to resist them. The defendants in the trial may have been criminally liable for their actions in Auschwitz, according to Hofmeyer, but the vastly more powerful German judiciary had apparently been powerless to confront or resist the will of Adolf Hitler.

This legal powerlessness meant that Hitler's secret extermination orders could be carried out unhindered. And yet these were still kept secret, to avoid public scrutiny. However, this very secrecy also meant that any possible argument for the legal validity of such orders was mistaken, since at a minimum, such orders would have had to have been published in order to acquire legal force.[31] Finally, this secret order for the extermination of millions was given to the SS, not to the Wehrmacht, the citizenry or the judicial authorities, "da man sich darüber einig war, dass allein die SS mit ihrem unbedingten Gehorsam und mit ihrer unbedingten Bindung an den Führer bereit war, dieses Verbrechen zu begehen ohne nach der moralische Zulässigkeit zu fragen und ohne die Rechtswidrigkeit dieses Tuns zu berücksichtigen".[32]

The historiographic implications of Hofmeyer's defense of the standard continuity thesis could hardly be more apparent. The German judiciary had been hapless victims of the Nazi regime. The Nazis were here clearly distinguished from the German state apparatus. In political terms, this meant that the manifest failure to Denazify the judiciary after the war was not a problem for West German democracy, since that judiciary had not really been Nazified in the first place.[33]

EAST GERMAN ARGUMENTS

There remains one final interpretive schema proposed in the Auschwitz trial to consider, that of the East German civil counsel *(Nebenkläger)*, Friedrich Karl Kaul. Kaul had been dispatched to the Auschwitz trial by the SED Politbüro as part of an explicit propaganda campaign aimed at shoring up the legitimacy of the GDR by undermining that of the FRG as a neo-fascist regime.[34] Kaul took every opportunity during the trial to highlight the role of German big business, especially I. G. Farben in Auschwitz, and to argue that the same élites still

governed the FRG. In his closing argument, he reiterated and expanded this argument.

The key to Kaul's argument was a historiographic interpretation of the Nazi past that, like the official West German position, stressed continuity, but now in an explicitly political, rather than a formal legal, sense. In particular, he emphasized a historiographic interpretation that stressed that murder had been *Staatsdoktrin* prior to 1933 as well.[35] "Die Kräfte, die Deutschland auf diesem Weg immer weiter Vorwärts stiessen, bis schliesslich Auschwitz, den – dürfen wir wirklich sagen: endgültigen? – Schlusspunkt bildete; diese Kräfte blieben sich stetig gleich, ja mehr noch …!"[36] In short, whether under the Nazis or under Weimar, the murderous hostility of monopoly capitalism to real human freedom remained the same. The difference was at most one of degree.

He pointed out that the defendants were not entirely mistaken when they complained that they were being punished for carrying out orders while those who gave the orders "ungeschoren davongekommen sind". "[D]iese Klagen entsprechen den tatsächlichen in der Bundesrepublik bestehenden Verhältnissen, wenn sie auch nicht geeignet sind, die Angeklagten in ihrer strafrechtlich zu messenden Schuld zu entlassen."[37] The fact that Nazi luminaries had again acquired positions of influence and authority in the FRG was even born out by the fate of the SS witnesses in the trial, many of whom now occupied respected positions in West Germany. This was an offense against "allgemeine Gerechtigkeit".[38]

Kaul argued that the court had to consider the broad historical background to these crimes. In this, the distinctive character of Kaul's closing argument, the complicated interaction between historical insight and political propaganda that characterized his argumentation, becomes particularly apparent. Drawing heavily on the expert testimony given by various historians in the trial, Kaul argued that "die Errichtung und die Funktion des Konzentrationslagers Auschwitz, insbesondere die in diesem Konzentrationslager begangenen Verbrechen, fester Bestandteil der allgemeinen nationalsozialistischen Politik gewesen sind und deshalb auch nur auf diesem Hintergrund zutreffend beurteilt werden können".[39] The historians all agreed, "wenn auch leider nur oberflächlich", that the key feature was that this was an "Aggressionspolitik".[40] This policy consisted in the "gewaltsamen Unterdrückung" of the "friedliebenden Bevölkerung" of both *Germany* and any other country that dared resist Nazi expansion.[41]

In particular, Kaul pointed out that this expansionist zeal was part of a broader "Vernichtungswille", which manifested itself above all in the extermination of the Jews.[42] He stressed the broad complicity of German elites in this destruction. "Zusammenfassend kann also bis hierher als Ergebnis der Beweisaufnahme festgestellt werden, dass die in den nazistischen Konzentrationslagern

betriebene Massenvernichtung in enger Zusammenarbeit und im Zusammenwirken mit der Ministerialbürokratie und dem Oberkommando der Wehrmacht des Nazistaates in die Wege geleitet wurde."[43]

Kaul did not rest content, however, with pointing far more explicitly to the broad institutional context of the Holocaust than did any other trial participant. Given his ideological agenda, it was imperative that he point to the underlying economic factors that he viewed as driving the entirety of Nazi policy. "Weiterhin hat die Beweisaufnahme ergeben, dass zwischen dem in den Konzentrationslagern verwirklichten Programm der Vernichtung sogenannten 'unwerten Lebens' durch Arbeit und den Bedürfnissen der Konzerne nach Arbeitskräften ein innerer Zusammenhang bestand."[44] Martin Broszat in his expert testimony had indicated the extent to which the concentration camps became "Sammelstätten" for slave labor.[45] Not only had Broszat, *on Kaul's reading,* argued that the existence of armaments factories had been decisive for the establishment of concentration camps in certain locals, but that there was "sogar ein direkter Zusammenhang zwischen den Arbeitskräfteanforderungen der Industrie und den Verschleppungsaktionen".[46]

Kaul concluded: "Das hier in der Beweisaufnahme festgestellte Zusammenwirken von SS, Ministerialbürokratie, Wehrmachtsführung und Industrie schuf erst die Grundlage für den Massenmord in Auschwitz, für die im grössten Ausmass betriebene Vernichtung 'wirtschaftlich nicht mehr verwertbaren Lebens', wie Staatsanwalt Vogel es nannte. Ohne diese Grundlage hätte kein einziger der Angeklagten jahrelang die ihm angelasteten Verbrechen unbestraft begehen können."[47] Thus on Kaul's reading, monopoly capitalism, with its imperialist drive to quite literally conquer new markets, was directly responsible for Auschwitz. That this same monopoly capitalism continued to govern the FRG hardly needed to be added.

CONCLUSION

What are causes? What are consequences? These questions lie at the heart of any criminal trial. Indeed, trials are among the most sophisticated mechanisms ever devised for establishing "truthful" narratives of causation. And yet as the conflicting interpretations offered regarding the truth of about the relationship between the Third Reich and the FRG in the Auschwitz trial indicate, the truthfulness of such narratives depends on the interpretative frameworks, the "working hypotheses", within which they are embedded. This statement need not be taken as a postmodernist provocation. There are facts and indeed trials are particularly successful at eliciting them. However, facts cannot, as it were,

speak for themselves. As Michael Stolleis has pointed out: "Richter und Historiker haben – um überhaupt Ordnung in einen Nachrichtenstrom bringen zu können – eine leitende Hypothese, eine 'Idee', wie es gewesen sein könnte. Beide bewerten das Ergebnis, das sie gemeinsam (wenn auch mit verteilten Rollen) in eine Geschichtserzählung umformuliert haben. Diese Erzählung berichtet nicht die Wahrheit, sondern bildet nur eine konsensfähige Summe dessen, was erzählt worden ist."[48]

In the case of the Auschwitz trial and of many other Holocaust trials in West German courts, this consensus proved impossible to attain. In particular, as I have argued, not only was there no consensus about whether there was in fact a legal continuity between the Third Reich and the FRG, but even in cases where different parties agreed that there was such a continuity, they often disagreed vehemently over the political and historical *meaning* of that continuity. Thus, mainstream German legal opinion held that there was a continuity of sovereignty between the Third Reich and the FRG and that that continuity grounded the possibility of criminal prosecutions for Nazi crimes. In the Auschwitz trial, presiding judge Hofmeyer took this to mean, as well, that the German judiciary itself was innocent of all culpability in Nazi atrocities. West German judges could sit in judgment on Nazi crimes not just because they had formal legal jurisdiction but also, in effect, because they retained the moral stature necessary for such judgment. Some defense counsel, by contrast, maintained that the existence of a legal continuity between the Third Reich and the FRG meant precisely the opposite of what mainstream legal opinion believed, i. e. that it meant that Nazi prosecutions were an inadmissible violation the principles of legality. Others argued that there was no connection between the two regimes, that Nazi law was valid in positive legal terms and that putting people on trial for obeying the laws of what was, in effect, a foreign state was absurd. Finally, the East German position likewise held that there was a continuity between the Nazi regime and the FRG, but primarily in a political, rather than a legal sense; that the FRG was a Nazi regime.

Now clearly not all of these arguments are equally valid and I do not mean to imply that there is no basis upon which to choose between them. Yet even the more absurd claims – Hofmeyer's proclamation of the absolute innocence of the German judiciary or Kaul's assertion that there was no meaningful difference between the Third Reich and the FRG – contain kernels of truth that cannot be dismissed out of hand. Hitler had destroyed the independence of the judiciary, although with the all too willing aid of much of the judiciary itself.[49] And there was far more continuity among the governing elites of the two societies than seems appropriate in retrospect.[50] Above all, then, one must approach Holocaust trials as themselves multifaceted political events, ones that

mirrored, rather than resolved, the political tensions of postwar German society. If one expects from them, not the truth of the Nazi past and the Holocaust, but rather a series of ongoing debates about that past and its relation to the German present, then it becomes possible to gain a richer, more complex understanding of the various truths and their diverse consequences that these trials generated.

Notes

1 Carlo Ginzburg, *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice,* London 1999, 17–18.
2 Carlo Ginzburg, "Clues: Roots of an Evidentiary Paradigm", in *Clues, Myths, and the Historical Method,* Baltimore 1989, 158–209.
3 Ginzburg (wie Anm. 1), 35–36.
4 One could argue that the law itself is nothing but a particularly elaborate and sophisticated "working hypothesis" concerning relevant causation. See e. g. H. L. A. Hart and Tony Honoré, *Causation in the Law,* 2nd ed., Oxford 1985. Indeed, one of the major points of critique on the part of Critical Legal Studies has been the narrow and hierarchical character of the legal working hypothesis. See e. g. Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology", *Journal of Legal Education* 36 (1986), 518–562.
5 Niklas Luhmann, *Soziale Systeme,* Frankfurt a. M. 1987.
6 Henri Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la Loi no. 10 du Conseil de contrôle allié,* Paris 1960.
7 Adalbert Rückerl, *NS-Verbrechen vor Gericht. Versuch einer Vergangenheitsbewältigung,* Heidelberg 1984, 109.
8 Hermann von Mangoldt, *Das Bonner Grundgesetz,* Berlin 1953, 1.
9 Egon Schunck and Hans De Clerck, *Allgemeines Staatsrecht und Staatsrecht des Bundes und der Länder,* Siegburg 1964, 26.
10 On the nullity of the Weimar Constitution, see: Rolf Stödter, *Deutschlands Rechtslage,* Hamburg 1948, 260–261. On the nullity of certain Nazi laws, see: Gerhard Leibholz, Hans-Justus Rinck, *Grundgesetz für die Bundesrepublik Deutschland,* Köln 1966, 21–24.
11 Hans Fertig, "Plädoyer (Klehr)", Fritz Bauer Institut, Sammlung Auschwitz-Prozess (Hereafter: FBI SAP: FAP) 1/V10, 3.
12 Fertig (wie Anm. 11), 3.
13 Ibid., 4–5.
14 Ibid.
15 Ibid.
16 Hans Fertig, Plädoyer (Schlage), FBI SAP: FAP1/V10, 5.
17 Fertig (wie Anm. 16), 6.
18 Fertig (wie Anm. 16).
19 Hans Knögel, Plädoyer (Scherpe), FBI SAP: FAP 1/V11, 33–34.
20 Hans Knögel (wie Anm. 19), 35. Citing *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ) 5, 95.
21 Knögel (wie Anm. 19).
22 Ibid., 36. Citing Anton Roesen, "Rechtsfragen der Einsatzgruppen-Prozesse", *Neue Juristische Wochenzeitung* 17 (1964), 133–136.
23 Needless to say, the defense also challenged the prosecution's case on factual and evidentiary grounds, but that part of their strategy need not concern us here.
24 This second argument has been made with precisely the opposite political intent by various

scholars, who claim that the formal legality of Nazi actions means precisely that law must be conceptualized in natural law terms that transcend state sovereignty. See e. g. Richard Lawrence Miller, *Nazi Justiz. Laws of the Holocaust,* Westport 1995 or Gerhard Werle, Thomas Wandres, *Auschwitz vor Gericht. Völkermord und bundesdeutschen Strafjustiz,* München 1995. Arguably, this reasoning lies at the heart of all postwar developments in international human rights law. See Geoffrey Robertson, *Crimes Against Humanity. The Struggle for Global Justice,* New York 1999.

25 Tape Recording (Hereafter: TR), 19 August 1965, 182nd Session, FBI SAP, CD AP357, T17. Because the prosecution did not explicitly consider the issue of legal continuity in their closing arguments but implicitly concurred with the prevailing legal doctrine, I leave aside here any consideration of their closing arguments.

26 TR (wie Anm. 25), T18.

27 Ibid., T20.

28 Hofmeyer had become a municipal judge in 1936 and a military judge during the war. See Gerhard Ziegler, "Fanatiker der Sachlichkeit: Hans Hofmeyer – der Vorsitzende im Auschwitz-Prozess", *Die Zeit,* 27. 8. 1965.

29 TR (wie Anm. 25), T22.

30 Ibid., T24. It is worth noting that, with reference to Hitler's order of April 25, Hofmeyer calls it "dieses Gesetz und diese Drohung" – But if this was a law, then it must have had some legal force. Perhaps Hofmeyer is here arguing implicitly that there was a distinction between law and justice but he does not say so explicitly.

31 TR (wie Anm. 25), T30.

32 Ibid., T31–32.

33 On the failure to Denazify the judiciary, see Ingo Müller, *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz,* München 1987.

34 Annette Rosskopf, "Anwalt antifaschistischer Offensiven: Der DDR-Nebenklagevertreter Friedrich Karl Kaul", in Irmtrud Wojak (Hg.), *"Gerichtstag halten über uns selbst …". Geschichte und Wirkung des ersten Frankfurter Auschwitz-Prozesses,* Frankfurt a. M. 2001, 142–44 and Annette Weinke, "Strafverfolgung nationalsozialistischer Verbrechen in den frühen Sechzigern. Eine Replik", *Mittelweg* 36/3 (2001), 45–48.

35 Friedrich Karl Kaul, Auschwitz-Prozess Frankfurt am Main: Schlussvortrag und Erwiderung des Prof. Dr. Friedrich Karl Kaul Prozessvertreter der in der Deutschen Demokratischen Republik ansässigen Nebenkläger im Strafverfahren gegen Mulka u. a. vor dem Schwurgericht beim Landgericht Frankfurt a. M., n. p., 1965, 7.

36 Kaul (wie Anm. 35), 8.

37 Kaul (wie Anm. 35).

38 Ibid., 9.

39 Ibid., 39.

40 Kaul (wie Anm. 35).

41 Ibid.

42 Ibid.

43 Ibid., 41.

44 Kaul (wie Anm. 35).

45 Ibid.

46 Ibid.

47 Ibid., 45.

48 Michael Stolleis, "Der Historiker als Richter – der Richter als Historiker" in Norbert Frei, Dirk van Laak, Michael Stolleis (Hg.), *Geschichte vor Gericht. Historiker, Richter und die Suche nach Gerechtigkeit,* München 2000, 178.

49 Bernd Rüthers, *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich,* München 1988.

50 Mary Fulbrook, *German National Identity after the Holocaust,* Cambridge 1999.

ZUSAMMENFASSUNG

DIE WAHRHEIT UND IHRE KONSEQUENZEN. ÜBERLEGUNGEN ZU POLITISCHER, HISTORISCHER UND JURISTISCHER «WAHRHEIT» IN WESTEUROPÄISCHEN HOLOCAUST-PROZESSEN

Die Frage nach der Beziehung zwischen juristischer und historischer Wahrheit ist besonders wichtig bei Gerichtsverfahren, die mit Massenverbrechen und Genozid zu tun haben, speziell in Holocaust-Prozessen. Allerdings stehen sowohl die juristische als auch die historische Wahrheit immer mit einer weiteren Wahrheit in Verbindung – der politischen Wahrheit. Der Artikel untersucht die Positionen, welche die Richter, die Verteidigung und der ostdeutsche Nebenkläger im Frankfurter Auschwitz-Prozess einnahmen, und fragt zugleich nach der juristischen Kontinuität zwischen dem Dritten Reich und der Bundesrepublik Deutschland. Dabei wird die These aufgestellt, dass die scheinbar rein historischen und/oder juristischen Wahrheiten, die sich im Laufe des Prozesses ergaben, gleichzeitig auch politische Wahrheiten waren. Diese politischen Wahrheiten widerspiegeln ihrerseits den Stellenwert des Gerichtsverfahrens in der schwierigen Vergangenheitsbewältigung der BRD der 1960er-Jahre.

(Übersetzung: Thomas Ch. Müller)