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Michael Bryant  
*Bryant University*

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# Eichmann in Jerusalem—and in West Germany: Eichmann Trial Witnesses and the West German Prosecution of Operation Reinhard Crimes, 1958–1966

MICHAEL BRYANT\*

For to what lengths will that man go in the dark who fears nothing but a witness and a judge?

—Cicero, *Laws*

The trial of Adolf Eichmann fifty years ago was a landmark in several respects. It marked not only the prosecution of an important *génocidaire* who had placed his energies and talents in the service of the Final Solution, but also furnished the survivors and the families of the victims a world stage from which to tell their personal stories of persecution at the Nazis' hands. In contrast with the Nuremberg war crimes trial, which, in preferring documentary evidence to personal testimony, had deemphasized the singularity of the Holocaust, the Eichmann trial restored the voices of Jewish victims directly affected by Eichmann's actions. In the decades since the Eichmann trial many scholars have observed these historic aspects.<sup>1</sup> One feature of the Eichmann trial that has received less attention from scholars is its impact on West German prosecutions of Holocaust crimes.

Coincidentally, Eichmann's arrest and trial occurred at roughly the same time that West Germany was intensifying efforts to locate Nazi

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\* Associate Professor, Bryant University.

1. On the "trial by document" at Nuremberg, see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1993); LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT* 11–94 (2001); BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* (1977); MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945–46* (1977); DONALD BLOXHAM, *GENOCIDE ON TRIAL* (2001). On the opportunities afforded by the Eichmann trial for Jewish victim testimony, see LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT* 97–182 (2001); DAVID CESARANI, *BECOMING EICHMANN* 250–51, 268 (2004).

offenders within its own borders and bring them to trial.<sup>2</sup> In this essay, I will explore some of the contributions to West German Holocaust trials rendered by Jewish survivors who also testified at the Eichmann trial. I will suggest that these contributions were not only valuable to the West German trials, but essential to their success as well. Jewish witnesses provided West German courts with evidence critical to proving specific crimes by former death camp guards and to classifying the defendants as perpetrators of, rather than accomplices to, the mass murder of the Jews. Without their testimony, some of the worst lower-level offenders within the Nazi death camp system would likely have either escaped judicial punishment altogether or received reduced sentences.

For purposes of economy, I will focus on the major West German trials of the three "Operation Reinhard" death camps: Belzec, Treblinka, and Sobibor. As described in fuller detail below, Operation Reinhard was the program set in motion in October 1941, when Heinrich Himmler, chief of the SS, entrusted the destruction of the Jewish population in Poland's "General Government" (the part of Poland not incorporated into the Reich) to SS Police Leader of the Lublin district, Odilo Globocnik.<sup>3</sup> It was Globocnik who organized the construction of Belzec, Treblinka, and Sobibor as literal murder centers to annihilate the 2,284,000 Jews of the General Government.<sup>4</sup>

I will further narrow the scope of this article by focusing on the defendants in these trials convicted as perpetrators of mass murder under the German homicide law (§ 211, StGB). An exception will be made respecting the Belzec trial where, for purposes of contrasting the drastically different outcome of this abortive case with the relatively successful results in the Treblinka and Sobibor proceedings, I will examine the acquittals of seven of the eight defendants and the final conviction of the eighth, Josef Oberhauser, as an accomplice to murder. Only four defendants were convicted as perpetrators of murder in the three major Operation Reinhard cases: none in the Belzec trial, three in the Treblinka trial, and one in the Sobibor proceeding.<sup>5</sup> As we will see,

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2. In 1960, West Germany asked Argentina to extradite Josef Mengele, the Nazi doctor who performed medical experiments on prisoners in Auschwitz. See e.g., *The Search for Perpetrators*, U.S. HOLOCAUST MEM'L MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005167> (last visited Feb. 4, 2013).

3. *Aktion Reinhard*, YAD VASHEM, [http://www1.yadvashem.org/odot\\_pdf/microsoft%20word%20-%205724.pdf](http://www1.yadvashem.org/odot_pdf/microsoft%20word%20-%205724.pdf) (last visited Feb. 5, 2012).

4. *Id.*

5. Kurt Bolender, a defendant who would have surely been convicted as a perpetrator in the Sobibor trial, committed suicide before the end of the trial. See DICK DE MILDT, IN THE NAME OF

Eichmann trial witnesses were indispensable to their convictions as mass murderers warranting the harshest punishment under West German law.

I. BELZEC, SOBIBOR, TREBLINKA: A PRIMER ON THE OPERATION  
REINHARD CAMPS, 1941-1943

The death camp was the apotheosis of Nazi Jewish policy, which from the beginning had dreamt of ridding the German Reich of its Jewish population.<sup>6</sup> Throughout the 1930s that policy had advanced from the curtailment of Jewish civil liberties, to the marking and segregation of Jews from “Aryan” society, and then to the confiscation of their property.<sup>7</sup> By the summer and fall of 1941, the penultimate stage of this policy, which called for Jewish expulsion and resettlement to places like Nisko near Lublin and the French colony of Madagascar, had become impracticable. In October 1941, the Nazi leadership decided to solve the “Jewish problem” through an infinitely more radical means—the physical extermination of every Jew within its reach.<sup>8</sup>

It is a cruel coincidence of history that this decision was taken shortly after Hitler formally ended the “euthanasia” program in August 1941.<sup>9</sup> In the two years prior to its official discontinuance, the Nazi leadership, through Hitler’s personal chancellery, had administered “Operation T-4”—a program for the mass murder of the mentally disabled at six primary killing sites inside the German Reich.<sup>10</sup> A gas chamber disguised as a shower room, complete with phony showerheads unconnected to any waterline, was installed at each of these sites.<sup>11</sup> Some 30 patients could be gassed within 20 to 30 minutes

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THE PEOPLE: PERPETRATORS OF GENOCIDE IN THE REFLECTION OF THEIR POST-WAR PROSECUTION 257–61, 276, 281 (1996).

6. CHRISTOPHER R. BROWNING, *THE ORIGINS OF THE FINAL SOLUTION: THE EVOLUTION OF NAZI JEWISH POLICY, SEPTEMBER 1939–MARCH 1942* 424–27 (2004).

7. On the structure of Nazi Jewish policy (definition, expropriation, concentration, annihilation), see 1 RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS*, 49–59 (2003) [hereinafter HILBERG I].

8. *THE ORIGINS OF THE FINAL SOLUTION*, *supra* note 6, at 318.

9. *Id.* at 192.

10. *Id.* at 190–91. The mental hospitals chosen as killing sites were Bernburg, Hadamar, Brandenburg, Grafeneck, Sonnenstein, and Hartheim. Hitler’s Chancellery administered the program through offices located at Tiergartenstrasse No. 4 in Berlin—hence the code name of the program, “Operation T-4.”

11. DE MILDT, *supra* note 5, at 60–61.

by means of bottled carbon monoxide released into the hermetically sealed room.<sup>12</sup>

The Nazis also waged their war of extermination against the disabled in the *Wartheland* (the portion of Poland annexed to Germany) and East Prussia, where a unit under SS *Sturmabführer* Herbert Lange murdered the handicapped in “gas vans” disguised as commercial vehicles. Lange’s unit bundled the victims at the rear of these vans in sealed compartments into which pure carbon monoxide was pumped as the van was driven away.<sup>13</sup> In late spring of 1940, Lange’s men murdered 1,559 German mental patients and 400 Polish patients at the Soldau transit camp in East Prussia.<sup>14</sup> Between the onset of the campaign against the mentally ill, and its termination in August 1941, a cadre of experienced killers was groomed, possessing both the will to carry out their orders unswervingly and the technical know-how of mass extermination.

When Hitler decided to kill all the European Jews within his grasp, his underlings harnessed the expertise of these T-4 murder technicians to a series of separate yet interlocking programs, which formed the heart of the Final Solution.<sup>15</sup> Among the most audacious of these programs was “Operation Reinhard,” the effort to kill all of the Jews concentrated in the General Government.<sup>16</sup> Himmler entrusted its organization and administration to his SS and Police Leader for Poland’s Lublin district, SS-*Obergruppenführer* Odilo Globocnik.<sup>17</sup>

From late October 1941 until January and February 1942, a “commando” of 30 men previously employed in the mass murder of the disabled was sent to Lublin.<sup>18</sup> These included seasoned euthanasia specialists Dr. Irmfried Eberl, director of the T-4 killing centers at Brandenburg and Bernburg; Dr. Helmut Kallmeyer, a chemist in the Criminal Technical Institute of the Reich Police Office; Christian Wirth,

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12. *Id.*

13. THE ORIGINS OF THE FINAL SOLUTION, *supra* note 6, at 188–89.

14. *Id.* at 186–89.

15. *Id.* at 416. Himmler had “loaned” SS men to Hitler’s Chancellery for execution of the euthanasia program between 1939 and 1941. In the fall of 1941, Himmler “was going to collect his debts by taking back his SS personnel experienced in gassing and borrowing some of Viktor Brack’s men was [sic] well.” Brack was the deputy of Hitler’s Chancellery and the Chief of its Section II, which had primary responsibility for carrying out the “euthanasia” program in Germany. The German staffs of the Operation Reinhard camps would ultimately consist of hardcore SS men like Kurt Franz and T-4 employees with only nominal ties to the SS.

16. The program may have been code-named after the head of the Reich Security Main Office, Reinhard Heydrich.

17. THE ORIGINS OF THE FINAL SOLUTION, *supra* note 6, at 419–20.

18. *Id.* at 419.

former detective superintendent of the Stuttgart Criminal Police Headquarters (a department of the Gestapo) and director of various T-4 gassing centers; Josef Oberhauser, a T-4 employee and future liaison for Wirth; and Dr. Herbert Linden, the Reich Delegate for Mental Hospitals and Nursing Homes.<sup>19</sup> Eberl, Kallmeyer, and Linden were among the euthanasia personnel assigned by Globocnik in Lublin to construct Belzec, the first of the Operation Reinhard death camps.<sup>20</sup> The precise number of euthanasia operatives sent to establish and administer the death camps of occupied Poland is unknown. West German investigations into death camp crimes in the 1960s, however, mention a figure of 92 former T-4 personnel assigned to Operation Reinhard in Lublin.<sup>21</sup>

Before it was chosen as a site for Operation Reinhard's first death camp, Belzec was a German labor camp. It was built in early 1940 for Jewish slave laborers involved in constructing fortifications on the border between Soviet and German territory.<sup>22</sup> The labor camp was liquidated in the fall of 1940.<sup>23</sup> A year after its dissolution, Josef Oberhauser was sent to Belzec to supervise the building of a new camp. Twenty Polish workers did the actual construction. They erected three buildings on the site following the blueprints of an ethnic German carpenter.<sup>24</sup> The smallest of the three contained three rooms of equal size. Each room had stout inner and outer doors capable of being secured with crossbars on the outside, and equipped with rubber seals. Pipes underlay the floors of the three rooms. The Poles completed the job on December 22, 1941.<sup>25</sup> Thereafter, former Soviet POWs from the

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19. HILBERG I, *supra* note 7, at 49–53.

20. See testimony of Viktor Brack at Nuremberg, contained in the files of the investigation and prosecution of Belzec personnel housed in the federal archive at Ludwigsburg, Germany. Testimony of Viktor Brack, Oct. 12, 1946, *BArch B 162/3168 (Eidesstattliche Erklärung Viktor Hermann Brack)*. Ascertaining the precise identities of all T-4 personnel Brack assigned to Globocnik in the fall of 1941 has proven elusive; the names of Eberl, Kallmeyer, and Linden were identified by the *Sachbearbeiter* for the Belzec case, Dietrich Zeug, in June 1960; see *id.* ("Operation Reinhard" Concise Summary of Current Results of Investigations by the Central Office of the State Justice Administrations, 9 June 1960). See also Josef Oberhauser Interrogation, Sept. 15, 1960, *BArch B 162/3169*; THE ORIGINS OF THE FINAL SOLUTION, *supra* note 6, at 419.

21. See e.g., YITZHAK ARAD, *BELZEC, SOBIBOR, TREBLINKA: THE OPERATION REINHARD DEATH CAMPS* 17 (1987). Arad adduces a figure of 450 people assigned to Operation Reinhard: 153 SS and police under Globocnik's command in Lublin, 205 SS and police members, and 92 T-4 personnel.

22. THE ORIGINS OF THE FINAL SOLUTION, *supra* note 6, at 419.

23. *Id.*

24. *Id.* at 419–20.

25. *Id.* at 420.

Ukraine, trained after their capture at the SS training center at Trawniki (Lublin), installed a ramp along the north face of the small building and a rail line that led into an adjacent field.<sup>26</sup> In this field the Ukrainians excavated a large trench.<sup>27</sup> The ethnic German carpenter informed Oberhauser that the small building would be a gas chamber.<sup>28</sup>

Around this same time, Christian Wirth became commandant of Belzec, and Oberhauser became his emissary to Globocnik in Lublin.<sup>29</sup> Under Wirth, Jewish workers built the guard towers and remaining buildings on the site.<sup>30</sup> Wirth also introduced an innovation in the killing technology inspired by his work with the euthanasia program. He rejected bottled carbon monoxide in favor of using a diesel engine as a poison gas generator, thereby splicing Lange's gas van with the stationary gas chamber of the euthanasia centers.<sup>31</sup> Wirth's hybrid could achieve higher killing rates without reliance on outside providers of bottled gas.<sup>32</sup> With this technical adaptation, he created the first vertically integrated death camp. The influence of Nazi euthanasia was evident not only in the choice of personnel and the employment of a fixed gas chamber, but also in outward camouflage to deceive the victims.<sup>33</sup>

In February 1942, Wirth and his men were ready to test their brainchild. An experimental gassing was held in which 150 Jewish workers were murdered in Belzec's gas chamber.<sup>34</sup> Afterward, Wirth departed Belzec for Berlin, but returned in March with his commando comprising ex-T-4 men. These individuals were admitted to the SS on arrival; they wore the gray uniforms of the SS and were assigned SS ranks. Although putatively under Globocnik's command, they remained intimately linked to the offices in Berlin responsible for organizing and administering euthanasia.<sup>35</sup> They vacationed at an Austrian retreat for euthanasia personnel and received additional pay and personal mail from a courier employed by euthanasia officials, who visited Lublin each week.<sup>36</sup>

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; ARAD, *supra* note 21, at 24.

30. THE ORIGINS OF THE FINAL SOLUTION, *supra* note 6, at 420.

31. *Id.*

32. ARAD, *supra* note 21, at 20–24.

33. *Id.*

34. THE ORIGINS OF THE FINAL SOLUTION, *supra* note 6, at 420.

35. ARAD, *supra* note 21, at 18.

36. *Id.*

In the preceding months, the camp had been subdivided into two subcamps: the northern and western subcamp, Camp I, was designated the reception and administration area; and the eastern subcamp, Camp II, was devoted to extermination.<sup>37</sup> In mid-March 1942, a transport of Jews from Galicia and a subsequent one from the Lublin ghetto arrived at Belzec.<sup>38</sup> The camp was ready for them. From mid-March to April 14, waves of transports washed into Belzec from Polish towns in the Lublin district—Zamosc, Piaski, and Izbica. They included 30,000 Jews deported from the Lvov district, characterized in Nazi reports as “nonworking” Jews—a fatal classification.<sup>39</sup>

By mid-April, 75,000 Jews had been killed.<sup>40</sup> When the first stage of genocide had ended in June 1942, the Jewish death toll at Belzec stood at 93,000.<sup>41</sup> At this time, the gas chambers were expanded from three to six, all disguised as shower facilities. The capacity was more than 2,000 victims per gassing, or twenty freight cars.<sup>42</sup> Transports to Belzec stopped in December 1942, and mass murder ground to a permanent halt.<sup>43</sup> On Himmler’s orders the camp was razed and converted into a farm for occupancy by a Ukrainian guard.<sup>44</sup> As many as 600,000 Polish Jews were killed there.<sup>45</sup> Only two Jews deported to Belzec survived.<sup>46</sup>

Belzec was the model for the two other death camps of Operation Reinhard: Sobibor and Treblinka. Richard Thomalla, an agent of the SS Central Building Administration (which had also commissioned the building of Belzec), headed the project to construct a death camp near the village of Sobibor, located eight kilometers south of Wlodaway in the Lublin district.<sup>47</sup> Local Poles were hired to build the camp and 80 Jews from local ghettos were sent there to assist in the construction. They toiled under the watchful eyes of Ukrainian guards from

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37. *Id.* at 27.

38. *Id.* at 72.

39. *Id.*

40. *Id.*

41. *Id.* at 73.

42. *Id.* at 74.

43. *Id.* at 126.

44. *Id.* at 371.

45. *Id.* at 127. Polish Jewish victims at Belzec alone accounted for 414,000 victims. Arad reaches the 600,000 figure by adding the tens of thousands of Jews from other European countries deported to Lublin ghettos who were later murdered in the Belzec camp. Arad’s figure is primarily based on the report prepared by the Polish Committee to Investigate Nazi Crimes in Occupied Poland, and matches the estimate of the state court of Munich at Josef Oberhauser’s trial in 1965. It is the most commonly accepted estimate of Jewish fatalities at Belzec.

46. DE MILDT, *supra* note 5, at 276.

47. ARAD, *supra* note 21, at 30.



Trawniki.<sup>48</sup> Once the camp was done, these Jewish workers were murdered.<sup>49</sup>

Globocnik appointed Franz Stangl, another T-4 man, as the first commandant of Sobibor, schooling him in techniques of industrialized Jew-killing through a crash course at Belzec.<sup>50</sup> Here he encountered Christian Wirth, whom he first met on the edge of a knoll overlooking a pit filled with thousands of corpses.<sup>51</sup>

The Sobibor camp was segmented into three sub-camps. Camp I consisted of the entrance, a railroad ramp, and lodging for the camp staff and work Jews.<sup>52</sup> Camp II was a reception area, in which recently arrived Jews disrobed and where their possessions were sorted and stored by camp staff.<sup>53</sup> The “tube,” a passage enclosed in barbwire and interwoven tree branches, joined Camp II to the extermination area at Camp III.<sup>54</sup> Guards drove the victims through the tube into the gas chambers. After gassing, the corpses were dumped into trenches 10 meters by 15 meters wide and 5 meters by 7 meters deep.<sup>55</sup>

Between May and November 1942, at least 75,000 Jews from Lublin ghettos were transported to their deaths in Sobibor.<sup>56</sup> Genocide crested there in three successive waves: May to June 1942, October to November 1942, and March to July 1943.<sup>57</sup> In the intervals between these three waves, smaller transports of Jews arrived in the camps in trucks and horse-drawn vehicles.<sup>58</sup> The state court of Hagen suggested in its 1966 verdict in the main Sobibor trial that these smaller transports of Jews may have bypassed the gassing facilities entirely; instead, they might have been led directly to the trenches in Camp III and shot.<sup>59</sup>

When Sobibor was closed in November 1943, it had murdered between 150,000 and 250,000 Jewish deportees.<sup>60</sup> Unlike its forerunner

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. C.F. RUETER & D.W. DE MILDT, 25 JUSTIZ UND NS-VERBRECHEN 84–88 (State Court of Hagen, Case No. 642a) (2001).

53. *Id.*

54. *Id.*

55. *Id.*

56. See ARAD, *supra* note 21, at 80. The figure of 75,000 is from the state court of Hagen’s 1966 verdict in the main Sobibor trial. RUETER & DE MILDT, *supra* note 52, at 84. Arad cites a higher figure of 90,000–100,000 gassed between May and July 1942 alone.

57. ARAD, *supra* note 21, at 80–86.

58. *Id.*

59. RUETER & DE MILDT, *supra* note 52, at 88.

60. There are wide disparities in the figures cited in the literature. Arad adheres to a figure of 250,000, based on a transport size of 2,000–2,500 deportees. See e.g., Arad, *Die ‘Aktion*

and model, Belzec, Sobibor's awful harvest of human lives was not complete: a revolt within the camp in October 1943 enabled scores of prisoners to escape. Most were recaptured and murdered, but thirty or more eluded their captors and survived the war.<sup>61</sup> Some of these prisoners would later return to testify against their tormentors as witnesses at the main Sobibor trial in 1965.<sup>62</sup>

Of the three camps administered by Globocnik from his headquarters in Lublin, the champion of mass death was Treblinka, located 65 miles northeast of Warsaw. Among Nazi murder sites scattered across German-occupied Europe, only Auschwitz-Birkenau claimed more Jewish lives than Treblinka.<sup>63</sup> It consisted of two sub camps—a labor camp for Polish gentiles and Polish Jews from the Warsaw district (Treblinka I),<sup>64</sup> and an extermination center (Treblinka II).<sup>65</sup> When the construction of the death camp began in late May-early June 1942, genocide at Belzec and Sobibor was already in full swing. Sobibor's builder, Richard Thomalla, was the head of the Treblinka construction team.<sup>66</sup> The work teams that built the camp consisted of Polish and Jewish prisoners from Treblinka I. All of the Jewish prisoner-workers were eventually murdered. As if to consecrate the site in an unholy baptism, the German overseers killed and brutalized the Jewish laborers during Treblinka II's erection.<sup>67</sup> A Polish prisoner involved in the labor team at Treblinka recalled that, "during the felling of forests, [the SS] forced Jews to stand beneath the trees which were

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*Reinhard': Gaskammern in Ostpolen, in NATIONALSOZIALISTISCHE MASSENTÖTUNGEN DURCH GIFTGAS 177 (1983). His figures square with estimates by the state prosecutor of Hagen in the main Sobibor trial. The higher figures may be based on a judicial report prepared by a Polish judge after the war, who conducted interviews of survivors from the Sobibor camp. In his report the judge affirmed that 250,000 victims were murdered at Sobibor. He arrived at this estimate based on a transport size of 2,000 to 4,000 Jews, figures provided by a Polish railroad engineer. The Hagen state court was persuaded, by contrast, that the documentation on transports from Germany, France, and Czechoslovakia (the "Protectorate") showed a transport strength of 1,000 people. With this lower number as its touchstone, the court offered a conservative estimate of 150,000 Jews murdered at Sobibor. The expert witness (*Sachverständiger*), Wolfgang Scheffler, cited a figure of 151,000; the lay assessors (*Schöffen*) believed the number stood at 152,000. RUETER & DE MILDT, *supra* note 52, at 89 (Hagen Regional Court Verdict in the criminal case of Kurt Bolender et al.).*

61. ARAD, *supra* note 21, at 40.

62. *Id.*

63. See 3 RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS, 1320 (2003) [hereinafter HILBERG III].*

64. ARAD, *supra* note 21, at 37.

65. See *id.* at 40–43.

66. *Id.* at 37.

67. *Id.* at 40.

about to fall down,” thereby causing the deaths of four Jewish workers.<sup>68</sup> The SS supervisors conducted raids of the Jewish quarters, in which they killed the Jews on the spot.<sup>69</sup> These early acts of senseless cruelty were only a preview of what would follow.

The extermination camp opened in July 1942 under its first commandant, Dr. Irmfried Eberl, the former director of the T-4 euthanasia centers at Brandenburg and Bernburg.<sup>70</sup> Its purpose was to eradicate the 366,000 Jews in the Warsaw district, as well as Jewish populations in Radom, Lublin, and Bialystok. 29,000 other European Jews and thousands of Roma would perish in the gas chambers of Treblinka during its one and one half year existence. At first, the camp operated with three gas chambers, each measuring four meters by four meters wide and 2.6 meters high.<sup>71</sup> Following the pattern at Belzec and Sobibor, they were disguised as showers: the ceilings of each chamber were equipped with pipes and showerheads.<sup>72</sup> Conveying the illusion of a functional bath, the pipes routed carbon monoxide gas into the chamber from a diesel engine located in an attached room.<sup>73</sup>

In late August to early September 1942, a “large gas chamber” was built to improve the deadly work of the “small” ones, which had proven inadequate to the tasks demanded of them.<sup>74</sup> The brick building housing the larger facility consisted of five gas chambers, five meters by five meters wide and two meters high.<sup>75</sup> Otherwise, the large gas chamber resembled the smaller facility. Pipes conducted carbon monoxide exhaust from a diesel engine installed in the adjacent “machine room.”<sup>76</sup>

After arrival in the camp, the deportees were “selected” for either labor or extermination in the reception area.<sup>77</sup> The latter group disrobed in a barrack before being herded naked, blows from clubs, whips, and fists raining down on them, through a “tube” connecting the reception area to the gas chambers.<sup>78</sup> The smaller chambers killed as many as 300

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68. *Id.*

69. *Id.* at 39–40.

70. Rael D. Strous, *Dr. Irmfried Eberl (1910–1948): Mass Murdering MD*, 11 IMAJ 216, 217 (2009).

71. ARAD, *supra* note 21, at 42.

72. *Id.* at 42.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Treblinka*, U.S. HOLOCAUST MEM’L MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005193> (last visited Feb. 4, 2013).

78. *Id.*

persons, and the larger 400 persons, at a time.<sup>79</sup> After gassing, Jewish work teams searched all the corpses for hidden valuables.<sup>80</sup> The corpses were then dragged to the burial pits, where they were covered with thin layers of sand. In May 1943, two crematoria were installed, in which the bodies of the victims were incinerated immediately after gassing.<sup>81</sup>

As at Sobibor, a prisoner revolt erupted late in Treblinka's existence. It began on August 2, 1943, led by work Jews sensing that the camp, along with themselves, would soon be liquidated.<sup>82</sup> Prisoners gained access to the armory, secured weapons, and attacked the SS.<sup>83</sup> They also set some of the camp buildings on fire as other prisoners sought escape over the fence.<sup>84</sup> Most were mowed down by guards shooting from the camp watchtowers,<sup>85</sup> and the majority of successful escapees were later recaptured and shot anyway.<sup>86</sup> Of the 750 fugitives, only 70 survived Treblinka's liquidation.<sup>87</sup> Some of these survivors joined their counterparts from Sobibor and appeared as witnesses against camp personnel at the West German Treblinka trial in 1964.<sup>88</sup>

In the aftermath of the Treblinka uprising, the camp commandant, Franz Stangl, made preparations to close the camp.<sup>89</sup> When Stangl was sent to fight partisans in Trieste, he was replaced by Kurt Franz. Franz ordered that any trace of the crimes committed at Treblinka be obliterated.<sup>90</sup> He oversaw the demolition of the camp by 100 work Jews.<sup>91</sup> When it had been razed, all the work Jews were shot.<sup>92</sup> Trees were planted on the grounds and the site was given to a former Ukrainian guard as a farm.<sup>93</sup>

When the last of the camps of Operation Reinhard were dismantled in the fall of 1943, they had claimed the lives of nearly 1.8 million

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79. ARAD, *supra* note 21, at 354.

80. *See Treblinka*, *supra* note 777.

81. ARAD, *supra* note 21, at 40–42; Indictment of K. Franz et al., StA Düsseldorf, 8 Js 10 904/59, BA, B 162/3848, 129–40.

82. ARAD, *supra* note 21, at 286.

83. *Id.* at 288–90.

84. *Id.* at 292.

85. *Id.*

86. DAVID CROWE, *THE HOLOCAUST: ROOTS, HISTORY AND AFTERMATH* 250 (2008).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 251.

91. *Id.*

92. *Id.*

93. *Id.*

Jews.<sup>94</sup> Although the Nazis continued to murder Jews at Auschwitz-Birkenau and other sites well after the closure of Belzec, Sobibor, and Treblinka, the frightful work of annihilation at these camps accounts for more than one-third of the Holocaust's victims.<sup>95</sup>

## II. BACKGROUND OF THE WEST GERMAN OPERATION REINHARD TRIALS

Given the enormity of the crimes committed at Belzec, Sobibor, and Treblinka, it may appear scandalous that many death camp perpetrators avoided punishment for their crimes until the 1960s, particularly in West German courts. In fact, the reasons for the belated confrontation with these lower-level killers in West Germany are complex. The International Military Tribunal ("IMT") at Nuremberg (1945–46), although touching on the extermination of the Jews, by no means foregrounded the Nazis' Final Solution.<sup>96</sup> The only death camp commandant available to testify at the IMT was Rudolf Hoess, the former commandant of Auschwitz.<sup>97</sup> While Hoess testified about the existence of other death camps—specifically identifying Belzec and Treblinka—the proceedings of the Tribunal scarcely addressed Operation Reinhard.<sup>98</sup> These failures of judicial representation were understandable given the Allies' lack of knowledge at this time of the immensity of Nazi genocide—an ignorance they shared with the German judicial authorities.<sup>99</sup>

Unawareness of the colossal proportions of the Holocaust was not the only reason that the major West German trials of death camp killers did not occur until the 1960s. Limits imposed by the Allies on German courts' jurisdiction over Nazi crimes also contributed to the delay. The Allies closed all German courts in May 1945, only to reopen them months later with significant restrictions on their jurisdiction over Nazi-

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94. *Id.* at 247, 251. This figure includes both Operation Reinhard and the so-called "Harvest Festival" (*Erntefest*) killings, in which Waffen SS and Order Police units shot between 42,000 and 45,000 Jews in three slave labor camps (Trawniki, Poniatowa, and Majdanek) over two days, November 3–4, 1943; see also CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND*, 133–42 (1998) (the state prosecutor of Düsseldorf offered a "cautious estimate" of 1,750,000 Jews killed in the three death camps of Operation Reinhard); see also Indictment, K. Franz et al., *BArch B 162/3848*.

95. Applying the calculations in Hilberg (citing a Jewish victim total of 5,100,000), 34.3% of Holocaust victims were killed in the Operation Reinhard death camps. See HILBERG III, *supra* note 63, 1320–21.

96. DE MILDT, *supra* note 5, at 248.

97. *Id.*

98. *Id.*

99. *Id.*

era crimes.<sup>100</sup> Under the Allied Control Council Law #10 (December 1945), German courts were only able to hear criminal cases involving German defendants and German victims.<sup>101</sup>

A burst of prosecutions of Nazi crimes in German courts followed. Between 1945 and 1949—before the establishment of West and East Germany—German courts convicted 4,500 Nazi defendants of crimes committed during the Third Reich, a figure that approaches the numbers convicted in Allied military courts.<sup>102</sup> None of these convictions related to the genocide committed in the Operation Reinhard death camps. Control Council Law #10 withheld from German courts any jurisdiction over Nazi crimes inflicted on Allied nationals, and most of the victims of the Operation Reinhard camps were Poles whose murders were thus beyond the reach of German law.

German courts in the western half of the country first encountered Operation Reinhard in the course of their investigations into euthanasia crimes.<sup>103</sup> Because the principal victims of the Nazi “euthanasia” of the disabled were German nationals, these crimes fell within the jurisdiction of the restored German judiciary as defined by Control Council Law #10. In July 1946, the Frankfurt police arrested a mechanic named Josef Hirtreiter on suspicion of involvement in the murder of the disabled at the Hadamar killing center.<sup>104</sup> While the charges against him were ultimately dropped, in his interrogations by police Hirtreiter spoke of his assignment to the “Malkinia” camp where Jews were gassed.<sup>105</sup> A July 1948 Frankfurt newspaper account reported that Hirtreiter had been sentenced by a denazification court to 10 years of forced labor for his participation in gassing as many as 5,000 Jews in the “concentration camp Malkinia.”<sup>106</sup>

Alerted by the article on Hirtreiter, the Frankfurt prosecutor launched an investigation into the Malkinia camp, which revealed that the camp in question, although located near the hamlet of Malkinia, was in fact Treblinka.<sup>107</sup> The prosecutor expanded his investigation to

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100. *Id.* at 22.

101. *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GER. arts. III–IV (1946) [hereinafter *Control Council Law No. 10*].

102. GERHARD WERLE & THOMAS WANDRES, AUSCHWITZ VOR GERICHT: VÖLKERMORD UND BUNDESDEUTSCHE STRAFJUSTIZ 19 (1995).

103. DE MILDT, *supra* note 5, at 249.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

include Hubert Gomerski and Johann Klier - two men Hirtreiter had identified in his 1946 interrogations as working with him in the Sobibor death camp.<sup>108</sup> Two Jewish survivors of Sobibor, Samuel Lerer and Esther Raab, recognized a third Hirtreiter co-worker, Erich Bauer, when they ran into him on the Kreuzberg fairgrounds in Berlin in 1949.<sup>109</sup> When Raab recognized Bauer, he replied in astonishment, "How is it that you are still alive?"<sup>110</sup> Lerer and Raab reported Bauer to the police, and he was arrested.<sup>111</sup> Both Raab and Lerer would later testify as survivor-witnesses in the 1965 Sobibor trial.

In 1950 a Berlin court tried and convicted Bauer, a gassing technician at Sobibor, of murder as a perpetrator.<sup>112</sup> Initially sentenced to death (at that time, a murder conviction as a perpetrator carried with it an automatic death sentence), his sentence was commuted to a life prison term when the new West German state abolished capital punishment.<sup>113</sup> Gomerski and Klier were also tried in 1950, with radically different results. Largely on the strength of Jewish survivor testimony proving his acts were gratuitously cruel and sadistic, Gomerski was convicted of murder as a perpetrator.<sup>114</sup> Klier, however, was acquitted based on his un rebutted defense of duress, a commonly invoked defense in the later Operation Reinhard trials.<sup>115</sup>

Hirtreiter's trial followed in March 1951, a proceeding characterized by such lurid but credible accusations against the defendant that the regional court judges hesitated at first to accept them.<sup>116</sup> When they had satisfied themselves of the veracity of the witnesses and the authenticity of their stories, the judges convicted Hirtreiter of murder as a perpetrator.<sup>117</sup> Both he and his ex-colleague Gomerski received life prison terms, the harshest punishment under West German law after abolition of the death penalty.<sup>118</sup>

Thus, the West German judiciary had acquaintance with the crimes of Operation Reinhard and Jewish survivor witnesses long before the major death camp trials of the 1960s. These first encounters with

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108. *Id.* Hirtreiter, Gomerski, and Klier had all been assigned to the Hadamar euthanasia center and to the Operation Reinhard camps.

109. DE MILDT, *supra* note 5, at 391.

110. *Id.*

111. *Id.*

112. *Id.* at 250.

113. *Id.*

114. *Id.* at 253.

115. *Id.* at 252.

116. *Id.* at 254-55.

117. *Id.* at 255.

118. *Id.* at 254-55.

Operation Reinhard, however, were fortuitous. Hirtreiter's name arose only because of the Frankfurt prosecutor's investigation into Nazi euthanasia, as did the names he identified during his police interrogations, Gomerski and Klier. Bauer's prosecution was possible only because of his chance meeting with two survivors of Sobibor who were able to recognize him four years after the war's end. Before the formation of a central clearinghouse devoted to documenting Nazi crimes in 1958, criminal investigations typically began when private citizens filed a *Strafanzeige* ("report of crime") against a person suspected of violating the German penal code.<sup>119</sup> Such a system, as applied to former death camp personnel, was clearly unworkable given the paucity of survivors available to report a suspect to the police.

Other factors also contributed to the rarity of death camp trials in West Germany between 1951 and 1960. For one, the West Germans lacked both documentation from, and basic knowledge of, the Final Solution for years.<sup>120</sup> For another, state and federal criminal police ranks were full of ex-Nazi officials.<sup>121</sup> Furthermore, many witnesses, important evidence, and crime scenes themselves were inaccessible behind the Iron Curtain. All of these factors created a daisy chain of impediments to prosecuting death camp offenders.

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119. Eric Haberer, *History and Justice: Paradigms of the Prosecution of Nazi Crimes*, 19 HOLOCAUST GENOCIDE STUD. 487, 495 (2005).

120. The ignorance of even educated Germans in the 1960s about the fundamentals of the Final Solution is illustrated by an incident in the 1960 trial of an Auschwitz physician. As a non-German survivor testified that he had seen the defendant on the ramp at Birkenau (the extermination camp of the Auschwitz complex), he was interrupted by the chairman of the panel of lay assessors (*Schwurgericht*), who admonished the witness that "this case doesn't involve Birkenau, but Auschwitz. So, Mr. Witness, what do you know about Auschwitz and the defendant?" When the witness resumed his testimony, he again asserted that he had seen the defendant on several occasions in Birkenau—and immediately drew a second interruption from the chairman. "Mr. Witness, I've already explained that we're not concerned here with Birkenau but with Auschwitz. If you're not able to understand the German language, may I perhaps call in a translator?" The chairman was unaware that Auschwitz and Birkenau formed a unified camp, or that the railway siding for the main camp at Auschwitz was in the subcamp Birkenau. Anecdote told by Göttingen historian Hans-Günther Seraphim, reproduced in ANNETTE WEINKE, DIE VERFOLGUNG VON NS-TÄERNATERN IM GETEILTEN DEUTSCHLAND: VERGANGENHEITSBEWALTIGUNGEN 1949–1969, ORDER, EINE DEUTSCH-DEUTSCHE BEZIEHUNGSGESCHICHTE IM KALTEN KRIEG (2002).

121. On the compromised West German federal and state police, see ANNETTE WEINKE, EINE GESELLSCHAFT ERMITTELT GEGEN SICH SELBST: DIE GESCHICHTE DER ZENTRALEN STELLE LUDWIGSBURG 1958–2008 (2008); IRMTRUD WOJAK, FRITZ BAUER: EINE BIOGRAPHIE 285 (2009); MICHAEL GREVE, DER JUSTITIELLE UND RECHTSPOLITISCHE UMGANG MIT DEN NS-GEWALTVERBRECHEN IN DEN SECHZIGER JAHREN 47, 66–67 (2001); WEINKE, *supra* note 120, at 165–66.



One of the most important Holocaust trials in German history, the Ulm “Einsatzgruppen” trial of 1958, dramatized the shortcomings in the West German punishment of Nazi crimes and opened the door to much-needed reforms in the Federal Republic. The Ulm proceeding began when a civil servant and former SS-*Oberführer*, Bernhard Fischer-Schweder, sued for reinstatement to his former civil service position, from which he had been removed due to his Nazi past.<sup>122</sup> The labor court that heard his petition dismissed it, prompting Fischer-Schweder to protest his dismissal in a letter to a local newspaper.<sup>123</sup> A rabbi originally from Lithuania but living at the time in Stuttgart recognized Fischer-Schweder as the ex-chief of the State Police field office in Tilsit, Lithuania. In September 1955, the rabbi filed a *Strafanzeige* against Fischer-Schweder, alleging his involvement in the shooting of Lithuanian Jews during the summer of 1941. In the aftermath of Fischer-Schweder’s arrest in May 1956, other participants in the massacres were apprehended. In 1958, all the defendants were prosecuted in the city of Ulm (state of Baden-Württemberg). They were charged with murdering more than 5,500 men, women, and children in August 1941 as members of a special commando unit active along the German-Lithuanian border.<sup>124</sup>

As scholars of the postwar trials have noted, the Ulm trial became the model for subsequent prosecutions of Holocaust-related crimes in West German courts.<sup>125</sup> Prior to 1958, Nazi war criminals, if hauled before a court of the Federal Republic, typically faced their judges as single individuals.<sup>126</sup> The state prosecutor in the Ulm case indicted the ten Tilsit defendants as a single group involved in a multifaceted criminal transaction—one that encompassed numerous actors. This approach influenced the West German trials of “euthanasia doctors,” other *Einsatzgruppen* shooters, and death camp personnel in the 1960s.

In another regard, too, the Ulm verdict became an archetype for the Federal Republic’s trials of Nazi crimes after 1958. Both the indictment and the state court’s judgment characterized Hitler, Himmler, and Heydrich as the “main perpetrators” of the Holocaust. For the court, this meant that these men at the summit of the Nazi state conceived the Final

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122. See Symposium, “*The Murderers Among Them*”—*German Justice and the Nazis*, 3 HOFSTRA L. & POL’Y SYMP. 137, 142 (1999) [hereinafter Hofstra Symposium].

123. See *id.*

124. WEINKE, *supra* note 120, at 12–13; GREVE, *supra* note 121, at 47; MARC VON MIQUEL, *AHNDEN ODER AMNISTIEREN?* 151 (2004).

125. See e.g., JÖRG FRIEDRICH, *DIE KALTE AMNESTIE* 340–78 (1994); INGO MÜLLER, *HITLER’S JUSTICE* 249–54 (1991); WEINKE, *supra* note 120, at 17–19.

126. See MÜLLER, *supra* note 125, at 251–52.

Solution, assumed primary responsibility for it, and used the lower-level defendants as tools to achieve their aims. Because the Ulm defendants did not inwardly approve of the Final Solution, they were accomplices, not perpetrators, in the court's analysis. Fischer-Schweder was accordingly convicted of complicity in murdering 526 Jews and sentenced to a ten-year prison term; his co-defendants received prison sentences of three to fifteen years.<sup>127</sup>

### III. THE CREATION OF THE CENTRAL OFFICE/LUDWIGSBURG

The 1958 Ulm trial revealed to the West Germans that the Nuremberg trials had not cleansed the Federal Republic of Nazi war criminals. Instead, the spectacle of ten respectable citizens being charged with heinous crimes thirteen years after the war's end showed that mass murderers were living comfortable and anonymous lives in the Federal Republic. Many understood that the Ulm case was an accident. But for the happenstance that the Stuttgart rabbi recognized Fischer-Schweder from his letter in the newspaper, the trial would likely have never happened, and the murderers of thousands in Lithuania would have continued their postwar lives without fear of punishment.<sup>128</sup>

In order to conduct the investigation of Nazi crimes on a more systematic basis, the justice ministers of the West German states decided in October 1958 to establish an agency devoted to investigating and documenting them.<sup>129</sup> Headquartered in Ludwigsburg in Baden-Württemberg, the agency bore the cumbersome title of "the Central Office of the State Judicial Administrations for the Investigation of National Socialist Violent Crimes" ("Central Office").<sup>130</sup> The creators of the Central Office imposed significant restrictions on its jurisdiction. It had the power to investigate Nazi crimes and liaise with state justice offices, but lacked any prosecutorial authority.<sup>131</sup> Once it had completed an investigation, the Central Office could do little more than send its files to state prosecutors, who would decide whether or not to indict.<sup>132</sup> The Central Office could investigate only Nazi crimes committed beyond the Federal Republic's borders.<sup>133</sup> With this remit, the Central

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127. RUETER & DE MILDT, *supra* note 52, at 642.

128. In this regard, the case bears comparison with the *per accidens* character of the Hirtreiter, Gomerski, Klier, and Bauer trials.

129. Hofstra Symposium, *supra* note 122, at 142.

130. *Id.* at 154.

131. *Id.* at 142.

132. See Sabine Swoboda, *Paying the Debts – Late Nazi Trials Before German Courts*, 9 J. INT'L CRIM. JUST. 243, 251 (2011).

133. *Id.* at 252.

Office opened for business in December 1958 under its first director, the former lead prosecutor in the Ulm *Einsatzgruppen* trial, Erwin Schüle.<sup>134</sup>

Given the creation of the Central Office and a renewed commitment to investigate the crimes of the Final Solution, the prospects for successful prosecution of Holocaust killers in West Germany would have seemed encouraging. However, there were systemic problems facing these trials. One of the most formidable of these was the lack in many cases of specific evidence proving criminal wrongdoing by suspected killers. The problem of evidence arose from the very nature of Holocaust crimes, in which most or sometimes all the victims had been killed. Documentation alone that linked a suspect with a unit involved in ghetto clearings or guard duty at a Polish death camp was not enough to secure a conviction, particularly where the potential defendant had no command authority.<sup>135</sup> As Helge Grabitz, a former German prosecutor involved in trying Nazi crimes, has pointed out, this basic lack of available proof meant that only 20 of the 101 known ghetto clearings in the Lublin district of Poland—operations that sent thousands to their deaths in Belzec, Treblinka, and Sobibor—could be prosecuted.<sup>136</sup>

A further obstacle to these trials was the distinction between perpetration and complicity in West German law, a difference already drawn in the Ulm *Einsatzgruppen* trial.<sup>137</sup> The tendency of German courts after 1958 was to classify Nazi defendants as accomplices to the murder of the Jews, unless there was evidence that the defendant exceeded his orders—that is, unless he demonstrated his inward and subjective approval of the Holocaust.<sup>138</sup> Merely following orders was not enough to convict a Nazi offender as a perpetrator of murder—the judge had to be satisfied that he had acted from “base motives.”<sup>139</sup> In effect, this meant that there had to be proof the defendant acted sadistically or from racial hatred. In many cases, such evidence could only be provided by an eyewitness—and since the former camp personnel were understandably reluctant to incriminate themselves,

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134. WEINKE, *supra* note 120, at 28–29.

135. Helge Grabitz, *Die Verfolgung von NS-Verbrechen in der Bundesrepublik Deutschland und der DDR*, in KEINE “ABRECHNUNG”: NS-VERBRECHEN, JUSTIZ UND GESELLSCHAFT IN EUROPA NACH 1945 157 (1998).

136. *Id.*

137. See DE MILDT, *supra* note 5, at 9.

138. See *id.* at 253 (“In the eyes of the court it left little doubt as to the brutal inner disposition of the defendant at the time of his Sobibor days.”).

139. *Id.*

proving base motives was mostly done through Jewish survivor testimony.<sup>140</sup>

In sum, even where the prosecutor could tie the defendant to a specific criminal act, additional proof was needed to show the defendant was a perpetrator rather than an accomplice. If such proof were unavailable, the court could only convict him of complicity to murder, which translated into a more lenient punishment.<sup>141</sup>

#### IV. FIRST CONTACTS BETWEEN THE CENTRAL OFFICE AND THE ISRAELIS CONCERNING THE DEATH CAMPS

Erwin Schüle, as head of the Central Office, was undoubtedly aware of the challenge of gathering evidence adequate to sustain indictments and convictions of death camp perpetrators. Hence, he must have regarded the prosecution of Adolf Eichmann as a heaven-sent boon.

Eichmann was arrested in May 1960, and his trial began in April 1961—during the time, in other words, when the Central Office was conducting investigations into Belzec, Sobibor, and Treblinka. Whether the Eichmann trial galvanized West German efforts to bring the executors of the Final Solution to justice has been a subject of controversy since the 1960s. Hannah Arendt believed the Eichmann trial was the trigger to the large death camp trials in the Federal Republic that followed in its wake.<sup>142</sup> Schüle adopted a different view. He asserted that the origins of pending investigations of Nazi death camps preceded Eichmann's arrest and trial.<sup>143</sup> Whatever the merits of either position, one thing is indisputably clear: the Germans coordinated

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140. *See id.* at 258.

141. *Id.* at 254.

142. *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (for her conclusions regarding the Eichmann trial).

143. The issue of primacy and influence has endured until the present day. In a recent article, Louis Begley claims that the Eichmann trial “galvanized West German authorities, who moved with spectacular results to prosecute notorious war criminals who had been living peacefully in Germany, some of them having been previously ‘denazified.’” Louis Begley, *The Day of the Hunter*, N.Y. REV. BOOKS (Dec. 8, 2011), <http://www.nybooks.com/articles/archives/2011/dec/08/day-hunter/?pagination=false>. In fact, only days after Eichmann's capture in May 1960, Israeli police officers were assigned to Yad Vashem (the Israeli national Holocaust memorial) to work with staff members who had previously helped the West Germans locate documents for their national trials of Nazi crimes. This fact supports Schüle's view that the West German investigations preceded Eichmann's arrest. *See* CESARANI, *supra* note 1, at 248.

with the Israelis in securing the names of Eichmann trial witnesses who could offer testimony at West German trials of Nazi perpetrators.<sup>144</sup>

The earliest official contact between the Israelis and Central Office officials investigating Operation Reinhard crimes occurred in October 1959, a time that preceded Eichmann's arrest by seven months. The contact consisted of a letter in October 1959 signed by Werner, the investigating officer for the Belzec case, and addressed to the chief archivist of Yad Vashem, Dr. Josef Kermisz.<sup>145</sup> The letter recounts the sources of Werner's information on Belzec and ends with a request for the names and contact information of survivors who might reside in Israel.<sup>146</sup>

In November, Yad Vashem responded to the Central Office's inquiry.<sup>147</sup> According to Kermisz, there was only one survivor of Belzec: a Lemberg Jew named Rudolf Reder, a name with which Dietrich Zeug, the Central Office official in charge of the Sobibor investigation, was already familiar. Kermisz was unsure whether Reder was still alive, but he knew Reder had written an account of his experiences at Belzec immediately after his liberation.<sup>148</sup> The account was published in a volume edited by the former Crakow branch office of the Jewish Historical Institute in Warsaw. Kermisz also provided Werner with a reference to another book by Reder, devoted exclusively to Belzec, which was published in 1945. Kermisz also listed 17 names of suspects from the Belzec camp, including the assistant to the camp commandant, Josef Oberhauser, and Lawrence Hackenholt, whom Kermisz described as a chauffeur and machine operator involved in grave excavation.<sup>149</sup>

Reder's name had originally come to Zeug's attention from his review of the literature<sup>150</sup> and Werner's October correspondence with Yad Vashem. In late October, Zeug had inquired of the International Tracing Service at Bad Arolsen about Reder's whereabouts. Arolsen replied in early November that Reder had filed a claim for compensation with the Governmental District Office

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144. See CESARANI, *supra* note 1, at 335.

145. Letter from Dietrich Zeug to Yad Vashem (Feb. 24, 1960) (on file with *BArch* B 162/4427).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Especially the Polish book *DOKUMENTY I MATERIAŁY DO DZIEJÓW OKUPACJI NIEMIECKIEJ W POLSCE* (1946), in which Reder had authored a chapter on Belzec. Reder's contribution is found on pages 217–24.

(*Regierungsbezirkamt*) for Restitution in Mainz.<sup>151</sup> Zeug followed up a week later with a letter to the Mainz Office, which replied with a confirmation of Reder's application in late November. It also sent along Reder's address and a copy of his application.

Appended to the application was an autobiographical sketch from December 1954 describing Reder's life before, during, and after his internment at Belzec. He was born in the Polish town of Dembica on April 4, 1881, but was living in Lwów<sup>152</sup> when the Germans invaded the USSR. At that time he was the owner of the largest soap factory in the city. He was confined in the Lwów ghetto after its erection in December 1941 and compelled to work as a slave laborer in his own soap factory, which the Germans had confiscated. On August 18, 1942, the Gestapo arrested him at home and took him to the military installation Podzamcza before internment in the Janowska camp—a labor/transit/concentration camp. His stay there was brief, for the next morning he and other prisoners were loaded amid a rain of blows into railcars at the Kleparow train station. The next stop was the Belzec death camp.<sup>153</sup>

Reder arrived in Belzec on August 17, 1942. His railcar was unloaded and all save Reder and seven other men were immediately gassed. In what was a hallmark of Nazi institutionalized murder, the camp commandant, a Sudeten German named Fritz Irrmann, informed the deportees they would be assigned to labor details after a shower. Reder described the sequence of events:

All the [recently arrived] prisoners were brought into a large barracks, where the women's hair was cut. They were then driven into a narrow corridor; there was a door at the end with an inscription: "Bathing and Inhalation Rooms." A flowerpot with a single flower hung in front of the door. Behind the door was another corridor, to the right were three doors and to the left three doors, which led into six gas chambers. Each chamber held 750 people. The building was made of concrete. I know from my own observation that the gassing took no longer than 20 minutes . . . . The gas was conducted through pipes powered by an engine located in a small cubicle. I operated a machine that excavated trenches designated as graves for the gassing victims. I also had to drag the corpses from the

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151. Letter of International Tracing Service to Central Office (Nov. 3, 1959) (on file with *BArch* B 162/3164).

152. In German, "Lemberg."

153. Comment (Nov. 27, 1959) *BArch* B 162/3165; Sworn Statement of Rudolf Reder, at 240, *BArch* B 162/3165 (Dec. 7, 1954).

gas chambers to the graves. Around 500 Jews were used in this last activity.<sup>154</sup>

Three transports arrived every day during Reder's time in the camp, each comprising fifty railcars of 12,000–13,000 Jews. Nearly all the deportees were murdered and buried by the evening of their arrival. Reder estimated the number of burial trenches at thirty; each was 100 meters long, 25 meters wide, and 15 meters deep. As many as 10,000 corpses could be buried in a single trench.<sup>155</sup> When the grave was full, the corpses were doused with lime and the trenches filled in with sand.<sup>156</sup>

In his interrogation by the Munich prosecutor's office in August 1960, Reder described how he escaped from Belzec. In November 1942 he traveled by truck to Lviv with a driver and four Ukrainian guards in search of sheet iron to be used to build chimneys for ovens in the camp.<sup>157</sup> After arrival, Reder spent the night in a Gestapo building. The next morning, he and the others loaded the iron. The guards left Reder in the company of another guard while they went to dinner. When the lone guard fell asleep in the truck, Reder slipped away and found refuge with a woman he knew and whom he would later marry. Remarkably, she lived in a building partly occupied by the Gestapo, and even worked as a cleaning woman in their offices. Reder hid in this very building until Lviv's liberation by the Red Army. Irony piled on irony in the case of Rudolf Reder. His future wife cared for a dog belonging to the Gestapo. She diverted some of the meat given by Gestapo officials for the dog's maintenance to Reder, who lived on it until liberation.<sup>158</sup>

On November 30, 1959, Zeug sent a letter addressed to Reder to an address in Toronto provided by the Mainz Restitution Office. After a brief introduction informing Reder of the Belzec investigation, the letter acknowledged him as "the sole surviving eyewitness to escape from Belzec." It then posed a series of questions to Reder, including whether he had observed specific crimes (especially murder) committed in the camp, and whether he was familiar with Josef Oberhauser and Gottfried

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154. Sworn Statement of Rudolf Reder, *supra* note 153 at 240.

155. In his interrogation by a Munich prosecutor on August 8, 1960, Reder stated that each trench held up to 100,000 corpses. The larger figure is very likely a typo. Roman Robak Interrogation, *BArch B 162/3168* (Aug. 8, 1960).

156. *Id.*

157. Presumably, the crematoria were designed to incinerate the bodies of victims already murdered and buried in the camp trenches: see ARAD, *supra* note 21, at 177–78.

158. Roman Robak Interrogation, *supra* note 155.

Schwarz.<sup>159</sup> Zeug's letter evoked no response from Reder. On January 7, 1960, Zeug sent a second letter to Reder, indicating that Gottfried Schwarz was dead, and requesting information on Oberhauser, whom he characterized as adjutant to the Belzec camp commander, Christian Wirth.<sup>160</sup>

On January 19, Reder replied to Zeug's letter, denying any knowledge of Oberhauser. Zeug forwarded photos of Oberhauser to the World Jewish Congress in New York with the request they be sent to Reder for identification.<sup>161</sup> Representatives of the World Jewish Congress then contacted Reder, secured two sworn statements from him, and forwarded these to the Central Office. The second of these signified a breakthrough in the Belzec case: Reder recognized Josef Oberhauser in the three photos shown to him. Reder wrote: "[Oberhauser] wore a cap in the Belzec camp, and I saw him only in a long SS dress coat. I am, however, certain that it is one and the same person."<sup>162</sup>

In March 1960, Schüle contacted Robinson at the World Jewish Congress, requesting that Reder travel to Munich and positively identify Oberhauser face-to-face. Months passed before Reder made the trip. The Munich prosecutor's office conducted the interrogations on August 8, 9, and 10, 1960. Ominously for the prosecution's case, when confronted by Oberhauser, Reder claimed he had never seen him.<sup>163</sup> Consequently, the state court of Munich<sup>164</sup> quashed the arrest warrant for Oberhauser on August 10, 1960. At the end of the first week in September, the senior prosecutor wrote Schüle that, unless incriminating evidence from Poland or the US National Archives emerged proving Oberhauser's crimes at Belzec, the case against him would be dismissed.<sup>165</sup>

Zeug responded with an internal memorandum in mid-September 1960, urging that second interrogations of other perpetrators or former death camp insiders like Hermann Pfannenstiel, Kurt Franz, and

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159. Letter from Dietrich Zeug to Rudolf Reder, (Nov. 30, 1959) (on file with *BArch* B 162/3165).

160. Roman Robak Interrogation, *supra* note 155.

161. Letter from Dietrich Zeug to Thomas Friedmann, (Jan. 27, 1960) (on file with *BArch* B 162/3166).

162. Letter from Robinson of World Jewish Congress to Schüle, *BArch* B 162/3167 (Feb. 29, 1960); *see also* Sworn Statement of Rudolf Reder/Roman Robak, *BArch* B 162/3166 (Jan. 26, 1960); Supplemental Sworn Statement of Rudolf Reder, *BArch* B 162/3166 (Feb. 12, 1960).

163. Robak Interrogation, *supra* note 155.

164. 4th Criminal Chamber of the Regional Court of Munich.

165. Letter from Chief Prosecutor associated with the Regional Court of Munich I to Schüle, (Sept. 6, 1960) (on file with *BArch* B 162/3169).



Heinrich Gley be conducted to elicit such evidence. Zeug also recommended that the trial records pertaining to T-4 crimes at Hadamar and Grafeneck be revisited, insofar as “ninety-two members of the ‘Führer’s Chancellery’ were assigned to ‘Operation Reinhard’”—meaning that a more thorough analysis of the trial documentation might yield the identities of witnesses capable of incriminating Oberhauser.<sup>166</sup> The memo pointed out that follow-up analyses of records at the Berlin Document Center had enabled the investigating magistrate in Düsseldorf to deepen his understanding of the personnel assigned to Treblinka. Zeug closed with a suggestion that the homes of Oberhauser, Unverhau, Girtzig, and Gley be searched. House searches of Treblinka suspects, including Franz and the widows of former Belzec commandants Christian Wirth and Gottlieb Hering, had produced valuable inculpatory materials like photo albums, photographs, and correspondence with other compromised persons.<sup>167</sup>

Unsurprisingly, additional interrogations of Oberhauser ended in more equivocation and stonewalling. Oberhauser did not deny his presence at Belzec; rather, he insisted he was sent there, not to assist with the extermination of Jews, but “to gather war material in the area around Belzec.” The death camp had not yet been constructed when he arrived on the site in the fall of 1941. Oberhauser continued:

My cleaning up operation lasted until the summer of 1942. Mostly I supervised 10 to 20 Ukrainians in transporting firearms, ammunition, barbed wire, among other things, from the military equipment depot to Lubica and Ravaruska and loading them there in railcars. Sometime in the spring of 1942—there was still snow—the Belzec death camp was built. At first only barracks were set up, which were enclosed with barbed wire. As far as I can remember, the SS Central Construction Management of Lublin was responsible for the camp’s construction; it used Polish civilian workers in this task. Later on the camp was continuously rebuilt and enlarged. This occurred under the supervision and direction of the camp commandant, with the assistance of Ukrainian units under his command. I would like to point out that I was never in Belzec for very long, but only for a few days. My longest stay lasted around 14 days, and this was at the beginning of the cleaning up operation.<sup>168</sup>

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166. Opinion on the Memorandum from Chief Prosecutor Dr. Bader of Sept. 6, 1960 (Sept. 15, 1960) (on file with *BArch* B 162/3169).

167. *Id.*

168. Josef Oberhauser Interrogation, *BArch* B 162/3169 (Sept. 15, 1960).

Oberhauser denied any involvement in constructing the gassing equipment and disclaimed knowledge of experimental gassings at the camp.<sup>169</sup> The challenge facing the Central Office investigators and the Munich prosecutor's office was to refute this defense. Curiously, the source of rebuttal came not from the lone surviving prisoner of Belzec, Rudolf Reder, but from other camp guards—Robert Lorent, Heinrich Gley, Werner Dubois, Karl Schluch, and Robert Jührs. On the strength of their interrogations, a new arrest warrant was issued for Oberhauser on November 20, 1961. The authorities arrested Oberhauser on December 4, 1961.<sup>170</sup> Oberhauser was the leading defendant in the Munich prosecutor's indictment of eight former Belzec staff members on August 8, 1963.<sup>171</sup>

#### V. EYELESS IN MUNICH: THE BELZEC INDICTMENT AND TRIAL

The Munich prosecutor's theory of criminal liability portrayed the Belzec defendants as accomplices in the murders committed in the death camp.<sup>172</sup> According to this theory—reminiscent of the Ulm court's approach to the Tilsit Einsatzgruppen defendants in 1958—Hitler, Himmler, and Heydrich originated the plan for the Final Solution in the course of preparing for the invasion of the USSR. Implementation of the plan was entrusted to the SS. Nazi leaders assumed sole responsibility for the program of extermination. Rather than instigate the on-site actors to their crimes, the leadership made them responsible only for carrying out their orders. “[Nazi leaders] were the givers of orders who demanded unconditional obedience from their subordinates,” and thus the leadership qualified as “perpetrators actively willing an intentional killing.” The killing of hundreds of thousands of Jews at the death camps of Poland constituted murder under the German homicide law, section 211 StGB, because it was motivated by racial animus—a “base motive” under the statute.<sup>173</sup>

Having branded Hitler and his closest henchmen as the “primary” murderers (*Haupttäter*), the indictment asserted the objective and subjective illegality of the genocide. “The objective illegality of the

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169. *Id.* (“I had nothing to do with the concentration and destruction of the Jewish population in the East. I was never an observer of a gassing or any other mass execution.”).

170. Letter from the Prosecutor's Office Associated with the Regional Court of Munich I (Dr. Ulsch) to the Central Office, *BArch* B 162/3171 (Dec. 22, 1961).

171. *Id.*

172. *Id.*

173. See *Strafgesetzbuch § 211*, DEJURE.ORG, <http://dejure.org/gesetze/StGB/211.html> (last visited Feb. 5, 2013); Indictment, Josef Oberhauser et al., 22 Js 68/61, *BArch* B 162/3173 [hereinafter Oberhauser Indictment].

ordered mass extermination of innocent people requires, in view of the monstrousness and brutality of the measure . . . no further proof.”<sup>174</sup> Moreover, Hitler and his followers were aware of the illegality of their actions, as proven by the cloak of secrecy draped over the planning and execution of the Final Solution. As for the defendants, they were subject to a “special jurisdiction” by virtue of their membership in the SS, which made them amenable to the provisions of the *Militärstrafgesetzbuch* (Military Penal Code) as well as to the jurisdiction of SS and police courts. On this analysis, the orders of Heydrich’s office and its subsidiaries in the chain of command were equivalent to military orders.

According to the indictment, “the defendants ordered to assist in killing the Jews . . . had no opportunity for discretionary action.”<sup>175</sup> Hence, their criminal responsibility for carrying out orders was to be determined by section 47 of the Military Penal Code. Section 47 ascribed fundamental responsibility to the commanding officer whenever the execution of his orders violated a criminal law.<sup>176</sup> The subordinate carrying out these orders was punishable as an accomplice so long as he was aware of the criminal nature of the order. The prosecutor then applied the principles of liability under section 47 to the defendants in order to characterize them as accomplices:

It is obvious that Hitler’s extermination order and the further orders issued for implementation of the crime . . . were contentually illegal. The illegality of the mass annihilation of innocent persons without respect to their age or gender was clear to the defendants, as they have admitted. They knew that the acts commanded of them were criminal and unjustifiable under any circumstances. The defendants are accordingly criminally liable as accomplices [*Teilnehmer*] for their actions in accordance with section 47 I 2b, Military Penal Code.<sup>177</sup>

The indictment added that its classification of the defendants as accomplices was proper because “there was no indication the defendants, who were in a strict command relationship, had participated in the destruction of the Jews on their own initiative . . . . Likewise, no exceeding of orders is apparent.”<sup>178</sup> Insofar as they had “supported

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174. Oberhauser Indictment, *supra* note 173.

175. *Id.*

176. See generally Paola Gaeta, *The Defense of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law*, 10 EUR. J. INT’L L. 172, 175–76 n.6 (1999).

177. Oberhauser Indictment, *supra* note 173.

178. *Id.*

through their actions the purposes of the perpetrators, i.e., the actions of another,” they were accessories to murder.<sup>179</sup>

The indictment brushed aside the arguments raised by the defendants that would later result in dismissal of the case against seven of them. Oberhauser, Gley, Jühns, Schluch, and Zierke claimed they had no possibility of escaping participation in mass murder at Belzec, and for this reason took no steps to evade their orders.<sup>180</sup> They were fearful that refusal to follow orders would jeopardize their lives, resulting in either a death sentence pronounced by a military court for failing to obey an order, or summary execution for open insubordination.<sup>181</sup>

While conceding Wirth’s brutality, the indictment dismissed the duress argument raised by Oberhauser on the ground that it did not fit his proven image as the “obedient subordinate, stooping to carry out criminal orders unconditionally out of loyalty to command authority and a falsely understood sense of duty.”<sup>182</sup> For the prosecution, there was no sign that Oberhauser’s will had been “bowed by the generally prevailing situation of terror induced by the National Socialist state and by his superior Wirth.”<sup>183</sup> The indictment likewise rejected the duress arguments of the other defendants, insofar as they could have tried to extricate themselves from participation in genocide without incurring Wirth’s wrath.<sup>184</sup>

None of the accused denied his involvement in killing Jews at Belzec, nor did any of them deny knowing that the extermination of Jews at Belzec was wrongful. Rather, during the preliminary investigation conducted by the examining magistrate, the defendants invoked the defense of duress.<sup>185</sup> They argued that they feared for their lives unless they complied with their superiors’ orders. Werner Dubois claimed he “inwardly” condemned the destruction of the Jews, but added that “an open refusal to obey orders” would have “certainly led to his own liquidation.”<sup>186</sup> He recounted that during his work with the euthanasia program he had sought release from T-4, an effort that elicited warnings from his superior that if he persisted he would be sent to a concentration camp. Given Wirth’s “ruthlessness” and “unscrupulousness,” Dubois had little doubt that further requests for a

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179. *Id.*

180. DE MILDT, *supra* note 5, at 276–77.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

transfer would endanger his life. On one occasion, Wirth had threatened Dubois with his pistol, provoking Dubois to draw his own pistol in self-defense. The triviality of the incident that prompted Wirth to threaten Dubois's life foreshadowed Wirth's likely response to the far more serious request for reassignment.<sup>187</sup>

Fuchs and Unverhau likewise insisted they did everything in their power to reduce their participation in mass killing "to a minimum" and to secure a transfer from Belzec "as soon as possible."<sup>188</sup> Fuchs, like Dubois, claimed his superior officer in Berlin had threatened him with internment in a concentration camp should he try to dodge his service through "gimmicks." Also like Dubois, he came to appreciate the suicidal nature of disobeying Wirth's commands. Once, Fuchs tried to avoid an order from Wirth to install dummy showerheads in the gassing barracks. When Wirth discovered his dereliction, he struck Fuchs with his riding crop and ordered his execution.<sup>189</sup> Only the intervention of his colleagues Fichtner and Niemann spared him this fate. According to Fuchs, this experience taught him that any opposition to Wirth's orders would entail a "direct danger to his own life."<sup>190</sup>

Unverhau recited a near facsimile of Dubois's defense, claiming he was threatened with internment when he had sought reassignment from T-4.<sup>191</sup> While on leave from his grisly chores at Belzec, he approached the T-4 offices about a transfer from the death camp. Wirth learned of Unverhau's request and, on his return from leave, berated Unverhau in the presence of the other men.<sup>192</sup> Wirth's censure climaxed with Wirth drawing his gun and threatening to shoot Unverhau. Refusing a Wirth order was "equivalent to suicide."<sup>193</sup>

Gley, Jührs, Schluch, and Zierke reprised the same duress arguments as their co-defendants. They argued that "they had seen no practicable way to escape their participation in the extermination program."<sup>194</sup> The decree dismissing the case continued:

For this reason they took no steps to avert their orders and carried them out. In the event of a refusal to follow orders—as they were convinced at the time—they would have risked their lives, insofar as

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187. Decree of the 4th Penal Chamber of the Munich Regional Court I (on file with *BArch* B 162/3172).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

they would have either been sentenced to death by an SS and Police Court or shot without legal procedure on account of open defiance. This last possibility is a natural assumption based on the personalities of both camp commandants Wirth and Hering.<sup>195</sup>

The prosecutor objected to this line of argumentation on the grounds that a “genuine condition of duress, such as presupposed by section 52 of the Penal Code, did not exist here.”<sup>196</sup>

For the prosecution, the defendants were legally obligated to incur “a certain degree of risk in order to avoid involvement in the crimes.”<sup>197</sup> They could have sought a transfer during their furloughs outside the camp, and in this manner avoided the unpleasanties of filing such a request directly with Wirth or Hering. Imminent threats to their lives could thereby have been averted. The Munich regional court completed its summary of the prosecution’s counterargument: “The defendants had to accept being reviled as a coward or suffering disadvantages to their career.”<sup>198</sup>

The court ultimately agreed with the defendants and dismissed the indictments against them.<sup>199</sup> The verdict revealed the improbability of prosecuting death camp guards successfully in the absence of Jewish survivor testimony. The court began its analysis by noting that the mere assertion of duress was not enough to refute the charge of aiding and abetting murder at Belzec. The defendants also had to show that their claims of duress were supported by evidence (“factual indications”) before they could prevail.<sup>200</sup> The threshold question, then, was whether the evidence presented was sufficient to bolster the defendants’ claim and stop the indictment against them in its tracks. The court answered this question in the affirmative:

[I]n the case at bar the preliminary investigation has yielded numerous factual indications, showing that the defendants’ assertions they continuously sought release from the offices of T-4 (Fuchs, Unverhau), or saw no possibility of evading participation in the extermination of Jews at Belzec without endangering their lives and therefore carried out the orders

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

communicated to them (Gley, Jührs, Schluch, Zierke), cannot be adequately refuted.<sup>201</sup>

For the court, it was significant that none of the defendants occupied prominent positions within the Nazi state. They were forced to go to Lublin, where they were given nominal SS ranks and plugged into the lowest levels of a camp administration “built on military principles.”<sup>202</sup> “Under these circumstances,” the court affirmed, “the possibilities available to the defendants for successfully avoiding participation in mass killing without considerable danger to their own person was at the outset restricted to a minimum.”<sup>203</sup>

In assessing the range of discretionary action confronting the defendants, the court focused “not only on their subordinate positions,” but also on “the mentality of their superior officers.”<sup>204</sup> Christian Wirth and Gottfried Hering were “characterized by all the defendants in the same way: they were not persons able to entertain any contrary ideas [to their own].”<sup>205</sup> The court continued:

[Wirth and Hering] were described as ruthless and fanatical National Socialists, from who it could be seriously feared they would react violently in the event the unconditional obedience they demanded were to be refused. The fact that Wirth was a person of almost unrivalled brutality emerges not only from his behavior toward the defendants Dubois, Fuchs, and Unverhau, but may also be considered proven based on the total results of the investigatory proceeding.<sup>206</sup>

In sum, the defendants had good reason to fear that open refusal of orders—including the criminal orders authorizing and enforcing the Final Solution—could have led to their immediate punishment by an SS and Police court. Like the crime of desertion, which was punished with draconian ferocity in SS courts and in military courts-martial during the war, defiance of orders to participate in the genocide of Jews at Belzec would have resulted in “certain death.”<sup>207</sup>

The court’s analysis accepted the defendants’ exculpatory claims on their face because no other evidence existed to contradict them. Thus, it was accepted as true that Dubois, Fuchs, and Unverhau did

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

indeed seek to extricate themselves from their work at Belzec. The court also assumed that these three defendants carefully considered the potential results of disobeying orders and determined that refusal would result in their own deaths. Instead, Fuchs and Unverhau sought to limit their involvement in the genocide as much as possible. Gley, Jührs, Schluch, and Zierke, on the other hand, did not try to secure reassignment from Belzec, but their inaction was due to their assumption that such efforts would be both hopeless and likely fatal to themselves. Given these circumstances—all of the allegations made by the defendants that were unrefuted by adverse witnesses—the court held that “intentional participation in a criminal act cannot be upheld against them.”<sup>208</sup>

Elsewhere in its decree, the court appeared to follow a theory of *Putativnötigungsstand* (“putative duress”).<sup>209</sup> On this theory, even if an actual situation of duress did not exist, the defense would nonetheless apply where the defendants genuinely believed they faced a danger to their own lives for refusing their orders.<sup>210</sup> Whether actual or putative duress was applied, however, the result was the same: the case against the seven was dismissed, leaving Josef Oberhauser as the only remaining defendant when his trial began in January 1965.<sup>211</sup>

Oberhauser, Wirth’s intimate and his liaison with Globocnik in Lublin, also tried to raise a duress defense. However, the panel of lay assessors was unconvinced. They found instead that he had never tried to escape or mitigate the tasks given to him; rather, he “implemented them in unswerving adherence to orders” without considering possibilities for avoiding them.<sup>212</sup> In short, Oberhauser didn’t act with

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208. *Id.* The court’s reasoning followed the regnant paradigm of criminal analysis in German law set forth by Ernst Behling in 1906, according to which proof of “guilt” (*Schuld*) was necessary for conviction even when the actor had fulfilled all the elements of the offense (*Tatbestandsmäßigkeit*). In the Belzec case, the defendants indeed fulfilled the elements of aiding and abetting murder, but no attribution of guilt was possible, given the context of duress in which they had allegedly acted. Hans Welzel, *Die Deutsche Strafrechtliche Dogmatik der Letzten 100 Jahre und die Finale Handlungslehre*, 11 JURISTISCHE SCHULUNG 421 (1966).

209. See generally George Fletcher et al., *European Responses to World War Two War Criminals and Human Rights Violators: National and Comparative Perspectives*, 8 B.C. THIRD WORLD L.J. 3, 14–15 (1988) (Symposium).

210. *Id.*

211. Decree of the 4th Penal Chamber of the Munich Regional Court I, *supra* note 187. The prosecution appealed the case to the appellate court of Munich (Penal Senate), which on July 22, 1964, upheld the dismissal. The appellate court’s reasoning was identical to that of the regional court (at one point in the verdict, it virtually lifted a block of text from the regional court’s opinion), holding that the defendants’ defense of duress could not be disproven. Decree of the Appellate Court of Munich—Penal Senate, (July 22, 1964) (on file with BArch B 162/3172).

212. Josef Oberhauser Interrogation, ZStL 208 AR-Z 252/59 (Dec. 12, 1960).



the belief that he was enmeshed “in a hopeless dilemma.” The lay assessors based their interpretation on the proven fact that Wirth trusted Oberhauser as a fellow Nazi of impeccable reliability: “Oberhauser’s preferential position, which, in the eyes of bystanders, cast him as Wirth’s ‘adjutant,’ ‘constant companion,’ or ‘shadow,’ supports the inference that Wirth . . . believed he had found a man in the defendant who was, from an ideological perspective, reliable and from whom he expected no difficulties in implementing the measures of extermination ordered by the government.”<sup>213</sup>

Even after Wirth’s promotion to inspector of the three death camps and his transfer to his new workplace in Lublin, he ensured that Oberhauser would be available to work for him in his new post. According to the court, “this fact likewise indicates that Wirth valued the defendant as a conscientious subordinate, one who supported the government without reservation and readily performed his service.”<sup>214</sup>

Other features of Oberhauser’s service with Operation Reinhard undercut his defense that he had acted reluctantly and under duress. In March 1943, Himmler authorized the promotion of the “best men and leaders involved in [Operation Reinhard]” after visiting Belzec, Treblinka, and Sobibor.<sup>215</sup> Based on Globocnik’s recommendation, which was influenced by Wirth, Oberhauser was promoted to *Untersturmführer* (SS-Lieutenant). The court observed that this elevation from a non-commissioned rank to an officer rank was exceptionally rare, particularly for persons of Oberhauser’s “educational background.”<sup>216</sup> Such promotions were reserved for persons considered by the Nazi leadership to be “ideologically and militarily” irreproachable. From these predicate facts, the court concluded that Oberhauser “would never have been promoted to SS officer if he had condemned the measures ordered by the state authorities as a crime, thereby showing he lacked the unconditional obedience and hardness demanded of the SS officer.”<sup>217</sup>

After the regional court rejected Oberhauser’s various defenses, it was faced with determining the crimes for which Oberhauser would be convicted. The Munich court followed the analysis of earlier West German trials related to the Nazis’ Final Solution. First, the court affirmed that the Final Solution met the Penal Code’s definition of

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

murder under section 211 (both the old and new versions).<sup>218</sup> As we have seen, the newer version of section 211 defined a killing as murder when it was driven by “base motives” like racial animus or carried out in a “cruel” or “deceptive” manner.<sup>219</sup> The process of mass murder at Belzec, as recounted by eyewitnesses, fulfilled each of these criteria.

Moreover, the top Nazis who devised the scheme to murder Europe’s Jewish population knew their plan was illegal. They sought to conceal the Final Solution from the public by declaring it a “top secret matter” (*Geheime Reichssache*), the “highest level of secrecy” attached to a government program.<sup>220</sup> On this analysis, then, Hitler and his confederates in crime were direct perpetrators acting in concert.

How, then, did Oberhauser fit into this schematic of perpetration? To answer this question, the court agreed with the prosecution that Oberhauser was subject to a “special military judicial jurisdiction”<sup>221</sup> based on his membership in the SS. Therefore, Oberhauser was subject to the provisions of the German Military Penal Code and military criminal law, as well as the jurisdiction of the SS and Police Courts. Furthermore, the court declared that Hitler’s order to implement the Final Solution, including all subsequent orders to carry out the genocide, was a military command.<sup>222</sup> This meant that Oberhauser’s offense had to be evaluated in light of section 47 of the Military Penal Code, which defined the criminal liability of subordinates acting on

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218. Before 1941, section 211 of the German Penal Code defined murder as a premeditated killing: “whoever intentionally kills a person, if he carried out the killing with premeditation, is guilty of murder for that killing.” W. VON HENLE & F. SCHIERLINGER, STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH 227 (1912). In 1941, section 211 was revised; the effect was to redefine murder as a killing impelled by certain motives. “A murderer is any one who kills another person out of joy in killing, satisfaction of the sexual drive, covetousness or other base motives, maliciously or cruelly or by means endangering the community or for the purpose of making possible or concealing the commission of another crime.” LOTHAR DOMBROWSKI, STRAFGESETZBUCH: TEXTAUSG. M. D. WICHTIGSTEN NEBENGESETZEN U. KONTROLLRATSGESETZEN 83 (1948). The new version of section 211, although justified by Nazi jurists at the time on National Socialist ideological grounds, “survived postwar efforts to denazify German law”—perhaps because it was modeled on a Swiss statute—“and continues unchanged until today.” See MICHAEL S. BRYANT, CONFRONTING THE “GOOD DEATH”: NAZI EUTHANASIA ON TRIAL, 1945–1953 119–20 (2005).

219. For the West German jurisprudence on murder, see the discussion of section 211 of the West German Penal Code in EDUARD DREHER & HERBERT TRONDLE, STRAFGESETZBUCH UND NEBENGESETZE 1102 (40th ed., 1981).

220. GERALD FLEMING, HITLER AND THE FINAL SOLUTION 22 (1982).

221. Oberhauser, like all SS men, was amenable to this “special jurisdiction” by virtue of the “Decree Concerning Special Judicial Jurisdiction in Criminal Matters for Members of the SS and Police Units Involved in Special Operations,” enacted on October 17, 1939 (*Reichsgesetzblatt I*, 2107).

222. *Id.*

orders of their superiors.<sup>223</sup> According to section 47, the commanding officer bears sole responsibility if the performance of an order violates criminal law.<sup>224</sup> The subordinate is liable as an accomplice if he was aware that the order involved actions “that aimed at a general or military crime or wrongful act.”<sup>225</sup>

The court then applied these tenets of liability to Oberhauser’s case. “It is obvious,” explained the court, “that Hitler’s extermination order and the orders issued for its execution aimed at the commission of crimes—namely, the killing of human beings without any justification whatsoever—which were illegal based on their contents.”<sup>226</sup> Oberhauser admitted he had understood the patent illegality of killing innocent men, women, and children, but claimed he had acted under duress. This defense, the court held, was not available to him:

[I]n carrying out his orders, the defendant, as the disciple of the Nazi absolutist state and as an obedient SS non-commissioned officer, acted in unwavering devotion to his orders, never seriously considered disobeying these orders nor pondered the possibility of evading participation in the mass murder demanded of him. Accordingly, the criminal acts were not wrung from him through imminent threats to life and limb; his will wasn’t perverted through such a threat.<sup>227</sup>

The regional court found that Oberhauser had assisted implementation of the Final Solution with full understanding of its illegality.<sup>228</sup> He was aware of the cruelty of the killings carried out at Belzec, as well as of the fact that “the innocence and defenselessness of the victims were exploited.”<sup>229</sup> However, he did not act “with the will of the perpetrator” (*Täterwille*).<sup>230</sup> Rather, because no evidence was

223. Militär-Strafgesetzbuch [MILITARY PENAL CODE], June 20, 1872, § 47 (Ger.).

224. *Id.*

225. *Id.*

226. Oberhauser Indictment, *supra* note 173.

227. *Id.*

228. *Id.* (“He knew that the killing operations had been planned and prepared long beforehand, and that solely racial and political considerations were decisive for the intention to commit the crime.”).

229. *Id.*

230. The “will of the perpetrator” refers to the criterion followed by the West German Supreme Court that distinguished between a “perpetrator” (*Täter*) and an accomplice (*Gehilfe*). The perpetrator, who acts with the “intention of the author” of the crime (*animus auctoris*), is either the initiator of it, or possesses an attitude of sympathy with the crime such that he or she embraces it “as his/her own” (*als eigene gewollt*). The accomplice, by contrast, does not inwardly identify with the crime, but contributes to its commission on behalf of another person (*animus socii*). However, a subordinate actor who can be proven to have inwardly approved of the crime, such as by committing actions in excess of his or her orders, may be convicted as a “co-

presented at trial proving that he had ever exceeded his orders, Oberhauser had acted only with the “will of an accomplice” (*Gehilfenwille*).<sup>231</sup> He was convicted of five counts of complicity to murder in the deaths of at least 150 Jews by supervising their unloading on arrival in the camp and one count of complicity in the deaths of at least 300,000 Jews by procuring building materials for the gassing facilities. After weighing factors in mitigation and aggravation, the court imposed a prison sentence of 4.5 years.<sup>232</sup>

Oberhauser’s conviction salvaged a largely failed effort to prosecute the staff at the Belzec death camp. Some of the acquitted were indicted in other Operation Reinhard trials involving Treblinka and Sobibor,<sup>233</sup> while the rest were able to evade judicial punishment for their involvement in the Final Solution.<sup>234</sup> With an acquittal rate of nearly 88 percent, it is hard to regard the Belzec trial as anything less than a debacle. The reason for its failure was a lack of witnesses able to contradict the defendants’ protests that they had acted under duress.<sup>235</sup> For example, the testimony of the lone Jewish survivor of Belzec, Rudolf Reder, was negligible to the outcome of the trial.<sup>236</sup> The most incriminating evidence he offered—which, in the final analysis, counted for little in the court’s dismissal of charges against seven of the eight accused—was his statement that “reluctant conduct of the SS personnel” at Belzec was never apparent.<sup>237</sup> The problem for the Belzec

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perpetrator” (*Mittäter*). See A. Eser, *Strafrecht*, in 5 STAATSLEXIKON 331–43 (1989); see also Jescheck and Weigend’s exposition of perpetrator and accomplice liability, HANS-HEINRICH JESCHECK, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* 580 (4th ed., 1988).

231. *Id.*; see also DE MILDT, *supra* note 5, at 278–79.

232. Eser, *supra* note 230, at 331–43; JESCHECK, *supra* note 230, at 580. The court punished Oberhauser based on the principle of *Tatmehrheit* (joinder of offenses): in other words, he was not punished for the Final Solution (the “main crime,” or *Haupttat*, for which only perpetrators were chiefly responsible), but only for his “numerous accessorial actions.” These were committed at various times, and were triggered by new orders issued by his superiors. Ultimately, the panel of lay assessors imposed a prison term of 3.5 years for complicity in the murder of 300,000 people and 3 years for five counts of complicity in the murder of at least 150 people. From these “individual punishments” (*Einzelstrafe*), the assessors arrived at a “total punishment” (*Gesamtstrafe*) of 4.5 years. Note that in cases such as Oberhauser’s, in which the defendant committed multiple criminal acts, the total punishment under German law must always be higher than the most severe punishment for any one act, but may not equal or exceed the sum of all the individual punishments.

233. See DE MILDT, *supra* note 5, at 257–98. Acquitted defendants prosecuted in subsequent trials were Karl Werner Dubois, Robert Jührs, Heinrich Unverhau, and Ernst Zierke.

234. *Id.*

235. *Id.* at 276.

236. *Id.*

237. ERNST KLEE, 15 WAS SIE TATEN – WAS SIE WURDEN 161 (1998).

trial was the Nazis' lethal efficiency in eliminating human life, including the witnesses who could later testify against them.

VI. FORTUNE'S SHIFTING SANDS: EICHMANN TRIAL WITNESSES  
AND THE WEST GERMAN TREBLINKA TRIAL

Although the Israelis could not find survivors of Belzec as requested by the Ludwigsburg authorities, they were far more successful with Treblinka and Sobibor. In the fall of 1959, Tuviah Friedman, director of the Institute for the Documentation of Nazi War Crimes in Haifa, sent the Central Office in Ludwigsburg the names of ten survivors of Treblinka. Over the next four years, the Israelis provided the Central Office and the Düsseldorf prosecutor in charge of preparing the Treblinka trial with the statements of witnesses examined by the Israeli police. When the Düsseldorf prosecutor issued his indictment of fourteen members of the Treblinka death camp staff on January 29, 1963, the list of ninety-seven witnesses included at least four survivors who had testified at the Eichmann trial.<sup>238</sup>

Ya'akov Wiernik was a Polish Jewish carpenter deported from Warsaw to Treblinka on August 23, 1942. Due to his carpentry skills, he was spared the fates of most Jews sent to Treblinka.<sup>239</sup> During his one-year imprisonment there, he and other "work Jews" built the guardroom, the entrance gate to the camp, and some of the camp's barracks.<sup>240</sup> At the Eichmann trial, Wiernik testified chiefly about the structure of the Treblinka camp, based on a detailed map he had drafted in 1944. Although his name rarely appears in the text of the Treblinka judgment, Wiernik was often cited as a government witness in the Düsseldorf prosecutor's indictment. He testified at length not only about the dimensions of the camp, but also described atrocities committed by the defendants that he personally observed. He was an especially important witness for the prosecution in showing that the Final Solution at Treblinka met the criteria of murder under German Penal Code § 211, which, as we have seen, required a killing to bear certain legally defined characteristics. These included killings arising from base motives (i.e., racial hatred), deception, or cruelty.<sup>241</sup>

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238. Letter of Tuviah Friedman to Gerichtsassessor Zeug (Dec. 27, 1959) (on file with *BArch* B 162/3166).

239. Indictment, K. Franz et al., *BArch* B 162/3849.

240. *Id.*

241. *Id.*

Wiernik, along with other Jewish survivors who had testified at the Eichmann trial,<sup>242</sup> described how an orchestra consisting of camp prisoners, which, in the language of the indictment, played “in a cheerful and happy style,” greeted Warsaw deportees on arrival at the camp.<sup>243</sup> The SS had arranged the orchestra for the purpose of reassuring the deportees as they were led to the gas chambers. Disguised as shower rooms, the killing facilities had signs posted along the way informing the victims that Treblinka was a “transit camp” from which they would later be sent to work camps. The final sentence on the signs indicated that all the deportees had to bathe in the interests of personal hygiene. Prisoners were required to disrobe and surrender all of their personal effects for disinfection. Receipts were given to them for their valuables.<sup>244</sup> The fraud was then reinforced by speeches delivered by camp guards, reassuring the victims that they were merely being asked to shower before assignment to labor detail. Such duplicity, for both the prosecutor and the court, met the definition of *Heimtücke* (“deception”) under the German homicide law.<sup>245</sup>

Wiernik also described scenes of pure horror, in which Jews stripped of their clothing shivered in the winter cold outside the gas chamber. As they waited for their promised shower, the screams of other Jews being gassed inside assailed their ears.<sup>246</sup> Occasionally the diesel motors used to generate lethal carbon monoxide fumes broke down, and repairs lasting hours were made as the next group to be gassed froze outside in the bitter winter temperatures. For the prosecutor and the court, this aspect of the killing process met the element of *Grausamkeit* (“cruelty”) under the German homicide law.<sup>247</sup> Wiernik and other Eichmann trial witnesses proved that the killings at Treblinka were murder. However, this by itself would not have been enough to secure convictions of the defendants. Specific contributions by each defendant to the mass murder had to be shown.

Witness testimony was essential to the conviction of the most notorious figure among the defendants, Kurt Franz. Franz, in contrast with several of his co-defendants, denied every allegation made against

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242. *Id.* (identifying Kalman Taigman, Abraham Lindwasser, and Elihu Rosenberg).

243. *Id.*

244. See “Operation Reinhard”: *The Extermination Camps of Belzec, Sobibor and Treblinka*, in 16 YAD VASHEM STUDIES (Aharon Weiss ed., 1984), available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/reinhard.html#8>.

245. C. F. RUETER & D. W. DE MILDT, 22 JUSTIZ UND NS-VERBRECHEN (2001).

246. Indictment of K. Franz et al., *Arch B* 162/3848; RUETER & DE MILDT, *supra* note 245.

247. RUETER & DE MILDT, *supra* note 245.

him.<sup>248</sup> Although he was the worst of the accused, he contested every charge and at no point during or after the trial did he express the faintest degree of remorse for his actions or sympathy for the victims.<sup>249</sup>

A member of the SS before the outbreak of the war, Franz was sent to Berlin in late 1939, where he was initiated into Operation T-4.<sup>250</sup> Franz was assigned to a camouflage office in charge of the "euthanasia" program, the *Gemeinnützigen Stiftung für Anstaltspflege* ("Charitable Foundation for Institutional Care"), and thereafter served in a series of killing centers: Grafeneck in Württemberg, Hartheim Castle near Linz, Sonnenstein in Saxony, and Brandenburg near Berlin. Between late 1941 and early 1942, Franz was transferred to the actual executory organ of the euthanasia program, the *Kanzlei des Führers* ("Chancellery of the Führer"), where he served as a cook in the Chancellery's building.<sup>251</sup>

In spring 1942, Franz, who had by now risen to the rank of SS-*Scharführer* (sergeant), was assigned to the guard force at the Belzec death camp, where he remained until summer 1942.<sup>252</sup> He was subsequently transferred to Treblinka. On arrival he assumed command of the Ukrainian guards (the so-called "Hiwis," or "volunteers"), but the range of his activities expanded significantly beyond supervising the Ukrainians.<sup>253</sup> As the regional court of Düsseldorf found, Franz quickly became involved in administering the entire camp operation. Before long he had risen to the position of deputy commander of the camp, second only to Treblinka's commandant at the time, SS-*Hauptsturmführer* (Captain) Franz Stangl. In the words of the court, "in this capacity he held all the reins in his hand, exercising an unrestricted influence on the entire course of activities within the camp, particularly when the successor to Dr. Eberl . . . took little or no interest in the external operation of the camp . . ."<sup>254</sup>

As a ubiquitous figure inspecting work commandos and monitoring the camp equipment in both the upper and lower sections of Treblinka, Franz, in the words of the Düsseldorf court, "revealed a kind

248. *Id.*

249. *Id.*

250. Operation T-4 was the top-secret program for the destruction of the mentally disabled. It was code-named for the street in which the administrative office of the program was located, Tiergartenstrasse, or "zoo street."

251. Indictment of K. Franz et al., *supra* note 246.

252. *Id.*

253. *Id.*

254. RUETER & DE MILDT, *supra* note 245, at 121, 127, 134, 136, 151, 230. The "successor to Dr. Eberl" in the quotation above refers to Franz Stangl.

of sadism and such contempt toward all Jewish life that can scarcely be envisioned by the human imagination.”<sup>255</sup> His seemingly inexhaustible brutality was legendary. Jewish witnesses described Franz as the “terror of the camp.”<sup>256</sup> In its verdict, the court stated that “a large part of the river of blood and tears that flowed through Treblinka may be laid solely to his account.”<sup>257</sup> The court arrived at this conclusion based on testimony furnished by Eichmann trial witnesses. Wiernik, Kalman Taigman, Elihu Rosenberg, and Abraham Lindwasser testified that Franz never missed an opportunity to mistreat and kill Jewish prisoners.<sup>258</sup> Taigman was among several survivor witnesses who recounted how Franz set his massive dog Bari on the hapless inmates, severely wounding them and, in some cases, tearing them apart.<sup>259</sup>

Franz punished any prisoner resistance by executing the resister, often in a grisly fashion. Taigman described one such incident, in which Franz “selected” as many as 10 Jews and shot them with a pistol in front of their fellow prisoners.<sup>260</sup> Franz was clearly a sadist, delighting in his malevolent power over the Jewish prisoners. He engaged in murderous “sport” shooting of Jews with other Treblinka guards and competed with them in contests to kill Jewish infants by smashing their skulls against the barracks wall.<sup>261</sup>

Based on the voluminous witness testimony against him, the court had no trouble classifying Franz as a “co-perpetrator” (*Mittäter*), insofar as he subjectively identified with the Final Solution and strove with gusto and dedication to carry it out.<sup>262</sup> He was found guilty of murdering at least 300,000 Jewish victims in connection with the Final Solution; he was also convicted as a perpetrator of murder in the deaths of at least 139 people, carried out entirely on his own initiative. The regional court sentenced him to a life prison term.<sup>263</sup>

Two of Franz’s other colleagues at Treblinka were likewise convicted of murder and given life sentences, largely on the strength of Jewish survivor testimony (among them, former Eichmann trial

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255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*; Indictment, K. Franz et al., *supra* note 244.

259. RUETER & DE MILDT, *supra* note 245.

260. *Id.*

261. *Id.* Franz’s attacks on infants were confirmed by other eyewitnesses: Maniek Platkiewicz, Moszek Laks, and Abraham Kolski. The source of the “sport shooting” incident was Wolf Szejnberg.

262. *Id.*

263. *Id.*



witnesses). Heinrich Arthur Matthes, who, like Franz, was a participant in the Nazi regime's murder of the disabled, was sent to Globocnik's office in Lublin in late August 1942. He received the rank of SS-*Scharführer* before assignment to Treblinka.<sup>264</sup> At Treblinka, he was in charge of the "upper camp," comprising the extermination area. His duties included overseeing all operations within the upper camp and supervising the *Arbeitsjuden* ("work Jews").<sup>265</sup> Matthes was particularly concerned with ensuring the frictionless operation of the killing process. In fulfilling his tasks, the court found that Matthes was anything but "squeamish":

[Matthes] struck out with his leather whip at the prisoners whenever it seemed necessary to him, or had them beaten by the capos. He was lord over life and death of the Jews within the death camp subordinate to him, and he could as he wished either beat or have others beat the unfortunate people, but also kill them or have them killed, when they for example were no longer able to work or some other occasion arose.<sup>266</sup>

Matthes' defense was that he did nothing more than carry out the orders given him, which were to guarantee an orderly procedure within the upper camp.<sup>267</sup> Matthes denied direct involvement in gassing Jews. He claimed he never drove Jews into the gas chambers because, "as a family man and nurse," he did not "have the heart" to do it.<sup>268</sup> He sought out ways to absent himself while the victims were murdered, such as by withdrawing into the kitchen of the upper camp to dine on soup.<sup>269</sup> This defense, according to the court, was refuted by both Matthes' former colleagues and by former Eichmann trial witnesses, who were characterized by the court as "the most reliable of the witnesses."<sup>270</sup> These witnesses included Elihu Rosenberg and Abraham Lindwasser, who testified that Matthes, as the "highest authority and boss" of the extermination area, was present during the liquidation of the Jewish transports.<sup>271</sup>

Not only did Matthes not retire into the kitchen to his soup, but he demonstrated a zealous commitment to "overcoming all difficulties that

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264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

arose with great strictness and brutality.”<sup>272</sup> Rosenberg and Lindwasser testified that Matthes ordered the opening and shutting of the gas chambers and personally supervised the gassing process.<sup>273</sup> Rosenberg’s testimony was especially damaging to Matthes, because he was able to precisely identify specific victims by name that Matthes had murdered.<sup>274</sup> Lindwasser, on the other hand, was a crucial witness for the prosecution because of his ability to recall specific atrocities and to identify Matthes as the unquestionable perpetrator.<sup>275</sup>

The final defendant at the Treblinka trial convicted as a perpetrator of murder was August Wilhelm Miete. Miete, like his colleagues, was a veteran of the Nazi euthanasia program—he worked at Grafeneck and incinerated the corpses of murder victims at Hadamar.<sup>276</sup> Sometime between late June and early July of 1942 he arrived in Lublin, donned the field-gray uniform of a SS-*Unterscharführer* (“Lance Sergeant”), and left for Treblinka. His duty station centered on the lower camp. Together with other SS men, Miete shot elderly and ill Jews culled from arriving transports.<sup>277</sup> The victims were murdered in the camp clinic. He also supervised commandos sent outside the camp to collect wood and to perform other chores. One of his main functions was to supervise the *Sortierplatz* (“sorting place”), where the victims’ clothing was searched and packaged for shipment back to the Reich.<sup>278</sup>

Taigman was among the congeries of witnesses who attested to the *besonderen Eifer* (“special zeal”) with which Miete performed his duties. In unloading Jewish transports and herding them toward the gas chambers, he “drove them in haste so as to preclude any reflection, making frequent use of his whip. In many cases he also used his gun.”<sup>279</sup> According to the court, Miete “moved like an evil spirit” through the camp, dispensing death wherever he turned, thereby earning the nickname among the prisoners of *Todesengel* (“angel of death”).<sup>280</sup>

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272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*; see also Rosenberg Interrogation, *BArch* B 162/4431 (Feb. 11, 1961). Rosenberg cites the names of work Jews shot by Matthes: Alek Weintraub, Josel Rosenbaum, and a third victim named Dawid (Rosenberg could not recall the surname). Rosenberg’s memory was prodigious: he not only identified Franz as “Lalka” (“puppet,” a nickname given to Franz because of his well-groomed appearance), but identified the names of some of his victims, including Mandel Nuessenbaum and Elieg Adlerstein.

276. RUETER & DE MILDY, *supra* note 245.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

The Düsseldorf regional court followed the analysis of the court in the Ulm Einsatzgruppen case. The architects of the Final Solution—the Nazi leadership (Hitler, Himmler, Heydrich, and Goering) but also intermediate functionaries in the machinery of destruction (Globocnik and Wirth)—were the main perpetrators of the Holocaust, while their underlings who personally supported the genocide of the Jews were guilty of mass murder as co-perpetrators. The defendants shared with the top-level Nazis their racist loathing for the Jews. Franz demonstrated “boundless zeal,” an “energy,” and a “persistence” in his contributions to the murder of Jews and the Roma that was “in no way inferior to the initiators of the crime.”<sup>281</sup> Matthes’ “cruelty” and “stubbornness” proved his “considerable agreement with the goals of the National Socialist government.”<sup>282</sup> Miete was a “bloodthirsty sadist and a pitiless executioner” who exhibited an “unnatural joy in killing.”<sup>283</sup> All were convicted of murdering hundreds of thousands of victims and sentenced to life terms in prison.<sup>284</sup>

#### VII. SPLITTING THE DIFFERENCE: EICHMANN WITNESSES AT THE SOBIBOR TRIAL

The West German inquiry into the Sobibor death camp emerged from the Central Office’s investigations into Treblinka and Chelmno. One of the Treblinka witnesses reported to the Israelis the name of a Sobibor survivor, Edda (Ada) Lichtmann.<sup>285</sup> A Polish Jew from Crakow, she was transported with 7,000 other Jews to Sobibor in June 1942.<sup>286</sup> On arrival, she and two other women were selected for work in the camp’s laundry facility; all other women in the transport were gassed. She and her two companions were housed in a small forest cabin situated in a wooded area in Camp I (the administrative sector) near the assembly point where recently arrived Jews were brought.<sup>287</sup> “It was so near,” Lichtmann reported, “that the people were only a few meters away from me.”<sup>288</sup> From this vantage point, she was able to observe the arrivals of transports from Germany, Austria, Holland, France, and

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281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. Statement of Edda Lichtmann, *BArch* B 162/4170 (June 19, 1968).

286. *Id.*

287. Eventually, as other female work Jews were added to the laundry detail, a larger barracks was constructed to house them. C. F. RUETER & D. W. DE MILDT, 25 JUSTIZ UND NS-VERBRECHEN, CASE NO. 642A (2001).

288. Statement of Edda Lichtmann, *supra* note 285.

Czechoslovakia. She was also in a position to see interactions between the SS guards and the arriving Jews.<sup>289</sup>

In late February 1960, Dietrich Zeug contacted Yad Vashem requesting a statement from Lichtmann concerning her experiences in Sobibor.<sup>290</sup> One day later, Zeug asked an Israeli delegation in Cologne to arrange for the interrogation of Sobibor survivors living in Israel. Zeug identified nine survivors; four of the nine would later testify at both the Eichmann trial in Jerusalem and the West German trial of eleven former Sobibor guards in 1965.<sup>291</sup> As his colleagues did in their investigation of Belzec and Treblinka, Zeug appended a list of questions to be posed to the witnesses. The most significant of these probed the witnesses' knowledge of the names, ranks, and physical appearance of former SS guards in the camp, and asked them to identify specific crimes committed by these persons that the witnesses had observed with their own eyes.<sup>292</sup>

This witness list was sent to the Israeli delegation and included the names of Lichtmann and Moshe Bahir. Both would later offer powerful testimony against Adolf Eichmann. Their testimony against former Sobibor guards proved similarly effective. They were among the group of six witnesses who identified Karl Frenzel from photographs shown them during the investigation.<sup>293</sup> After the suicide of the leading defendant in the case, Kurt Bolender, on October 10, 1966, Frenzel became the focus of the regional court's verdict.<sup>294</sup> A carpenter and butcher before the outbreak of the war, Frenzel worked in the euthanasia gassing centers at Grafeneck, Hadamar, and Bernburg before his assignment as an SS Staff Sergeant to Sobibor in the spring of 1942.<sup>295</sup>

Moshe Bahir related acts of brutality committed by Frenzel against Jewish prisoners, including one of the most appalling episodes of the many told during the trial. Bahir testified that Frenzel had discovered that a work Jew had tried to commit suicide by slashing his wrists. As the prisoner lay dying, Frenzel had him carried from his barracks to the

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289. *Id.*

290. Letter from Dietrich Zeug to Yad Vashem, *supra* note 145.

291. One of the accused, Kurt Bolender, committed suicide before announcement of the verdict; another, Erich Fuchs, was severed from the trial and prosecuted in a separate proceeding. *Id.*

292. *Id.*; see also Dietrich Zeug, Questions Posed to Purchasing Delegation of the State of Israel (Feb. 25, 1960) (on file with *BArch* B 162/4427) [hereinafter Zeug, Purchasing Delegation].

293. C. F. RUETER & D. W. DE MILDT, 25 JUSTIZ UND NS-VERBRECHEN (2001) (Judgment in the Criminal Case of Karl Frenzel et al., Case No. 642a).

294. *Id.*

295. *Id.*

parade ground. Frenzel verbally abused the dying man, struck him with his whip, and shot him in the presence of the assembled work Jews.<sup>296</sup> Before dispatching the wretched man with his pistol, Frenzel addressed himself to his audience, admonishing them that no Jew had the right to take his own life; the decision over the life and death of Jews resided only with the Germans. Only the Germans, said Frenzel, had the right to kill.<sup>297</sup>

Adda Lichtman related an incident in which Frenzel caught an 11-year-old Jewish boy with a can of sardines. Frenzel took the boy to the sorting barracks where Lichtman worked, ordering the work Jews there to watch the boy's fate. He forced the boy to hold the can over his head as Frenzel proclaimed that no Jew was permitted to eat foreign sardines. He then drew his pistol and shot the boy in full view of the assembled work Jews.<sup>298</sup>

Jakob Biskiewicz and five other survivor witnesses laid the foundation of Frenzel's conviction for killing 200 Jews selected from a transport that arrived in Sobibor on June 10, 1942.<sup>299</sup> The doomed transportees from Biala Podlaska were unaware that Sobibor was an extermination camp. One of them submitted a petition to the guards requesting that they be treated well. The guards, enraged by this "outrageous" and "insolent" conduct, decided that the Jews would pay for their effrontery.<sup>300</sup> Most of the transport Jews were sent to the gas chambers, but 200 of them were forced to load packets from the sorting barracks in Camp II into empty boxcars at the ramp. They performed this chore at a constant run while the Germans and Ukrainians formed a *Gasse* (alley) through which they had to run amid blows from clubs and whips.<sup>301</sup> As they moved through the *Gasse*, the dog Bari, brought to Sobibor from Treblinka, was set on them for the sole purpose of terrorizing and wounding the prisoners. Afterwards they were liquidated in the gas chambers.<sup>302</sup>

Biskiewicz and other witnesses recalled the *Gasse* incident and unanimously placed Frenzel at the scene. One of Frenzel's co-

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296. *Id.*

297. *Id.* at 134.

298. Lichtmann did not testify in person before the lay assessors (*Schwurgericht*), but provided her testimony in Israel. Despite efforts by the defense to discredit her, the lay assessors found her testimony reliable, in part because other witnesses corroborated it. Statement of Edda Lichtmann, *supra* note 285.

299. RUETER & DE MILDT, *supra* note 293.

300. *Id.*

301. *Id.*

302. *Id.*

defendants, Kurt Bolender, confirmed the Jewish witness statements, adding that he had spoken with Frenzel several days after the alley incident.<sup>303</sup> Frenzel told him “he had missed out on the great fun, people arrived with a petition, the Ukrainians were mustered, and the Jews were beaten and battered.”<sup>304</sup>

Another witness, Berek Freiberg,<sup>305</sup> testified to what the regional court called *eigenmächtige Tötungen* (“unauthorized killings”) by Frenzel—that is, murders perpetrated entirely on Frenzel’s own initiative without the promptings of an order.<sup>306</sup> These included two gratuitous shootings. The first involved a transport of Jews who had perished from hunger and debilitation during their lethal train journey to the camp. Freiberg, a work Jew, discovered a man who had survived the trip lying among the litter of corpses. Freiberg attended to him, helping the distraught man to sit up as Freiberg consoled him. When Frenzel noticed this act of compassion, he struck Freiberg repeatedly in the face and shot the survivor on the spot.<sup>307</sup>

The second incident was strikingly like the first: as Freiberg was dragging what he assumed was a dead body to a rail car, the “corpse” sat up and asked Freiberg “whether it was still far away.”<sup>308</sup> Freiberg took his arm and escorted him to the rail car. Frenzel then arrived on the scene, saw that the victim was still alive, and struck Freiberg with his whip. Freiberg released the victim, who fell to the ground. Frenzel shot him with his pistol.<sup>309</sup> The regional court apparently felt moved to append a moral and legal assessment<sup>310</sup> of this dreadful incident immediately after its recitation in the judgment: “[Frenzel] acted here from his arrogance toward a Jew he regarded as a racial inferior, as well as from a zeal in killing. Therefore he exceeded without thought the scope of the commanded extermination procedure, according to which debilitated Jews were to be taken for killing in Camp III.”<sup>311</sup>

Based on these and other events corroborated by Jewish survivors, the Hagen court found that Frenzel’s killings were actuated by “base

303. *Id.*

304. *Id.* at 121.

305. Berek Freiberg, sometimes referred to as “Dov,” was also a witness in the Eichmann trial.

306. RUETER & DE MILDT, *supra* note 293.

307. *Id.*

308. *Id.*

309. *Id.*

310. Courts typically reserved their legal (and sometimes ethical) evaluations of a defendant’s conduct for the analytical sections of their verdict. Here, the court indicated already in its findings that Frenzel was a perpetrator of murder under German law.

311. RUETER & DE MILDT, *supra* note 293, at 127.

motives”—that is, a personal joy in murdering the Jews he considered racial inferiors.<sup>312</sup> He was convicted as a co-perpetrator in the murders of at least 150,000 people and as a perpetrator acting alone in nine instances. The court imposed a life sentence.<sup>313</sup>

### VIII. CONCLUSION

The survivor-witnesses of Treblinka and Sobibor who testified against Eichmann in his 1961 trial faced a very different task than witnesses in the West German trials. Eichmann was not a low-level, hands-on perpetrator of Holocaust violence but a mid-level bureaucrat, albeit one with inordinate influence and powerful connections, who designed train schedules and organized deportations to the camps. Given his prominence within the system of death created by Nazi leaders, it was enough to prove the appalling reality of the Final Solution in order to convict him under Israeli law. This notwithstanding, the Israeli prosecutor Gideon Hausner strove in vain to prove a single case in which Eichmann had murdered anyone with his own hands.<sup>314</sup> Efforts to link Eichmann with the murder of a Hungarian boy, the *Einsatzgruppen* shooters in the east, or the organization and maintenance of the Operation Reinhard camps all came to nothing and the Israeli court dismissed each of these charges against him.<sup>315</sup> Nonetheless, Eichmann's very real contributions to the Holocaust—particularly his merciless on-site exertions to deport Hungarian Jews to the death camps and damning evidence of his personal zeal and anti-Semitism—ultimately led to his conviction and execution.<sup>316</sup>

The situation was quite different in the West German death camp trials. There, it had to be proved that men lacking command authority had performed specific acts in violation of the German homicide law. Mere presence in the death camp as a guard was not enough. In proceedings where such proof was lacking, as at the abortive trial of Belzec camp guards in January 1964, judges dismissed the case against them. Jewish survivors who had testified against Eichmann provided the critical evidence in the Treblinka and Sobibor trials that enabled the

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312. *Id.*

313. *Id.* at 151, 230. Frenzel was the only one of the original eleven Sobibor defendants to be convicted as a perpetrator of murder. Four other guards were convicted of “aiding and abetting murder” (*Beihilfe zum Mord*), while the remaining five were acquitted. The acquitted included Belzec veterans Jührs, Unverhau, and Zierke.

314. DEBORAH LIPSTADT, *THE EICHMANN TRIAL: JEWISH ENCOUNTERS* 117 (2011).

315. *Id.* at 99.

316. CESARANI, *supra* note 1, at 269–323.

prosecutors to avoid this outcome. They not only tied the defendants to murders within the camp, but also showed that their crimes met the definition of perpetration under German homicide law. On the strength of their testimony, the likes of Kurt Franz and Karl Frenzel were convicted and given life sentences.

As we have seen, the first of the Operation Reinhard trials, Belzec, was not a total failure. It successfully convicted Josef Oberhauser of complicity to mass murder. His factually verified position within the camp command structure was decisive in his conviction. His close relationship with Wirth, his reputation as a stalwart National Socialist that spurred his rapid ascent from non-commissioned to officer rank, and his punctilious execution of his duties within the camp all belied his claims of duress and inner rejection of genocide. The court's analysis of Oberhauser's guilt was legally unobjectionable. Likewise, its classification of Oberhauser as an accomplice rather than a perpetrator of murder was in keeping with the prevailing jurisprudence in Nazi-era cases tried in West German courts.

The Munich regional court did not invent the *Gehilfen-Judikatur* ("accomplice jurisprudence"). This phrase is often applied as an epithet to the judiciary's practice of categorizing simple orders-followers as accomplices while reserving the more serious label "perpetrator" for high-ranking officials and Nazi killers who exceeded their orders. Oberhauser's classification as an accomplice was consistent with the rules of complicity in West German criminal law. A close reading of the investigation and trial yields no signs that the West German authorities were biased in his favor.

Additionally, a study of the Belzec proceedings shows that Jewish survivor-witnesses were critical to successful prosecution, particularly of low-ranking guards lacking command authority. Such a thesis becomes even more persuasive when we consider the main Treblinka trial in Düsseldorf. Where Belzec marked the nadir of West German prosecutions related to the Operation Reinhard camps, Treblinka was a triumph. It was the anti-Belzec, the vindication of Ludwigsburg's exhaustive research and coordination. Like the Eichmann trial that preceded it, the Treblinka proceeding afforded a place for Jewish survivors to bear witness against their former tormentors. The victims were not the nameless and faceless dead, as at the Belzec trial; they were living, flesh-and-blood people with agile and retentive minds. Their ability to refute the defenses of mass murderers was the crucial factor in the trial's success.



In a perfect world, we might lament the delay in justice served. We would deprecate the limitations of German law, with its distinction between accomplices and perpetrators, its statute of limitations, and its stubborn insistence on proof of a specific criminal act before convicting a death camp guard. We would find fault with the Germans for focusing on lower-level actors and their sensational crimes while exempting higher-ranking professionals, like special court judges and *Wehrmacht* officers, from criminal investigation. However, we would do well to remember that for all their flaws, the conviction and punishment of men like Oberhauser, Franz, Matthes, Miete, and Frenzel was a victory in the cause of justice—a victory made possible by Jewish survivors and their willingness to re-live the traumas and terrors of the death camp.