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Responses to World War Two Criminals and Human Rights Violators: National and Comparative Perspectives; European, American, and Canadian Responses (Panel Discussion: Holocaust and Human Rights Law: the First International Conference)

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RESPONSES TO WORLD WAR TWO CRIMINALS AND HUMAN RIGHTS VIOLATORS: NATIONAL AND COMPARATIVE PERSPECTIVES

EUROPEAN RESPONSES

Professor George Fletcher: Good Morning. I'm George Fletcher,[1] the moderator of the first panel. We're going to discuss European legal responses to the Holocaust. Our time is very brief and therefore, I propose that we proceed in the following way. Our two speakers, Professor Henry Friedlander[2] and Mr. Fritz Weinschenk,[3] represent sophisticated and diverse perspectives on the general problem of justice in the European trials. Professor Friedlander will give us a general overview and his perspective on the problem. Mr. Weinschenk will then tell us about some practical aspects on the basis of his detailed experience. I will delegate to myself the privilege of asking a few questions at the outset and then we will turn the floor over to general discussion. First, Professor Friedlander please.

Professor Henry Friedlander: Immediately after the war, the Nuremberg and other Allied trials preempted the prosecution of Nazi crimes in postwar Germany. German and Austrian courts,[4] the subject of my talk this morning, which were opened in late 1945, could only prosecute Nazi crimes committed against German (and Austrian) nationals (or stateless persons), and not against Allied nationals, including Jews from Allied countries. Not until 1950 did they gain jurisdiction over such crimes. What is interesting about the trials in the German and Austrian courts is the fact that they applied the traditional Penal Code of Germany and Austria. Thus, for example, Germany applied two types of law: first, the Penal Code of 1871 and the Criminal Procedures of 1877, and second, the Military Penal Code of 1877, which applied both to German soldiers and to the SS and police. In Germany, however, the courts could also apply Allied Control Council Law No. 10, which was the basic law under which the Allied courts at

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[2] Professor Friedlander teaches history in the Judaic Studies Department at Brooklyn College of the City University of New York. He is co-editor of the SIMON WIESENTHAL CENTER ANNUAL and has published extensively on the criminal law and procedure applied to Nazis. His articles include: *The Judiciary and Nazi War Crimes in Post-War Germany*, SIMON WIESENTHAL CENTER ANNUAL (1984); *The Deportation of German Jews: Postwar Trials of Nazi Criminals*, LEO BAECK INSTITUTE YEARBOOK (1984); *Nazi Criminals in the United States: The Fedorenko Case*, SIMON WIESENTHAL CENTER ANNUAL (1985) (with Earlean McCarrick); *The Trials of the Nazi Criminals: Law, Justice and History*, DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES (1986); *Nazi Criminals in the United States: Denaturalization after Fedorenko*, SIMON WIESENTHAL CENTER ANNUAL (1986) (with Earlean McCarrick).

[3] Mr. Weinschenk is a partner at the New York firm of Hamburger, Weinschenk, Molnar & Busch. He has frequently been appointed "commissioner" by West German criminal courts and prosecutors to take testimony in the United States for war crimes cases pending in West Germany. Mr. Weinschenk has written *The German War Crimes Trials, A Report*, NEW YORK LAW JOURNAL, April, 1968; *Nazi Trials in West Germany Near End*, NEW YORK LAW JOURNAL, April, 1978; *The Majdanek Trial 'Scandal' — Last of 'Dirty Dozen' Sentenced*, NEW YORK LAW JOURNAL, July, 1981.

[4] *See* A. RÜCKERL, NS-VERBRECHEN VOR GERICHT, (1982); Friedlander, *The Judiciary and Nazi War Crimes in Postwar Germany*, 1 SIMON WIESENTHAL CENTER ANNUAL 27,44 (1984).

Nuremberg and elsewhere operated, and which included "Crimes Against Humanity." The situation was similar in Austria, where special laws included the crime of "treason against the Austrian state."

Of special interest, Control Council Law No. 10 permitted the German courts to prosecute a group of Nazi criminals that could not be touched under their own National Penal Code. These were the so-called informers. There is nothing in the normal criminal law, I would suppose, though I am not an attorney, that makes it illegal for a person to report a true statement to the local police. In other words, a German could go to the police, be it the Gestapo, the regular uniformed police, or the judicial authorities and report that his or her neighbor was listening to a foreign news broadcast, was hiding Jews, or was cursing Hitler, or doing something else prohibited by the law at that time. If the fact was true, that is, the neighbor was listening to foreign broadcasts, hiding Jews, or cursing Hitler, then there was nothing in the Penal Code that made this report punishable. In fact, a good citizen is supposed to report to the police crimes that take place in his or her neighborhood. Only under Control Council Law No. 10, with its "Crime Against Humanity" provision, which included in its definition "persecution on political, racial or religious grounds," could the German courts sentence these informers. This is one example of the limitations of the National Penal Code and the advantages of applying new law.

In the immediate postwar years, both Control Council Law No. 10 and the National Penal Codes were applied with great severity. Death sentences were handed down in both Germany and Austria. Some of them were also carried out before the abolition of the death penalty (in West Germany in 1949 and later in Austria and West Berlin). Heavy sentences were also handed down. The number of prosecutions was extremely high in those years. An overwhelming majority of all prosecutions of war criminals that have been carried out in Germany and Austria were carried out in those immediate postwar years. Most of them, however, involved minor felonies. One example is the trials of those who participated in the November 1938 pogrom known as *Kristallnacht*, which included the burning of synagogues and the demolition of Jewish shops. Those persons were sentenced in large numbers in the immediate postwar years. They were prosecuted for "breach of the peace," in German, *Landfriedensbruch*, which was an old Prussian law that applied to those participating with a mob in causing physical damage to buildings, etc. It carried a sentence from about six months to about five years.

This high prosecution rate changed in the 1950's, when Germany, both West and East, and Austria, received their independence from the Allies. They could then prosecute all crimes, including those committed in the territories formerly occupied by Germany. However, limitations were imposed upon them by the Allies. First, the Western Allies refused to permit the Germans to use Control Council Law No. 10, which had to be terminated. Allied law could no longer be applied. Second, the so-called transfer agreement between the Allies and West Germany of 1952, ratified by the Senate of the United States in 1955, stipulated in paragraph 1, chapter 1, that "German courts may exercise such jurisdiction as they have under German Law, unless investigation of the alleged offense was finally completed by the prosecuting authorities of the power or powers concerned." What this basically came down to was that major killers, for example, chiefs of concentration camps or heads of *Einsatzkommandos*, who at Nuremberg had been condemned to death, then had their sentences reduced to life in prison, and finally were let go by 1958, could no longer be tried in German courts. These senior perpetrators would then appear as witnesses in the trials of their former subordinates. This introduced

a certain amount of cynicism on many levels. Only France has revised this provision. The United States and Britain have never revised it, and now it is probably too late to try these people.

As far as the West German trials are concerned (and this applies also to Austria), the *Bundestag* decided not to apply retroactive law. Only the law operating at the time of the commission of the crime in the 1930's and 1940's could be applied. The genocide provision, which was incorporated as a new law into the German Penal Code could not be applied retroactively to Nazi crimes. Therefore, war criminals had to be convicted for crimes already prescribed in the Penal Code, such as murder and manslaughter. This has both disadvantages and advantages. The disadvantage is, of course, that this law was never designed to prosecute war criminals. It was designed for ordinary crimes and ordinary criminals, as we understand it. It was designed for perpetrators operating outside the accepted boundaries of society. However, Nazi crimes were sponsored by the government and the Nazi perpetrators acted on behalf of the nation. The usual needs of society, prevention and re-socialization, simply did not apply in trials of Nazi criminals. They were always very well adjusted and well behaved, prior and after the commission of the crimes, they were "good neighbors" and all that. They are thus much harder to judge under the restraints of a traditional penal code.

Not until the late 1950's did prosecutions became prevalent; until then most thought that all criminals had already been prosecuted. When one compares East Germany to West Germany, the differences are striking. In the German Democratic Republic, the judiciary remained purged of former Nazis. In West Germany, however, the so-called 131 Law returned all civil servants to their jobs unless they had been convicted of a crime. Like West Germany, East Germany applied the traditional German Penal Code until the late 1960's when the new Socialist Penal Code was introduced. But, unlike the West Germans, they did apply retroactive law by incorporating the Nuremberg provisions into the German Penal Code. Nevertheless, there were fewer trials in East Germany. One explanation offered by East Germans, one I am willing to accept, argues that most Nazis with something to fear fled to the West. The West was far more attractive to them for all kinds of reasons. This began immediately at the end of the war, and with the exception of small groups of local Nazis this is probably quite true.

In Austria there were also fewer trials. One explanation is that Austrians, with Allied help, had been able to play the role of a country occupied by the Germans. The Allies had classified Austria, like Czechoslovakia, Poland or France, as one of the victims of Nazi Germany, and on that basis Austrians were able to say, "Let the Germans do it."

I would like to add only one more comment to this survey: whatever the results of trials in West Germany, Austria and East Germany, they have been of enormous help to historians.

Let me sketch two problems that have confronted West German courts and prosecutors. The first is the differentiation between murder and manslaughter, which is extraordinarily complex, and which is based not on premeditation but on the nature of the crime. This forces the German prosecutors and the German courts to investigate in far greater detail the motives of the perpetrators and the circumstances of the deed, which tell us much about the nature of Nazi criminality. Of course, this may not help the ends of justice by convicting and sentencing criminals but, because the courts must analyze the evidence along these lines, it does help us to understand the criminal act.

The second point I would like to make involves the nature of the defense. One available defense is duress. All Nazis perpetrators have claimed "duress under orders"

(*Befehlsnotstand*). In other words, they have claimed that if they had not carried out these criminal orders, they or their families would have suffered severe penalties. But in forty years of judicial proceedings, not one single case has ever been produced to prove this allegation; no one has ever proved that anyone ever suffered or would have suffered such penalties had he refused to carry out a criminal order. It is widely believed that no such penalty was ever imposed, or could be imposed, on a German perpetrator. We also know the reverse: the careers of those who refused to carry out such orders did not suffer, some were later even promoted.

However, the courts can and do recognize "putative duress." Thus, if the perpetrator "believed" that something would happen to him, this can be an acceptable defense. It is usually granted only to persons of limited education, who therefore did not at that time comprehend their legal position. By the way, it is therefore also rarely granted to lawyers in the SS. The courts imposed restrictions before "putative duress" could be granted. In other words, the perpetrator must prove that he did everything possible to avoid following the criminal orders. It is not enough to go to the superior officer and say, "I would rather not do it," and then, when the superior replies, "It is an order," carry out the deed. The perpetrator has to do a little more to show that he tried to avoid following the criminal orders. Further, he must carry out the order only as far as is necessary to comply; he may not exceed them.

Another point that the courts must examine is embedded in Article 47 of the German Military Penal Code. By the way, it was embarrassing for the Allies that the American and British Military Penal Codes did not include a provision as progressive as Article 47 of the German Military Penal Code, which remained on the books during the Nazi period, although it was not enforced. Article 47 provided, as did the American and British codes, that a soldier who carries out his superior's criminal order is not punishable; punishment is imposed only on his superior, who issued the order. However, Article 47 added that the soldier is to be punished if he was aware of the criminal nature of that order. The American and British Military Penal Codes of World War II did not include that provision; after the war they added it. That means that the court must prove that the perpetrator was aware of the criminal nature of his orders. In other words, the defendant can use as a defense the argument that he did not know what the law was.

This defense was similar to another defense often used. It arose in a case that had nothing to do with Nazi crimes. It was a Hamburg case involving an attorney who, in the middle of a trial, told his client that unless she paid him the bill she owed, he would no longer defend her. The state attorney charged the attorney with coercion, and he was convicted in the Hamburg courts. The Supreme Federal Court of Germany overturned the conviction. His act was illegal, but he had in good faith believed that it was legal. He had thus committed an "error of law" (*Verbotsirrtum*). The defense of "error in fact" had long been accepted in German courts; the "error of law" defense was new. And this defense was thereafter used by Nazi war criminals.

It is interesting to note that one cannot claim both duress and "error of law" as a defense. This is what happened in the case of two physicians tried in an euthanasia case. Physician Number One stonewalled, saying, "I was doing the right thing, there was nothing wrong with what I did, killing these patients." Physician Number Two said, "It's a terrible crime and I was opposed to it, but I operated under duress. If I hadn't gone along, they would have done this and that to me." They were both convicted, but when it went to the appellate court, they remanded it with the demand that possible "error of

law" be considered. On remand, Physician Number One, who had stonewalled, got off, because the court could not prove that he really knew that euthanasia was a criminal act. However, Physician Number Two, who had claimed duress, was again convicted. The reason was as follows: As the physician committed the criminal act only under duress, he obviously knew that he was committing a crime. Conversely, if the physician did not know it was a criminal act, he would not have needed duress to make him pliable. Because of this decision, perpetrators henceforth found themselves in the position of having to choose at the beginning which defense to offer — duress or ignorance of the criminal nature of the act.

May I add one thing at the end: what makes the trials in German courts so valuable, is not the rate of conviction, which is low, and not the size of the sentences, which are minuscule; it is the historical work done by the prosecutors and the courts. Considering the denial of the Holocaust today, their work is of extreme importance, because the documentation compiled in these trials proves that the Holocaust did happen.

Professor Fletcher: Thank you very much, Professor Friedlander for that excellent presentation. Now I would like to turn the platform over to Mr. Weinschenk who will tell us about some practical aspects of these trials.

Mr. Fritz Weinschenk: Professor Friedlander has given you something of the law and the history of these trials. I'm here to give a report today on the nitty-gritty, on how these trials worked in actuality from the standpoint of a practicing lawyer who has taken part in them for more than twenty years. How do you deal with hundreds and thousands of criminal defendants? How do you deal with many thousands of fact patterns? If you have a jury trial for each defendant you would stretch to the year 2005. It so happens that the German criminal procedure, which is the continental type and vastly different from ours, expedited the trials of these perpetrators in a due process manner. In order to understand this, we have to go into a little bit of the German system of criminal prosecution.

First of all, a German proceeding starts with a prosecutorial investigation. The prosecutor by law is required to inquire into all crimes that come to his attention. He has to do this as our grand jury would. He has to examine the witnesses, the documentary evidence collected, and the experts. He has to do this in a very thorough manner, much more thoroughly than our grand jury. Our grand jury has to find evidence sufficient to make out a *prima facie* case. He has to go, not only into the *prima facie* aspects, but he also has to consider the defense. He has to act as an investigative organ of the state. When he is finished with his comprehensive examination, he collects all his material and presents it to the court. This is in the nature of an indictment or complaint.

The complaint is a very voluminous document in Nazi cases. It usually runs into several hundred pages. It quotes not only who the witnesses are, but what they said and what their testimony will be. It has photographs, documents, and the entire case. The court will then consider the complaint and decide whether there is a legally founded case, i.e., whether the indictment is legally sufficient. If it is not sufficient, they will dismiss the case. The curious factor is that the prosecutor can appeal from the decision of the court not to consider the complaint. If the court finds the indictment sufficient, they will open the trial. The defendant does not have a right to appeal from the decision of the court to open the trial.

The jurisdiction in Nazi cases lies with the court of general jurisdiction, which has two parts, a civil part and a criminal or penal part. The penal part has jurisdiction over the crimes of homicide, murder, and manslaughter, which are usually the complaints in Nazi cases. The cases are tried before a panel of three judges and two jurors. The system is different from ours. There are no rules of evidence. The court can freely consider all evidence and *sua sponte* rule out evidence it considers irrelevant. The two jurors are, as the comparatists in this audience will know better than I, there to infuse common sense and life experience into the deliberations of the judges. They have a full voice in the deliberations of the court.

I have had some weird experiences with German jurors. In one case a witness was testifying about an action in a ghetto by German troops. He testified that they had their rifles shoulder-carried and I overheard this juror saying, "That witness must be lying. We always carried our rifles muzzle downward in the rain."

After the evidence has been heard by the court in a series of hearings, not in a trial as we know it in the United States, but in a continuous series of hearings which may not be interrupted by more than ten days, they will make a judgment. Many witnesses in Holocaust cases refuse to step on German soil. In cases of that kind the entire court, minus the defendants, will go to the witnesses. Thus, German courts have been in Israel for months, as well as in the United States, Poland, the Soviet Union, and even Australia. You can imagine the amount of money and time that has to be spent on this. If the court meets in foreign countries, sometimes permission has to be obtained from the judicial authorities of the country where they meet in order not to violate sovereignty of that state. The testimony also has to be heard by locally authorized judicial officers or attorneys who have subpoena power, in order to make the testimony valid in the court back home. After the evidence is heard, which usually takes years, the judgment is rendered. The judgment, as Professor Friedlander mentioned, in one case could be several volumes, encompassing thousands of pages. The judgment is a verdict, a summation, a probation report, and a sentencing all rolled into one. It is utterly unlike what we are used to in this country. After the judgment, the case can be appealed. Either party can easily appeal on an issue of fact or law. The entire case will then be heard again. Most of the testimony of the witnesses, however, will not have to be repeated. After the first appeal, a second appeal on issues of law can be made to the German Supreme Court. You can easily see what kind of time and effort this takes.

Professor Friedlander has mentioned the meager results of prosecutions. These results are indeed very depressing. I have data on the trials from May 8, 1945 to January 1, 1986. Prior to 1949 there were 12 death sentences, and from 1945 to date there were 160 life sentences, 6,192 prison terms less than life, and 83,153 not guilty, incompetence, and lack of proof dismissals. There are 1,302 cases still pending at this time. These are depressing statistics at first blush. The German judicial official in charge, the chief prosecutor in Ludwigsburg, insists, and I think rightfully so, that this is not because of a lack of will or a lack of effort to prosecute. I have to say, and I think Professor Friedlander will agree with me, that this program has been a massive national effort to seek justice. I don't think that is deniable. However, the inability to achieve due process convictions in this area stems from the difficulty and sometimes impossibility of making proof. I can make this clearer by describing to you the type of evidence that is needed.

The first type of evidence is documentary. Documents speak for themselves, and they are very important. But documents are only circumstantial. Until about the middle of the 1960's, the Germans were limited to the documentation that was then available.

There were large volumes, massive quantities of documents that had been in East Germany, that were still in the United States at that time in Alexandria, Virginia, and in Israel in the Yad Vashem and other places. Only in the middle of the 1960's were the Germans able to evaluate and get a hold of the massive documentation that was in Poland, in the Soviet Union, in Israel and so on.

You cannot convict on documents alone. The other type of evidence that you need, as Professor Friedlander pointed out, is witnesses. You have two classes of witnesses. You have colleagues and comrades of the perpetrators, and you have victims. The colleagues of the perpetrators are reticent. First of all, they have sympathies with the defendants. Second, they have a certain fear of incriminating themselves. The victims, of course, as witnesses, while we deeply sympathize with them and are affected by their stories, can be broken down by any half-way competent defense counsel in two minutes flat. You cannot, after twenty years, testify validly about a murder case. You have trials in the United States where witnesses are judged as unreliable after one year. So that is a problem. The result of this is that the trials have become longer and longer. Where in 1962, from the start of the prosecutorial investigation, it took 3.6 years, in 1977, a case from the start of the prosecutorial investigation to the end of the first stage, the trial stage, took 16.8 years. This is not the fault of the German courts, it is simply the result of the circumstances in those trials.

In conclusion, you ask, what is the result? I agree very much with Professor Friedlander, that there has been a unique historical effort and a unique result. However, the task is tremendously difficult, and requires a massive national effort to carry out a due process program of Holocaust trial in any country, by a successor regime that supercedes a criminal regime like the Nazis'. Thank you very much.

Professor Fletcher: Thank you very much Mr. Weinschenk for that excellent presentation. I'd like to make a few quick comments myself and then we'll open the floor to questions. First, I think it's important to note one important difference between German procedures and our own. It's a difference that complicates these trials. There is no principle, no possibility of granting immunity to co-conspirators as a way of securing testimony at a trial. There is no institution of state's witness or some technique that would enable one to get some conspirators or some other people who were involved to testify against each other. That is precluded by the principle of the legality of full prosecution.

Second, I'd like to raise a few points about the issue of retroactivity. I think that's one of the hottest civil liberties issues in all of these trials. A major legal development in Germany that requires mention is the long struggle to abolish the statute of limitations in these cases. The statute of limitations in the Code, at the time that the crimes were committed, was twenty years. That meant that if the statute started running in 1944, it should have been due in 1965. Then in 1969, they extended the statute of limitations for ten years. Finally, in 1979, as you probably know, after a long and deep debate in German society, in the newspapers as well as in the legal community, they abolished the statute of limitations altogether. I don't have that much sympathy as a personal matter for those who would want to say that war criminals have a right to rely upon a statute of limitations. But it is not a simple issue. That is, one has to recognize that there is some argument on the other side. There is a problem of procedural due process in repealing the statute of limitations.

A further problem of retroactivity concerns the recognition of claims of superior orders and justification generally. Now I have seen some cases involving *Kristallnacht*, the

"night of broken glass," of prosecutions for the malicious destruction of property, in which the defendants relied upon some notion of administrative regulation or superior orders for participating in the mob violence. There is no doubt that the participants thought that what they were doing was fully legitimate. The position of the German courts in this question is that the term "wrongfulness" or "unlawfulness" has to be interpreted normatively. That is, it is not a defense simply to rely upon an actual order or an actual regulation if that order or regulation violates higher principles of law.

However, it cannot be denied that the rejection of these defenses of superior orders constitutes an element of retroactive prosecution. That is, one is prosecuting people on the basis of law that existed at the time they committed the offenses, namely on the basis of the criminal code. But the prosecutor is not recognizing the institutionalized set of orders on which people relied when they engaged in mob violence. In so doing, one is disregarding a part of the law that benefits the defendant.

Consequently, the "mistake of law" defense is necessary, because it operates partly as a corrective measure against the rejection of the claim of superior orders or justification based upon other regulation. It should be pointed out, though, that the defense does not require that the defendant know that he was engaged in wrongdoing. It only requires that he should have known. There were arguments in the early stages of this game in which they argued that knowledge of actual wrongdoing was necessary, but from that 1952 decision the Supreme Court rejected the requirement of actual knowledge.

Professor Friedlander: May I say something? Obviously I am not as knowledgeable about this historical setting and history of law. The debate over the statute of limitations has always focused only on murder, not on manslaughter, which is quite different from the United States and, therefore, most everything had already expired before the debates began. They have argued that it is not retroactive because it involves procedure rather than substantive law, and procedure can always be changed. Obviously, there could be two opinions on this matter.

Your idea of linking a mistake of law defense with this refusal to accept superior orders is an intriguing thought. But, as a historian, causation is a very serious matter. The case that I described, which showed how a mistake of law defense was first accepted by the German courts, was based on something that had nothing to do with Nazi crimes.

Now when it comes to superior orders, the German courts have from the very beginning taken a very logical position, it seems to me. For example, Hitler wrote an authorization for the euthanasia program on his private stationery, which not many saw. It was locked away and shown to certain select people. Now that is not the way law, even in Nazi Germany, was passed. The German courts ruled that before the law could be binding it had to be proposed by a ministry and discussed with various Nazi ministers. Hitler would then make a decision, and the law would be published in the gazette. But these laws were never published. The German courts held that you cannot set up a totalitarian regime and simply decide what law is. This was done in Nazi Germany when Himmler wrote a letter to the newspapers. This letter was considered law, and was enforced by his various agencies. But that, courts very early decided, is not law. Otherwise, everything was permissible.

Professor Fletcher: I think your argument is very intriguing. You're using a positivistic model to attack the legal status of these Nazi regulations, but there is no doubt in the

opinions of the German courts that their basis for rejecting the defenses is not technical or formal, but simply because these defenses flatly violated principles of natural justice. That is, these orders were on the basis of their substance, invalid, not on the basis of their form.

Professor Friedlander: Some courts did, in the early years, argue that way. I never saw it fully accepted by all of them as the basis.

Professor Fletcher: It is easier for a court to make this kind of technical argument. But they felt that their moral position was stronger and they had no qualms about taking a higher road in rejecting Nazi legislation that could be used as a basis for defense.

Mr. Weinschenk: I just wanted to say that to me this question is basic. It goes much deeper than the Nazis. It goes into the responsibility of say, presidents of corporations and political leaders. It is a basic question. The way the Germans have handled it, the German Supreme Court has handled it, on the whole, is commendable.

The treatment goes into philosophy. It goes into the natural law concept. It goes beyond what to me is, after all, a legal technicality. It goes to what the Eichmann Court in Jerusalem called the "Black Heart Theory." In other words, when you commit these things there is a law, there is a line where you deviate from acceptable moral norms regardless of what statute is in force. I think that the German Supreme Court has laid down the rules there very plainly. I don't know whether Professor Friedlander agrees.

Professor Friedlander: You have to do two things at a trial in Germany. First the court has to decide: was this act an act of murder? And on that level you are absolutely right, they decide that it was an act of murder on this basis of positive greater law. But when it comes down to fixing the guilt of the actual defendant, whether defense can be offered, then they are technical, then they are legalistic. If the legalistic rule doesn't exist, then he gets off. It was an act of murder, but he had an excuse and in most of the cases I have looked at, this has worked.

Professor Fletcher: I would not agree with that. I take it that the euthanasia cases you're referring to are those that were published in 1946 or 1947.

Professor Friedlander: No. They go as late as the 1950's as well.

Professor Fletcher: The defense that was recognized in the euthanasia case was a totally novel defense. The first set of courts that handled these under the allied occupation held that the doctors who participated in the mercy killing of mentally imbalanced, defective patients were culpable. They acted wrongfully despite the unpublished order. They were personally to blame for having done it. But nonetheless, they could make out a good defense and avoid liability for participating in these homicide cases. In the first set of cases that was published the doctor's argument was that if they had not participated in the euthanasia, other doctors would have done it more zealously. This is a kind of utilitarian argument which the court explicitly rejected. Nonetheless, a totally novel claim developed; that because the doctors had lived in some kind of hermetic world, insulated from normal moral sensibilities, they should not be punished for what they had done. That displayed considerable ingenuity on the part of the court, going

beyond any kind of written legal materials. I think in fairness to the audience we should open up to a few questions.

Question: I wanted to understand the low conviction rate a little more. What is the standard of proof that is required? Who was the decision-maker as between the judge and the jury? You mentioned that the judges were those who sometimes served under the Nazi regime. Is that a factor in the low conviction rate? Who were the juries? There were so many cases. Were the same people used for many cases? How were they selected? Were people excluded for war time or Nazi participation? How did the conviction rate in West Germany compare to East Germany? Was it higher?

Mr. Weinschenk: I have seen a lot of courts. Many, many of the judges were young. They were not even teenagers during World War II. I have seen few judges that were even German soldiers during World War II. There are some of course.

Question: But my question was directed specifically to the postwar, pre-1950, when 85% of the cases were tried.

Mr. Weinschenk: It is the other way around. I think that most cases were tried after that. There are relatively few instances known to me where there were judges with a Nazi background. People who were heavily incriminated were barred from judicial office unofficially. The jurors are selected from voting lists and different jurors have to sit on different cases. They are from all levels of the population. The jurors that I have seen have only a limited voice in the deliberations of the court. There are only two jurors and they can be out-voted by the three judges. They are not the triers of the fact really, as in our system. They only act. Now as to the second part of your question. I am of the opinion that the trials in East Germany lacked due process. I do not agree that we can regard the East German trials as adequate to our standards. I have talked to East German lawyers and the sort of information I got on the East German trials was depressing.

Professor Fletcher: I just wanted to respond to your point about the standard of proof because that is a natural question for American lawyers to ask. Because there is no separate jury, there are no jury instructions, so there is no explicit articulation of the standard of proof. The general principle is that the prosecution has to establish guilt on all issues and if there is any doubt, the defendant will receive the benefit of that doubt. The only way to find out, however, whether there is doubt on the issue whether the evidence is adequate or not, is to read the judgment written by the judge on the panel. Now I take it in none of these cases has there been a record made. I mean a verbatim record.

Professor Friedlander: No, it is against the law.

Professor Fletcher: No, I don't think it is against the law.

Mr. Weinschenk: No, it is not against the law.

Professor Fletcher: They don't do it as a matter of practice.

Professor Friedlander: They are not allowed to use tape recorders.

Professor Fletcher: If you're involved in a German trial I don't think there is anything illegal about bringing in your own court reporter to take a verbatim record.

Mr. Weinschenk: That doesn't fit into the system. The testimony of a witness is dictated into the record in summary. In the judgment you will find, "witness (A) is credible and (B) he testified to facts x, y, and z." You will go down the line. I have seen judges who make themselves big tables, incident (A), witness (X), evidences — a hoofmark, going down the line very systematically.

Professor Fletcher: I just wanted to say here that the point is that it is hard to go beyond the judgment to find out whether the courts were acting responsibly, because they are in fact interpreting all the material presented in the judgment. So the judgment is indeed the beginning and the end of the inquiry. It's different from the American system.

Professor Friedlander: I would like to add, first of all, the classical jury system of the United States, which also operated in Weimar Germany, was reintroduced in Bavaria for one year in the late 1940's. The trial records we have don't tell us anything because all they provide are the answers of the juries. They didn't have to write detailed opinions. In the non-classical jury system during much of this period, however, it was three judges and six jurors. These six jurors chosen to sit in these trials are lay people who have the right to vote on all issues, equal to the judges, except when it involves submission of evidence or some other technical legal matter. They have equal votes on facts and sentence and they could out-vote the judges in those years. Now I think they change the numbers every once in a while. The judges have to write up the decision to conform to that. Prosecutors have told me that if you're very sophisticated, you can tell when they don't like what they are writing up. Of course, they have prestige and can influence the jurors. But because there are no individually signed decisions, there are no dissents. You never know who did what for what reason, unless you are personally involved in these things. The decision can be appealed on both fact and law if anything in the decision contradicts accepted fact, so the judges have to be very careful. I have read decisions in U.S. federal courts on these denaturalization cases where judges, for example, get the date of the invasion of Russia wrong. This cannot happen in Germany. The thing would be sent back immediately because you can't make that kind of error. Consequently it takes months for the reporting judge to write it up. This makes the decision a good historical document in many ways.

Question: One point you made concerned the defense not going overseas or out of the country to hear witnesses. Did the defense consider this a problem?

Mr. Weinschenk: The defendants don't go overseas. The defense counsel goes overseas.

Question: But even in that situation, normally according to our standards the defendant should be present at his own trial.

Mr. Weinschenk: The reason why the defendants themselves don't go overseas is because most countries wouldn't let them in. The defense counsel is there.

Professor Friedlander: Whatever happens overseas must be read in open court.

Mr. Weinschenk: Yes. The protocols that are made abroad must be read in open court.

Question: Just a comment to Professor Friedlander that excusing some perpetrators of war crimes or atrocities, reminds me ironically of Jewish law. I saw a great parallel when you said that German laws excused some perpetrators of what otherwise would be crimes because they didn't know what was happening or lacked formal education. I wondered if it had ever occurred to you as well, that there was a strange parallel there.

Professor Friedlander: Certainly ironic.

Professor Fletcher: Are there many cases in practice where the excuse is recognized?

Professor Friedlander: Putative duress?

Professor Fletcher: Yes.

Professor Friedlander: Oh yes, for example, in the *Sobibor* case, and we are talking here about persons who worked in an extermination camp where 250,000 people were murdered. Some of the very lowest of the functionaries on the bottom, who were limited in their educational background, received the benefit of the putative duress defense. It stretches the imagination a little bit when it concerns persons who are involved daily for a year in this process of mass murder. But remember that in Sobibor the commander of the whole camp was a man named Christian Wirth, who started in the euthanasia program and later became the commander of all three extermination camps of Operation Reinhard. He was a very violent person. It is possible that the persons under him thought that something would happen to them if they didn't carry out his orders, and the courts have thus accepted the putative duress defense. It happens a lot.

Professor Fletcher: The defendants were actually acquitted.

Professor Friedlander: I don't know. I'm not a lawyer, but acquitted is a good term. They did not receive a sentence.

Professor Fletcher: Well, wait a minute. What happened in these trials?

Professor Friedlander: They were guilty of murder but the court accepted their putative duress defense.

Professor Fletcher: No, that doesn't make any sense. If the court established that there was a wrongful act, they must have been acquitted of any criminal liability.

Professor Friedlander: Correct.

Professor Fletcher: O.K. So then in our sense they were acquitted. That's one of the advantages of the German system. They can condemn the act but nonetheless excuse the perpetrator at the same time.

Professor Friedlander: The German Supreme Federal Court has strictly interpreted putative duress. They have laid down the rule that the perpetrator, in order to use the defense successfully, must show that he did everything possible, even to the extent of playing sick, having himself transferred or backing out. It hasn't always worked, but there are such cases. One case of this involved a colonel in the uniformed police in Russia, whose unit was assigned to killing Jews in a village. He protested the order. He didn't want to carry it out, but yielded to his orders and his troops did kill about 500 persons. That night he got into a car and drove from Minsk to Rega over icy roads — it's described in detail how icy they were — to report to his boss and to argue against having to do this thing. Within twenty-four hours his entire unit was transferred out and another unit was sent in to do the job. He was not convicted. In other words, duress was accepted. His effort was enough, even though he had committed the act of shooting the first batch. But he then protested and got out. He moved away, indicating, in other words, that he made an effort. And I suppose that is really what the courts want.

Mr. Weinschenk: I have seen one case in which the defendant was not a military man, he was a foreman in a slave labor factory.

Professor Friedlander: Oh, that case.

Mr. Weinschenk: Yes.

Professor Friedlander: One of the worst types.

Mr. Weinschenk: He wrote a confession. Confessions play an entirely different role in the German system. He said, "Yes, I beat up people. I did this but I didn't discriminate, I beat up everybody, not only Jews. After all, there was a war on." This case has been like a yo-yo, up and down on appeals. It is still being tried.

Professor Friedlander: He got a life sentence and has sat in jail since the late 1940's. But now the case has been reopened. What happens is that sometimes witnesses have testified to some crime that they have observed and then later in a restitution case or something else tell a different story. When that comes to light, then the case can be reopened.

Professor Fletcher: I should add quickly that there is nothing peculiar about this German defense of putative duress. The same principles apply in American law, except that it is much more difficult to get duress recognized in a homicide case, whether real duress or putative duress. Any other questions?

Question: Yes, Professor Friedlander, you mention difficulty in trying to convict informants and so forth. I know there is a case from the 1960's, a civil case, in which a woman successfully sued in tort against someone who had informed on her husband during the war. Do you know of any other tort cases against informants or perpetrators or persecutors where damages have been awarded as opposed to a sentence?

Professor Fletcher: Are you talking about the case that was discussed in the Hart/Fuller debate? There is one famous case of this sort that is discussed in the 1958 Harvard Law Review.

Question: I think the case was after 1958.

Professor Fletcher: No, well there were some earlier cases that raised the same point though they generally recognize the higher concept of law, and that the reliance upon Nazi regulations was invalid and was not an adequate basis for defense.

Mr. Weinschenk: Is this a German case?

Professor Fletcher: Yes, but I'm not so sure that tort damages were awarded. The case focused on the problem of grudge informers.

Mr. Weinschenk: The German concept of tort is an entirely different one. It's a part of the law of obligations. I know there have been cases of this nature, not only for informers in Nazi camps, but also other damages in the Third Reich. One of the major suits was against I.G. Farben, which resulted in a massive recovery.

Professor Friedlander: The case was filed by Norbert Wollheim, now an accountant in New York City, who was a slave laborer in one of the I.G. Farben compounds. On behalf of many thousands of slave laborers, he recovered several million deutschmarks, which were distributed by a fiduciary organization.

Professor Fletcher: The restitution provided by statute was not enough.

Professor Friedlander: Correct.

Professor Fletcher: The problem is that restitutionary statutes have precluded a large number of torts. That is a good question. Why didn't the restitutionary statute provide enough? Did they ask for punitive damages?

Professor Friedlander: Because it was negotiated wrong, that's why!

Mr. Weinschenk: The Wollheim suit was based on general principles of noncommitted act tort law.

Professor Fletcher: But it was not precluded by the recovery that was already available.

Mr. Weinschenk: No because the indemnification statutes did not cover the precise situation that they would handle.

Professor Fletcher: I do not know. Do the restitutionary statutes provide for pain and suffering?

Mr. Weinschenk: Not in that sense, no.