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"EPILOGUE OF SHAMEFUL HISTORY?" – THE TRIAL AGAINST JOHN DEMJANJUK AND THE CRIMINAL PROSECUTION OF FORMER AUSCHWITZ CAPOS AFTER 1945 IN GERMANY – A FEW REMARKS

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ABSTRACT

Corruption in politics is a phenomenon commonly raised by the public. Social studies indicate this type of corrupt behavior as The article contains a critical discussion of the criminal prosecution of Nazi perpetrators from the "grey zone", whose perpetratorship was in fact mixed with victimhood. Starting from the court verdict against the alleged Sobibor Ukrainian auxiliary policeman John Demjanjuk in 2011, the criminal cases against a selected number of Auschwitz functional prisoners in the Federal Republic of Germany are discussed. The contribution aims at a critical assessment of the jurisdiction against a group of people, whose guilt is a moral, practical and legal challenge. Scholars have no doubt that the state attempt to restitute National Socialist injustice (including the prosecution of former SS and NSDAP perpetrators) has failed. But what about borderline cases like concentration camp capos?

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The question of how to adequately punish perpetrators, who were allegedly guilt of mass murder during World War II, has been a recurring issue for the last decades. Now, almost 70 years after the end of the war, real attempts of criminal persecution and punishment of perpetrators of Nazi crimes are inevitably coming to an end. Nevertheless, the discussion about guilt and punishment, moral and collective responsibility in Germany and elsewhere in the Western world has remained vital. While there is a consensus about the shortcoming of the attempt to punish clear-cut perpetrators in Germany, another aspect has so far been almost overlooked. How to deal with individuals accused of Nazi crimes, whose position as "perpetrator" is not as evident? People, who had allegedly been directly involved in torture and murder, but who became part of the oppressing system not by own, free uncoerced choice? Did and does the applicable law allow for appropriate punishment and distinction according to the level of guilt (as determined by the courts)? These questions were vividly discussed in 2009-2011, when the district court in Munich tried the case of John Demjanjuk, a stateless retiree accused of murder in thousands of cases at the German death camp in Sobibor, where he supposedly had served as a Ukrainian auxiliary policeman (so-called Trawniki man) in 1943. After

a turbulent and widely reported trial, Demjanjuk was found guilty and condemned to 5 years in prison[1]. Due to the advanced age of the convict and as a result of the filed appellation, he was released from his sentence until the final verdict of the German Federal Supreme Court. Since John Demjanuk passed away in 2012 prior to a consideration of the case by the Supreme Court, his case was never definitively settled. TV stations and newspapers from all over the world frequently referred to the trial as last great process against a Nazi perpetrator. The court's argumentation in the verdict was commonly by experts conceived as a big surprise and innovation – if it had been confirmed by the Federal Supreme Court, it would have marked an entire turnaround in the jurisdiction against Nazi criminals. The Munich court of first instance namely argued that the sole proof of Demjanjuk's presence at a mass killing site like Sobibor as a guard was sufficient to convict him guilty of participation in mass murder.

This revolutionary and groundbreaking change did not appear until 66 years after the end of the war. The German journalist Heinrich Welfing, observer of the trial and author of a book about the Demjanjuk case, called the judgment in the Munich case "at the best an epilogue of a shameful history"[2]. What kind of shame does Welfing signalize? Is it the judgment of a person at the very bottom of the perpetrator's authority hierarchy – a person, who himself to a certain degree is a victim of Hitler's terror machine – which should be called a shame? Is it at all possible to judge Soviet POW's, who agreed to collaborate, considering the fact that millions of POW's were starved to death, tortured and killed during the war? Moreover, how can the Demjanjuk judgment be understood in the context of a whole series of other trials, especially in the 1960s and 70s, against German SS-men, which ended with acquittals or very low prison sentences?

The problem of assessing the guilt of perpetrators, who were at the same time or prior to their crimes victims themselves, did not emerge for the first time in the Demjanjuk case. Already in the immediate aftermath of the war, a larger number of former functional prisoners from concentration camps were accused in German courts for their crimes committed in the camps. One of the most well-known post-war trial against Nazi perpetrators apart from the Nuremberg trial, namely the first Auschwitz trial in Frankfurt in 1963-1965, also included one former Auschwitz prisoner among the 22 defendants: Emil Bednarek from Silesia, political prisoner and block eldest at the Auschwitz I and Auschwitz II-Birkenau camp. This article wants to investigate the way, German courts have dealt with cases like Demjanjuk and Bednarek. Did the criminal law provide sufficient tools to

1 John Demjanjuk was born as Iwan Demjanjuk in March 1920 in Dobovi Makharyntsi in Soviet Ukraine. As a soldier of the Red Army, he was taken in captivity by German troops in May 1942. After the war, he emigrated to the United States and became a naturalized US citizen in 1952. Due to suspicions about him having falsified his immigration paper concerning his past, he was stripped of his US citizenship in 1981 and extradited to Israel a few years later. He was found guilty by the Israeli court and condemned to death for his service at the Treblinka extermination site in Poland. After new evidence had appeared upon the disintegration of the Soviet Union and the opening of some Soviet archives, Demjanjuk's conviction was overturned in 1993. It had turned out, that he could not have been 'Ivan the Terrible' at Treblinka – the reason why he had been convicted – as witnesses had confused him with another Ukrainian auxiliary SS guard, Ivan Marchenko. Demjanjuk returned to the United States, had his citizenship returned in 1998. As a result of further investigations alleging that he had served as a Trawniki-trained police auxiliary at Trawniki, Sobibor and Majdanek and later as a member of an SS Death's Head Battalion at the Flossenburg camp he again lost his US citizenship and was finally, after years of procedures and negotiations, transported from the US to Germany, as German prosecutors were preparing a process against him. (For more information, see the encyclopedia article on John Demjanjuk on the homepage of the United States Holocaust Memorial Museum - http://www.ushmm.org/wlc/en/article.php?ModuleId=10007956).

2 H. Wefing, *Der Fall Demjanjuk. Der letzte große NS-Prozess.* C.H. Beck, Munich 2011, p. 207. Wefing continues: "It is too late, particularly for our country. The Federal German judiciary after 1945 has almost completely failed if it comes to the persecution of Nazi perpetrators." (Ibidem).

distinguish between direct perpetrators and so-called "desktop-perpetrators"?

Some observers of the German Demjanjuk trial, especially in Poland, have uttered their concern about yet another German attempt to clear the own history and to get rid of the feeling of sole responsibility for the Holocaust and other mass crimes of World War II. They have argued that calling a non-German auxiliary police and concentration camp guard like Demjanjuk a "Nazi perpetrator" had the aim to shift the burden of guilt to others, i.e. foreigners. The last well-known and widely discussed argument for supporters of this point of view was the emission of the TV serial "Our mothers, our fathers" in spring 2013 and the following extensive public debate in Germany, which was very critically perceived abroad, for instance in Poland.

The attempt to approach questions of shame, guilt and justice related to the Holocaust and other mass crimes during World War II must not be restricted to individual examples, as they are always embedded into the local, regional and precise historical context. Agreeing with Hermann Langbein, former Auschwitz prisoner and observer of the Frankfurt trials against the Auschwitz SS-guards, one should also consider the political meaning and impact of Nazi perpetrator processes, which forced all observers and in consequence the whole society to settle up with the national socialist terror system[3]. The dissonance between attempts to escape the own guilt and widely reported processes like the Auschwitz process in the 1960s and the Demjanjuk process in 2009-2011 shows the ambivalence of this issue and the post-war political and societal atmosphere, in which the long and painful process of *Vergangenheitsbewältigung* (coming to terms with the past) took place, played an important role for the outcome.

PERPETRATORS OR VICTIMS – THE "GREY ZONE"[4]

The tragic and at least partly eery fate of Demanjuk not only offers material to fill newspapers and magazines with stories, but gives also grounds to critically assess and question the final verdict. And it provokes us once more to risk a more profound look at the criminal persecution of Nazi perpetrators in the "grey zone" between victimhood and being perpetrator in the Federal Republic of Germany after 1945. John Demjanjuk was the first former Trawniki-trained foreign national auxiliary guard to be trialed in Germany[5]. And the question, if and in how far he joined the SS out of own free will and can therefore be pledged guilty, played also a role in the Munich trial. Certain similarities in this respect can be drawn to the case of capos in concentration camps, who were prisoners, victims of the unlawful system, who then became part of the oppressive system as functional prison-

3 Langbein, writing these words in 1965, argues further: "These *[the Frankfurt Auschwitz trials – auth.]* processes and their public response will possibly become explicit indicators for the moral situation of the Nazi era in the future post-war historical works. The important political meaning of these series of processes, which was already noticeable during the actual trial sessions, consists in the fact that the public opinion gets to know about incontestable facts from a period of German history, which until then had been for too many people a black spot." - Langbein H., *Auschwitz przed sądem. Proces we Frankfurcie nad Menem 1963-1965*, Instytut Pamięci Narodowej, Państwowe Muzeum Auschwitz-Birkenau, Via Nova, Wrocław/Warszawa/Oświęcim 2011, p. 3.

4 The term „grey zone" was coined by the Auschwitz survivor Primo Levi and has gained immense popularity among scholars investigating the history of Nazi concentration camps and the sociological aspects of the victims's existence within the hierarchy of prisoners. Anna Bravo from the International research center about the works of Primo Levi (Centro Internazionale di Studi Primo Levi) has dedicated a whole article to the idea of the grey zone: On the Gray Zone, http://www.primolevi.it/Web/English/Contents/Auschwitz/090_On_the_%22Gray_Zone%22 (downloaded: 4.06.2013)

5 Processes like this however happened in the Soviet Union: one example is the case of another Ukrainian guard and former Soviet POW, Ignat Daniltschenko, who was condemned to 25 years detention in a prison camp in Siberia for having served in the death camp Sobibor and the concentration camp Flossenbürg. The files of his trial were also recalled during the Demjanjuk trial. See H. Wefing, *Der Fall Demjanjuk*…, pp.136-137.

ers and crossed the line between victimhood and being a perpetrator. What was the specific role of this group of people about?

The Italian writer and Auschwitz survivor Primo Levi stated in his last book *The Drowned and the Saved*[6] that it was impossible to distinguish clearly between perpetrators and victims among the prisoners at Auschwitz. Levi observed that all those, who were to a certain degree privileged – mainly functional prisoners, who were assigned competencies to decide about the fate (and practically about life and death) of their fellow prisoners, were part of a grey zone. Functional prisoners in concentration camps were situated higher up in the "prisoner self-administration" (*Häftlingsselbstverwaltung*), as they were assigned by the SS in order to maintain order, control daily life and work and minimize resistance among prisoners. In the cosmos of the concentration camp, which was strictly separated from the outside world with its usual social norms, the status of being a functional prisoner opened the chance to survive at the expense of others, to steal, torture and denounce or, on the other hand, to support and, at least potentially, save lives[7]. The invisible border between obeying the strict orders of the SS and taking action on own motivation, between providing help to others and "looking away", between denouncing and purposeful overlooking of small offences against the camp regulation[8], was fluid. A concentration camp prisoner, who was a victim of the Nazi terror system independently from the reason of his deportation, could become a perpetrator for different reasons: due to the situation, due to the perspective to improve his own living conditions or due to coercion from above. This complicated net of dependencies seems to make a legal judgment – without getting into moral discussions – very challenging. The same situation – according to the findings of the Munich district court – had also faced Demjanjuk, when he moved from a POW camp to the SS training camp in Trawniki and later to the extermination camp in Sobibor as a guard. This poses the question of guilt, as guilt is one of the essential prerequisites for the conviction of a perpetrator in a criminal trial in a democratic, constitutional state. Did Demjanjuk serve in Sobibor out of his own will? Was there a chance for him to escape and would the refusal to obey orders have meant death? While these questions were crucial for all post-war processes against Nazi perpetrators, they became a new, and deeper meaning in processes against defendants from the "grey zone", as we will see later. While John Demjanjuk was the first foreign auxiliary police guard trained at Trawniki, who was trialed in Germany, there were quite a number of processes against so-called functional prisoners from concentration camps accused of torturing or murder after the war. This issue will discussed later in order to see, how the German judiciary coped with processes of this kind[9].

LEGAL BASIS FOR THE CRIMINAL PERSECUTION OF NAZI PERPETRATORS IN WEST GERMANY

The initial legal basis for the prosecution of Nazi perpetrators was established already on 8 Au-

6 Levi, Primo, *The Drowned and the Saved,* Vintage, *New York 1988.*

7 Although this goes beyond the scope of this text, at least two examples of the latter option shall be mentioned at this point: Otto Küsel and Werner Krumme. Küsel is mentioned in a great number of survivor's accounts from the Auschwitz main camp (Stammlager) as an example of a functional prisoner, who used his power to help others. Krumme on the other hand was awarded the title Righteous among the Nations in 1964 for his support of Jews before and during his imprisonment at Auschwitz. More on Werner Krumme can be found in the article by B. Distel and W. Krumme *"Das System an sich konnte ich nicht ändern. Ich konnte es nur rim Rahmen meiner Möglichkeiten an einigen Stellen unterhöhlen."*, „Dachauer Hefte" no. 7 1991, pp. 119-128.

8 This was important, as already small offences were punished with beatings and other tortures.

9 The question, in which situations a victim can be called a perpetrator and tried like that has already been raised:

gust 1945: the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*[10] was signed by the governments of the UK, the USA, France and the Soviet Union. According to this document, the defendants were to be tried in the countries, where they had committed their crimes. Those, whose crimes were not restricted to one geographic area, were to be tried by the International Military Tribunal. The Charter of the International Military Tribunal specified four types of crimes as subject to jurisdiction of the Tribunal. These were: crimes against peace, war crimes, crimes against humanity and the planning, initiating and waging of wars of aggression[11]. On the basis of these regulations, the Nuremberg Trials were held. Law no. 4 of the Allied Control Council from 30 October 1945 decided that the International Military Tribunal in Nuremberg and the military courts in the occupation zones were mainly to deal with crimes committed by German perpetrators against persons belonging to one of the allied nations. The re-established German courts however were to try crimes committed by Germans against other German citizens or stateless persons[12]. Law no. 10 of the Allied Control Council from 20 December 1945 ("Punishments of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity") took over the statement of facts from the Charter and decided that the further trials against war criminals were to be carried out by the military courts in the respective occupation zones.[13] In the following years, the American military courts tried an overall number of 1021 former guards of the concentration camps Dachau, Buchenwald, Mauthausen, Mittelbau-Dora and Flossenbürg (in a series of lawsuits 885 individuals were sentenced and 136 acquitted)[14]. Also in other German occupation zones and abroad, there were processes in the first post-war years. From 1950, German courts were entitled to also try Nazi crimes committed against citizens of the allied countries, but on the basis of the German Criminal Code (and not Law no. 10 of the Allied Control Council). In the following years, the statutory limitation of less severe crimes became subsequently a serious issue. Limitation for murder was lifted by the West German parliament just in 1979 and after more than 10 years of political debates[15]. According to a database collected by scholars of the Institute for Contemporary History in Munich concerning the West German lawsuits against Nazi perpetrators, 70 % of all convictions were announced in the years 1945-1949[16]. In the years 1945-2005, West German and Federal prosecuting authorities initiated an overall number of 36 393 criminal proceedings[17] against 172 294 suspects[18]. Throughout the decades, 14 693 persons were tried and 6 656 sentenced to prison – only 1 147 due to homicide[19]. The majority of convictions included rather short

René Wolf used the concept of Levi's grey zone during his analysis of the Third Auschwitz Capo Trial in Frankfurt in 1967/68, which will be mentioned later on in this text.

10 The text of the agreement is available under http://avalon.law.yale.edu/imt/imtchart.asp - accessed on 26 May 2014.

11 The text of the agreement is available under http://avalon.law.yale.edu/imt/imtconst.asp - accessed on 26 May 2014.

12 For a summary about the prosecution of Nazi perpetrators by German courts during the occupation period (1945-1949), please see: E. Raim, *NS-Prozesse und Öffentlichkeit. Die Strafverfolgung von NS-Verbrechen durch die deutsche Justiz in den westlichen Besatzungszonen 1945-1945*, in: Osterloh, J./Vollnhals, Clemens, NS-Prozesse und deutsche Öffentlichkeit. Besatzungszeit, frühe Bundesrepublik und DDR, Vandenhoek & Ruprecht, Göttingen 2011, pp. 33-51.

13 The legal basis for the prosecution of Nazi perpetrators is outlined in Rueckerl, A. *Ściganie karne zbrodni hitlerowskich 1945-1978*, Główna Komisja Badania Zbrodni Hitlerowskich w Polsce, Warszawa 1980.

14 A. Rueckerl,Ściganie karne..., p. 21.

15 In 1969, the West German parliament had extended the limitation period for murder from 20 to 30 years, but just 10 years later it was lifted completely.

16 See E. Raim, *NS-Prozesse…*, p. 42, and A. Eichmüller, *Die Strafverfolgung von NS-Verbrechen seit 1945. Eine Zahlenbilanz,* in: Vierteljahreshefte für Zeitgeschichte, 56 (2008), pp. 635.

17 A. Eichmüller, *Die Strafverfolgung…,* p. 624. These include only proceedings, who had been registered in the official register of criminal proceedings (so called Js register).

18 Ibidem, p. 625.

19 Ibidem, p. 631/632 and p. 634.

prison terms, only 9% concerned prison terms of more than 5 years[20].

Until the announcement of the verdict against John Demjanjuk in May 2011, jurisdiction of German courts against Nazi perpetrators had clearly based on the assumption that a conviction of a defendant in cases of homicide, manslaughter or assistance in one of the aforementioned could be only possible, if evidence for a specific, concrete crime could be found during the proceedings. With the exemption of cases, where the respective allied authorities had temporarily authorized German courts to act on the basis of Law no. 10 of the Allied Control Council, German judiciary functioned on the basis of a criminal code, which originated from the 19th century. The purpose of the act was to punish individuals for individual crimes, therefore a conviction was only possible, if the guilt of the defendant could be proven. Hence, it was necessary to provide evidence regarding time, place, circumstances and identity of the victim. Without going into details, it is obvious that the dimensions of the Nazi crimes and the time distance between crime and criminal process rendered the provision of evidence for individual offences extremely difficult, if not impossible. Still back in the 1970's, Adalbert Rückerl, then head of the Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes in Ludwigsburg/Germany, expressed the conviction that "within penal law, there is no room for the assumption that the sole membership in a department or unit which was involved in a crime, is sufficient as a prima facie evidence for a criminal offence"[21]. In many cases, it proved simply impossible to find reliable witnesses, who could testify about a crime and provide a detailed description of the place, time and physical appearance of perpetrator and victim. The more years passed after the war, the harder it was for witnesses, to give precise testimonies - especially in cases, where the defendants were so-called desk-perpetrators, whose identity and appearance was usually not known to the victims. While the Rückerl 40 years ago was convinced that the post-war legal system in the Federal Republic demands all citizen rights for defendants even in cases of "concern that in consequence some of them [defendants] would remain unpunished"[22], the Munich district court in 2011 introduced a radical change and announced a diametrically different verdict, claiming that the sole proof of Demjanjuk's presence at a Nazi death camp in the function of a guard is sufficient to prove his guilt. The entire operation of such camps, argued the court, had only one goal – namely to kill as many people as possible in a minimum amount of time. Therefore every person serving on the side of the SS perpetrators must have been guilty and it is not necessary to find witnesses or other concrete evidence.

PUNISHMENT OF PERPETRATORS FROM THE "GREY ZONE" IN THE FEDERAL REPUBLIC OF GERMANY

Although many critical voices have been raised about the criminal persecution of Nazi perpetrators in the Federal Republic after 1945, the issue of processes against former concentration camp capos or other foreign "helpers" during the Holocaust has remained at the margins for many decades. The widely criticized, often astonishingly low prison judgments against former SS-men or NSDAP functionaries involved in mass crimes during World War II were usually justified by the courts with so-called putative necessity (*Putativ-Notstand*). According to this concept, a defendant cannot be convicted for having obeyed unlawful orders from his superiors, if he had been in a subordinated function and if his superiors had intentionally let him believe, that in case of refusal to carry out the order, his life or health will be at stake[23]. This

20 Ibidem, p. 635.

21 A. Rueckerl, Ściganie..., p. 21.

22 Ibidem, p. 65.

23 Ibidem, p. 65.

issue had to be answered also in the Demjanjuk process, where the court discussed if and how he should have tried to escape or refuse to work at Sobibor. In contrast to the process against parts of the SS staff of the Sobibor death camp in 1965-66 before the district court in Hagen, where among 12 defendants 5 were finally acquitted due to putative necessity[24], the court in Munich maintained in 2011 that Demjanjuk was obliged to make an escape attempt. Only then would it be possible to claim that he was free of guilt and had tried to resist against the unlawful orders of the SS.

Leaving the above mentioned shortcomings aside: how did the above mentioned legal prerequisites influence the prosecution of other perpetrators, who were at least partially also victims of the unlawful and cruel system of the Third Reich and had then become murderers under the circumstances they were thrown into? Was the treatment of these sort of defendants really not any different from the majority of trials against Nazi perpetrators, as René Wolf suggests with regards to the Third Auschwitz trial 1968 against to former camp capos[25]? Or wasn't it rather true that the same legal system was applied to their cases, but that the specific situation caused an unequal outcome? Taking into account the fact that concentration camp survivors in many cases even years after the liberation reminded themselves of the physical appearance of functional prisons they had interacted with, but usually had difficulties in naming the majority of the SS guards, the picture looks more differentiated. To establish the guilt of the person, who tortured somebody with his own hands in front of a number of witnesses is at least potentially without a doubt easier than in the case of a high-rank officer, whose tasks were limited to signing orders or taking strategic decisions far away from the site of massacre. The examples shown below concern former functional prisoners – men and women – in the camps belonging to the Auschwitz concentration camp complex. They seem to be suitable to show similarities to the Demjanjuk case as far as the question of guilt of perpetrators from the "grey zone" is concerned, and they mirror the development of the West German jurisdiction. Already in 1950, the jury court at the district court in Bochum convicted, among others, the former camp elder Paul S., the block elder Fritz R. and the capo Karl M. to prison sentences of a maximum of 2,5 years[26]. The legal basis of the trial was Law No. 10 of the Allied Control Council, therefore the offence for which the defendants were tried, was crimes against humanity in connection with grievous bodily harm (not murder). All three defendants were accused for their behavior in the Auschwitz subcamp Jawischowice in Upper Silesia in the years 1942-1945. The court found that they had tortured their fellow prisoners in a more cruel way, as they were ordered to by the SS and were thus to be found guilty. In the course of the trial, several witnesses reported numerous cases of grievous bodily harm committed by S., R. and M.

The defendants S., R. and M. had initially arrived at the camp as victims and did have no connections to the national socialist movement. However, in the course of the devilish Nazi order to make appropriate prisoners supervisors of their fellows in misery, they willingly allowed themselves to be integrated in the system, which the SS had considered to be appropriate. They allowed the perpetrators to use them as slaves and have therefore become the

24 Verdict of the district court Hagen – LG Hagen, 20.12.1966, 11 Ks 1/64. Only one of the defendants, the former commander of camp I in Sobibor, was sentenced to life-long prison as murderer. Five other defendants were sentenced to 4-8 years in prison for complicity in murdering several thousands of people, another defendant committed suicide prior to the pronouncement of judgment.

25 R. Wolf *Judgment in the Grey Zone: The Third Auschwitz (Kapo) Trial in Frankfurt 1968,* "Journal of Genocide Research" 9 (2007), vol. 4, p. 620.

26 Institute for Contemporary History Munich, Gb 08.14/1 – judgment of the District Court Bochum 2 Ks 1/50 of 20 April 1950.

scapegoat of a terror regime, with which they initially did not have anything in common. As they have proved to be obedient tools, the injustice committed by them can be traced back to the national socialist dictatorship, because the authorization and the opportunity for such a behavior as such was given to the defendants solely thanks to the sadism of the SS regime[27].

For the decision about the length of the prison term, the court took into account the difficult situation of the defendants regarding the SS in the camp. The court tended i.e. to believe the former camp elder S. that "he had been frequently punished, whenever the SS camp leader was dissatisfied with a situation and that he had always been in danger to be held accountable in a highly unpleasant manner"[28]. In the courts opinion, defendant Fritz R. was a "sadistic and brutal rowdy", who was "hated and feared as 'Jew baiter'"[29] in the camp. Due to his hard fate after the war, his serious war damage and the tragic death of his wife, the court considered 2 years and 6 months to be an appropriate and sufficient sentence.

Another interesting case in this respect is the trial against Margarete Ries, a former female capo in Auschwitz, which took place in 1949. Remarkable is that the trial was handled by a civil denazification tribunal and not by a regular court, although the accusations were severe (5 cases of murder). Ries had been arrested in January 1948 after being recognized by a Jewish survivor at the railway station in Bremen/ Germany. Despite the detailed description of several incidents given by the Jewish woman Mrs. Berkmann, where Ries allegedly caused the death of five other women, among them Berkmann's sister, Ries was not accused of murder. Due to the lack of sources it was not discovered yet, why this was the case[30]. The public plaintiff finally applied to qualify Ries as a major offender[31], i.e. a person, who had committed crimes against victims or opponents of the national socialist ideology for political reasons. With verdict from 5 July 1949, the civil tribunal proclaimed that Ries was not affected by the denazification law and therefore to be acquitted. In the period between her capture in January 1948 and the trial in summer 1949, several important prosecution witnesses had emigrated or were otherwise no longer available and the court argued that it was not entitled to consider testimonies in written form without interrogating their authors in person, as the statements were based on perceptions of the witnesses only[32]. Furthermore, Ries did not act out of political beliefs or with the aim to support the Nazi regime: "The motivation for her crimes was not of a political nature (…), she has rather been forced to these deeds excluding her free expression of will.[33]" During the investigation, Ries had admitted regular brutal beatings but did not confess the murders she was accused of. This early trial – one of the rare known processes against female former Auschwitz prisoners[34] – shows not only the difficulties with the application of the denazification law, but also poses the unambiguous question about the legal treatment of victims and perpetrators in one

27 Ibidem, p. 41.

28 Ibidem, p. 46.

29 Ibidem, p. 48.

30 A description of the case of Margarete Ries including excerpts from interrogations, application to the court and the verdict has been published in German language in 2012 as the result of a project. See: E. Schöck-Quinteros/S. Dauks, *"Im Lager hat man auch mich zum Verbrecher gemacht." Margarete Ries – vom "asozialen" Häftling in Ravensbrück zum Kapo in Auschwitz*, Universität Bremen, Bremen 2012.

31 Text of the petition printed in E. Schöck-Quinteros/S. Dauks, *"Im Lager…",* p.77.

32 According to par. 250 of the German Code of Criminal Procedure, such witnesses had to be interrogated in person by the court, otherwise their testimonies could not be used. The text of the petition was published in E. Schöck-Quinteros/S. Dauks "Im Lager…", p. 83-88.

33 Ibidem, p. 87.

34 E. Raim furthermore reports the case of Philomena M., another female functional prisoner from Auschwitz-Birkenau, who had been sentenced to four years in prison for several cases of grievous bodily harm by a court in Munich. See E. Raim, *NS-Prozesse und Öffentlichkeit…,* p. 45.

person and the thin line between victimhood, own initiative and guilt.

In 1956, the jury court at the district court in Berlin sentenced former capo Otto Locke to life imprisonment, holding him guilty for seven murders committed at Auschwitz, where he had been imprisoned between 1940 and 1944 as a “professional criminal”[35], before joining the SS division of Oskar Dirlewanger (known as *SS-Sturmbrigade Dirlewanger*)[36]. At Auschwitz, he had worked in several work details; the incidents he was accused of had taken place between late 1943 and summer 1944, when he had served as capo of the tailor and shoemaker workshops at the camp Auschwitz II-Birkenau. The court was convinced that

in all seven cases, the defendant acted at least with conditional intent *[“bedingt vorsätzlich”].* He was aware that his maltreatment would cause such severe injuries, that the tortured prisoners possibly could die as a consequence. As the actual findings show, he furthermore consciously approved the possible death of the prisoners as a consequence of his beating and carried out the maltreatment anyway[37].

The court found no justification to diminish or exclude Locke’s responsibility for the committed cases of homicide, but on the contrary described him as a person “abusing the power”[38] he had got in the camp as a functional prisoners. Several witnesses were independently from each other able to describe not only the defendant, but also the incidents in question in a very reliable and detailed manner, so that the court finally was persuaded of the arguments. The judgment closed with the statement that “taking into account his enormously powerful position, it would have been easy for him to render the life of his fellow prisoners easier; this is at least, what several other capos have done without risking their privileges”[39].

In the 1st Auschwitz trial in Frankfurt in the years 1963-65, which was widely reported about and discussed in West German society, the former functional prisoner Emil Bednarek was the only non-SS member among the defendants. The prosecutor accused him of tortures and several murders committed during his period in the camp. Unlike many indicted former SS men (and especially the higher-ranking among them), Bednarek had had daily contact with prisoners and was known to them by his name and physical appearance. During the hearing of evidence, a large number of former prisoners of Auschwitz were able to describe Bednarek’s behavior in the camp, including concrete situations, where the block elder Bednarek had beaten, humiliated and killed fellow prisoners[40]. In line with the then applicable jurisdiction, the court in Frankfurt acknowledged the testimonies and was convinced of the defendant’s guilt. Emil Bednarek was finally sentenced to life-

35 So-called *Berufsverbrecher*, prisoners marked with green triangles – people taken into protective custody for having committed series of crimes (mainly thefts, robberies, bodily assaults, murders, etc.).

36 In the text of the judgment, the court informs about Locke’s voluntary joining of the Dirlewanger unit – overall, several hundreds of male prisoners (first persons imprisoned as ‘professional criminals’, later also political prisoners) from different concentration camps were recruited to serve in the SS-Sturmbrigade under the commando of Oscar Dirlewanger, which was involved in a huge number of war crimes (i.a. in Belarus and during the Warsaw Uprising) and functiones mainly as a penal division of the SS.

37 Judgment against Otto Locke, 2 PKs 1/56, in: Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen NS-Tötungsverbrechen 1945-1966, vol. XIV, Amsterdam, 1976, p. 332.

38 Ibidem, p. 333.

39 Ibidem, p. 333-334.

40 One example stems from the testimony of the witness and fomer Auschwitz prisoner Karol Doering, who testified at court: “It happened in summer 1944 (…). I heared loud screaming. Bednarek, who then was block elder at the punishment company, pushed one of the prisoners inside the building (…) He hit him with a stick. Later I heard that the beaten prisoner had tried to supply a friend from the penal company with some food. I hid myself and observed, how this man fell on the floor and Bednarek put a stick on his throat. Then he stepped on that stick with both feet and choked the prisoner on the floor” (quotation from: H. Langbein, *Auschwitz przed sądem. Proces we Frankfurcie nad Menem 1963-1965*, Instytut Pamięci Narodowej, Państwowe Muzeum Auschwitz-Birkenau, Via Nova, Wrocław/Warszawa/Oświęcim, 2011, p.585.

term in prison and life-long deprivation of civil rights for 14 cases of murder. The trial observer and former political prisoner of Auschwitz Hermann Langbein commented the judgment as following: "It leaves a bitter aftertaste, if a banal murderer gets the hardest sentence and another person, who had performed his tasks in the headquarters of the murder machine, ends up much better"[41]. This assessment can hardly by denied, especially when taking into account that the main defendant Robert Mulka, the former adjutant of camp commander Rudolf Höss, was sentenced to 14 years imprisonment for complicity in the murder of 750 persons each on at least four separate occasions. The court was convinced of Mulka's responsibility for incoming transports to Auschwitz during his period in office at the camp. Even more questionable from this point of view sounds the verdict against Klaus Dylewski, an SS-man and former member of the camp Gestapo, who was sentenced to 5 years imprisonment. The testimonies given during the trials concerning his cruel torturing methods were not deemed sufficient – the court stated during the announcement of judgment that "in none of the cases it was possible to provide evidence against the defendant, showing that one of his victims died because of his tortures"[42].

During the 3rd Auschwitz trial in Frankfurt in 1967/68, which was hardly discussed and covered by the West German press, two more former functional prisoners were accused of homicide and sentenced to life-imprisonment – the German "criminal" capos at the Auschwitz III Monowice camp Heinrich Bernhard Bonitz and Josef Joachim Windeck. In an article in the Polish journal *Przegląd Lekarski* from 1973, he is described as brutal and malicious, a multiple murderer who killed his victims either by drowning or with a hand stroke in the neck[43]. Windeck on the other hand was known as a pitiless master over life and death, whose identification sign used to be a whip, which he always carried and used to discipline other prisoners[44]. Both of them were sentenced to life imprisonment for murder. Analogically as in Bednarek's case, the court was convinced of their guilt and did not admit any mitigating circumstances in favor of the defendants. In the final verdict, the court stated that

> "No special standards can be applied to the circumstances in national socialist concentration camps (…). Although the state and its 'responsible' representatives had carried out the murder for political, racial and anti-religious reasons (…). For the defendants, murder had become a part of their daily routine. But this one-sided change of value standards cannot be accepted as justification (…).[45]"

The verdict is in line with the general assumption of the necessity to prove every single incident in order to sentence a defendant, which turned out to be easier in the case of low-ranked, "direct" perpetrators like the accused functional prisoners. The justification of the verdict indicates clearly the will of the court to judge homicide in the concentration camp according to the same criteria than murder committed in the free, civilized post-war environment in West Germany of the 1960's. Evidently, the specific circumstances of a functional prisoner in a Nazi concentration camp which created a setting far from any sphere of law and order, a distinct "anti-civilization", where not taken into account.

41 Ibidem, p. 649.

42 Ibidem, p. 638. The reason, why none of the witnesses could see, if a victim had died from the tortures or not was simply, that the torturing happened behind closed doors. If functional prisoners hit and tortured, this mainly happened in front of the eyes of other prisoners.

43 Kłodziński, S., *Rola kryminalistów niemieckich w początkach obozu oświęcimskiego*, „Przegląd Lekarski 1973 31" vol. 1, pp. 113-126.

44 More information on Bonitz and Windeck can be found, apart from the cited court decision, in Bernd C. Wagner's book *IG Auschwitz. Zwangsarbeit und Vernichtung von Häftlingen des Lagers Monowitz 1941-1945. Darstellungen und Quellen zur Geschichte von Auschwitz,* vol. 3, K.H. Saur, Munich 2000.

45 Judgment against Bernhard Bonitz and Josef Windeck – LG Frankfurt/M. vom 14.6.1968, 5 Ks 1/67, in: Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945-1999. Bd. XXIX, Amsterdam-München 2009, pp. 423-526.

CLOSING REMARKS – PERPETRATORS, VICTIM BYSTANDERS OR ALL IN ONE?

After the study of the examples above, the classical division of the European societies and individuals during the Holocaust in perpetrators, victims and bystanders coined by the famous Jewish American Holocaust scholar Raul Hilberg seems to be not capable to encompass people like Bednarek, Demjanjuk, Bonitz or Locke. They were people thrown from somewhere into a murderous system, who under the extreme circumstances of war, oppression, POW camp, jail or concentration camp accepted offered privileges in the hope to save their own lives on the cost of becoming part of the genocide system. A man torturing his fellow prisoners as a concentration camp capo is without any doubts a perpetrator, just the same applies to an auxiliary police guard at a death camp. However, how meaningful are origins of their presence in these places for the judgment? Does it matter that the men and women mentioned above were in the first instance victims of the Third Reich? Hermann Langbein, who himself had been in a privileged position in the camp and therefore had had the occasion to observe a considerable number of capos like the above mentioned, was not convinced of their sole guilt: "The crimes committed by criminal "functionals" in the camp should not be assigned solely to them. How can you entrust morally fickle individuals with power? Individuals how always had had trouble with law and order and who had been rejected by society. They took advantage of the indefinite power, which the SS gave them. (…) The crimes of the green triangles at Auschwitz are to be basically [also] attributed to the camp direction. It was part of the SS system to play off prisoners against each other in order to privilege those, who showed full "obedience" to the SS"[46].

One is sure: the examples shown unveil a certain paradox of the post-war German legal prosecution of Nazi perpetrators: sentences against direct perpetrators from the lowest level in the hierarchies, whose status as victim or perpetrator cannot be easily and unambiguously be determined and who were often assigned to the worst tasks, in many cases were stricter and more clearly articulated, then in case of higher ranking SS-men or members of the Nazi party who had taken decisions sitting at their office desk. This can partly be attributed to the legal constrictions based on the 19th century penal law codex, which turned out to be inadequate for the immense and extraordinary character of the World War II crimes.

The path-breaking judgment in the Demanjuk trial was not able to change this overall picture. Firstly, it was taken many years too late – the great majority of still unpunished perpetrators had already passed away or were in a very poor health state. Secondly, John Demjanjuk himself – the former Soviet POW who had been tried already in the 1980's in Israel – was no suitable case to state an example on a nation-wide level. Here, one has to agree with Hermann Langbein, who saw the reason for the paradox judgment in the 1st Auschwitz trial in Frankfurt in the inadequate legal regulations, which did not match the unprecedented dimensions of the mass murder, the defendants were accused of. "This is the case, because at the time when the German Penal Code was passed, the imagination of the legislators did not encompass genocide planned by the state.[47]" For a long period after 1945, the German circle of lawyers and judges was governed by a consensus, which accepted the insufficient legal instruments and in consequence the lack of punishment of thousands of perpetrators. In this context, the famous Chief Public Persecutor of the federal state Hesse Dr. Fritz Bauer states in his book *Die Humanität der Rechtsordnung: aus-*

46 Letter from H. Langbein to S. Kłodziński from February 1973, cited after: Kłodziński, S., *Rola kryminalistów niemieckich w początkach obozu oświęcimskiego*, p. 114.

47 Langbein, H. Auschwitz…, p. 649.

gewählte Schriften in the 1960's*:* "The German judiciary never understood these restrictions as deficit, but it defended the view that 'our good old law' is completely sufficient"[48]. What is more, already in 1965 Bauer uttered the concern that these type of consensus was related to an attempt to atomize the enormity of the crimes and the guilt. Remarkably, Bauer, who was the main initiator of the series of Auschwitz trials in Frankfurt in the 1960's, saw this problem already 45 years before the Demjanjuk verdict.

The attempt to reestablish justice with regards to the prosecution and punishment of Nazi perpetrators in the Federal Republic of Germany after World War II leaves many questions unanswered. For a summary, let us listen to the author of the book on the Demjanjuk trial, Heinrich Wefing:

"[The process took place] too late for our country: the West German judiciary almost completely failed after 1945, if it comes to the prosecution of Nazi perpetrators. This became also clearly evident during the Demjanjuk trial. And this appraisal won't either be changed by potential convictions of other perpetrators similar to Demjanjuk. (…) [The process was] at the best an epilogue to a shameful history[49].

The lately undertaken world-wide efforts to sue the last living SS men, who had served in concentration camps, is therefore not more than a humble attempt to straighten an unfavorable balance. Desirably, the findings concerning the criminal prosecution of Nazi perpetrators should be taken as a reference, if not initial point, with respect to the chase of and processes against perpetrators of more temporary genocides.

48 F. Bauer, *Die Humanität der Rechtsordnung: ausgewählte Schriften* (ed. J. Perels/I.Wojak), Campus, Frankfurt/New York 1998, p. 80.

49 Wefing, H., Der Fall…, p. 207.

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