J. Damon, Germanist / 1600 Northwood Road, Austin TX 78703

Email < Jdamon@Austintx.net > / Tel 512 472 3959

TRANSLATION OF EXPERT REPORT

BY DR. HERZOGENRATH-AMELUNG

****

Germar Scheerer, Doc. 93 transl.
A-#: 78660016, September 11, 2001

Expert Report

In the Political Asylum Case of Germar Scheerer

U.S. INS A-# 78660016

by

Dr. jur. Dipl.-sc.pol. Günther Herzogenrath-Amelung

Obermünsterstraße 6

D-93047 Regensburg

Germany

Phone: 011-49-941-55573

Fax: 011-49-941-563304

Table of Contents

A. The Police and National Security ("State Protection") In the Federal Republic of Germany

What is meant by the term "National Security?" The leading German Police Reference Book defines it as follows:

> "National Security, in a general sense, includes all constitutional, penal and administrative law deriving from the need for an armed democracy to protect the liberal democratic Constitution from efforts directed against it. […] In a more specific sense, national security is separated from the Federal and State Constitutional Protection Forces according to article 73 no. 10 lit. b and c of German Constitution. The Constitutional Protection Force has the mission of collecting and analyzing intelligence about efforts which threaten the Constitution. National Security in a more specific sense is the deployment of executive power, in particular of police and legal department, to protect the nation and the constitution according to the analysis of such intelligence."

(from: Rupprecht, Reinhard, ed.: Polizei-Lexikon (Police Dictionary), 2. – current – edition Heidelberg 1995, keyword "Staatsschutz", p. 494)

It should be noted that in Germany, police power is organized on a state level rather than on a federal level. The following description is taken from an expert article recently published by a leading employee of the National Security Police in the German state of Lower Saxony:

> "In order to effectively fight hostile elements which are active nation wide, the police have rules for nationally coordinating exchanges of information and for nation wide cooperation in process of protecting national security."

The article also refers to "open and under-cover gathering and processing of information by the National Security Police". Elsewhere, the article mentions:

> "In order to asses the situation of national security, the following investigative and enforcement agencies are all engaged in analyzing intelligence:
> State Police Bureaus of Investigation (LKA, *Landeskriminalamt*.), the Federal Police Bureau of Investigation (BKA, *Bundeskriminalamt*), the various State Offices for the Protection of the Constitution (*Landesamt für Verfassungsschutz*, d.U.), the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, BfV.)

As additional sources of information, spies ("VP" = *Vertrauenspersonen*, trusted persons) as well as the "utilization of informants" are listed. (Goßmann, Ralf-Günter, "Polizeilicher Staatsschutz – Nur eine Personalreservee oder unverzichtbarer Bestandteil moderner Polizeiorganisation?" (National Security Police – Just a manpower reserve, or indispensable part of the modern police organization?) in: "Kriminalistik, Unabhängige Zeitschrift für die kriminalistische Wissenschaft und Praxis" (Criminology, Independent Journal for Criminological, Science and Practice), issue 12/2000, pp. 812 ff.).

The above is generally true regarding the activities of the National Security Police in all German States. In Baden-Württemberg for example (Germar Scheerer's state of residence and the state in which he was prosecuted), the National Security section belongs to Department 1 of four departments, according to an organizational chart of the district criminal police office. Source: Schürholz, Franz-Hellmut: "Kriminalitätsbekämpung in Baden-Würtemberg" (Fighting Crime in Baden-Würtemberg), in: "Kriminalistik, Unabhängige Zeitschrift für die kriminalistische Wissenschaft und Praxis", issue 5/2000, p. 311).

B. About the Crime of Inciting the People, § 130 StGB

I. Inciting the people, old version

For the criminal prosecution of “Holocaust denier”, this law had and has a central role. Until 1994, it had the following wording:

> “§ 130 incitement of the masses
>
> Who, in a way suitable to disturb public peace, attacks the human dignity of others by
> – stirring up to hatred against parts of the population,
> – calling for acts of violence or despotism against them or
> – insults them, exposes them to contempt, or slander them,
> will be punished with a prison term from three months to five years.”

The legally protected right is public peace. It is noteworthy that the crime is already considered to have been committed, if the deed is (even just) “capable” to disturb public peace. It is thus not necessary that an actual disturbance of public peace did indeed occur. Historically seen, it is interesting that this law received the above form “as a reaction to anti-Semitic and Nazistic events” (as can be assumed today, some of these events were staged by communist secret services). In the past as well, this law served to punish instigating statements (e.g., “The Jews are sub-humans”, German Federal Supreme Court in penal Matters, 16, 49; 1, 63).

II. Inciting the people, new version

By virtue of the so-called Law to Fight Crime of October 28, 1994, “this law was again tightened […] in order to fight right-wing extremist and anti-foreigner propaganda.” (Schönke/Schröder, StGB, 26. Auflage 2001, § 130 Rn 1) It received the following (still valid) form:

> “§130 incitement of the masses
> (1) Who, in a way suitable to disturb public peace,
> 1. stirs up to hatred against parts of the population, or calls for acts of violence or despotism against them or

2. attacks the human dignity of others by insulting parts of the population, exposing them to contempt, or slandering them,

will be punished with a prison term from three months to five years.

(2) With a prison term of up to three years or with a fine will be punished who

1.a) disseminates,

b) exhibits, advertises, performs publicly or otherwise makes publicly accessible,

c) offers, leaves to, or makes otherwise accessible to a person younger than eighteen years, or

d) produces, orders, delivers, holds in stock, offers, announces, advertises, imports or exports, in order to use them or parts gained thereof according to the letters a to c or to enable others to such end,

writings (§ 11 para. 3) which incite to hatred against parts of the population or against national, racial, religious or groups defined by their ethnic identity, calls for acts of violence or despotism against them or attacks the human dignity of others by insulting parts of the population, exposing them to contempt, or slandering them,

2. In the same way will be punished who disseminates a presentation of the content as described in number 1 by broadcasting.

(3) With a prison term of up to five years or with a fine will be punished who publicly or during a gathering approves, denies or trivializes, in a way suitable to disturb public peace, an act of §220a para. 1 committed under the rule of National-Socialism.

(4) Paragraph 2 also applies to writings (§ 11 para. 3) with contents as mentioned in paragraph 3.

(5) In cases of Paragraph 2, even in connection with paragraph 4, and in the cases of paragraph 3 § 86 para. 3 applies accordingly."

The legislative opined that "apart from a courageous and open political dispute […] the stubborn ones also have to be opposed with the means of the penal law." (Bundestags-Drucksache (Printed Matter of German Parliament) 12/7960 p. 4, 12/8411 p. 4). Another reason for tightening the law were "revisionists activities" (perhaps even those of the applicant), as can be seen from the statements of the German General Attorney:

> "When right-wing extremists tried to shake off the burden of the National-Socialist genocide with keywords like 'Auschwitz-Lie'– on the basis of pseudo-scientific expert reports about the chemical constitution of remainders of concentration camp buildings – in order to rehabilitate National-Socialism, the legislative reacted in 1994 with the Law to Fight Crime: The denial, approval and minimization of the National-Socialist genocide was outlawed with §130 German Penal Code."

(Source: Nehm, Kay: „Die Rolle der Justiz bei der Bekämpfung des Rechtsextremismus" (The role of the legal system in fighting right-wing extremism), in: Bundeskriminalamt (German Federal Police Office) (ed.): Rechtsextremismus, Antisemitismus und Fremdenfeindlichkeit, Vorträge anläßlich der Herbsttagung des Bundeskriminalamts vom 21. bis 23. November 2000 (Right-Wing Extremism, Anti-Semitism, and Xenophobia. Lectures on the Occasion of Fall Convention of the German Federal Police Office, 21.-23. November 2000), Neuwied and Kriftel 2001, p. 41).

The newly inserted paragraph 3 seems to be foremost (though not exclusively) questionable, because this is recognizably a special law on behalf of a certain group of the population which fell victim to National-Socialist persecution between 1993 and 1945. It was argued from various sides that this law is unconstitutional. Apart from that, paragraph 3 also poses problems regarding its interpretation, particularly regarding "approval" and "minimization". Example: is somebody committing a crime who is claiming a different, i.e., much lower amount of victims for "Auschwitz" than the one currently accepted(?) as true? Or is somebody committing a crime who assumes a genocidal intention of Hitler (or the NS-leadership), but denies the existence of gas chambers in Majdanek? One might consider such questions to be cynical, but these are constellations which the courts have to deal with. Moreover, there is another dogmatic difficulty regarding the subjective (inner) side of the crime, as is mentioned by Schönke/Schröder (German Penal Code, § 130 no. 20) as follows:

> "Almost unsolvable problems are raised by the questions of intent. If denial is objectively the denial of a certain truth, then an intentional denial, as demanded by para. 3, can

> according to general rules only be a denial, whose untruth is known or at least accepted by the perpetrator, may the fact in question be as obvious for all others as it can be."

One of the specialties of "Holocaust deniers", however, is (as I know from my own experience) that they are absolutely convinced of what they claim (and, by so doing, of what the "deny"). If a sentence is handed down in such cases, this can apparently only be done by the court's imputing (or fabricating) the intent, which is necessary for such a verdict. At the end of the discussion of this problem, one finds the following statement of the commentary (Schönke/Schröder, § 131, no. 20):

> "As Auschwitz will always remain the trauma of the Germans, […], the 'Auschwitz-Lie' is obviously also such a trauma for the German penal law."

Nothing is to be added to this. As a matter of fact, the given law protects a certain historical point of view by the penal law. Especially regarding the "Deckert Case" and the "Orlet case", this is inhibitory to the German research of modern history (whose results always have to be open, if it wants to be taken seriously). I do not only see a conflict between the constitutionally guaranteed freedom of speech and freedom of science on one hand and other (political) interests on the other. To justify the restrictions of civil rights, the past is basically referred to (which in my opinion is unjustified, as Germany is to be regarded as a stable democracy):

> "Countries which did not have to make the experience of the National-Socialist dictatorship have a different, more generous relationship to political freedom of speech, while being very vigilant against neo-Nazism in Germany. Nobody should expect that the United States will give up her grown interpretation of her constitution, according to which a free society has to cope with political weirdos and well-poisoners in a free political dispute and not by prohibitions." (Kay Nehm, *op. cit*., p. 49).

C. So-called "Self-Evidentness" According to Section 244 III Sentence 2 German Penal Proceeding Rules and its Application by German Courts Against "Holocaust Deniers"

I. The principal law for the introduction of evidence is Section 244 of the German Rules for Criminal Procedure

This law states in Paragraph 2:

> "In order to determine the truth, the court is required to allow the introduction of evidence to include all facts and other evidence which are significant for a decision."

This means no more and no less than that the court has to fulfill its task to collect evidence in an optimal way according to what is factually possible and legally admissible (German Federal Supreme Court in Penal Matters, 1 94, 96; 10, 116, 1008). The determination of the truth, as stated by the German Federal Constitutional Court, is "the central objective of the criminal trial" (Decision of German Federal Constitutional Court 57, 250, 275); the duty to determine the truth must be the "principle dominating the handling of all procedural rules" (German Federal Supreme Court in Penal Matters 1, 94, 96; 10, 116, 118). Apart from that, the accused has the right to introduce exonerating evidence – see also Art. 6 of United Nations Human Rights Convention. All this is undisputed. The conditions which allow a court to reject properly filed applications, are defined by German law. The basis for allowing rejection of an application to introduce evidence because of "self-evidentness." This can refer to the self evident nature of the claim to be proven, or – according to the predominant opinion – to its opposite!) See Section 244 Paragraph III Sentence 2 German Penal Proceeding Rules. Paragraph 3 reads:

> "A motion to introduce evidence can be rejected provided the introduction of such evidence is inadmissible.

> Otherwise a motion to introduce evidence can be rejected only *if such introduction of evidence is superfluous for the reason that it is self-evident*; or if the fact to be proven is irrelevant for the decision or has already been proven; or if the evidence is completely unsuitable or inaccessible; or if the motion has been made in order to delay the proceedings; or if a key assertion, which is made to exonerate the defendant, can be treated as if the claimed fact were true." (emphasis added)

What exactly does "self-evident" mean? This term comprises two elements, namely "common knowledge" and "court knowledge." A fact is "common knowledge" if ordinary persons normally have knowledge about it or – in the absence of expert knowledge – can readily learn about it with the help of easily accessible sources of information (German Federal Supreme Court in Penal Matters 6, 292, 293). These are facts which can be perceived so easily and without serious doubt that an ordinary mature person is knowledgeable of them. "Court knowledge" means facts reliably known to judges in connection to their professional activities, without the use of private sources of information. For us, the first term, "general knowledge," is obviously relevant. Self-evident facts have to be dealt with during the main trial (Decision of German Federal Constitutional Court 48, 206, 209; German Federal Supreme Court in Penal Matters 6, 292,296). The legal comment Schönke/Schröder elaborates on this (Section 244 German Penal Proceeding Rules, note. 72):

> "The parties involved in the case must have the opportunity to make statements concerning the assumption of self-evidentness, to express concerns about it, and file motions for introduction of evidence to prove the incorrectness of the fact or thesis that is assumed to be self evident, or the lack of conditions for self-evidentness."

In criminal cases in which the defendants are accused of "denying the Holocaust," the following happens. As a rule, the defendant (or his lawyer, or both) move to introduce evidence (for instance: that for reasons of natural science or technical limitations, homicidal gassings could not have taken place at Auschwitz; that the number of victims is incorrect; that there was no official plan to kill all Jews in the German area of influence; etc). As of the present, such applications to introduce evidence, have always been rejected due to the self evident nature of the contrary

assertion. This is based on § 244 III Sentence 2 German Penal Proceeding Rules. For example, the German Federal Supreme Court ruled in the case of Günter Deckert as follows (German Federal Supreme Court, Verdict of December 15, 1994, ref. 1 StR 656/94 = "Neue Juristische Wochenschrift" 1995, p. 340):

> "As a historical fact, the mass murder of Jews in gas chambers of concentration camps during World War II is self-evident. Whoever ignores this in the course of political agitation, deserves no mitigation of sentence."

It must be pointed out that the introduction of such evidence in a German court would be permissible from a procedural point of view. The only reason it is not allowed is because it is declared to be superfluous.

A recently published PhD-thesis entitled "Die Strafbarkeit des Auschwitz-Leugnens" (The Punishability of Auschwitz Denial), comments on this practice as follows (Thomas Wandres, Berlin 2000, p. 271):

> "The criminal courts cleverly refused to allow exonerating evidence in order to deny a propaganda forum to right wing extremists and to prevent a public repetitions of harmful and inciting slogans."

It is remarkable that here an expert who had dealt with this issue intensively concludes that the courts adjust their procedures to accommodate non-legal considerations. One could even say: political considerations. Whether or not this is true may be debatable, but Wandres' statements confirm again that proceedings of this kind do have their peculiarities. With reference to the established legal practice of the German Federal Supreme Court, all German courts on all levels reject such applications to introduce evidence. In several cases, an appeal was filed with the German Constitutional Court against these final (revising) decisions (for instance by me in the case of Gerd Honsik, see my CV under B.II.). So far, however, the German Constitutional Court has always declared the rejection of such motions to introduce evidence as legal, referring to the

corresponding decisions of the German Federal Supreme Court or the Higher District Courts. A change in handling evidentiary matters in this manner (which in my opinion is extremely questionable) is not in sight. It can be expected only in case of fundamental political changes in Germany.

D. The Deckert Case, or Orlet Case

I. Introduction

Of all cases against “Holocaust deniers”, the criminal case against Günter Deckert is certainly the most prominent for the following reasons:

The person Günter Deckert:

Günter Deckert was Federal Chairman of the “Nationaldemokratischen Partei Deutschlands” (Nation Democratic Party of Germany), NPD. The NPD is (or was) the most active “right wing radical” party in Germany. Entries about it can always be found in the reports of the Federal and State Bureaus for the Protection of the Constitution. The importance of this party is also evident in the fact that an application to ban this party is currently pending with the German Federal Constitutional Court.

The deed:

Günter Deckert was accused of having translated and discussed a lecture held at a political convention in English by the American engineer and expert on execution technology Fred Leuchter (author of the “Leuchter Report” which is well known in revisionist circles). At the core this lecture concerned what did (or did not) happen at Auschwitz.

II. The “Crime”

Of all verdicts ever handed down against “Holocaust deniers”, the one by the District Court Mannheim from June 22, 1994, announced under Reference (6) 5 KLs 2/92 (more accurately: its written verdict, i.e. the reasons for the sentence according to § 267 German Penal Proceeding Rules) has attracted the most intensive public attention (and, as needs be shown, a reaction which is unique in the legal history of the Federal Republic of Germany).

The events and facts leading to this case were described in an article of the “Deutsche Richterzeitung” (German Judge Journal, the official organ of the German Judges Union) (Presiding Judge at the Upper District Court Dr. Robert Herr, Karlsruhe: “Zur ‘Rechtsblindheit’ und zur ‘Unabhängigkeit’ der deutschen Richter/Innen” (About the legal blindness and independence of German judges)):

> “On November 10, 1991, in a side room of a restaurant in Weinheim, a non-public lecture took place. The ‘Working Community of National Associations’ had invited ‘nationally minded’ individuals, and some 120 individuals had gathered. At this event, the US-American citizen Fred Leuchter, who had been contracted by the defendant Deckert, spoke in English about the ‘gas chamber myth’, which was translated and commented upon by Deckert. Apart from his activity as a weapons technician for the US armed forces, Leuchter, an engineer born in 1943 in Boston (in the suburb of Malden), also dealt with the construction, improvement and maintenance of execution devices in US penitentiaries. In 1988, he was asked by the defense to present an expert report in a court case about the gas executions in Auschwitz, for which he traveled to Poland and subsequently compiled the so-called ‘Leuchter-Report’. In this work, he maintains that due to a lack of technical equipment, only 500,000 people could have been gassed in Auschwitz within 6 years and that the executions would have to last until the year 2006 to reach the unimaginable number of 6 million murder victims.”

III. About the course of the proceedings

1. On November 13, 1992, the 4. High Criminal Chamber of the District Court Mannheim sentenced the defendant in its verdict for incitement of the people, libel, denigration of the memory of the dead and incitement to racial hatred to a prison term of one year on probation (ref. (4) 5 KLs 2/92). In handing down this verdict, judge Dr. Orlet, who will be dealt with later, was not involved.

2. Objecting to this decision, both the defense and the prosecution filed for an appeal before the Federal Supreme Court, which overturned the verdict on March 15, 1994, (ref. 1 StR 179/93) and ordered a retrial in front of a different chamber of the District Court Mannheim. This chamber of three professional judges and two lay judges (Schöffen) was setup as follows: Presiding Judge at District Court Dr. Müller (as President), Judge at District Court Dr. Orlet as well as Judge at District Court Folkerts as assisting Judge; Vera Klug and Evelyn Hopp as lay judges. With verdict of June 22, 1994, the defendant was (again) sentenced to a prison term of one year on probation for incitement of the people, libel, denigration of the memory of the dead and incitement to racial hatred (ref. (6) 5 KLs 2/92). Against this verdict, both defence and prosecution filed a motion for appeal before the Federal Supreme Court within the permissible limit of one week (starting at the day after the verdict was announced verbally).

In August 1994, the written verdict became known, which caused hefty reactions mainly because of the following passages:

> “Insofar as the defendant has violated the §§ 185, 189 German Penal Law, is was also not justified by § 193 German Penal Law. One could argue that the defendant had a justified interest by trying to reject claims against Germany put forward due to the Holocaust half a century afterward the event. But to this end, he did not apply appropriate means (cf. Dreher /Tröndle op. cit., § 193 no. 8), but rather exceed them greatly.”

In the Court’s statements about the determination of the penalty, one reads, i.a.:

> “In favor of the defendant was considered that he has no criminal record, which is even more positive because he has been politically active for decades and involved in the harshest political arguments which are an extreme temptation to ignore the penal law.”

The Court evaluated

> “the deed was mainly motivated by his intention to reinforce the resistance of the German people against Jewish claims derived from the Holocaust. It was also not ignored that still today, roughly 50 years after the end of the war, Germany is exposed to far-reaching claims of political, moral and financial nature deriving from the persecution of the Jews, whereas the mass crimes of other nations remained unpunished, which, at least in the eyes of the defendant, places a heavy burden on the German people.”

Finally, the chamber justified its decisions to suspend the prison term i.a. as follows:

> “According to § 56 German Penal Law, the prison term had to be suspended, since it is to be expected that the defendant will abide by the laws in future as a result of the mere imposition of this verdict. After all, the defendant made a good impression during this trial. He has a responsible-minded personality of strong character and with clear principles. With great commitment and considerable expenditure of time and energy, he stands up for his political views, which are very important to him.”

Furthermore, the court wrote that Deckert is a “man of high intelligence”. Additionally, one reads, i.a.:

> “Not even the fact that the defendant sticks to his revisionist views and will do so in all probability in the future as well, can justify a different assessment. After all, this method of thinking is not illegal.”

Moreover, the chamber stated that not even the “defence of the legal system” according to § 56 para. 3 German Penal Law requires the execution of the penalty, which was justified i.a. as follows:

> “To the contrary, the chamber has no doubt that the population in its vast majority will understand that a 54 year old family father with a clean record, whose crime is basically only to have expressed an opinion, will have the legal advantage of a suspension of his penalty.”

IV. Reactions to the written verdict:

1. Reactions of legal professionals

In a convention of all judges at the District Court Mannheim held on August 15, 1994, the majority of them disassociated themselves from the verdict (40 of the 64 judges employed at this District Court attended this convention). The president of the District Court Mannheim, Gunter Weber, wrote a letter to the Jewish community in Mannheim, asking for “pardon and leniency.” He wrote that the verdict contained “objectively misleading formulations”. Finally, also on August 15, 1994, the president of the District Court Mannheim passed the following resolution:

> “1. As a result of the continuing absence due to sickness of Presiding Judge at District Court Dr. Müller, Presiding Judge at District Court N. immediately takes over the presidency of the 1st and 6th High Criminal Chambers (§ 21 e para. 3 Court Constitutional Law).
>
> About the necessary changes in the schedule as a result of the continuous delay due to sickness of Presiding Judge at District Court Dr. Orlet, the presidency will make a decision later for reasons of procedural law.” (source: Deutsche Richterzeitung (German Judge Journal), no. 10, October 1994, p. 391).

On TV, the vice president of the German Judges Union, Victor Weber, demanded measures against the judges involved in this verdict. In the September issue 1994 of the "Deutschen Richterzeitung" (German Judge Journal, official organ of the German Judges Union), the president of the German Judges Union, Rainer Voss, critiqued the verdict (at a time when it was not yet legally binding!) in a lead article entitled "In Mannheim, the legal system failed" i.a. as follows:

> "I know that it is normally not our task to comment on verdicts or to assess them. According to our self-understanding as judges, we have to respect the verdicts handed down out of the independence of the judges. It is therefore the first time that the German Judge Union has given up its restraint, because the limit of the acceptable has been exceeded here in an unbearable way. This verdict is an imposition for all those who suffered under National Socialist crimes. It is a derision against all those millions of victims of the Holocaust. I am angry about it and feel ashamed that such a verdict was announced in the name of the people." (Source: Deutsche Richterzeitung, no. 9, September 1994, p. 352).

The then federal Minister for Justice, Mrs. Sabine Leutheusser-Schnarrenberger, made the following statement ("Focus" no. 33, August 15, 1994, p. 25):

> "This is a slap in the face of all victims of the Holocaust. Now, I can only hope for the appeal of this verdict."

The public prosecutor of Mannheim announced on August 11, 1994, that it would investigate whether the written verdict contained any illegal statements by the judges ("Süddeutsche Zeitung" August 12, 1994).

2. Reactions of politicians

German Chancellor Helmut Kohl said:

> "This verdict is simply a disgrace. The verdict is harmful for the German reputation abroad."

The vice president of the CDU fraction (then Germany's biggest party and the leading party in the government coalition) in the Deutsche Bundestag (German Parliament), Heiner Geißler, stated:

> "I demand a reversal of this verdict. Additionally, we need a hearing of the parliament on this."

Rudolf Scharping, then president of the SPD (Social-democratic Party of Germany, the biggest party of the opposition) said:

> "This verdict is scandalous, a *carte blanche* for right-wing extremist leaders."

From the Jewish side this was commented as follows (Michel Friedman, Member of the Central Council of Jews in Germany):

> "Outrageous. The chamber praised an intellectual arsonist as having an immaculate character."

The Jewish World Congress declared:

> "The language of this verdict could also have been taken from right-wing extremist literature."

(All quoted according to "Focus", no. 33 – one of the leading German news magazines, August 15, 1994, pp. 24 ff.)

Translated by J. M. Damon ……..

It turned out that the written verdict was compiled by Judge at District Court Dr. Orlet as the so-called reporting judge (see § 197 of Court Constitutional Law; it was also signed by the presiding judge, Dr. Müller, as well as the assisting judge Folkerts, according to the German Code of Criminal Procedures). Therefore, the interest of the media focused on Dr. Orlet, who was hounded even in his private sphere. About his condition in August 1994 on the occasion of an interview, a journalist reported later:

> "There sat a man, making an impression of being lonely and totally isolated, without friends, a man who appears to be mentally and physically shaken. He was sick at that time, he suffers from the effects of a heart attack he had years ago, he said." (Source: "Süddeutsche Zeitung", May 12, 1995).

Moreover, this trial was the subject of discussions in the state parliament of Baden-Württemberg (the legislative body of the state where Mannheim is located). The member of parliament Max Nagel (SPD) filed the following "Small Inquiry" for the state government to answer:

> "I ask the state government: Which possibilities exist to remove Judge of District Court Mannheim, Mr. Rainer Orlet, from office?" (source: Parliament of Baden-Württemberg, 11th session, Printed Matter 11/4936 of November 14, 1994).

Additionally, the state parliament of Baden-Württemberg prepared an impeachment according to Art. 98 para. 2 and 5 of the German basic law in connection with Art. 66 para. 2 of the state constitution of Baden-Württemberg – a unique event in the history of the Federal Republic of Germany (Source: Parliament of Baden-Württemberg, 11th session, Printed Matter 11/5671, March 21, 1995). According to this, a judge can "be transferred to a different office or can be retired", if he "violates principles of the Basic Law or the constitutional order of the state while in office or in private". Such proceedings, however, were not necessary against Dr. Orlet, because on May 15, 1995, he retired according to his own wishes due to health. Before that, numerous lay judges refused to do their job within a legal body in which Dr. Orlet is assigned as judge. Additionally, he was successfully rejected in one case for – alleged – bias to the detriment of a

foreign (Turkish) defendant (Higher District Court Karlsruhe, decision of April 19, 1995, ref. 3 WS 72/95).

3. Reactions of the media

The news magazine “Focus” wrote (no. 33, August 15, 1994, p. 24):

> “Legal scandal in Mannheim: Verdict praises instigator Deckert and gives encouragement to formulate Nazi slogans.”

In general, the media wrote about a scandalous verdict (for instance in the “Süddeutschen Zeitung”, May 11, 1995). The leading German weekly newspaper “Die Zeit” titled its leading article in the issue of August 18, 1994: “Outrage is not enough”. Inside on page 3 is a one-page article on the verdict with the headline “Slain by blindness” and the subtitle “Hidden sympathies and pitiful sloppiness: why the Mannheim Judges morally acquitted the NPD-president.” I think I need quote no more statements.

4. Legal outcome of this case

The verdict was reversed by the German Federal Supreme Court on December 15, 1994 (ref. 1 StR 656/94), and referred back to a Criminal Chamber of the District Court Karlsruhe. Finally, this court sentenced the defendant with its verdict, announced on April 21, 1995, for inciting the people, libel, denigration of the memory of the dead and incitement to racial hatred to a prison term of two year w i t h o u t probation. (ref. IV KLs 1/95 2 AK 1/95). The defendant’s application for a revision of this verdict was rejected by the German Federal Supreme Court, so that it is now legally binding. In the meantime, the defendant has served his prison term.

5. This expert’s opinion

The reason why this verdict was called a “scandal” may become clear in the two following quotations:

> “As Deckert himself, so also his verdict with its justifications touches the core of our national and social self-image. As a people, we are a rehabilitated former dangerous criminal.” (Guest comment by Hanno Kühnert in the “Deutschen Richterzeitung”, October 1994, p. 393).

Furthermore:

> “If Deckert’s [revisionist] ‘view of the Holocaust’ were correct, it would mean that the Federal Republic of Germany was based on a lie. Every presidential address, every minute of silence, every history textbook would be a lie. In denying the murder of the Jews, he denies the Federal Republic's legitimacy.” (Bahner, Patrick, in “Frankfurter Allgemeinen Zeitung”, August 15, 1994).

Article 97 of the German Basic Law reads:

> “The judges are independent and only subject to the law.”

All in all, the reaction of parts of the legal system, parts of the executive bodies and the entire media to the verdict of the District Court Mannheim from June 22, 1994, is a severe, and in my eyes an unjustifiable encroachment on the constitutionally guaranteed independence of judges. It is obvious that a judgment can be criticized in an open society. Unacceptable, however, were two things: First that the reactions against the verdict focused on the author, the reporting judge Dr. Orlet – despite the fact that apart from him two other professional judges (one of them a presiding judge!) and two lay judges were responsible for the verdict; secondly that this was an intervention into a pending court case. For a state claiming to be a state under the rule of law, however, the following is most seriously and with a far-reaching impact:

Since the “Case of Deckert/ Orlet”, everybody standing trial on charges of “denying the Holocaust” (in a general sense), have cause to fear that they can no longer receive a constitutional trial as guaranteed by article 20 para. 2 of the German Basic Law, which is supposed to consider only law and justice, because the corresponding judges – who after all are only human – must reckon with similar reactions as experienced by the chamber of the “Orlet Case” in general and by Judge Dr. Orlet in particular, in case they make a judgment which does not comply with the obvious expectations of at least a part of the legal, political and media system.

Regarding Mr. Scheerer's request, it is important to take note of the following:

The Stuttgart District Court announced its verdict against Mr. Scheerer on 23 June 1995. That was after the retrial and official conviction of Judge Deckert by the Karlsruhe District Court. There can be no doubt that the judges in Stuttgart knew of the controversies which were associated with the Deckert trial in August 1994 and afterwards, if for no other reason than the proximities of Stuttgart, Mannheim and Karlruhe. Further evidence that members of the Stuttgart District Court followed the Deckert trial closely, is provided by the fact that Stuttgart Court demanded and received a copy of the verdict of 15 March 1994 issued by the German Federal Court BGH and incorporated it into their proceedings. For this reason we are justified in asking whether the judges in Stuttgart, after everything that had befallen their colleagues in Mannheim, could have dared to pronounce a sentence which failed to meet the expectations of the courts, politicians and media.

E. The Verdict of the Stuttgart District Court 6/23/1995, ref. 17 KLs 83/94

Let us examine this verdict with regard to several issues which are relevant to the pending request for political asylum.

I. Was this a "political trial", and was it part of a political campaign by the government? Can the answers to these questions be found in the verdict?

The above question can be answered with "yes," for the following reasons:

1. The police investigations were conducted by the Baden-Württemberg State Bureaus of Investigation, Department 822 (ref. 822-165/93). It has to be assumed that this department dealt primarily with national security cases (refer to Section A above for an explanation of the German practice of using state police to enforce national security.)

2. The criminal charge was compiled by a department within the Public Prosecutor's office whose (primary?) duty is to formulate charges in national security cases.

3. The court derived its sentence from the penalty range which is prescribed for the crime of "inciting the people," Paragraph 130, Section 7 of the German Penal Code, comprising "crimes against public order." The authoritative legal commentary on the German Penal Code (Schönke/Schröder, Strafgesetzbuch (Penal Code), Kommentar (Commentary), 26th edition, Munich 2001, introducing remarks to §§ 123 ff.) has this to say about Section 7:

   "…Furthermore the penal laws for the protection of domestic peace and internal security (§§ 125 ff., 140) included in this section deal with *material which is particularly sensitive to political considerations* (emphasis added.)

4. Additional proof of the political nature of the proceedings against Scheerer is the fact that the court lists the political goals, convictions und motives of the defendant (the accuracy of the court's assessment is debatable, but not an issue here). Earlier in the verdict, in the "Findings" under "Section A, Overview" (Page 8 of Verdict), it states:

   "The publication evolved in the years 1991 to 1993 in conjunction with the *right-wing extremist views of the accused*, who is unwilling to accept the negative consequences of the National Socialist regime for Germany." (emphasis added)

Page 28 of the verdict states:

> "Since from the beginning the defendant dedicated his writing *to political, particularly nationalistic and racist purposes*, he sought contact primarily with rightwing extremist circles." (emphasis added)

On page 155 the verdict states:

> "The defendant's preoccupation with the subject of Auschwitz is in a comprehensive sense **politically motivated**." (note: bold face in original, for emphasis)

In considering Scheerer's penalty, the court considered the following as disadvantageous for the defendant (p. 238 of the verdict):

> "To realize *his political goals*, he risked even the most intimate areas of his personal and social life." (emphasis added)

5. The following gives further proof that this was a political trial: Legally, Germany has authorities both on federal as well as on state level, whose task it is to protect the constitution (State Offices for the Protection of the Constitution and Federal Office for the Protection of the Constitution, See section A.). In Bavaria, section I of the "Law for the Bavarian Bureau for the Protection of the Constitution" (quote here the version of 8/24/1990) ("Organisation und Aufgaben des Verfassungsschutzes", Organization and Structure of the Bureau for the Protection of the Constitution) one reads:

> "Article 1
>
> (1) To protect the liberal democratic Basic Order, the existence and security of the Federation and the States, Bavaria has a Bureau for the Protection of the Constitution. This Bureau also combats organized crime.

(2) The liberal democratic Basic Order according to Paragraph 1 is an organization of a governmental system under the rule of law and on the basis of the self-determination of the people, according to the will of the prevailing majority, as well as on the basis of liberty and equality, but excluding any violent and arbitrary regime. The principal points which constitute this order are at least:

Adherence to human rights as described in the Basic Law, in particular the right of the individual to live and develop freely; adherence to the sovereignty of the people, separation of powers, legal responsibility of the government, lawfulness of the administration, the independence of the court system, a multiparty system and equal opportunity of all political parties with the right of constitutionally forming and acting as an opposition."

In 1996, the Bavarian State Ministry for the Interior published the third, unrevised edition of a brochure entitled "Revisionism". Under Item 4 "The development" (of revisionism), it also mentions the Stuttgart trial against Scheerer. It reads:

"4.4. Rudolf Report

The 120 pages long Rudolf Report, which, i.a., refers to the Leuchter Report, was compiled in 1991 in defense of the right-wing extremist Otto Ernst Remer, who was accused of inciting the people. In Remer's trial, this report was introduced as proof of the 'Auschwitz Lie' [the assertion that millions of Jews were *not* murdered at Auschwitz, translator's note]. The author is academically accredited Chemist Germar Scheerer, born Rudolf, a former member of the right-wing extremist party 'The Republicans' (REP). […] In June 1996, the District Court Stuttgart sentenced Scheerer to 14 months imprisonment without probation for incitement of the people, incitement to racial hatred, denigration of the memory of the dead and libel. […]".

The above quotation allows the conclusion that the activity for which Scheerer was punished, at least in the eyes of the state of Bavaria, is directed against the "liberal democratic Basic

Order", and is thus interpreted as being directed against the German constitution, i.e., as being political in nature. This is an assessment which is certainly agreed upon by the other German offices for the Protection of the constitution.

6. Additional evidence that the case against Scheerer was a political one is the way in which the German media reported the trial (I think I need not go into details in this regard).

Conclusion:

Considering all the evidence, there can be no reasonable doubt that the trial against Scheerer, in which I served as defence lawyer, was a political trial.

II. Did Mr. Scheerer have a fair trial?

In order to answer this question, one needs to know what a fair trial is under German law. (It is beyond my competence to determine whether or not Mr. Scheerer's trial would be considered "fair" under US law.) In the commentary on the German Penal Law to which I referred above, the principal requirements for a "fair trial" are described as follows (Schönke/Schröder, StGB, 26. edition, Einleitung (introduction), Randnummer 28 (remark 28)):

> "'Fair Trial' is a collective term consisting of various elements which must be present in any and every legal procedure. The fundamental roots of this right of fair trial are to be found in basic civil and human rights, which are materially guaranteed by the principles of a state which is ruled by law …."

In this context we must pay special to Article 6 of the European Declaration of Human Rights, which has been ratified by the Federal Republic of Germany.

According to German law, all organs of the judicial process (the police as investigating authority, the public prosecutors, and finally the courts) must adhere to the principle of "fair trial" at every

stage of the proceedings. Since a verdict has indeed been passed on Mr. Scheerer, one could assume ipso facto (as the German executors of penal justice have certainly done) that my client did received a “fair trial.” If this were not the case, according to their reasoning, the verdict could not have gone into effect. However, the following considerations must give rise to reservations against such assumptions:

In its pleading before the court, the defence requested the introduction of supplementary evidence. According to German law, the court needs to consider this kind of evidence only if it is prepared to sentence the defendant. The defence however had pleaded not guilty. It sought to introduce evidence which would have proven that the ‘Conclusions’ of the incriminating Expert Report written by Mr. Scheerer, both the ‘Conclusion to Part A’ as well as ‘Conclusion to Part B’, are correct. The court sentenced Mr. Scheerer and dealt with this request for admission of evidence only in its written verdict, which is permissible on principle. The court wrote the following about this (p. 231):

> “Ultimately, this request for supplementary evidence would result in denial of the mass murder of the Jews, which was committed primarily in the gas chambers of the concentration camp Auschwitz. […] Since the judiciary decided long ago that mass murder of the Jews is a self-evident historical fact, especially in Auschwitz, no evidence is needed (Section 244 paragraph 3 sentence 2 StPO (German Code of Criminal Procedures).”

The defence believes that it was incorrect for the court to reject this request for evidence. The evidence offered should have been admitted. It is indeed correct that according to legal practice of the German Federal Supreme Court – which was confirmed by the German Federal Constitutional Court – the rejection of such requests for evidence is legally permitted according to Section 244, Paragraph 3, Sentence 2 StPO (German Code of Criminal Procedures) The court gave as its reason that the opposite of what was claimed by the request for evidence is self-evident. Such legal reasoning leads to a situation in which certain opinions regarding a complex historical event which continued for many years, have been declared sacrosanct. It is indisputable that many questions regarding this event, which happened many years ago, are still unanswered, as numerous continuing controversies show. With such a practice, the German legal system

unjustly claims to have the competence to replace historiography and, in the case at issue, several other scientific disciplines as well. With such a legal practice, individuals with dissenting views on certain historical events were, and continue to be, denied all possibility of proving their arguments. The Stuttgart Court refused to consider any portion of the content of Mr. Scheerer's Expert Report, even though it constituted the major part of the incriminating publication! The content of the report is mentioned very briefly on pages 8 and 9 of the verdict; the court's statement that this "is written in a scholarly style" (page 23) is however remarkable. It is obvious that due to its own lack of expert knowledge, it would have been impossible for the court to judge whether or not the statements of the "Expert Report" and the conclusions drawn from them are accurate. It is precisely for this reason that the German Penal Procedure Rules allow the use and assistance of expert knowledge. The Stuttgart Court, however, did not avail itself of opportunity to assess the accuracy of the "Expert Report" with the help of various experts in different fields of expertise (such as chemists, historians, experts of architecture). Is it speculative to assume that the court refused this opportunity because the consequences for the interior and exterior relationships of the Federal Republic of Germany would have been considerable, should it turn out that the conclusions drawn by the defendant in were accurate? The question of whether or not this is the case, is not our subject for discussion here, and I would not be competent to judge because of my lack of expertise in this field. However, there is no question that the defendant was denied opportunity to prove the correctness of what he had written.

Conclusions:

It is my opinion that prevailing legal procedures in Germany constitute a breach of the principle of "fair trial." Hence, my answer to the question of whether Mr. Scheerer had a fair trial must unfortunately be "no."

Translated by J. M. Damon ……..

III. Was Mr. Scheerer prosecuted and sentenced because he expressed dissenting political views?

1. Concerning the trial at Stuttgart District Court(Ref. 17 KLs 83/94)

I believe I have shown that this trial was political in nature and, moreover, that "revisionist" activities are considered by the German legal authorities to be directed against the Constitution. It should be noted, however, that the Stuttgart Court was only dealing with the particular version of the "expert report" which was published under the name of Remer (including preface and epilogue). Concerning this Expert Report, the Verdict states on Page 23:

> "This work, which forms the basis of all of his journalistic activities, is written in a scholarly style. It addresses a specific subject of chemistry (the problems connected with hydrogen cyanide) and avoids general political conclusions."

We are thus justified in concluding that the defendant was sentenced not for any political statements included in his proper Expert Report, but because Remer's preface and epilogue (as reprinted in the verdict on pp. 109a – 114) had been attributed to him (again, the question can remain open whether or not Remer was indeed the author of the preface and epilogue). This is confirmed by the written verdict ("Court Assessment", pp. 233 ff.), in which the sentence imposed for incitement of the people is justified as follows:

> *"For political considerations and because of hatred against the Jews*, the entire Remer Version maintains that reports of the systematic murders of Jews under National-Socialism, primarily in the concentration camp Auschwitz, were pure inventions whose aim was to bludgeon and exploit Germany." (emphasis added).

Overall, it is clearly established that the Stuttgart District Court considers that the motives for the defendant's crimes are political in nature (the question of whether this assessment is correct is

debatable but irrelevant.) Already on page 14 under section B, for instance, the court states under the headline “General Remarks about Motivation and Strategy of the Accused”:

> “In his view, the postwar development of Germany was determined by Allied perceptions of the Hitler regime, in particular allegations of systematic annihilation of Jews in extermination camps. The self image and the world image of the Germans were determined by the same Allied perceptions. Since the accused is not prepared to accept the consequences of these perceptions, as he sees them, *he decided to work to change the perceptions, at least by creating doubt about the National Socialist mass murders.*” (emphasis added).

The verdict states further that, after having joined the Republican political party, the defendant became convinced that “his radical goals could not be achieved within the confines of a political party” (Verdict, p. 14). The court went on to opine that Mr. Scheerer “is at least receptive to National Socialist thought, especially racial theories” (Verdict, p. 15). Elsewhere (on page 28) it infers that he intended, from the beginning, to “dedicate his writing to political, specifically nationalistic and racist purposes”. Finally, on p. 239, the Court characterizes Scheerer as “a fanatical, politically motivated criminal with profoundly anti-Semitic convictions.”

Let me emphasize that I consider it irrelevant whether or not the assessments of the Court are correct. The point to be noted is that the Court attributed political motivations to the applicant and then evaluated these political motivations negatively. This is also the reason why probation was denied to the defendant, even though he had no prior convictions (page 239 of Verdict).

The relevant question relating to this request for political asylum – whether Mr. Scheerer was convicted in full or in part because of political views imputed to him by the Stuttgart Court – should be answered “yes.”

2. Concerning the Tübingen County Court trial (Ref. 4 Ls 15 Js 1535/95)

I did not represent Mr. Scheerer in the Tübingen trial. I do, however, know that the cause for prosecution was his book “Grundlagen zur Zeitgeschichte” (English title “Dissecting the Holocaust”) published by the defendant under the pen name “Ernst Gauss.” This book was described in the Stuttgart Verdict as follows (p. 239):

> “During and despite the current trial, the accused continued to prepare and publish other revisionist works which provide additional evidence of his views. The new writings continue to employ the strategy of pretended objectivity in order to deny the Holocaust. For example, in the fall of 1994, the book “Grundlagen zur Zeitgeschichte” (Foundations of Contemporary History / Dissecting the Holocaust) appeared and the book refuting Pressac was prepared for publication.”

Even though I do not have the indictment of the public prosecution in this Tübingen case in front of me, I have no doubt (in view of the statements of the Stuttgart judges) that the indictment boils down to the accusation that the defendant is engaged in “denying the Holocaust,” which German prosecutors construe as the crime of “inciting the people” under Section 130 of the penal code. Even though I am unfamiliar with the details, I have no doubt that the same circumstances prevail here which, as I have demonstrated, prevailed at the Stuttgart trial: this was (and is) a political trial.

3. Other criminal cases against Mr. Scheerer

Due to Mr. Scheerer's continuing publishing activities since he went into exile, one must assume that additional criminal prosecutions are pending against him, which currently cannot be pursued because Mr. Scheerer is not in Germany. Regarding such possible additional criminal indictments, one can safely infer that he will be charged with “denying the Holocaust” in all of them.

IV. Other Remarks About the Stuttgart Verdict (ref. 17 KLs 83/94)

1. According to the Stuttgart verdict, the illegal publication consisted of two part. The first part was the Expert Report itself, of which the defendant is mentioned as author. The second part consisted of Preface and Epilogue, of which Mr. Otto Ernst Remer is mentioned as author. The second part was attributed to Mr. Scheerer as well.

It is striking that the Court treated the "Remer Version" of the Expert Report as a single entity (p. 235f.):

> "The Remer-Version of the 'Expert Report', which along with the preface and epilogue constitutes a single homogeneous work, not a scholarly work overall."

As reason for this the court states:

> "The accused and his accomplices used the seemingly scientific main part of the work in order to commit the crime, primarily in the preface and epilogue of the work." (p. 236 of the verdict)

This appears to be unfounded: Why then would Scheerer bother to write the Expert Report in the first place? Everything is turned upside down here. This eccentric view of the Court has severe consequences, however. Page 236 of the verdict states:

> "Considering the fact that the Remer version of the Expert Report is not a scholarly work overall, this court was under no obligation to verify whether parts of this work might be scientifically valid. This is unlikely considering Scheerer's political aims and the above described manner in which he deals with facts."

With this reasoning the Court was able to take unfair advantage and evade its duty: Introducing evidence, in which conclusions drawn by the defendant were proven correct, could have been

unpleasant. (I am not competent to judge whether this would have been the case. Why not establish that the factual statements of the defendant were erroneous, by introducing evidence from expert witnesses in this trial – to unmask him, so to speak?) The second unfair advantage which the Court took with such eccentric reasoning was to deny Mr. Scheerer his constitutionally guaranteed freedom of speech (Article 5 paragraph 1 of German Basic Law) as well as freedom to pursue scientific research (Article 5 paragraph 3 of Basic Law). See page 235 of Verdict. But regarding the defendant's punishment, it would have been appropriate to investigate this question: According to Section 46 para. 1 of the Penal Code, the guilt of a perpetrator should be the basis for the sentence).

2. The Court's Assessment of Evidence:

The Court's assessment of evidence was not entirely appropriate. In particular the Court's assessment of whether Scheerer had supported the Remer-Action is not entirely convincing. Regarding the Court's statements on factual findings and assessment of evidence, I want to point out two things which deserve to be critiqued:

a) On page 44 of the verdict, the court quotes Mr. Willy Wallwey as a contributor to the book "Grundlagen zur Zeitgeschichte" (Dissecting the Holocaust). The verdict states on page 44:

> "In a letter dated 1 January 1993, he introduced himself to his colleagues with the following words: 'In my spare time I am active as amateur historian. Until now my area of special interest has been my old branch of the military, the Waffen SS…' After describing his work load as a self employed architect, he continued, '… On the other hand, it is clear that the clock shows five minutes before midnight and time is running out for most persons of my persuasion.'"

On p. 166, the Court again questions Wallwey in order to establish the "integration of the accused into the rightwing extremist milieu". It states:

> "The witness Wallwey 'was working on' his 'old outfit, the Waffen SS' and was concerned that time for the *rehabilitation of National Socialism* was running out". (emphasis added)

Here, the Court is very obviously imputing to the witness the idea that his only goal in dealing with the (history of) the Waffen-SS was the "rehabilitation of National Socialism." It gives no evidence. This feeds our apprehensions that early in the trial the Court was not unbiased towards the defendant.

b) On p. 49 the verdict states:

> "A personal meeting between the accused and Philipp took place on 29th June 1991 at the latest, on the occasion of a convention of the J. G. Burg Foundation in the area of Nuremberg. In conjunction with the success of the above mentioned advertisements, a closed meeting of revisionists took place here with the aim of discussing how to proceed in future."

Elsewhere, this – alleged – participation of the defendant at this convention is mentioned again (Verdict, p. 148):

> "At one of these he participated in a closed revisionist meeting called by Remer on 29th June 1991, at which Remer gave the official greeting (page 49). This is proven by a copy of a registration form that he had filled out, which was found in his possession. The defendant did not deny this."

First, it needs to be said in this regard that this convention – which I attended for professional reasons – did not take place in the "area of Nuremberg" but rather in 93426 Roding/Oberpfalz. Furthermore: Not a "copy", but the original of the application form was found with the defendant (which, however, was not sent away by the defendant). Finally, the depiction of the verdict suggests the conclusion that Mr. Scheerer had admitted his attendance at this convention. Such a conclusion would be wrong. During the trial, my client has vehemently

denied this. According to everything that came to my knowledge before, during and after this convention, Mr. Scheerer did n o t attend it.

c) The defence summoned several witnesses in order to prove that the defendant has no (neo-)National Socialist or anti-Semitic views. On page 169f. of the verdict, the Court states that the witnesses Philipp, Wallwey, Weckert, Neumaier, Herrmann, Stratemann, along with the married couple Sternberg and the mother, sister and brother of the defendant – altogether 11 individuals – testified during the trial "that they had never heard him express anti-Semitic and rightwing extremist viewpoints". According to the Court, all these testimonies were either "knowingly false" or "the result of successful deception by the accused".

I could not share the Court's opinion: I found some testimony of the witnesses credible and exonerating.

At this point, attention should be drawn to the following:

Mistakes of the court while assessing the fact (in the Verdict under point II, "Findings") are hard to prove, since according to the German penal procedural law only trials held at county court level (in front of a single judge or jury court) are obligated to have recordings (if not verbal, so at least one summarizing the content) of what the defendant or witnesses say.

§273 of the German Penal Proceeding Rules reads as follows:

> "Apart from that, the *essential results of an interrogation* during a trial in front of a penal judge or a jury court are to be included in the protocol." (emphasis added)

As can be seen, this is only required for trial at county court levels, but not at district court level. The first instance of the trial against Mr. Scheerer was held right away in front of the District Court. Even though a protocol was prepared there (according to §§ 271 ff. German Penal proceeding Rules), it did not have to (nor actually did) include statements of neither the defendant nor the witnesses.

Likewise, the hearings of German penal trials are on principle not recorded on tape either. For the sake of completeness it has to be mentioned that the court can order the verbal recording of the trial in exceptional cases, i.e., according to §273 III German Penal Proceeding Rules: Prerequisite of such a recording is "that the occurrence or the verbal meaning of the statement in essential. The interest in such an assessment can be explained in reference to the current or a future trial. Occurrences or verbal meanings of statements are essential in a current trial, if they represent breaches of procedural law, if they can justify pleas of rejection [of a judge/jury member asf…]" (Karlsruher Kommentar zur Strafprozeßordnung, 4th edition, Munich 1999, § 273 no. 23). These prerequisites are considered to be given only very rarely.

d) I.a., the court justifies the sentences due to incitement to racial hatred as follows (Verdict, p. 235):

> "In connection with the claim that the Holocaust was an invention of the Jews, this incites racial hatred against the Jews in a calculated way."

The "expert report" including preface and epilogue were the object of the court's judgment. No anti-Semitic passages can be found in the "expert report". Preface and epilogue (for which Remer signed responsible) as well do not expressively claim, the Holocaust is "an invention of the Jews" – but this is what one is made to believe when reading the verdict! As should be clear, it is a difference whether somebody claims a certain fact or – as it admittedly can not be excluded in this case – if somebody present facts which can – or can not! – lead to the conclusion that a certain fact is given. One could have expected from the Court to distinguish this. That this distinction was not made is another indication that the defendant did not have a fair trial. (It should be pointed out that Mr. Scheerer expected an acquittal – in contrast to me, which I explained by stating that for political reasons the German Government could not afford such an acquittal in this case).

V. The Question of Whether the Sentence was Inappropriately Harsh

According to § 46 para. 1, sentence 1 German Penal Law, the basis for determining a sentence is the “guilt of the perpetrator”. The law states in paragraph 2:

> “When determining the sentence, the court assesses the circumstances which are advantageous and disadvantageous for the perpetrator. This includes in particular:
> – the motivations and goals of the perpetrator;
> – the state of mind reflected by the crime, and strength of intent to commit the crime;
> – the extent of defendant's abandonment of civil obligation;
> – the impact and effect of the crime;
> – the biography of the perpetrator together with his personal and financial circumstances; and
> – his behavior after the crime, especially his effort to compensate for the damage, as well as his efforts to compensate a damaged party.”

Of course, the Court has some latitude in determining a sentence. In favor of the defendant, the Court considered (Verdict, p. 237) that the defendant “has no criminal record,” which is somewhat surprising since, according to the Court, he is a “fanatical, politically motivated criminal.” The Court also considered that the defendant “would be severely affected by punishment, since he has to provide for a family with a small child.” Nevertheless, the Court sentenced the defendant to 14 months' imprisonment without probation. In my view, the Court's reasoning for imposition of this sentence, as stated on page 239) of the verdict:

> “A suspension of the prison term would damage public confidence in the legal system, with regard both to the nature of the crime and the way it was committed.”

is meaningless, incorrect and empty phraseology.

The “public confidence in the legal system” has been – and is still is – undermined by other acts of the courts, such as the early release of sex offenders, who repeat violent offenses, rather than by the distribution of a publication whose content is never was of any interest to broad circles of the German population. Considering that the defendant had no criminal record and lived with an

infant in a structured social environment, moreover, that the incriminating publication did not have any effect whatsoever on the general public – which was predictable at the time –, the sentence appears to be inappropriately high (statistically seen, some 2/3 of all prison terms handed down are on probation). One explanation might be that this case was conducted as a political trial, in which considerable political interests of the German government were at stake due to the defendant's significant "revisionist" activities.

My client applied for a revision of the District Court Verdict by the German Federal Supreme Court which was rejected. At this point, a specialty of the German Penal Proceeding Rules should be pointed out (summarized):

In cases of misdemeanors and crimes with an expected mild sentence, the first (fact-finding) trial takes place in front of a county court. One can appeal against the verdict of such a court. The second trial then takes place in front of a district court, where on principle all evidence already presented at the county court can again be introduced. Against the verdict of the district court, on can apply for a revision. At a revision, however, no new verbal trial takes place as a rule, but only an investigation of the challenged written verdict for violations of the law by the higher court. It must be noted that during its investigation the revising court is bound by the factual findings which the subordinated court used as a basis for its written verdict. Even the evaluation of the evidence can be challenged only in rare cases, since this is the genuine task of the so-called judge of the crime, who heard both the defendant and the witnesses during the trial. This means that during a revision it is almost never possible to successfully criticize, a defendant and/or witness had said something different than what is stated in a verdict, furthermore, their statements were indeed credible – contrary to the assessment of the challenged verdict.

F. About the question whether the applicant has to fear "political persecution" if he returns to Germany

1. With the verdict of the Stuttgart District Court of June 23, 1995, Mr. Scheerer was sentenced to 14 months' imprisonment without probation. The revision applied against this (by attorney at law Ludwig Bock, Mannheim) was rejected by the German Federal Supreme Court. This decision is legally binding (according to the applicant: since March 7, 1996; German Federal Supreme Court, ref. 1 StR 18/96). As is well know, he avoided serving his prison term by going abroad. It has to be assumed that an arrest warrant was issued against him in Germany. The question now is whether Mr. Scheerer still would have to serve his prison term, should this arrest warrant be executed. This has to be verified using the 5th section, "Statute of Limitation", 2. Heading ("Statute of Limitation for Sentences") of the German Penal Code. As far as this case is concerned, this law states:

   "Section 79 of German Penal Law, Statute of Limitation

   1. A legally binding penalty or measure […] can no longer be executed after the statutory period of limitation has passed.

      […]

   3. The statutory period of limitation […] is ten years for prison terms of more than one year and not more than five years. […]
   6. The period of limitation begins when the court decision becomes effective."

   Furthermore, Section 79 is of interest in this regard:

   "§ 79 b German Penal Law, Prolongation

   Before the statute of limitation expires, the court can extend it by half of the said statute of limitation in case the prison authority requests it, and provided the convicted individual remains in an area from which he cannot be extradited or deported."

   Currently the statute of has not yet expired. It is not known whether or not the public prosecution has applied for an extension under Section 79 b of the German Penal Code.

2. Moreover, Mr. Scheerer did not appear for the trial scheduled to begin on May 7, 1996, at the County Court AG Tübingen (ref. 4 Ls 15 Js 1535/95.) This trial was occasioned by publication of the book “Grundlagen zur Zeitgeschichte” (Dissecting the Holocaust) which he edited under the pen name “Ernst Gauss.” I did not represent Mr. Scheerer in this case, as I already mentioned, but it must be assumed that an arrest warrant has been issued on the request of the public prosecutor according to Section 230 para. 2 German Penal Law. (I do not know how many additional arrest warrants have been issued against Mr. Scheerer as a result of his publishing activities after he left Germany.)

G. What Are the Motives of the German Government in Prosecuting Germar Scheerer?

At the outset it should be mentioned that with regard to its founding, the Federal Republic of Germany is not a normal State. As Ernst Forsthoff expressed it, the Federal Republic of Germany was not established as the result of a decision, but rather a situation. Its birth was a “forceps delivery by the Allies” to use an expression coined by a public prosecutor in a political trial in which I served as defense lawyer. Evidence of the special conditions accompanying the genesis of German Basic Law is found in its last Article (146), which took the following form after reunification with the German Democratic Republic:

> “This Basic Law, which as a result of the unification and liberation of Germany now applies to the entire German people, shall lose its validity when a constitution shall come into effect, which has been chosen by the German people in a free election.”

This article supports the conclusion that the Basic Law has not been “accepted by the German people by a free election”. Historically considered, the Federal Republic of Germany is the antithesis to the Third Reich” and has always been seen in this way.

Germany attempted to come to terms with National Socialist injustice in the law as well as other areas. In the process, a certain historical image evolved regarding persecution of the Jews. This image became the foundation of a special kind of relationship to the Jewish community in German on one hand (or to the Jews living in Germany, since not all Jews in Germany belong to that community), and to the State of Israel on the other hand. It also seems as if the predominant historical image – which includes the sole responsibility of Germany for the outbreak of World War II – is being used to suppress internal political adversaries, particularly on the right of the political spectrum. A correction of this historical image, particularly as regards the "Holocaust", touches a trauma in the self image of the German people. It seems that German society has not yet come to terms with its past. Sociologists speak of a "sick nation" and "the German neurosis." In dealing with Jewish citizens, this neurosis is evident in the present German penal law and its application by public prosecutors and courts. The German tendency to perfectionism is an aggravating factor. As already mentioned, massive special interests (including financial interests) of domestic as well as foreign lobby groups have a detrimental impact on coming to terms with the recent German past. Such resolution would require objective research.

I consider the current legal situation and application of existing laws (as in this case) to be dubious, to put it mildly.

H. Criminal Prosecutions of other "Holocaust Deniers"

The trials of "Holocaust Deniers" are primarily conducted with the charges "Incitement of the People" (§ 130 German Penal Code) and "Denigrating the Memory of the Dead" (§ 189 German Penal Code). Not all cases are publicized.. This is because should the prosecutor, in the course of the criminal proceeding, charge the accused under Section §§ 407 ff. of German Rules of Procedure, no public proceeding is held if the accused raises no objection to the penalty imposed by the Court. In recent years, the best known of these cases include:

I. The trial of Otto Ernst Remer by the Schweinfurt District Court (ref. 1 KLs 8 Js 7494/91)

On 22 October 1992, Remer was sentenced on five counts of “Incitement of the People” aggravated by “Racial Hatred” to a prison term of one year and ten months without probation.Remer's appeal was rejected by the Court of Appeals in its decision of 16 November 1993 (ref. 1 StR 193/93). The following factual findings relating to the District Court were established:

> “The Court has established that he (Remer) subscribes to National Socialist opinions. In five of the ‘Remer Dispatches’ which he publishes, he has maintained that no Jews were killed in gas chambers during World War II. He maintains that the stories of such murders were invented in order to extort enormous sums of money from the German people, continuing to the present.”

The Appeals Court gave the following reasons for denying Remer's appeal:

> “The District Court was correct in assuming that it is common knowledge that mass murders of Jews in gas chambers of concentration camps during World War II is a historical fact. A motion to introduce evidence on this subject would therefore be superfluous (§ 244 para. 3 sentence 2 German Penal Code).”

Otto Ernst Remer avoided incarceration by fleeing into exile, where he died.

II. The Trials of Udo Walendy

1. Trial in Bielefeld District Court (ref. 2 KLs 46 Js 374/95)

The accused, a diploma political scientist, has for years investigated modern history and has written extensively on questions of modern history. His book “Wahrheit für Deutschland – Die Schuldfrage des Zweiten Weltkriegs” (The Truth for Germany – the Question of Guilt in World War II) is his best known work. In addition, he has for years published articles on contemporary history in the periodical “Historische Tatsachen” (Historical Facts).

In Bielefeld District Court, he was charged with incitement of the people on account of issue no. 1, “Kriegs-, Verbrechens- oder Propaganda-Opfer?” (Victims of War, Victims of Atrocities, or Victims of Propaganda?) and no. 64, “Immer neue Bildfälschungen II. Teil” (More New Doctored Photographs).

The first “Historical Fact” deals with the National Socialist persecution of the Jews, the other with the authenticity of photographs which purport to show German atrocities and whose authenticity Mr. Walendy questions. In the verdict dated 17 May 1996, Walendy was sentenced to a prison term of fifteen months without probation. As grounds for this sentence, the court stated that the accused could not claim the right of freedom of investigation (Article 5 of Basic Law) because “both publications were not, in form and content, to be considered as serious and methodical research which attempted to document the persecution and extermination of the Jews during the Third Reich.” Although the Court acknowledged that Walendy did not categorically deny that Jews had been murdered during the Third Reich, it stated that he had nevertheless played down the extent of these murders. The appeal for a revision of the sentence was rejected by the German Federal Supreme Court Appeals on 17 May 1996. It took effect on 18 December 1996 (ref. 4 StR 524/9). Mr. Walendy filed a complaint with the German Federal Constitutional Court but it refused to hear his complaint in a decision dated 27 May 1997 (ref. 1 BvR 195/97). Mr. Walendy, born in 1927, served his full sentence. His motion to change a portion of his prison term to probation was refused on grounds that his social prognosis was not good.

2. Trial in County Court Herford (ref. 3 Ls 46 Js 71/96 (97/96)

Here again, the defendant was accused of inciting the people and denigrating the memory of the dead, committed by the publications “Historische Tatsachen” nos. 66, 67, 68 and 44. Again, the subject of these publications were events of modern history, i.a., the National-Socialist persecution of the Jews. In issue no. 66 of the “Historische Tatsachen”, the defendant described his intentions on page 2 as follows:

> „Doubts about the systematic mass extermination of Jews are not permitted according to the current legal situation in the federal Republic [of Germany]. It is therefore the goal of historical research to investigate and eliminate elements which can lead to doubts.”

The County Court Herford sentenced Walendy in its verdict of May 6, 1997, to a prison term of 14 months without probation. Among others, this was justified with the allegation, the unbiased reader could come to the conclusion “that no secured knowledge exists about the systematic persecution and extermination of the Jews, that all figures are to be treated with great caution, and finally that it is impossibly to say which claims are correct and which are not.” It was stated that the defendant “pursued only the goal to deny and minimize the secured historical fact of the systematic persecution and extermination of the Jews” with the issues 66 and 68. About the defendant, the court also stated that he was “totally uninterested in any facts and details of the systematic mass extermination of the Jews”. Since his writings were unscientific, he had also no right to refer to the freedom of science.

The defendant appealed against this verdict, but this was rejected by the District Court Bielefeld on September 25, 1998 (ref. 6 Ns 3 Ls 46 Js 71/96 – W 3/98 VI –). The appeal for a revision of this decision was rejected by the Higher District Court Hamm. Of the 14 months’ prison term, Walendy spent 11 in prison, 3 were suspended on probation.

Conclusion: Currently, the legal risk is very high to publish research results of modern history which dissent in decisive points (Sole War Guilt of Germany, Extermination of the Jews) from what is considered to be the predominant, scientifically secured opinion.

[signed]

Dr. Günther Herzogenrath-Amelung

Attorney at Law

Regensburg, September 11, 2001

Attachments:

– Article by Robert Herr, Karlsruhe: „Zur ‚Rechtsblindheit' und zur ‚Unabhängigkeit' der deutschen Richter/Innen (About the legal blindness and independence of German judges)
– CV
