

VII. Jurists' Trial Verdict (U.S. v. Josef Alstötter, et al.) December 4, 1947

From 1946 through 1949, under the aegis of the International Military Tribunal, American occupying authorities carried out a series of 12 subsequent trials in Nuremberg against surviving members of the military, political, economic, medical, and juridical leadership cadres of Nazi Germany. In the case of the *U.S. v. Josef Alstötter, et al.*, an American military tribunal tried members of the Reich Ministry of Justice as well as jurists and prosecutors of the People's Court [Volksgesicht] and Special Court [Sondergericht]. The highest-ranking officials of the Nazi judicial system could not be tried. Franz Gürtner, the Nazi regime's first Minister of Justice, had died in 1941; Otto Thierack, Justice Minister since 1942, had committed suicide in 1946; and Roland Freisler, the infamous president of the People's Court, died in a bombing raid in Berlin in February 1945. In what came to be called the "Jurists' Trial," surviving high-ranking jurists and prosecutors stood accused of "judicial murder and other atrocities, which they committed by destroying law and justice in Germany and then utilizing the emptied forms of legal process for the persecution, enslavement, and extermination on a large scale." In describing the crimes of the judicial

system, prosecutor Telford Taylor remarked: "The dagger of the assassin was concealed beneath the robe of the jurist." Justice Oswald Rothaug—the chief of the Special Court before whom Leo Katzenberger's case was heard—was tried and found guilty. In the words of the judgment against him, "The trial itself, as testified to by many witnesses, was in the nature of a political demonstration. High party officials attended [...] During the proceedings, Rothaug tried with all his power to encourage the witnesses to make incriminating statements against the defendants. Both defendants were hardly heard by the court. Their statements were passed over or disregarded. During the course of the trial, Rothaug took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question. [...] Because of the way the trial was conducted, it was apparent that the sentence that would be imposed was the death sentence."

The facts as established in the verdict show the ways in which Rothaug perverted legal norms and manipulated the process to ensure that Katzenberger would be found guilty and put to death.



This political cartoon, which appeared in *Arbeiter-Illustrierte Zeitung* in 1934, is captioned "The Touchstones of German Justice...because of the appearance of a uniquely expedited process, proceedings and sentences in German criminal justice represent a new touchstone for justice." © 2009 Artists Rights Society (ARS), New York / VG Bild-Kunst, Bonn

The judgment did not stop there, however. The tribunal made a more general statement concerning the use of the German legal system in carrying out the Nazi program of persecution and murder, and, in so doing, took a step in attempting to at least nominally right the legal wrongs of that era. Their condemnation of Rothaug and all that he represented was unequivocal. "One undisputed fact," the judgment stated, "is sufficient to establish this case as being an act in furtherance of the Nazi program to persecute and exterminate Jews. That fact is that nobody but a Jew could have been tried for racial pollution. [...] Katzenberger was tried and executed only because he was a Jew. [...] [His] execution was in conformity with the policy of the Nazi state of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination."

There were countless judges, prosecutors, and lawyers who acted as "willing instruments" of the Nazi agenda. There were others who struggled to maintain their ethical center of gravity amid a swarm of social and political pressures. Some succeeded more than others. In the end, the American Military Tribunal prosecuted 16 defendants: ten were convicted, four were acquitted, and two did not stand trial.⁸ Of those convicted, six received five to ten years in prison and four, including Oswald Rothaug, were given life sentences in jail. Rothaug was released in December 1956 and died in 1967.

Excerpts from Part 3 of the Decision in *U.S. vs. Altstötter, et al.*, December 4, 1947⁹

The third case to be considered is that of Leo Katzenberger. The record in this case shows that Lehmann Israel Katzenberger, commonly called Leo Katzenberger, was a merchant and head of the Jewish community in Nuremberg and that he was “sentenced to death for an offense under Article 2 legally identical with an offense under Article 4 of the Decree against Public Enemies in connection with the offense of racial pollution.” The trial was held in the public session on March 13, 1942. Katzenberger’s age at that time was over 68 years.

The offense of racial pollution with which he was charged comes under Article 2 of the Law for the Protection of German Blood and German Honor. This section reads as follows:

“Sexual intercourse (except in marriage) between Jews and German nationals of German or German-related blood is forbidden.”

The applicable sections of the Decree against Public Enemies read as follows:

Article 2

Crimes during Air Raids

“Whoever commits a crime or offense against the body, life, or property while taking advantage of air raid protection measures is punishable by hard labor of up to fifteen (15) years or for life and, in particularly severe cases, punishable by death.”

Article 4

Exploitation of the State of War as a Cause for More Severe Punishment

“Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to fifteen (15) years or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable.”

The evidence in this case, aside from the record, is based primarily upon the testimony of Hans Groben, the judge who first investigated the case; Hermann Markl, the official who prosecuted the case; Karl Ferber, who was one of the associate judges in the trial; Heinz Hoffman, who was the other associate judge in the trial; Armin Bauer, who was the medical expert in the trial; Georg Engert, who dealt with clemency proceedings; and Otto Ankenbrand, another investigating judge.

The salient facts established in connection with this case are in substance as follows:

Sometime in the first half of the year 1941 the witness Groben issued a warrant of arrest against Katzenberger, who was accused of having had intimate relations with the photographer Seiler. According to the results of the police inquiry, actual intercourse had not been proved, and Katzenberger denied the charge. Upon Groben’s advice, Katzenberger agreed that he would not move against the warrant of arrest at that time but would await the results of further investigations. These further investigations were very lengthy, although Groben pressed the public prosecutor for speed. The police, in spite of

9. *United States of America v. Altstötter, et al.* (“The Jurists’ Trial”), 3 *T.W.C.* 1 (1948), 6 *L.R.T.W.C.* 1 (1948), 14 *Ann. Dig.* 278 (1948). PDF available at Library of Congress Web site http://loc.gov/r/fird/Military_Law/NTs_war-criminals.html.

their efforts, were unable to get further material evidence, and it became apparent that the way to clarify the situation was to take the sworn statement of Seiler, and this was done.

In her sworn statement she [Seiler] said that Katzenberger had known both her and her family for many years before she had come to Nuremberg and that his relationship to her was a friendly and fatherly one and she denied the charge of sexual intercourse. The evidence also showed that Katzenberger had given Seiler financial assistance on various occasions and that he was administrator of the property where Seiler lived, which was owned by a firm of which he was a partner. Upon Seiler's statement, Groben informed Dr. Herz, counsel for Katzenberger, of the result and suggested that it was the right time to move against the warrant of arrest.

When this was done, Rothaug learned of it and ordered that the Katzenberger case be transferred from the Criminal Division Court to the Special Court. The first indictment was withdrawn, and another indictment was prepared for the Special Court.

The witness Markl states that Rothaug dominated the prosecution, especially through his close friendship with the Senior Public Prosecutor, Dr. Schroeder, who was the superior of Markl.

The indictment before the Special Court was prepared according to the orders of Rothaug and Katzenberger received the charge of race defilement as well as an additional charge under the Decree against Public Enemies that made the death sentence permissible. The new indictment also joined Seiler on a charge of perjury. The effect of joining Seiler in the charge against Katzenberger was to preclude her from being a witness for the defendant and such a combination was contrary to established practice. Rothaug at this time told Markl that there was sufficient proof of sexual intercourse between Seiler and Katzenberger to convince him and that he was prepared to condemn Katzenberger to death. Markl informed the Ministry of Justice of Rothaug's intended procedure against Katzenberger and was told that if Rothaug so desired it, the procedure would be approved.

Prior to the trial, the defendant Rothaug called on Dr. Armin Baur, medical counselor for the Nuremberg Court, as the medical expert for the Katzenberger case. He stated to Bauer that he wanted to pronounce a death sentence and that it was, therefore, necessary for the defendant to be examined. This examination, Rothaug stated, was a mere formality since Katzenberger "would be beheaded anyhow." To the doctor's reproach that Katzenberger was old and it seemed questionable whether he could be charged with race defilement, Rothaug stated: "It is sufficient for me that the swine said that a German girl had sat upon his lap."

The trial itself, as testified to by many witnesses, was in the nature of a political demonstration. High party officials attended, including Reich Inspector Oexle. Part of the group of party officials appeared in uniform. During the proceedings, Rothaug tried with all his power to encourage the witnesses to make incriminating statements against the defendants. Both defendants were hardly heard by the court. Their statements were passed over or disregarded. During the course of the trial, Rothaug took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question.

The witnesses found great difficulty in giving testimony because of the way in which the trial was conducted, since Rothaug constantly anticipated the evaluation of the facts and gave expression to his own opinions. Because of the way the trial was conducted, it was apparent that the sentence which would be imposed was the death sentence.

After the introduction of evidence was concluded, a recess was taken, during which time the prosecutor Markl appeared in the consultation room and Rothaug made it clear to him that he expected the prosecution to ask for a death sentence against Katzenberger and a term in the penitentiary for Seiler. Rothaug at this time also gave him suggestions as to what he should include in his arguments.

The [findings] for the verdict were drawn up by Ferber. They were based upon the notes of Rothaug as to what should be included. Considerable space is given to Katzenberger's ancestry and the fact that he was of the Mosaic [Jewish] faith, although that fact was admitted by Katzenberger. Much space is also given to the relationship between Katzenberger and Seiler. That there was no proof of actual sexual intercourse is clear from the opinion. The proof seems to have gone little farther than the fact that the defendant Seiler had at times sat upon Katzenberger's lap and that he had kissed her, which facts were also admitted. Many assumptions were made in the reasons stated that obviously are not borne out by the evidence. The court even goes back to the time prior to the passing of the Law for the Protection of German Blood and German Honor, during which Katzenberger had known Seiler. It draws the conclusion, apparently without evidence, that their relationship, for a period of approximately ten years, had always been of a sexual nature. The opinion undertakes to bring the case under the decision of the Reich Supreme Court that actual sexual intercourse need not be proved, provided the acts are sexual in nature.

Having wandered far afield from the proof to arrive at this conclusion as to the matter of racial pollution, the court then proceeds to go farther afield in order to bring the case under the Decree against Public Enemies. Here the essential facts proved were that the defendant Seiler's husband was at the front and that Katzenberger, on one or possibly two occasions, had visited her after dark. On both points the following paragraph of the opinion is enlightening:

"Looked at from this point of view, Katzenberger's conduct is particularly contemptible. Together with his offense of racial pollution he is also guilty of an offence under Article 4 of the Decree against Public Enemies. It should be noted here that the national community is in need of increased legal protection from all crimes attempting to destroy or undermine its inner cohesion. [...] This is why the defendant is liable to the death penalty which the law provides for such cases. Dr. Bauer, the medical expert, describes the defendant as fully responsible."

We have gone to some extent into the evidence of this case to show the nature of the proceedings and the animus of the defendant Rothaug. One undisputed fact, however, is sufficient to establish this case as being an act in furtherance of the Nazi program to persecute and exterminate Jews. That fact is that nobody but a Jew could have been tried for racial pollution. To this offense was added the charge that it was committed by Katzenberger through exploiting war conditions and the blackout. This brought the offense under the Decree against Public Enemies and made the offense capital. Katzenberger was tried and executed only because he was a Jew. As stated by Elkar in his testimony, Rothaug achieved the final result by interpretations of existing laws as he boasted to Elkar he was able to make.

This tribunal is not concerned with the legal incontestability under German law of the cases discussed above. The evidence establishes beyond a reasonable doubt that Katzenberger was condemned and executed because he was a Jew; and Durka, Struss, and Lopata met the same fate because they were Poles. Their execution was in conformity with the policy of the Nazi state of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination.

From the evidence it is clear that these trials lacked the essential elements of legality. In these cases the defendant's court, in spite of the legal sophistries which he employed, was merely an instrument in the Nazi state's program of persecution and extermination. That the number the defendant could wipe out within his competency was less than the number involved in the mass persecutions and exterminations by the leaders whom he served does not mitigate his contribution to the program of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.

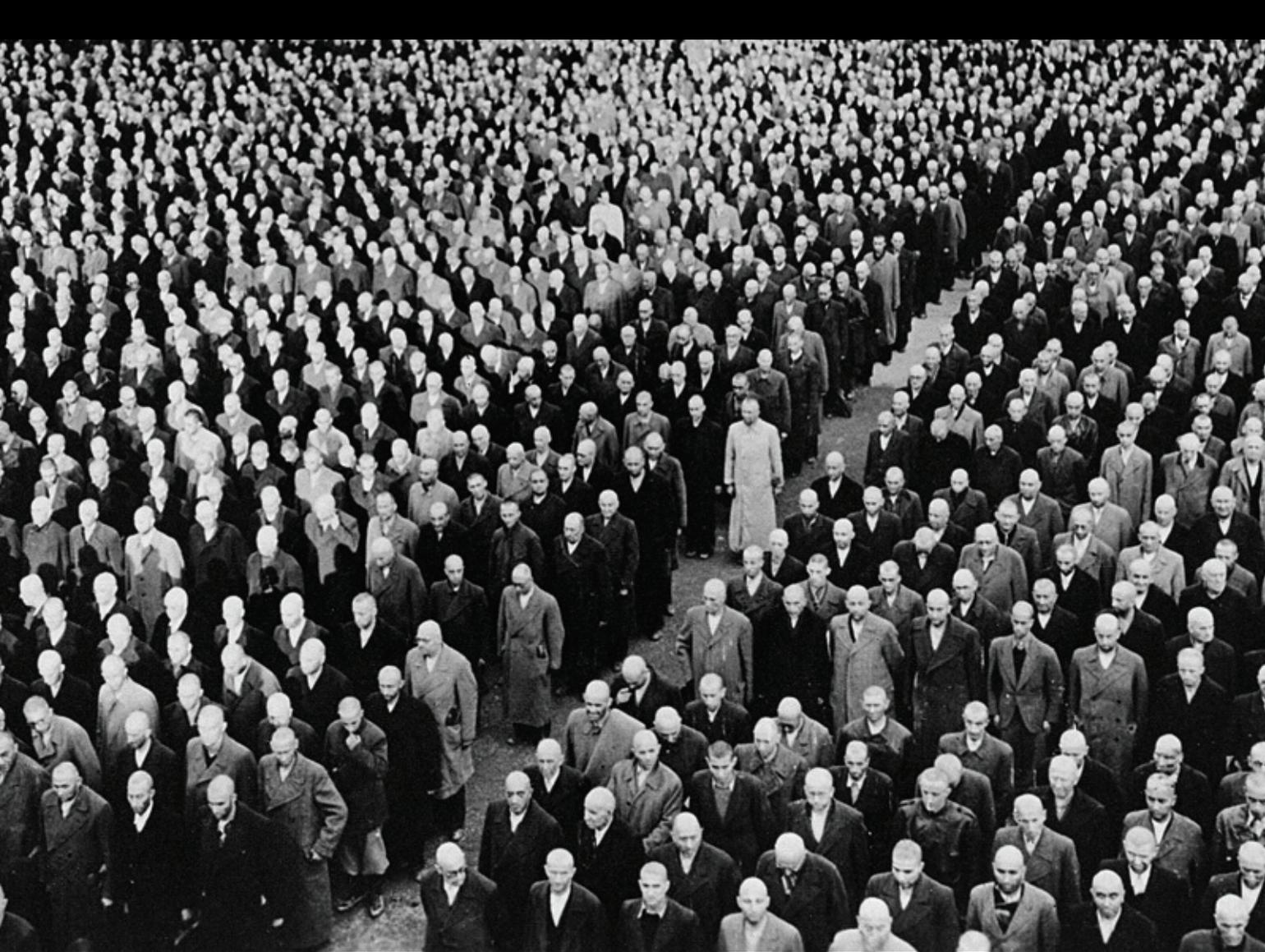
The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide.

Again, in determining the degree of guilt the tribunal has considered the entire record of his activities, not only regarding racial persecution but in other respects also. Despite protestations that his judgments were based solely upon evidence introduced in court, we are firmly convinced that in numberless cases Rothaug's opinions were formed and decisions made, and in many instances publicly or privately announced, before the trial had even commenced and certainly before it was concluded. He was in constant contact with his confidential assistant Elkar, a member of the criminal SD¹⁰ who sat with him in weekly conferences in the chambers of the court. He formed his opinions from dubious records submitted to him before trial. By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. From the evidence of his closest associates as well as his victims, we find that Oswald Rothaug represented in Germany the personification of the secret Nazi intrigue and cruelty. He was and is a sadistic and evil man. Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice.

Upon the evidence in this case it is the judgment of this tribunal that the defendant Rothaug is guilty under count three of the indictment [crimes against humanity]. In his case we find no mitigating circumstances, no extenuation.

Opposite: Newly arrived prisoners stand at attention during a roll call in the Buchenwald concentration camp. Germany, ca. November 10, 1938. USHMM, courtesy of Robert A. Schmuhl

10. The SD (Sicherheitsdienst) was the security service of the SS. The International Military Tribunal at Nuremberg declared both the SD and the SS "criminal organizations."



GLOSSARY

GLOSSARY OF TERMS AND INDIVIDUALS IN THE NAZI JUDICIAL SYSTEM

Erwin Bumke: President of Germany's Supreme Court from 1929 through 1945. Bumke had a reputation as an apolitical lawyer of the old school. Nevertheless, he joined the German National People's Party (DNVP) in 1919 and the Nazi party in May 1937 and became a compliant servant of the Nazi regime.

Concentration Camps: Places of incarceration under the administration of the SS, in which people were held without regard to due process and the legal norms of arrest and detention. In addition to concentration camps, the Nazi regime ran several other kinds of camps under various SS, military, police, or civilian authorities, including labor camps, transit camps, prisoner-of-war camps, and killing centers.

Criminal Police (Kriminalpolizei; "Kripo"): Police detective force responsible for investigating nonpolitical crimes.

Roland Freisler: German jurist and early supporter of the Nazi party, which he joined in 1925. After 1933, Freisler became Ministerial Director in the Prussian Justice Ministry and then State Secretary in the Reich Justice Ministry. He represented the Justice Ministry at the infamous Wannsee Conference, where German officials discussed the implementation of the so-called Final Solution to the "Jewish question" in Europe. In 1942, Hitler appointed him President of the People's Court in Berlin. Freisler declared to Hitler that he wanted to judge each case as he believed the Führer himself would judge it.

Franz Gürtner: German jurist and leading member of the DNVP. Gürtner belonged to the conservative camp that strove to set aside democracy in favor of an authoritarian regime, though he favored a moderate policy of gradual transition. In 1932, Franz von Papen appointed him Reich Justice Minister, a post he held until his death in 1941. Initially believing that the Nazi regime would return to orderly conditions, Gürtner achieved individual successes in the defense of legal principles; for example, in trials against clergymen (1935–39), he was able to ensure relatively fair treatment. But he also signed Nazi laws and mediated between the Nazi regime and conservative jurists to gain their cooperation.

Heinrich Himmler: Reich Leader of the SS and Chief of the German Police.

Secret State Police (Geheime Staatspolizei; "Gestapo"): Police detective force responsible for investigating political crimes and opposition activities.

Reich Security Main Office (Reichssicherheitshauptamt; "RSHA"): Headquarters of the Commander of the Security Police and SD. Included the central offices of the Gestapo, the Kripo, and the SD. The RSHA was commanded by Reinhard Heydrich and, later, Ernst Kaltenbrunner.

Mobile Killing Units (Einsatzgruppen): Special duty units of the Security Police and SD, augmented by the Order Police and Waffen SS personnel. These units followed the German army as it invaded the nations of central and eastern Europe. Their duties included arresting or eliminating political opponents, suppressing potential resistance, securing documentation, and establishing local intelligence networks. In Poland in 1939, these units were assigned to shoot Polish intellectuals and to concentrate the Jewish population into large cities. In the wake of the German invasion of the Soviet Union in 1941, they had explicit instructions to kill Jews, Soviet political commissars, and other key officials of the Soviet state apparatus and the Soviet Communist party, Gypsies (Roma), and other real or perceived "racial" and ideological enemies of the German Reich.

National Community (Volksgemeinschaft; literally, Folk Community): Term used by the Nazis for the German people as a whole. It refers to race-conscious “Aryan” Germans who accepted, obeyed, and conformed with Nazi ideology and social norms.

Decree against Public Enemies (Volksschädlingsverordnung; literally, Ordinance against Folk Pests): Enacted on September 5, 1939, this law made punishable by death all criminal acts committed by anyone exploiting the special circumstances of war, and it thereby expanded the range of criminal prosecution and culpability.

Preventive Arrest (Vorbeugungshaft): Legal instrument that permitted criminal police detectives to take persons suspected of criminal activities into custody without warrant or judicial review of any kind. Preventive arrest usually meant indefinite internment in a concentration camp.

Protective Custody (Schutzhaft): Legal instrument that permitted Gestapo detectives to take persons suspected of pursuing activities hostile to state interests into custody without warrant or judicial review of any kind. Protective custody was based on Article 1 of the Decree of the Reich President for the Protection of the People and the State of February 28, 1933. Protective custody most often meant indefinite internment in a concentration camp.

Reinhard Heydrich: SS General and Chief of the Security Police and SD (RSHA after 1939). In December 1940, he was tasked with developing the so-called Final Solution to the “Jewish question” in Europe. On July 31, 1941, he was given authority to deal with all agencies of the Reich in his capacity as the official responsible for coordinating the implementation of the “Final Solution.”

SA (Sturmabteilung, or Storm Troopers): Nazi paramilitary formation. They served as the street fighters of the Nazi party before Hitler’s rise to power in 1933.

“Sound popular judgment” (gesundes Volksempfinden): Slogan used in the nazification of the legal system. On June 28, 1935, the German Penal Code was amended so that courts had the option of deciding cases according to written codes or according to the principle of “sound popular judgment,” which gave judges more flexibility in determining guilt and in sentencing. In judging what constituted “sound popular judgment,” courts were to refer to Hitler’s public statements—that is, to the “Führer’s will.” As Nazi jurist Roland Freisler said, “Whether the judgment is sound must be tested against the standards and guidelines that the Führer himself has repeatedly given to the people (*Volk*) in important questions affecting the life of the people.”

SS (Schutzstaffel, or Protection Squads): Originally established as a bodyguard for Hitler as Führer of the Nazi political movement, the SS later became not only the elite guard of the Nazi Reich but also the Führer’s executive force prepared to carry out all security-related duties, regardless of legal restraint. From the beginning of the Nazi regime, Hitler entrusted the SS first and foremost with the removal and eventual murder of political and so-called racial enemies of the regime. The SS was specifically charged with the leadership of the so-called Final Solution, the implementation of the murder of European Jews.

Wilhelm Stuckart: Nazi politician and jurist responsible for the drafting of the Nuremberg Race Laws (1935) and their subsequent implementation. He was a right-wing extremist when he joined the Nazi party in 1922, and in 1926 he became its legal adviser. Stuckart headed the department for constitutional and legislative matters in the Ministry of the Interior.

People's Court (Volksgericht): Nazi court with jurisdiction over treason and other politically motivated crimes. It dealt summary justice without right of appeal to all those accused of crimes against the Führer, Adolf Hitler, and against the government of the Third Reich.

Reich Law Gazette (Reichsgesetzblatt): Legal register for the Reich since 1871. Since 1922 the *Gazette* had two parts: Part I contained laws, decrees, and rulings having the force of law, and Part II contained international treaties and agreements between the German Reich and other states.

Special Court (Sondergericht): Special court or tribunal for minor political crimes established in each Superior Court district by federal law on March 21, 1933. Defendants convicted for offenses before the Special Courts had no right of appeal.

Supreme Court (Reichsgericht): National Supreme Court of Justice (the highest tribunal in Germany), established in Leipzig, Germany, by the Court Organization Act of 1877.