

The Volksgerichtshof: 1934–45

William Sweet

Woodrow Wilson School, Princeton University

The Volksgerichtshof, supreme court for treason offenses under the Nazis, was Hitler's key institutional innovation in the field of criminal justice. Yet there has been no survey of its history.¹ I shall attempt here to indicate the general features of its development and, in particular, to suggest how its judges were persuaded to do Hitler's work. My conclusions are based partly on references to the Volksgericht in the Nazi legal journals, partly on the materials collected for the Nuremberg trials. I have not made use of the Volksgericht records at the Berlin Document Center.

I

The new treason law of April 24, 1934 created the Volksgericht and gave it jurisdiction over all crimes of treason. The Volksgericht was to have three chambers, two for the prosecution of high treason (Hochverrat), one for the prosecution of treason (Landesverrat). Two members of each chamber were to be professional jurists, and three members were to be "lay judges," selected from party and military organizations. All judges would be appointed for tenures of five years. Defense attorneys would have to get special permission to appear before the court, and they would be subject to disqualification even after the beginning of a trial. The legal definition of treason remained unchanged: high treason referred to crimes directed against the "internal order of the state, the constitution, or the state's territorial integrity," whereas treason covered crimes against "the external security of the state, its power position in relation to other states."² Penalties, however, were made substantially more severe.

¹ Helmut Heiber's articles deal only with two noteworthy cases: "Der Fall Grünspan," *Vierteljahreshefte für Zeitgeschichte* 5 (1957): 134–72; "Zur Justiz im dritten Reich: Der Fall Elias," *Vierteljahreshefte für Zeitgeschichte* 3 (1955): 275–96. Gert Buchheit's book deals only with the court's last years: *Richter in roter Robe: Freisler, Präsident des Volksgerichts* (München, 1968). Walter Wagner's prospective study of the *Volksgericht*, to be published in the Institut für Zeitgeschichte's series on Nazi law, has not yet appeared. The first volume of that series gives the court scant treatment in deference to Wagner (Hermann Weinkauff and Albrecht Wagner, "Die deutsche Justiz und der Nationalsozialismus," *Quellen und Darstellungen zur Zeitgeschichte*, no. 16/1 [Stuttgart, 1968]).

² Heinz Fastrich, *Die Erweiterung des Landesverrats* (Tageblatt, Haus Coburg, 1934), p. 1.

The Volksgericht was created as a direct result of Hitler's dissatisfaction with the Reichstag fire trial, in which he had hoped to prove the existence of a Communist conspiracy. Although the Nazis intended to make the Volksgericht a reliable instrument for such propaganda trials, their use of professional jurists on the court indicated either that they were hesitant to violate the tradition of an independent judiciary or that they simply saw no need to violate this tradition.

It is hard to see why the Nazis, in 1934, should have anticipated serious problems with the legal profession. They had found valuable allies in the court system throughout the Weimar period, and they were able to draw on these allies in making their initial appointments to the court. One appointee, Dr. Jorns, had played a notorious role in the trial of Rosa Luxemburg's and Karl Liebknecht's murderers: as a member of the prosecution staff, Jorns had given aid surreptitiously to the defendants. Another, Dr. Crohne, had achieved a reputation for ruthlessness in the 1929 trial of the pacifist Ossietzky.³

The degree to which the law of April 24, 1934 conformed to precedents suggests, however, that the Nazis were reluctant to violate the feelings of conservative jurists. Although designated a "special court," the Volksgericht was an entirely constitutional creation. Article 105 of the Weimar constitution forbade the creation of courts for the trial of individually determined cases, but not special courts for trial of general categories of cases.⁴ The Reichstag had already set up such a court in 1922, when—in response to the Rathenau murder—it established the Staatsgerichtshof with jurisdiction over political assassinations. Six lay judges had sat on the nine-member Staatsgericht. As for the Volksgericht's right to disqualify defense attorneys, lawyers representing members of the Communist party had to seek special approval to appear before the Reichsgericht during the Weimar period, and this practice was continued in the Federal Republic.⁵

Only the practice of selecting lay judges from specific political organizations was unprecedented. Yet even here the Nazis took pains to forestall adverse criticism by encouraging the belief that the

³ Otto Kirchheimer, *Political Justice* (Princeton, N.J., 1961), p. 214; Heinrich Hannover and Elizabeth Hannover-Drück, *Politische Justiz: 1918-1933* (Frankfurt, 1966), pp. 170-71.

⁴ As the Lautz defense demonstrated convincingly at Nuremberg (*International Military Tribunal*, Case III, Lautz, docs. 16, 284, 285, 40, 276, and 29).

⁵ Gerhard Kramer, "The Influence of National Socialism on the Courts of Justice and the Police," in J. Fried, M. Baumont, and E. Vermeil, *The Third Reich* (New York, 1959), p. 607; Kirchheimer, p. 255 n.

Volksgesicht was only a "temporary expedient."⁶ They pointed out that the Volksgesicht borrowed its prosecution staff from the Reichsgesicht and that its judges retained positions on other courts. Since a general reform of the legal system was under discussion at this time, it was widely anticipated that such a reform would either replace the Volksgesicht with something more permanent or transform it into a different kind of institution.

Eager young Nazis like Roland Freisler, to be sure, were soon to publicize ambitious plans for the court. As the new *Staatssekretär* for criminal law in the Ministry of Justice, Freisler proposed making the Volksgesicht supreme court for all penal law, reducing the Reichsgesicht to supreme civil court. He suggested that every crime should be considered a gradation of "Volksverrat" (treason against the people), and he argued, in accordance with the new "Willensstrafrecht" theory, that treason against the people required prosecution of the criminal "will" rather than prosecution of specific actions.⁷

The Ministry of Justice in 1934, however, was controlled not by men like Freisler but by older and more conservative jurists. The official commentary on the law of April 24, 1934 saw the Volksgesicht in very restricted terms, as a means of making law enforcement more efficient.⁸ Commentaries tended more often to compare the court with the army, the favored institution of conservatives, than to link it with the Nazi movement: the court would fight internal enemies just as the army fought external ones. It was suggested that the supreme military court might eventually assume jurisdiction over treason law.⁹ Franz Gürtner, the new minister of justice, thought that the Volksgesicht's basic mission was to restore unqualified respect to the law, which he felt had died with the 1918 revolution, "the great high treason."¹⁰ Although Gürtner had played a key role as Bavarian minister of justice in protecting Hitler after the 1922 putsch, he saw nazism as a means of legal restoration, not revolution.

Evidently his views were shared by some of the Volksgesicht's members. The court's first published decisions were so cautious that they came under attack from official quarters. In one case, the

⁶ Hans Richter, "Das Gesetz zur Änderung von Vorschriften des Strafrechts . . . vom 24. 4. 34," *Deutsche Justiz* 96 (1934): 604.

⁷ Roland Freisler, "Der Volksverrat," *Deutsche juristen Zeitung* 40 (1935): 905-13.

⁸ Commentary on the law of April 24, 1934: *Deutsche Justiz* 96 (1934): 597-98.

⁹ Buchheit, p. 30.

¹⁰ Franz Gürtner, "Einführung der Mitglieder des Volksgesichtshofes," *Deutsche Justiz* 98 (1936): 907.

Volksgesicht was criticized for allowing the defendants to retain their "honorary civil rights," a practice which had been traditionally used to distinguish political defendants from common criminals. The commentators took issue with the notion that a traitor could have honorable reasons for his conduct.¹¹ In another decision, the court interpreted an offense strictly in terms of its classification in the penal code. Again the commentary disapproved, this time on the ground that the decision was based only on "formal principles of interpretation."¹²

Our evidence does not suffice to explain what bearing these cases had on the decision in April 1936 to make the Volksgesicht a permanent "ordentliches Gericht." Freisler wrote that the law of April 18, 1936 aimed to make the Volksgesicht's principles the "permanent possession of German penal law," but he did not specify what principles he had in mind.¹³ Perhaps the decision to give the court's judges life appointments was a concession to traditional procedure. Perhaps, on the other hand, the Nazis thought that the court had won a respectable image and might now be put to more radical uses. The official register of all crimes was transferred to the Volksgesicht; the court received an independent prosecution staff and an independent press agency; the ambitious Georg Thierack was appointed president of the court. These measures might be seen as preparations for implementation of something like Freisler's plan, and three late 1936 decisions did, in fact, show a marked emphasis on the "criminal will." In October, for example, a man was found accountable for statements that he had made under the influence of alcohol. The fact that he had just been released from jail for making similar statements proved to the court's satisfaction his "persevering subversive sentiment."¹⁴

Two considerations suggest that this decision was a step in the direction of "Willensstrafrecht." In the first place, the defendant did not commit the crime in a responsible state of mind and was therefore apparently being punished for having a "will" of a certain disposition rather than for having deliberately chosen to commit a certain act. In the second place, the decision tended to violate "no double jeopardy" in that it seemed to punish the man twice for his

¹¹ Decisions of November 16, 15, and 8, 1934: *Deutsche Justiz* 97 (1935): 909. Commentary by O. St. A. Krug.

¹² Decision of December 7, 1935: *Deutsche Justiz* 98 (1936): 1438-39. Commentary by Ob.Reg.Rat Dr. Schmidt.

¹³ "Gesetz über den Volksgesichtshof," *Deutsche Justiz* 98 (1936): 656.

¹⁴ Decisions of November 19 and 27, 1936 and October 27, 1939: *Deutsche Justiz* 99 (1937): 114; 100 (1938): 114; and 99 (1937): 198, respectively.

initial offense. From this point of view, the decision anticipated a time when the traditional notion of criminal responsibility would be abolished, when Jews would be found guilty of being Jews, and when traditional legal procedures would be rendered obsolete.

From another point of view, however, the decision could be seen as nothing more than a slight extension of the traditional definition of intentionality. The defendant's initial offense could be viewed as evidence of his intention in the second offense, and it might be noted that defendants are commonly held responsible for acts committed under the influence of alcohol. (If a person has subversive sentiments, he should be all the more careful not to voice them publicly.) Moreover, an experienced jurist might justify this view of intentionality in terms of honorable German intellectual traditions, which had always assigned responsibility more to inner character than to "accidental" external actions. (If a person has subversive sentiments, he should change his character.) The fact is that this decision, like the law of April 18, 1936, can be given no definite political interpretation without further evidence.

What is clear is that a variety of legal arguments, probably based on widely divergent political aims (not merely on a doctrinaire application of Nazi "Willensstrafrecht"), converged in the late thirties to make the criminal will the focus of the Volksgesicht's jurisprudence. It was paragraph 83, "preparation for high treason," that lent itself best to this widening interpretation of intentionality, for paragraph 83 defined the criminal undertaking with exceptional vagueness. The Volksgesicht took three important steps in extending the range of paragraph 83. First, it applied paragraph 83 to other crimes, so that such crimes could be punished with the death penalty (and possibly so that less stringent rules of evidence could be used in court). Second, it argued that any crime whatsoever committed by a Communist could fall under paragraph 83 in view of the party's revolutionary aims. Third and most importantly, it extended paragraph 83 to acts so trivial as not to be covered by any statute at all. Thus the decision of May 26, 1937 argued that any steps

undertaken by the Communist party to hinder measures of the police serve at the same time the preparation of the forceful revolution. . . . All corresponding efforts fall therefore under the legal definition of preparation for high treason, which makes without differentiation every—even the most remote—preparation punishable, completely independent of whether it reaches a certain conclusion and the desired success.¹⁵

¹⁵ January 3, 1936: *Deutsche Justiz* 100 (1938): 113; September 11, 1936, December

The importance to the Volksgericht of being able to punish "even the most remote preparation" was fully revealed in a set of decisions that concerned the relationship of paragraph 83 to paragraph 139. According to paragraph 139, "whoever acquires knowledge of an intention to commit high treason or treason . . . and fails to give notice to administrative authorities or to the threatened party, is to be punished with imprisonment. If the act is not committed, punishment need not be administered." The inclusion of paragraph 83 under the heading "high treason" seemed to indicate that failure to report a preparation should be punished. If, for example, one knew that a man planned to distribute subversive newspapers, one would be obliged to turn him in. Crime prevention and "Willensstrafrecht" seemed to support this interpretation. Those against this interpretation pointed out, however, that any case falling under paragraph 83, no matter how trivial, would have to be punished, because there is no such thing as an "uncommitted preparation." A plan to deliver newspapers would be, in itself, a preparation. Those in favor of applying paragraph 139 to paragraph 83 countered that the judge could still retain the option of not administering punishment simply by regarding certain primitive stages of "preparation" as "attempted preparation."¹⁶

The issue was debated furiously in the court system (and had been since 1855), and the curious thing was that the Volksgericht took what initially seemed to be the conservative position, against application of paragraph 139 to paragraph 83. It took this position, moreover, on the seemingly humanitarian ground that the judge should be able to set the defendant free in insignificant cases.¹⁷

But in 1942 two lower court decisions were published that explicitly opposed the Volksgericht's point of view,¹⁸ and it was only then that the Volksgericht stated the main reason for its position. The essential point, according to the court, was that those in favor of applying paragraph 139 to paragraph 83 had based their

2, 1936, and February 1, 1937: *Deutsche Justiz* 100 (1938): 114; and May 26, 1937: *Deutsche Justiz* 100 (1938): 113-14.

¹⁶ Schmidt-Leichner, "Anzeigepflicht (139) auch bei Vorbereitung zum Hochverrat (83)?" *Deutsche Justiz* 103 (1941): 866-70; Huppmann, "Zur Strafbarkeit eines hochverräterischen Vorhabens," *Deutsche Justiz* 104 (1942): 178; E. Dreher, "Ist der Empfänger hochverräterischen Druckschriften nach Par. 139 zur Ablieferung verpflichtet?" *Juristische Wochenschrift* 65 (1936): 84-85.

¹⁷ August 23, 1938: *Juristische Wochenschrift* 68 (1939): 537. Commentary by V.G.Rat Lämmle.

¹⁸ *Strafsenat*—Posen, July 10, 1941: *Deutsche Justiz* 104 (1942): 37; *Oberlandesgericht*—Danzig, September 10, 1941: *Deutsche Justiz* 104 (1942): 1077.

position in part on the notion of an "attempted preparation." The Volksgericht, however, "has . . . in a constant position from which no exception has ever been made, represented the viewpoint that every, even the most remote, preparation—even a preparation for a preparation—is punishable." Or, as the commentator put it: "If the Volksgericht is again taking a position in this controversial question, it is particularly so as not to leave the . . . idea unattacked that there can be unpunished preparations for high treason."¹⁹

To insist on punishing an act as trivial as a vague plan to deliver a newspaper would require, in the long run, a society of informers and a police system based on torture. Yet the Volksgericht's interpretation of paragraph 83 was supported by long-range German and international trends. During the nineteenth century, liberalism had tended to abolish the state-of-mind legislation of the *ancien régime*s. But as international tensions mounted in the twentieth century and as the liberal state came to be threatened from both left and right, sentiment spread that internal and external security alike demanded prosecution of potential subversives even before they committed specific crimes. Weimar courts had ruled, for example, that Communist undertakings were punishable even if a "specific insurrectionist purpose had not been established and chances of success were remote."²⁰ Even in the United States, which has been relatively free of state-of-mind law, preparation for high treason has a close analogy in the conspiracy charge. Conspiracy "comes closest to making a state of mind the occasion for preventive action against those who threaten society but who have come nowhere near to carrying out their threat. No effort is made to find the point at which criminal intent is transformed into the beginnings of action dangerous to the community."²¹ Lest the Volksgericht's insistence on its duty to punish even a "preparation for a preparation" seem only an example of Nazi ruthlessness, it is worth considering Oliver Wendell Holmes's description of conspiracy. Just as the Volksgericht found a preparation punishable, no matter how remote it might be from accomplishing its purpose, Holmes found that although conspiracy requires an "overt act," "it does not matter how remote the act may be from accomplishing the purpose, if done to effect it . . . in any degree."²²

¹⁹ February 10, 1942: *Deutsches Recht* 12 (1942): 722–23. Commentary by Lämmle.

²⁰ Kirchheimer, p. 40; cf. Hannover and Hannover-Drück, pp. 228, 244.

²¹ A. S. Goldstein, "Conspiracy to Defraud the United States," *Yale Law Review* 68 (January 1959): 406.

²² *Hyde vs. U.S.*, 225 US 347, 387–88 (1912); quoted in H. Packer, "The Conspiracy Weapon," *New York Review*, November 6, 1969, p. 25.

There is no need to assume that the Volksgericht's members were radical Nazis deliberately undermining traditional law. They were probably fairly conventional jurists following general trends. Had the war not broken out in 1939, the court's interpretation of paragraph 83 might have been applied to an insignificant number of cases. As it happened, the war brought a variety of pressures to bear on the court, and the jurisprudence of the thirties added greatly to the temptation to grope for novel procedures. If states of mind rather than criminal acts were to be the focus of criminal law, it followed that new procedures designed to isolate intentions rather than actions would have to be devised. From this point of view, there is a direct connection between the Volksgericht's interpretation of paragraph 83 and the prejudicial, inquisitorial legal procedures of the forties.

II

The law of February 21, 1940 extended the Volksgericht's jurisdiction to cover the crime of listening to foreign broadcasts and to the crime of sabotage. During this same period, cases relating to the trial of foreigners began to fall under the court's jurisdiction. The court might have avoided the danger of a case overload by giving the law strict construction. Instead, it gave the radio and sabotage laws, both punishable with death, the widest possible construction²³ and, concurrently, stretched the laws relating to foreigners to meet the needs of the expanding Reich. When the Polish courts set up by German occupation authorities were found to be unreliable, Poles suspected of terrorism were brought before the Volksgericht with the bare justification that the "state feels threatened in its power position." Crimes committed by citizens of Lorraine and of Austria before German occupation of these regions were prosecuted; the Volksgericht argued that the defendants, as racial Germans, had always been subject to German law. A Czech defendant was found guilty of advising his nephew to join the Czech Legion, even though his nephew never had any such intention. "The court breaks consciously with the doctrine of the so-called accessory nature of criminal assistance."²⁴

²³ July 15, 1940: *Deutsche Justiz* 102 (1940): 115-16; July 8, 1940: *Deutsches Recht* 10 (1940): 1769; May 27, 1941: *Deutsche Justiz* 104 (1942): 105.

²⁴ November 22, 1938: *Deutsche Justiz* 100 (1938): 2038; October 28, 1940: *Deutsches Recht* 10 (1940): 2233; August 12, 1940: *Deutsches Recht* 10 (1940): 1769; April 8, 1940: *Deutsche Justiz* 102 (1940): 775. On the question of the Polish terrorists, see the Lautz memo of March 1942, *International Military Tribunal*, III, NG-548.

The trials of Poles and Czechs accused of trying to join foreign legions revealed the extent to which the court was now willing to rely on a priori assumptions about a defendant's character and motivation. Ernst Lutz, head prosecutor of the Volksgericht, was not exaggerating when he testified at Nuremberg that a Pole's intention to join a legion could be deduced from the "facts that the man was a Pole, that the existence of the legion was widely known, and that the man was lazy." In one case, the court dismissed the argument that armed resistance would have been futile with the remark that Poles had always shown a "remarkable lack of realism."²⁵

The decision of March 24, 1942 revealed a pattern especially common in these cases. The defendant, while in police custody, confessed to having tried to join a legion. During his trial he renounced his confession. The court concluded from his inconsistency that he could not be trusted and invoked its own a priori knowledge: "It is known to the court that entry into the Czech Legion is often disguised among participating Czechs as a harmless 'crossing the border' or with search for work in a country neighboring Germany." Since the defendant had claimed to be only crossing the border and since he was known to lie, he was guilty of having tried to join the legion!²⁶

Resort to arguments of this kind presupposed a well-tamed defense. The various ways in which the defense attorneys were crippled—economic dependence on the court, threat of arrest or of disciplinary action by party organs, insufficient time, inadequate contact with the defendant—are well-known and require no special elaboration here. A number of procedural innovations do, however, merit added attention.

Although the court had claimed the right to ignore the rule *ne bis in idem* as early as 1938,²⁷ "no double jeopardy" was fully abolished only after the outbreak of the war with the initiation of two new procedures, the "Nichtigkeitsbeschwerde" and "ausserordentlicher Einspruch." The "Nichtigkeitbeschwerde" made it possible for the Volksgericht and Reichsgericht prosecution staffs to appeal District and Special Court decisions in cases of judicial error.²⁸ No condi-

²⁵ Lutz affidavit, *International Military Tribunal*, III, NG-659; decision of December 17/18, 1941, *International Military Tribunal*, III, NG-595.

²⁶ *International Military Tribunal*, III, NG-1473.

²⁷ May 6, 1938: *Deutsche Justiz* 100 (1938): 1193.

²⁸ Weinkauff and Wagner, p. 137.

tions whatsoever attached to the still more sweeping "ausserordentlicher Einspruch": all decisions, including those of the Volksgericht, could be appealed within a year on grounds of either judicial or evidentiary error.²⁹ According to a Volksgericht judge, "ausserordentlicher Einspruch" was almost always used to make a penalty more severe, and seven out of ten retrials resulted in death penalties.³⁰ The trials were usually "very short,"³¹ and there is every indication that the threat of "ausserordentlicher Einspruch" was as demoralizing to the defense as its actual use.³² Moreover, defense attorneys, now restricted to requesting retrials only when new evidence had come to light, were strongly discouraged from making pardon appeals: they were to keep in mind that they were "dealing with enemies of the people."³³

Self-conscious "enemies of the people," such as members of the resistance, knew, to be sure, that it "would be a matter of life or death" in the event of arrest.³⁴ Even Nazi law approached the ideal of predictability for such individuals. But one did not have to be a member of the resistance to be brought before the Volksgericht. An Austrian radio technician was condemned to death because he had criticized a woman for contributing to the war effort by going to work. Lautz, thinking of unpunished "treasonable" utterances made during the First World War, referred to this case as "certainly no minor matter," but it probably was not so obvious to the technician that he had committed a serious offense.³⁵

Even those guilty of nothing at all were not safe from the court. As an example of what could happen by late 1944, the case of Leopold Felsen is worth considering. Felsen was accused by his wife of listening to foreign broadcasts. It was brought to the attention of the court that she had been trying to get rid of him since 1939; Felsen's daughter, after testifying against him, admitted in

²⁹ Ibid., p. 269.

³⁰ I.e., in the year 1944, according to the affidavit of G. Nebelung, *International Military Tribunal*, III, NG-384.

³¹ Affidavit of H. Petersen, *International Military Tribunal*, III, NG-396.

³² See the interesting case described by R. Dix, *International Military Tribunal*, III, NG-695.

³³ In Georg Thierack's "Anwaltsbriefe," according to B. Gruenewald, *International Military Tribunal*, III, NG-535.

³⁴ As the leader of one resistance cell testified at Nürnberg: R. Havemann, *International Military Tribunal*, III, NG-399.

³⁵ Decision of September 20, 1943: *International Military Tribunal*, III, NG-381; affidavit of E. Lautz, NG-659; Rothaug, NG-533, expressed the same opinion of the case.

court that she had committed perjury because her mother had threatened to kick her out of the house. The Volksgesicht nevertheless condemned Felsen to death, and he was left to complain in his last letter to his attorney: "An meiner Verteidigung war ich voll und ganz gehindert."³⁶

It comes as no surprise that the Volksgesicht, in rejecting Felsen's appeal, warned his lawyer to keep the whole business secret. The court had, in fact, published no decisions since 1942, and its last published decision leaves little room for doubt as to why it was no longer willing to subject itself to public scrutiny. The question before the court in March 1942 was whether Jews convicted of treason were to be deprived of their honorary civil rights. The Volksgesicht decided that they should not be deprived of these rights and, with exquisite pedantry, explained why: (1) Jews do not have any civil rights to be taken away; (2) Jews do not have any honor.³⁷

III

The Nazi regime evidently was taking increasing interest in the Volksgesicht in mid-1942. Freisler was appointed president of the court, Thierack was promoted to minister of justice, and Goebbels gave a private speech to the court.³⁸ But more importantly, following the Stalingrad reversal in early 1943, the Volksgesicht began to prosecute cases of defeatism in increasing numbers. The immediate result was a further degeneration of procedure; the long-term result was that Volksgesicht judges, for the first time, found themselves prosecuting their neighbors.

Oswald Rothaug, who as president of a Nuremberg Special Court had been known as the "Blutrichter von Nürnberg," was made head of the new branch of the prosecution staff responsible for defeatism cases. These cases tended to be pretty much alike. Usually some ordinary person was brought before the court for making some trivial remark such as "Das kann ja auch nur im dritten Reich passieren," and was promptly condemned to death.³⁹ As Rothaug

³⁶ *International Military Tribunal*, III, NG-336.

³⁷ March 18, 1942: *Deutsches Recht* 12 (1942): 721.

³⁸ Goebbels remarked that it "is not to be started from the law but from the decision that the man must be gotten rid of" (*International Military Tribunal*, III, NG-752). For the background of the Freisler-Thierack appointments, see Heiber's article on the Elias case.

³⁹ Decision of November 6, 1943: *International Military Tribunal*, III, NG-377. Geoffrey Barraclough has suggested that "sporadic resistance" deserves more study as a "corrective to the facile view that the only opposition to Hitler came from a

said, "The division for defeatism was known as the bone mill because one was ground down, day by day, by the monotony of the job. It was always the same kind of crime and the same kind of defendant."⁴⁰ Rothaug was not the only person ground down. In 1943, according to one report, the Volksgericht handled about 2,500 such cases, and "ausserordentliche Einsprüche" were common because "this was the area that increasingly attracted the interest of the Ministry of Justice."⁴¹

The war's key effect on the Volksgericht was, indeed, simply that the number of cases of every kind increased enormously. A secret memorandum reported only ninety-nine death penalties for the legal system as a whole in 1939. Between 1939 and 1940, however, death penalties increased tenfold, from ninety-nine to 929, and about a fourth of these were probably decided on by the Volksgericht.⁴² The increase in 1940 was rather insignificant, but between 1941 and 1943 death penalties increased more than fourfold, from 1,292 to 5,336.

These figures are indicative not only of increased activity on the part of the Volksgericht, but also on the part of the Special Courts. There had been much discussion during the 1930s of the idea that the Volksgericht should become the supreme court for a completely reformed penal system, and the rapid expansion of the Special Courts during the war years seemed to indicate that this plan was being put into effect. While there was no formal link between the Volksgericht and the Special Courts, Werner Johe has argued that the Special Courts looked increasingly to the Volksgericht for guidance. The evidence supporting this assertion is ambiguous,⁴³ but it does seem clear that the Nazi leaders thought of the Volksgericht and the Special Courts in the same terms. The law of February 2, 1940 had dealt only with the Volksgericht and the Special Courts,

handful of highly placed plotters" (*New York Review*, March 27, 1969, p. 35). There is much in the Volksgericht records to support this view; for an especially striking case see Lautz's memo of February 19, 1944, *International Military Tribunal*, III, NG-671.

⁴⁰ *International Military Tribunal*, III, NG-533.

⁴¹ Affidavit of P. Barnickel, a member of the prosecution staff, *International Military Tribunal*, III, NG-312.

⁴² Estimate based on the year 1943, in which 2,284 of the death sentences out of a total of 5,336 were for crimes related to treason (Thierack memo, "Die Strafrechtspflege im fünften Kriegsjahr," August 2, 1944: *International Military Tribunal*, III, NG-252).

⁴³ Werner Johe, *Die gleichgeschaltete Justiz* (Frankfurt, 1967), p. 115. Johe is certainly wrong in suggesting that Freisler's appointment was a promotion, not a demotion; see Kitzinger memo, August 17, 1942: *International Military Tribunal*, III, NG-1243.

though it established no link between them, and in 1943, only the Volksgericht and the Special Courts were exempted from the plan to draft 28,000 men from the legal system into the army.⁴⁴

The expansion of the Volksgericht–Special Court system led to a rather serious crisis of manpower and morale. The Nazis had increasing difficulty finding reliable judges, and resentment spread through the legal system.⁴⁵ Judging from one official report, foreign propaganda attacking the Nazi “police state” was making itself effective by late 1942.⁴⁶

As the Volksgericht’s case load became overwhelming, signs of unease spread among the court’s officials. In the year 1943 alone, the Volksgericht had condemned 1,662 (out of 3,338) to death. Only 123 defendants were found innocent.⁴⁷ In other words, each of the court’s six chambers had tried an average of 556 defendants in 1943, almost two a day. Although the court had been expanded considerably since the beginning of the war, it could not keep pace with this kind of overloading.

Court officials certainly had no objections to the frankly political purpose of the court, having systematically prosecuted dissenters of every kind from the very beginning. Members of the court showed few signs of guilt at Nuremberg about the court’s general activity, and one member stated quite unabashedly that its purpose had been the “suppression of opposition.”⁴⁸

But when overloading began to lead to the conviction of people innocent even in the Volksgericht’s understanding of the law, resistance made itself manifest. Thus a Volksgericht member complained in June 1943 both about inadequate suppression of opposition and about the persecution of the innocent. He was concerned, on the one hand, because certain *Oberlandesgerichte* were refusing to follow the Volksgericht’s policy of using death penalties in all cases involving Communists; because certain Austrian *Gauleiter* were clogging up the works with pardon appeals; and because the

⁴⁴ “Besprechungspunkte für die Cheftagung am 23/24.8.44,” April 18, 1944, *International Military Tribunal*, III, NG-636.

⁴⁵ G. Thierack’s memo of July 5, 1943, “Entlastung der Sondergerichte,” addresses itself to the crisis of legal authority and to the problem of finding reliable judges (*International Military Tribunal*, III, NG-478).

⁴⁶ Otto Ohlendorf, memo of October 11, 1942, in “Rechtssicherheit und richterliche Unabhängigkeit aus der Sicht der SD,” ed. Peter Schneider, *Vierteljahreshefte für Zeitgeschichte* 4 (1956): 399–422.

⁴⁷ G. Thierack’s memo of August 2, 1944 provides a detailed breakdown of cases for the years 1942 and 1943 (*International Military Tribunal*, III, NG-252).

⁴⁸ Affidavit of H. Petersen, *International Military Tribunal*, III, NG-396.

Volksgericht's own sixth chamber was refusing to follow the hard line. On the other hand, he complained that the

death sentences of the Volksgericht were much too rushed. Often nothing is said about the personal relationships of the defendant; . . . more seriously, the consideration of evidence—especially with respect to the nature of the act, even when disputed by the defendant—is often exhausted in short statements made before the investigator or police, or even in the mere opinions and prejudices of the court. A critical appraisal of such decisions is hardly possible. A recommendation of execution presupposes complete confidence in the court. But such confidence is shattered when . . . facts later become known that the defendant's statements—only recently declared false—appear very probable.⁴⁹

As judges increasingly found themselves condemning upper-class gentlemen to death for making defeatist statements that they might have made themselves, concern about degeneration of procedure became still more severe. Appeals began to pour in from prominent people, often from personal friends of court members, and court officials started to aid defendants surreptitiously. Lay judges, unable to influence their professional colleagues, began to avoid attending hearings. It is said that prosecutors and judges alike resisted Freisler's efforts to influence the court through special letters to its members.⁵⁰

Interestingly, these "jurists of the old school" (as Freisler called them) found some support from the Nazi leadership. Whereas Thierack, according to one attorney, had "respected external forms," Freisler lost all perspective and made the development of the court "cruder." Goebbels complained that Freisler had "made a powerful change of character. . . . That which he did too little as a *Staatssekretär* in the Ministry of Justice, he now does too much as president of the Volksgericht." Even Kaltenbrunner, head of the Sicherheitsdienst, complained in a memorandum that Freisler's "cheap manner" did not "correspond entirely to the dignity of the highest German court of justice."⁵¹

⁴⁹ Unsigned memo addressed to Rothenberger of June 4, 1943: *International Military Tribunal*, III, NG-594.

⁵⁰ According to B. Gruenewald, Springman and Koehler of the third and fourth chambers resigned toward the end of the war in opposition to Freisler (*International Military Tribunal*, III, NG-535); see also the affidavit of A. Weimann, NG-555. For the difficulties in getting lay judges to perform their duties, see Thierack's letter to Freisler, October 28, 1944, NG-148. For a case of SS intervention, see NG-274.

⁵¹ Kaltenbrunner memo 57536/44, quoted in Buchheit, pp. 271-72; *Goebbels Diaries*, September 23, 1943, quoted in Heiber, "Zur Justiz im dritten Reich," p. 277 n.

These men had, of course, no more respect for legal forms than Freisler did, but there was scarcely any reason to have a *Volksgericht* unless forms were preserved. The Nazis could dispose of political opponents quite easily by taking them into protective custody. The point of the *Volksgericht* must have been to provide a way of getting rid of people “legally” who, for one reason or another, could not be disposed of “illegally.” (In the case of the Czech defendants, for example, it was suggested that they simply be taken into protective custody, but Keitel insisted on trials.)⁵² The rub was that radical Nazis wanted the forms to be nothing but forms, whereas *Volksgericht* conservatives wanted them to be genuine safeguards. But as long as the Nazis depended on trained jurists to run their legal system, there was little chance of escaping this dilemma. As Goebbels put it, “Jurists will always be jurists.”

Although the *Volksgericht* was in a rather precarious state at the end of the war, it is possible that the Nazis—given more time—might have salvaged their political alliance with the court’s conservatives. For men like Chief Prosecutor Ernst Lautz, who was never a member of the Nazi party, showed little understanding at Nuremberg of how their own actions had undermined the rule of law. Their adoption of state-of-mind jurisprudence during the 1930s had undermined the traditional conception of legal responsibility, and with it the rationale for traditional procedure. Their desertion of “no double jeopardy” and of the statute of limitations, as well as their tolerance of the Gestapo inquisition, must be seen as logically connected with the prewar legal developments, and not only as a response to the war emergency. Similarly, the case overload resulted not only from the 1943 reversal, but also from broad construction of the law and from the prosecution of state-of-mind offenses such as defeatism. Men like Lautz blamed Freisler for the *Volksgericht*’s last years only because they failed to realize that the court was well on its way to becoming a legal farce long before Freisler played the buffoon.

It makes no sense to explain the *Volksgericht*’s development with the argument that lawyers are necessarily inhuman because they are trained to think only of “clauses, decrees, and directives,” as Freisler’s biographer asserts.⁵³ The problem was precisely that the *Volksgericht*’s members deserted the written law in preference for

⁵² *International Military Tribunal*, III, NG-419.

⁵³ Buchheit, pp. 123–24.

all-too-human stereotypes: lazy and impractical Poles, subversive Communists. If these men are to be understood, it is in terms of their having been merely the most extreme victims of a temptation that has afflicted all Western nations in the twentieth century: the temptation, under pressure of revolution or war, to prevent the suspected traitor's anticipated act by prosecuting his state of mind.