The Justice Case in Nuremberg: How the Prosecution and the Defendants Conceive the Involvement of the German Legal Profession in the Nazi Regime

Jean-Louis Halpérin

ABSTRACT

Der Band aus der „Grünen Reihe" der Dokumentenbände, der den Nürnberger Prozessen gewidmet ist, kann als ein Stück Rechtsgeschichte gelesen werden, welches die rechtliche Argumentation aufzeigt, die von den Staatsanwälten und von der Verteidigung angewendet wurde. Solch eine Untersuchung kann erklären, warum die amerikanische Staatsanwaltschaft nicht alle Konsequenzen der tiefen Verstrickung des Juristenstands in das NS-Regime aufgezeigt hat und wie die Verteidigung verschiedene Argumente nutzen konnte, um die Angeklagten zu entlasten und ihre Verantwortung abzuschwächen. Ohne dass es zu einer Solidarisierung zwischen den amerikanischen und deutschen Juristen gekommen wäre, vertiefte der Prozess gegen die Juristen den falschen Eindruck, dass Juristen eher Opfer als Mittäter des Naziterrors gewesen sind.

Among the twelve war crimes trials that the American authorities held in Nuremberg according to the Allied Control Council Law N° 10 (18th of October 1946), the third trial was called the "Justice Case", though its official designation was " United States of America *vs.* Josef Altstoetter et al.". Lasting eleven months, from February to December 1947, this trial involved fourteen defendants[1] who were charged with "participation in a conspiracy to commit war crimes and crimes against humanity", "commission of war

1 Sixteen men were indicted, but one of them (the ministerial counsellor Westphal) committed suicide and another (the chief of the Penal Division Engert) was too weak physically to participate in the process.

Comparativ | Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung 26 (2016) Heft 4, S. 74–87.

crimes against civilians of territories occupied by Germany and against members of the armed forces of nations at war with Germany" and "crime against humanity, including offences against both German civilians and the nationals of occupied territories". All the defendants were high officials in the *Reichsjustizministerium* or judges in the special courts devoted to the political repression. Because of the death of the two Hitler's Justice ministers – Franz Gürtner who died in 1941[2], and Otto Georg Thierack who committed suicide in November 1946[3] – a list of the seven higher officials of the Reich Ministry of Justice was established: Schlegelberger (State Secretary until August 1942), Rothenberg (State Secretary from August 1942 to December 1944), Klemm (State Secretary from January 1944 to May 1945), Altstötter (Chief of the Civil Law and procedure Division), Ammon (ministerial counsellor), Mettgenberg (Representative of the Chief of the Criminal Division) and Joel (Legal adviser concerning criminal prosecutions, then Chief Prosecutor in Hamm). The seven other defendants were judges or prosecutors before the special courts: Nebelung (a professional judge) and Peterson (a lay judge) were judges at the People's Court (*Volksgerichtshof*[4]), Barnickel and Lautz were prosecutors before the same Court, Cuhorst, Oeschey and Rothaug were judges or prosecutor (Rothaug) before the special courts (*Sondergerichte*) of Stuttgart and Nuremberg[5].

Among the fourteen accused persons, four were acquitted (Barnickel, Curhorst, Nebelung and Peterson, all four were accused as judges) and ten convicted: Rothaug, Oeschey, Klemm and Schlegenberger (two judges and two high officials) were condemned to life imprisonment, the other six (Alstötter, Ammon, Joel, Lautz, Mettgenberg and Rothenberger) to some years (from five to ten) of imprisonment. All the condemned were released after some years in jail during the years 1950s. The outcomes of this "Justice case" appeared to be deceptive, in respect of the process of denazification of the German Justice. Among the defendants, there was no ordinary judge, no advocate, no academic lawyer[6]. Roland Freiseler, the President of the Court's People from August 1942, well known by the trial of the accused of the 1944 attack on Hitler was dead in February

2 L. Gruchmann, Justiz im Dritten Reich 1933–1940, München 2001.

3 S. Schädler, "Justizkrise" und "Justizreform" im Nationalsozialismus. Das Reichsjustizministerium unter Reichsjustizminister Thierack (1942–1945), Tübingen 2009.

4 Founded in April 1934, the Volksgerichtshof had to judge the treason crimes, then a large array of political crimes. It was presided successively by Rehn (1934), Bruner (1934–1936), Thierack (1936–1942), Freisler (1942–1945), Crohne (who committed suicide in April 1945) and Haffner (1945, this last president was not prosecuted in 1945–1947 and denounced himself in 1953, he was never judged): D. Köpke, Der Volksgerichtshof: Im Namen des Volkes? Hamburg 2011. The Peoples' Court judged more than 15 000 persons (one half from the occupied territories) and pronounced more than 5 000 death penalties. It was finally divided in six Senates composed of five judges, two professional judges and three lay justices coming from the police, the army and the Nazi Party.

5 About Sondergerichte, C. Bozyakali, Das Sondergericht am Hanseatischen Oblerlandesgericht. Untersuchung der NS Sondergerichte unter besonderer Berücksichtigung der Anwendung der Verordnung gegen Volksschädlinge, Frankfurt am Main 2005. These special courts were first created in the 26 districts of the Oberlandesgericht. Their competence was enlarged, their number increased with 74 courts and they decided about 11 000 death penalties.

6 B. Diestelkamp, Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit, in: B. Diestelkamp and M. Stolleis (eds.), Justizalltag im Dritten Reich, Frankfurt am Main 1991, pp. 131-149. It is well known that the idea to judge Carl Schmitt was planned, then abandoned.

1945 in a American bombing. Hans Frank, the only jurist among the twenty-two defendants before the International Military Tribunal in Nuremberg, was condemned to death because of his action as General Governor of Poland and not as the head of the National Socialist Association of German Jurists (*Bund Nationalsozialistischer Deutscher Juristen*)[7]. Other jurists, although seriously compromised in Nazi crimes, were never prosecuted or questioned by judicial authorities[8]. The denazification process reached small outcomes in the German Justice: many jurists were released by the *Spruchkammer* and the Allied authorities decided to maintain many judges in their functions in order to restore quickly the German courts[9].

However, the so-called "Justice case" is a unique example of a trial especially devoted to the involvement of jurists in crimes against humanity. It is the matter of the judgment of German jurists by American judges. The Court was composed of three American civil judges: Brand, a former judge at the Oregon Supreme Court (who took the place of Marshall[10], who retired in June 1947 for health reasons)[11], Blair, a judge at the Texas Court of Appeal[12] and Harding, a judge of the Territory of Alaska[13]. The trial confronted two "legal cultures" or two groups of lawyers that share some common references from their professional education and activity in the legal field. The advocates of the defendants belonged also to the "legal profession". The English text of the proceedings uses this expression[14], which could correspond to the German notion of *Juristenstand*, a wording becoming familiar in the 19th century to designate all the lawyers with an academic education (judges, advocates and law professors)[15]. It is noteworthy that Gustav Radbruch has tried, as soon as 1946, to exonerate the *Juristenstand* of any collective responsibility in the Nazi crimes, considering that German jurists were "disarmed" by the impact of legal positivism linked with a strict obedience to statutory laws[16]. The social-democrat law

7 D. Schenk and H. Frank, Hitlers Kronjurist und Generalgouverneur, Frankfurt am Main 2006. During the 12th Nuremberg trial, the President of the Reich Military Court Rudolf Lehmann was condemned in 1948 to seven years of jail.

8 For instance, Werner Best who intervened in favour of many ex-nazis: U. Herbert, Best. Biographische Studien über Radikalismus, Weltanschauung und Vernunft (1903–1989), Bonn 1996.

9 A. Weinke, Die Verfolgung von NS-Tätern in geteilten Deutschland, Paderborn 2002.

10 Carrington T. Marshall (1869–1958) was the oldest and the most experienced of the judges (he was judge at the Supreme Court of Ohio since 1920), but he resigned in June 1947 from the Justice Trial in Nuremberg.

11 James T. Brand (1886–1964) was one of the alumni of *Harvard Law School*, judge at the Supreme Court of Oregon. He published a paper entitled 'Crimes Against Humanity and the Nürnberg Trials' in the Oregon Law Review 28 1949, pp. 93-119. This article is an ardent plea in favour of the repression of crimes against humanity by Nuremberg Courts. As Brand's conceptions were based at the same time on Kelsens's papers, on international law and on natural law convictions, it is a good testimony about the opinions of this presiding judge: according to him, the condemned of the Justice Trial were "guilty men" punished after a "fair trial".

12 Mallory B. Blair (1887–1962) was judge at the Texas Court of Appeal during 23 years. He was defeated in the judges' elections in 1947 before being chosen as judge for the Justice Case in Nuremberg. He let his notebook during the process to the University of Austin in Texas: http://www.lib.utexas.edu/taro/utlaw/00022/law-00022.html (verified on 01/10/2016).

13 Justin Woodward Harding (1888–1976) was member of the Ohio Bar, then district judge in Alaska.

14 Trials III, p. 50.

15 J.-L. Halpérin, Histoire de l'état des juristes. Allemagne, XIXe-XXe siècle, Paris 2015.

16 G. Radbruch, Rechtsphilosophie, Heidelberg 1999, p. 215.

professor, who could not be accused of any complicity with the Nazis, chose to accuse the positivist theories for the weakening of the spirit of legal resistance from the lawyers. At the end of his life, in 1949, Radbruch was member of the *Heidelberger Juristenkreis* that was in favour of granting pardon to the jurists having "followed" (as *Mitläufer*) Hitler's Regime[17].

Whereas all the most recent research works confirm that about 80 % of the judges and more than 35 % of the barristers were members of the NSDAP[18], the study of the Justice case offers the opportunity to examine the diverse perceptions of the involvement of the German jurists in the Nazi Regime, the American and the German lawyers had in 1947. By using the 1 267 pages of the printed version of the Justice case, one volume of the *Green Series*, I am trying to analyse this official record as a piece of legal history showing the legal argumentation mobilized by the prosecution and by the defendants (who were all jurists) for dealing with the implication of lawyers in the Nazi Regime. It is more difficult to use the opinions of judges about this question. The only concurrent opinion, the one of judge Blair[19], focused on two issues: the status of the Tribunal and the notion of "conspiracy". The sentences were decided unanimously and considered the cases of each of the defendants, not the collective liability of German jurists. With the analysis of the legal discourse of the prosecutors and of the defendants, I would like to consider: 1) the strong and week features of the American prosecution; 2) the arguments used by the German advocates of the defendants and by the defendants themselves. Was there a clear consciousness from the prosecution of a general involvement of German jurists, and especially judges, in the Nazis crimes or are they some clues for a relative indulgency, linked with the beginning of the Cold War, towards German high officials? On the other side of the bar, is it arguable to consider a common strategy not only to obtain that the defendants were released but also to present a coherent vision in order to exculpate the *Juristenstand*?

1. The strong and weak features of the American prosecution

The American prosecution wad led by Brigadier General Telford Taylor assisted by Charles Marion La Follette. Telford Taylor was the assistant of Robert H. Jackson and his successor for the Nuremberg trials held by American Courts. He had a key role in enlarging the scope of the Nuremberg trials in relation with the crimes against humanity[20]. La Follette, a lawyer and former republican representative of the State of Indiana,

17 N. Frei, Vergangenheitspolitik: Die Anfänge der Bundesrepublik und di NS Vergangenheit, München 1996, pp. 163-167.

18 For the judges, A. von Gruenewaldt, Die Richterschaft des Oberlandesgerichts Frankfurt am Main in der Zeit der Nationalsozialismus, Tübingen 2015 ; for the advocates, H. Rüping, Rechtsanwälte im Bezirk Celle während des Nationalsozialismus, Berlin 2010; M. Löffensender, Kölner Rechtsanwälte im Nationalsozialismus, Tübingen 2015.

19 Trials, III, p. 1178-1195: Blair concurred in the final judgment but criticized some reasons of the sentence.

20 K. C. Priemel, A. Stiller. Introduction. Nuremberg's Narratives. Revising the Legacy of the Subsequent Trials, in:

was the responsible of the American prosecution who obtained in 1947 that Robert Kempner could disclose the Wannsee Protocol[21]. La Follette was the main speaker for the prosecution[22] and he worked with a team of three assistants, among which Sadie Arbuthnot who was the first women to plead before a military tribunal in Nuremberg. These American prosecutors, who have gathered many archives pieces about Nazi justice, were well aware that many German jurists adhered to the NSDAP and participated in the Nazi Crimes. Taylor insisted on the fact that all the accused shared a common and criminal design with Hitler, the NSDAP leaders, the SS, the Gestapo and all the security services. According to his indictment, the defendants have used the *Reichsjustizministerium* and the special courts to control the persecution and extermination of all the opponents of the Nazi regime and of "members of certain "racial" and national groups". War crimes were committed against Jews of all the Nationalities, Poles, Ukrainians, Russians, gypsies and inhabitants of the occupied territories. Crimes against humanity were committed though "extermination in concentration camps", applying the decree "Night and Fog", confiscating Jewish properties, perverting the eugenic and sterilization laws into the murder of thousands of persons and inciting German population to kill Allied airmen forced down within the *Reich*. All these crimes were considered by Taylor as violation of the 1907 Hague Regulations, of the laws of customs of wars and of the general principles of criminal law of the civilized nations[23].

In his opening statement, La Follette affirmed that it was an "unusual" case, because the defendants charged with crimes committed "in the name of the law". All the accused persons, except the lay judge Petersen, were professional lawyers, accustomed to courts, but not to be present in the box as prosecuted criminals. These jurists, who have exercised judicial functions before of after administrative ones, have known the "spirit" of the law and La Follette doubted they ever forgot it. As "leaders of the German judicial system", they "consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice"[24]. But the crimes they have committed were "ordinary" crimes, especially murders, against "countless victims" whose "fundamental rights" were denied. La Follette made a distinction between the misdeeds, or miscarriages of justice, committed by the Nazi judges since 1933 (these violations of constitutional guarantees or of professional duties were not under the jurisdiction of the Nuremberg Court) and the participation in "the Holocaust of death and misery which

K. C. Priemel, A. Stiller, Reassessing the Nuremberg Military Tribunals. Transitional Justice, Trial Narratives and Historiography, New York Oxford 2012, p. 7.

21 R. K. Wittman, D. Kinney, The Devil's Diary: Alfred Rosenberg and the Stolen Secrets of the Third Reich, New York 2016.

22 C. Wilke, Fall 3 : Juristen von Gericht, Recht auf der Prüfstand und das Erbe der „Zivilisation", in: K. C. Priemel, A. Stiller, Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtschöpfung, Hamburg 2013, p. 292.

23 Trials III, p. 18-25.

24 Trials III, p. 31.

the Third Reich visited on the world and on Germany itself": "In this responsibility, the share of German men of law is not the least"[25].

The American prosecution considered the Justice case as a major trial in order to "reconsecrate" the temple of Justice, not only in Nuremberg, but also in the whole Germany. Judging the men who destructed the law in Germany in accordance with the law (what meant with a due process of law consistent with American standards) was a crucial challenge for restoring a legal order after World War II. With such a pathos, the Justice case got a pedagogic goal: the one of instructing all lawyers and future lawyers of the dangers of perverting judicial institutions in favour of criminal rulers. The quality of the accused as lawyers was featured as an aggravating factor for their responsibility. "These defendants, said La Follette, were not farmers or factory workers"[26]. If one can observe some patronising tone in La Follette's wordings, the idea was clear for the evidence of criminal intent (*mens rea*). "By the very nature of their legal training and experience", the defendants knew that *ex post facto* laws, discriminations against Jews, the decree "*Nacht und Nebel*" were likely to let possible countless murders of innocent persons. These apparently legal acts (in a formal point of view) were, for jurists, acts of abetting murders and the accused lawyers could not ignore it.

This point of departure could have led to the idea that all the German jurists, at least all the penal judges, participated in a criminal plan. However, the American prosecution did not draw such a conclusion. Presenting to American judges, who were not specialists in comparative law, some features of German law and judicial organization before 1933, La Follette recognized that German law, very influenced by Roman law, was not "the product of a continuous or uniform development"[27]. Despite of the differences of this codified legal system with the American law, Germany knew a kind of judicial independence before 1933. As a consequence of Hitler's seizure of power, the suppression of the Justice ministers of the *Länder* and the concentration of the whole control of judicial administration by the *Reichsjustizministerium* was the first step to destruct the law and the Justice. The Nazi Regime "could not live under the law, and the law could to live under it"[28]. It was the beginning of a slipping argument: first, the crimes committed by German lawyers were not the outcome of an ever-perverted German law, but the consequence of the control of the judiciary by the Nazi rulers; secondly, the lawyers were not Hilter's friends and Hitler's projects were directed against the intellectual tradition of lawyers.

La Follette quoted the 1930 threats directed by Hitler against the judges: "we can assure the judges that, if national socialism assumes power, they will be fired without pension"[29]. For the American prosecutor, all the projects of reforming justice, the ones of Frank or of Schlegelberger, were a lure: there was no future for the law and for the

25 Trials III, p. 32.
26 Trials III, p. 69.
27 Trials III, p. 34.
28 Trials III, p. 40.
29 Trials III, p. 41.

judiciary in the Nazi Regime. Forgetting that the judges were not fired, except the Jewish ones[30], by the Nazis, La Follette introduced the idea that the majority of German jurists were not criminals, but rather passive agents of a plan of destruction of the Judiciary. It is noteworthy that the prosecutor mentioned, as the International Military Tribunal had previously made, that the *Reichsgericht* condemned only Van der Lubbe and acquitted the other accused for the *Reichstag* fire in 1933. This fact was used to suggest that all judges were not obedient to Hiltler's will[31]. According to the American prosecution, the trend hostile towards jurists would have been exacerbated during the war: the Nazi rulers would have found some judgments too "mild" and feel "serious misgivings" concerning sentences: "apparently, however, pre-Hitler legal training sometimes had the unfortunate effect that even trusted Nazi judges failed in their decisions to measure up to the ideology and expectations of the Third Reich"[32]. Despite the linguistic precautions ("apparently", "however", "sometimes"), the American prosecution widespread the idea that there ne judges were not so Nazis as Hitler and his collaborators.

The next step was to consider that "something like a crisis in the German judicial system occurred in 1942". The point of departure was the last discourse of Hitler before the *Reichstag* on the 26th of April 1942. Hitler words were expressly quoted: "I except the German legal profession to understand that the nation is not for them, but that thy are here for the nation"[33]. The different changes that occurred in the Justice Ministry during the next months were interpreted as the consequences of this discourse: Schlegelberger's retirement, Freisler's transfer to the *Volksgerischtshof*, Thierack's choice as Justice Minister, the promotion of Rothenberger who have proposed a plan to reform the judicial system. All these changes were planned in order to strengthen the repression against the Jews and the traitors, as it was explained in Thieracks's letters addressed to the judges and even to the advocates. The plan consisted also in increasing the powers of the *Gestapo* and of the SS and to imagine a program of "drastically reducing the number of judges"[34].

The idea of a "justice crisis" beginning in 1942 was not an invention of the American prosecutors. Among the judges, there was such a feeling of an attack from Hitler and the SS against the judiciary[35]. However, the result of this perspective was to consider that there was a conflict between the small group of the accused officials of the Justice Ministry – a group deprived from its key figures by the deaths of Thierack and Freisler – and the majority of German jurists. A "diabolical" plan of using the justice machinery to commit mass crimes had "the definite effect of confusing and dulling the minds of lawyers and laymen alike"[36]. With such an opposition between the criminal leaders and

30 There was a short reference to the "purge of Jewish and politically dissident judges in 1933", Trial III, p. 49.
31 Trials III, p. 38 and p. 42.
32 Trials III, p. 49.
33 Trials III, p. 50. In fact Hitler has spoken about the German Justice (*die deutsche Justiz*) and not about the legal profession.
34 Trials III, p. 52.
35 Schädler, Justizkrise, pp. 9-10
36 Trials III, p. 58.

the manipulated lawyers, the prosecution revealed its flaws. The absence of any reference to the voluntary adhesion of judges, lawyers and law professors to the Nazi regime, the insistence to the spirits fanned by propaganda through the training camps imposed to young lawyers and the action of the *Akademie für Deutsches Recht* (presided one time by Rothenberger) gave credence to the idea that the majority of jurists were victims rather than criminals.

A special passage of the general statement of the prosecution was devoted to the German legal profession during the Third Reich. The American prosecutors recognized that the "professional life of German jurists flourished" before 1933. They knew the high level of professionalism of German jurists, the presence of strong associations among judges and lawyers before Hitler's takeover, but they remain very discrete about the participation of the majority of jurists in the subjection to the BNSDJ[37] or to the control of academic reviews. The analysis of these phenomena remained unachieved: the "older generation of jurists was perverted" by Nazi lawyers and by "opportunists who has sold their legal reputation for promotion within the Nazi hierarchy", the younger students and lawyers received a "thorough indoctrination" in law schools and in training camps[38]. This generational analysis was not so bad and the prosecution referred to photographs showing Gürtner and Kerrl (the Prussian Justice Minister on 1933–1934, who died in 1941) in a training camp before "gallows" from which was suspended the sign for the paragraphing of the legal codes[39]. But the conclusion was very short and deceptive: Kerrl's training camp was a "lawyers' madhouse" that participated in the "prostitution of German legal education". Was it the matter of a house ruled by mad lawyers or of a house conceived to make the lawyers mad? Were jurists the prostituted or the pimps of this kind of legal brothel? Because of the lack of resources for incriminating more jurists (especially judges of the ordinary courts, influential lawyers or academics), the American prosecution chose a half-measure: the selection of a small group of officials who could appear themselves as bit players or executants. The weakness of this choice was exploited by the defendants who could argue that were members among others of a exonerated *Juristenstand*.

2. The arguments used by the defendants' counsels

As soon as the beginning of the opening statement of defendants the main arguments opposed to the prosecution appear as well elaborated by the counsels of the accused persons. The first statement was the one of Egon Kubuschok, Schlegelberger's advocate, who was endowed with the role to speak on the behalf of all the defendants. Among the advocates of the defendants, Kubusckok was the most well-known and the most experimented: advocate specialized in penal affairs during the Weimar period, he had

37 See note 8 about the National Socialist Association of German Jurists.
38 Trials III, p. 98.
39 Trials III, p. 100.

defended Czech Resistance fighters before the *Volksgerichtshof*, then he hat obtained Van Papen's acquittal before the International Military Tribunal. Crowned by this victory, Kubuschok was well prepared to defend Schlegenberger he has called as witness in 1946 to exonerate the *Reichsregierung* from a qualification as criminal organization. The other dozen of German attorneys is not very well known, but one can notice the presence of Rudolf Aschenhauer, who was member of the NSDAP and of the SA, or of Alfred Schilf, who defended Hans Fritzsche, also acquitted by the International Military Tribunal, then one of Krupp's collaborators. Schubert and Schwarz defended also several defendants in the different Nuremberg Trials[40]. These advocates were experienced men that one can suppose understanding of Nazi jurists[41].

The opening statement made by Kubuschok was clearly structured. The German defendants were presented as servants of a German legal order that predated the Nazi Regime and was based on "the positivism of law"[42]. It was like a structural and cultural factor that made the German law different from the American one, in an objective perspective of *Wertfreiheit* (value freedom). Whereas the Anglo-American legal system was based on precedents and on "general ideas on morals and rights", the German law was featured through statutory and codified laws. Positive law was thus the only "directive" for German jurists in the administration of justice. Kubuschok did not take the extra step for discussing the *ex post facto* effect of incriminating German officials who have obeyed positive law, what would have hurt the American judges. *Gesetz is Gesetz* suggested the beginning of this pleading, which echoed Radbruch's text, perhaps known or ignored by American lawyers.

More skilfully, the next argument was focused on the 1935 reform of the German Penal Code, which has authorized the analogical reasoning. This reform was not described, as the American Prosecution made it, as a repressive means to incriminate all kinds of conduct, but as an attempt to give more power to judges in order to correct the flaws of codified laws and as the outcome of projects from the Weimar era. If this analysis was not completely untrue[43], it was very exaggerated to feature the Nazi reforms of penal law as the result of the "Free law movement" led by Hermann Kantorowicz and Gustav Radbruch, whose ideas were antagonistic with Nazism. But the American judges could know that there were some links between their own "legal realism" (developed in the

40 Priemel and Stiller, Die Nürnberger Militärtribunale, p. 804.

41 A. Weinke, Hermann Jahrreiß (1894–1992). Von Exponenten des völkerrechtlichen Kriegseinsatzes zum Verteidiger der deutschen Eliten in Nürnberg, in: S. Augsberg and A. Funke (eds.), Kölner Juristen im 20 Jahrhundert, Tübingen 2013, p. 187; J. Ross, Göring's Trial, Stahmer's Duty: A Lawyer's Defence Strategy at the Nuremberg War Crimes Trial, 1945-46, in: Madison Historical Review 5 (2014), article 3 shows that Goering's advocate, Otto Stahmer, was a member of the NSDAP. M. Salter, L. Charlesworth, Prosecuting and Defending Diplomats as War Criminals: Ribbentrop at the Nuremberg Trials, in: Liverpool Law Review 27 (2006) 1, pp. 67-96 does not give information about Ribbentrop's counsel, Fritz Sauter.

42 Trials III, p. 108.

43 J. Vogel, Fortwirkende Einflüsse aus nationalsozialistischer Zeit auf das Strafrecht als Ausdruck übergreifender Entwicklungslinien im Strafrecht des 20. Jahrhunderts, in: W. Konitzer (ed.), Moralisierung des Rechts: Kontinuitäten und Diskontinuitäten national-sozialistischer Normativität, Frankfurt am Main 2014, pp. 95-96.

years 1920s and 1930s) and the German Free Law movement. Kubushok could suggest the idea that all German judges have acquired more powers during the Nazi period, what would have exonerated the defendants implied in the drafting of the 1935 law from a specific liability.

Thereafter the German advocate used more classical arguments: the Justice ministers and their subordinates did not exercise any power in front of Hitler – who was himself enabled by a parliamentary law according to the Weimar's constitution – or in comparison with Himmler's police whose orders could not be disobeyed. The judiciary was the target of many attacks of the Nazi Part, as "an isolated animal at bay"[44]. Kubuschok completed the argument of some continuities between the penal policy of the *Reichsjustizministerium* and the pre-Nazi period about sterilization (that "found champions in Socialist and church groups") or euthanasia. Perhaps the specialists of these issues could find some allusion to the criminological science in Germany (the well known penal law professor Karl Binding has co-written in 1920 the book *Die Freigabe der Vernichtung Lebensunwerten Lebens*) and outside Germany before 1933 and that Gürtner fought against Hilter's projects of euthanasia of insane persons[45]. Finally, Kubuschok announced that he would call as experts two law professors, Hermann Jahrreiß about international law and Fritz Niethammer about penal laws. Such a choice supposed that German law professors, even if they taught during the Nazi period, were able to give an independent advice from jurists that were not contaminated by the Nazi ideology. All these clues indicate that there was a plan to conceive an organized and resolved to fight defence, probably something that was managed between the different advocates of the defendants.

Kubuschok implemented this strategy for defending Schlegelberger. This one was presented as an honest high-rank official, the very antithesis of Freisler, who was reluctant for directing the Minister after Gürtner's death, who was "forced" to be enrolled in the Nazi Party in 1938[46], and who retired from his functions in August 1942 with the reputation (confirmed by a statement of the BBC!) of the "last judge in Germany"[47]. Ammon, also defended by Kubuschok, was featured as a "deeply human and strictly religious man"[48]. A similar argument, in favour of a lawyer with legal scruples, was used by Schilf in favour of Klemm: although Klemm was member of the NSDAP and in close contact with Thierack, his advocate wanted to give a comprehensive picture of him "as a jurist and as a man", who would have made "unpolitical" work[49]. All the advocates depicted their clients as professional, educated members of the legal profession, who have obeyed orders according to the German tradition of positivism.

After the opening statements, the German lawyers used very skilfully the adversarial American procedure to direct (probably prepared) questions to the accused, to anticipate

44 Trials III, p. 113.
45 Gruchmann, Justiz im Dritten Reich, pp. 497-499.
46 Trials III, p. 288.
47 Trials, III, p. 128.
48 Trials III, p. 182.
49 Trials III, p. 132.

the cross-examination (that was not so aggressive) of the American prosecution and to call some experts in favour of their clients[50]. The most striking example was the intervention of Hermann Jahrreiß. The law professor of the University of Köln, who remained in functions during the whole Nazi regime and assisted the defence of general Jodl before the International Military Tribunal[51], supported very warmly Kubuschok's thesis of the responsibility of the German legal conceptions in the respect of Hilter's orders. He quoted the positivist theorist Anschutz, and his reject of any process of judicial review to control the consistence of statutory laws with the constitution. Jahrreiß considered also that the instability of the Weimar Republic, the "inflation of legislation" (no German jurist was "in position to know all the headlines of all the laws that have been passed), the chaotic condition of legal thinking have made the German (and "many jurists among them") "tired and apathetic toward authority"[52]: the citizens were dead and transformed in officials of the Government. From the idea of a crisis of authority in the Weimar Republic, the law professor induced curiously a kind of habituation to obedience that would have prepared the spirits to the Nazi Regime. The Weimar Republic was accused to have developed a rule-scepticism among the jurists, favouring the strict obedience to Nazi orders.

One of the most extraordinary moments of this oral statement was the answer to Kubuschok's question about Triepel's thesis of the impossibility for the judge to make international law prevail on domestic law[53]. Jahrreiß was making a short allusion to Kelsen, "my predecessor in Cologne, and who was now teaching in the United States"[54]. Jahrreiß, who has also used Kelsens's texts before the International Military Tribunal[55], did not say a word about Kelsen's firing by the Nazis and about the cause of his exile in America. He suggested very quickly that Kelsen's monism – allowing to make international norms superior to domestic norms – had no influence on the practice of German courts. This reference to Kelsen could be very troubling for American judges, who could have heard of the scientific authority and democratic commitment of the leader of the *Wiener Rechtsschule*. Responding to the counter-examination of La Follette, Jahrreiß affirmed that the four months he have experienced as an expert before the International Military Tribunal were the "most difficult times" of his life, especially through listening to Rudolf Höss about Auschwitz. The law professor could appear sensitive to human misery, but he was in fact indifferent towards the idea of collective liability of German jurists towards the Jews[56]. Through the appearance of a confession – Jahrreiß did not omit to say that he had

50 The witnesses were rather called by the Prosecution, for example the agent of the Security Service Eklar against Rothaug: Trials III, p. 367.

51 Weinke, Hermann Jahrreiß, pp. 168-170: although he was not member of the NSDAP, he was not included in the first list of professors maintained in Köln in 1945.

52 Trials III, p. 258-259.

53 It is the matter of the so-called dualist theory developed by Heinrich Triepel in his 1899 book *Völkerrecht und Landrecht*.

54 Trials III, p. 279.

55 Weinke, Hermann Jahrreiß, p. 190.

56 Weinke, Hermann Jahrreiß, p. 186.

also the experience of a criminal judge horrified by murders – the law professor acted in favour of the defendants by quoting the French judge of the IMT Donnedieu de Vabres and his doubts about the concepts of crimes against humanity[57]. One can reasonably think that this "expertise" was well prepared with Kubushock and the team of German advocates.

The defendants themselves used a strategic plan of defence. First, they claimed their quality of jurists and insisted on the fact that they were educated and deemed competent for judicial functions before Hitler's seizure of power. Schlegelberger brought forward his academic works, Rothenberger said that he was honorary professor at Heidelberg until 1942 and quoted Ulpian about the judges as "priests of Justice"[58]. Schlegelberger affirmed that he refused to enter the NSDAP in 1933, never assisted a Party conference or meeting and that his 1938 membership was ordered against his will[59]. Using another tactic, Rothaug remembered the fact that almost all the judges and procurators were members of the NSDAP, at least after 1937. It meant that the attitude of the defendants was not different from the one of all the high officials of the *Reichsjustizministerium* (about 250 persons) and of the great majority of judges[60]. Second, the defendants accused their dead superiors: Thierack, Frank, Himmler, Goebbels or Bormann (Gürtner was respected but considered as a weak character)[61]. Schelgelberger and Rothenberger argued from their dismissal that they disavowed the worst Nazi crimes. Rothenberger could say that he came back to Hamburg in 1943 as a simple notary, Schlegerberger had more difficulties in pretending that he "was not happy" with the donation of 100 000 marks made by Hitler for his retirement[62]. Third, they pretended to have attempted to get around the Party's orders: Rothenberger would have planned to make the judge "king" of the process through his plan of reform[63], Schlegelberger referred to a critical discourse at the University of Rostock (without quoting any academic) and affirmed that some persons were volunteers for sterilisation[64].

In this rhetorical defence, conceived by experienced jurists, the most extravagant answers concerned the "Jewish question". Clearly, the defendants and their advocates have understood, contrary to the Nazi dignitaries before the International Military Tribunal, that this question had become more and more important for the American prosecution. Questioned by Kubushok, Schlegelberger said that there was no Jewish question for him, all the races being created by God. He pretended to have, since his younger years, a Jewish friend whom he saved from the persecution, allowing him to be again a judge

57 Trials III, p. 281.
58 Trials III, p. 289, 389 and 470.
59 Trials III, p. 288.
60 Trials III, p. 395.
61 Trials III, p. 512 and p. 589.
62 Trials III, p. 305.
63 Trials III, p. 491-492 : here again, there is a means to use the works of past German jurists in favour of a larger freedom for the judges. Rothenberger quoted Adickes and Schiffer and did not forget to mention that the latter was "fully Jew".
64 Trials III, 722.

after 1945. Schlegelberger went so far as to say that he intervened personally before Hitler at the beginning of the Nazi Regime in order to maintain in functions some Jewish jurists (especially "research people of repute"), that he persuaded Hither in a first time, that Hitler was pressured by the Party members and by the *Länder* Justice ministers and that Hitler asked for Gürtner if Schlegelberger was not himself a Jew[65]! Such a fairy tale is unverifiable and unlikely for a high official of the *Reichsjustizministerium*[66]. Klemm pretented that he knew nothing about the extermination of Jews and the places of the Eastern camps[67]. Rothaug, who have presided a long trial against a Jewish man accused of a sexual relationship with an Aryan woman and participated with the unanimity of the other judges to the condemnation to death of this Jew, did not remember to have said (according to a witness) that one had to "exterminate the offender", because "Jews are our misfortune"[68]. Rothenberger described his experience in Hamburg, in close contact with Jews, 'knowing the advantages and disadvantages of the Jewry"; he pretended not to support the violence against the Jews, but that he was subjected by the propaganda to restrain their influence[69].

Finally, the prosecutors did not try to denounce these arguments of the defendants as deceitful statements. Whereas the American prosecution produced documents about the participation of some defendants, like Rothenberger, in official meetings with the judges or with the SS concerning the treatment of Jews, the counter-examinations remained silent about the knowledge of the accused high officials concerning the Holocaust. As no victim was heard during this trial, only the denials of the defendants remained in the written acts. In their statement, the judges considered that they do not punish the murders of alleged victims, but a "conscious participation" in a "system of cruelty and injustice", "in the name of law by the authority of Ministry of Justice and through the instrumentality of the courts"[70]. The judges spoke of an "interesting defence" of Schlegelberger and other defendants, arguing that they acted under "persistent assault by Himmler". This argument was judged "true" but insufficient to exonerate the officials of the Justice Ministry from the "dirty work" they have accepted to make: such a statement could be interpreted as an excuse for the professionals of the *Juristenstand* who were not members of the Justice Ministry[71]. Despite the terms of the final judgement about the impossibility that the defendants ignored the atrocities committed against Jews[72] and the

65 Trials III, p. 719.
66 E. Nathans, Franz Schlegelberger, Baden Baden 1990, p. 41.
67 Trials III, p. 746.
68 Trials III, p. 749-752.
69 Trials III, p. 754-755.
70 Trials III, p. 984-985.
71 Trials III, p. 1086.
72 Trials III, p. 1080-1081: the judges had a clear idea that it was impossible for high officials to ignore what was going on in the camps. They took account of the fact that Rothenberger had visited Mauthausen, "a human slaughter house" (Trials III, p. 1116). The recent works, notably about the letters of the German judges missioned in Poland (B. Manthes, Richter in der nationalsozialistischen Kriegsgesellschaft, Tübingen 2013, p. 319), reinforced this conviction that many jurists knew that the Jews were massively exterminated.

apparently severe penalties decided by the judges against Schlegelberger, Rothaug and Oeschey, the flaws of the American prosecution and the argumentation developed by the defendants were pulling together in the collective exoneration of the *Juristenstand* for the participation in Nazi crimes.