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**An attempt at justice:
NS-trials in Austria after 1945**

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Not only foreigners, but also many Austrians might ask: Were there any trials against Nazi perpetrators in the land of Kurt Waldheim? Which attempts at justice can one expect in a state that declares itself Hitler's "first victim", whereas some of the most abominable Nazi butchers and organizers of the Holocaust had been either Austrian citizens or, like Hitler himself or Adolf Eichmann, had been socialized in cities like Vienna or Linz? And if it is true that there was a considerable number of trials and that Austrian judiciary, in the first decade after the Second World War, does not need to shy any comparison with efforts of other countries to punish Nazi perpetrators, how come supposed Holocaust murderers want to be sent to Austria, when they get stripped of their citizenship by the US authorities – this was the case quite recently with the former SS guard Josias Kumpf, who was deported to Austria on 19 March 2009. Isn't it because they can be certain that they won't be prosecuted by the Austrian judiciary?

The case of Kumpf could be compared with that of John Demyanyuk, who was extradited from the United States to Germany a few weeks later, on 12 May 2009, as a result of German efforts to indict Demyanyuk for the crimes he had committed in the Sobibor death camp. These German efforts followed Demyanyuk's acquittal after his first conviction in Israel, because the Israeli prosecutor had confused him with another John Demyanyuk, the infamous "Ivan the Terrible" of the Treblinka death camp. Whereas German prosecutors demanded Demyanyuk's extradition, the Ministry of Justice in Vienna had tried to avoid Kumpf's deportation to Austria.

If you take into account these different approaches, the first impression is disastrous and seems to confirm the conviction that Austria is a "safe haven" for Nazi perpetrators. This was the message of the coverage of the above men-

tioned case even by newspapers like the *Times* in London (cf. “Austria sets free deported ex-Nazi guard Josias Kumpf”, *Times online*, 24 March 2009).

It is not my duty to defend Austrian judiciary, nevertheless I’d like to suggest the consideration of some basic facts in this case. I want to enumerate them, because the Kumpf case shows obstacles for the prosecution of NS crimes that can be observed in other cases, too, and the dealing with the case in the international media seems to me typical for the continuance of preconceptions about Austria and its Nazi past. Some of those basic facts are potentially available even without any knowledge of German, others require some knowledge of the Austrian legal system.

The *Times* doubted, for instance, that the Austrian authorities were not able to extradite him to his country of origin. Apparently the British correspondent did not know that ethnic Germans had been expelled from Yugoslavia after World War II and cannot be sent back there. Austrian police and judiciary indicated that the former SS man was not welcome in Austria, but Austria had to readmit him as a result of an American-Austrian agreement of 1956: The US enabled the immigration of a considerable number of refugees then living in Austria under the condition that Austria committed to “take them back” if it turned out that they had given false data during the immigration process. Former members of the SS had not been admitted, therefore Kumpf had fraudulently concealed his military service in the SS in front of the US authorities. Kumpf’s lawyers knew very well why they suggested for him, in the case of denaturalization, to plead for deportation to Austria: There he would be secure from prosecution, because according to Austrian law, Kumpf’s crimes of 1943 have been statute barred since 1963. According to the Austrian Penal Code a murderer who had been a minor when he committed the crime can be prosecuted only within 20 years after the murder.

But maybe it demands too much of journalism to expect the consideration of legal sophistries. For many newspapers, not only in the U.K., it’s the sensation which counts, and it has to be put into the headline (Kumpf “allegedly stood over a pit of executed prisoners and shot those who had survived”, the *Times* wrote), even if the article does not contain any proof of what the headline claims: That the man, who had found a “safe haven” in Austria, had “shot” innocent people. The *Times* quoted a statement of the US Attorney-General’s office, though, saying that Kumpf “stood guard with orders to shoot any surviving prisoners who attempted to escape an SS massacre”. I admit, it’s only a slight

difference between receiving an order to shoot and the execution of that order, but for some people this might mean a difference between life or death ...

I'd like to come back to the NS-trials in Austria after 1945. The most important contribution of Austria's judiciary to the punishment of Nazi crimes was the establishing of special courts in the immediate post-war period, the so called "Volksgerichte" ("People's Courts"). Although they operated until 1955, most of the cases had been instituted already before 1948. During the ten years of existence of the People's Courts, 136,829 preliminary proceedings led to 28,148 indictments and 23,477 judgments. Fifty-eight percent of the verdicts (that is 13,607) were convictions. Out of forty-three death sentences, thirty were executed. In addition to the death sentences, twenty-nine life imprisonments and 341 prison terms of ten or more years were imposed.

The vast majority of the defendants were indicted not for committing Nazi crimes in the truest sense of the word, but for membership in the clandestine Nazi party before the "Anschluss" of March 1938, holding certain functions in the Nazi regime, or producing wrong entries during the registration of former Nazi party members in 1945. The number of defendants who were sentenced for the most atrocious Nazi crimes (like ordering and organizing the transports to the death camps or committing or aiding and abetting murder and torture in camps and jails) was approximately 2,000; another 3,000 were sentenced for the crime of denunciation. A few weeks after the withdrawal of the Allied troops in the autumn of 1945, Austria dissolved the People's Courts on 20 December 1945.

After the dissolution of the People's Courts, only thirty-five of approximately 5,000 preliminary proceedings led to an indictment (against forty-eight defendants). Of those forty-eight defendants, forty-three got verdicts: twenty were sentenced and twenty-three acquitted. Out of the twenty convictions, five were for charges arising from the mass murder of Jews in East Galicia (nowadays part of Ukraine). Four involved the murder of Poles and Jews in central Poland. Investigations had also been instituted against those who had served as guards or SS officers in the Auschwitz-Birkenau extermination camp (roughly sixty men), the Majdanek extermination camp (around fifty men and women), or in police battalions (several hundred men). A special focus was the participation of around 300 Austrian SS men in the mass murders of "Aktion Reinhardt" in 1942/1943. As you probably know, "Aktion Reinhardt" was the largest operation during the Holocaust with around 1.8 million people murdered.

Only seven out of these hundreds of perpetrators had to stand trial, and not one was found guilty by a jury.

From the mid-1970s until the late 1990s, no charges against Nazi perpetrators were proffered. Between 1974 and 1978, all cases still pending were dismissed by the prosecution (among them two in which the Supreme Court had quashed the acquittal by a jury). The reason for this informal moratorium of prosecution of Nazi crimes in Austria might be found in a series of acquittals of convicted perpetrators. Between 1972 and 1975, in four out of five trials juries obviously refused to judge participation in the Holocaust as a punishable crime. It seems that the Ministry of Justice reacted by an informal decision to no longer prosecute Nazi crimes. Growing pressure through public opinion in Austria at that time made it difficult to avoid disgraceful findings along these lines in further trials.

In a public discussion in 1975, the then Minister of Justice, Christian Broda, who as a young man had himself been persecuted by the Nazi regime, justified the judiciary's acceptance of the findings of the juries. The Minister of Justice replied to reproaches of the Holocaust survivor Hermann Langbein, who, after the Auschwitz trial, in front of the district court in Frankfurt am Main had made every effort to convince Austrian prosecutors to indict those Austrian SS men whose role in the extermination machinery of Auschwitz had been highlighted during the Frankfurt trial – among them the constructors of the gas chambers of Birkenau. When the discussion took place, only three and a half years had passed since these Austrian perpetrators had been acquitted by Austrian juries. Langbein demanded an amendment to the rules of procedure that allowed for a reversal of “blatantly wrong” findings of juries in Nazi crimes trials. The acceptance of the jury verdicts “is a burden we have to bear for the rule of law,” the Minister retorted. Any discrimination of Nazi defendants would violate the fundamental right of fair trial. A few years later, Broda stated wearily that the enterprise to cope with the “apocalyptic” Nazi crimes by the rule of law had exceeded human will.

The moratorium ended in 1997, when the then Minister of Justice Nikolaus Michalek ordered an investigation of the accusations against the former Nazi doctor Heinrich Gross. In the 1970s, Gross had become one of the most prominent medical expert witnesses. Although at least since the 1980s details about his role in the Nazi “euthanasia” program had been uncovered by historians and journalists, Gross continued to be engaged by Austrian courts for expert hear-

ings in criminal proceedings. In 1999, he was indicted for murder. Immediately after the opening of the trial, Gross suddenly became unable to stand trial for “medical reasons.” He died in 2005. This was the last Nazi trial in Austria.

Maria Berger, who had been Minister of Justice 2007/2008, repeatedly stated that she was not ready to accept actual impunity for Nazi perpetrators out of consideration for their age. Some months after her inauguration, she offered a reward for information about the most wanted Austrian Nazi criminals – Eichmann’s “right hand” Alois Brunner and the notorious SS doctor Aribert Heim, known for his horrifying “experiments” on Mauthausen concentration camp prisoners. But despite her efforts to rectify what the Austrian judiciary had allowed in the decades before, it is unlikely that another trial will take place. There was an investigation against a female SS guard who had served in the Majdanek concentration camp, but she died in February 2008, before she could be indicted. Nevertheless, the Austrian Ministry of Justice sponsored a research project which is being done by the Research Centre for Post-war Trials at the Documentation Centre of Austrian Resistance in order to compare Majdanek trials in Poland, Germany and Austria – with the explicit request to look for individuals who have committed homicidal crimes and have not yet been punished.

I’d like to close with some remarks about the case of the former SS guard Josias Kumpf mentioned in the beginning of my lecture.

Kumpf was born in April 1925 in Yugoslavia an ethnic German. At the age of 17 he was conscripted to the Waffen SS. From October 1942 to October 1943 he served as an armed guard in the Sachsenhausen concentration camp. Immediately before the huge massacres of Jews in the Polish district of Lublin on 3 and 4 November 1943, he was transferred to the SS training camp of Trawniki, close to Lublin. Together with hundreds of other SS men, brought from different places to Trawniki, Majdanek and other camps around Lublin, Kumpf was assigned to guard the mass shootings there, which had been prepared since summer 1943 under the code word “Erntefest” (that is “harvest festival” or “Thanksgiving”) by Himmler, and his special envoy in Lublin, the Austrian Nazi Odilo Globocnik, as well as Globocnik’s successor the German Jakob Sporrenberg. During the “Erntefest” mass shootings more than 40,000 Jews, who had survived the “Aktion Reinhard”, were killed.

On 3 November 1943, 8,000 Jews were shot in the Trawniki camp by special SS and police units. Kumpf admitted to the American investigators that he had been there, as a guard, but claimed that he did not shoot, because none of the victims, who were still alive after the shootings, had been able to climb out of the ditches.

On 3 January 2007 the immigration court in Chicago ordered Kumpf's deportation to Germany, or if Germany would not accept him, to Austria, Serbia or any other country that would accept him. After he had exhausted all possible appeals, Kumpf was sent to Austria on 19 March last year. As mentioned above, in Austria he could not be prosecuted because the statute of limitation according to Austrian law has already expired. He died in a Viennese hospital on 16 October 2009.

There had been a quite similar case, more than twenty years ago. Again it was an ethnic German, not from Serbia but from Romania, who had served in the SS, had stayed in Austria for some years after the war, and eventually emigrated to the United States: Martin Bartsch. In 1987 he gave up his U.S. citizenship to avoid deportation and departed for Austria. He arrived in Vienna, when, after the election of Kurt Waldheim as Austrian president, the debate about Austria's Nazi past had reached its climax. Former inmates of the Mauthausen concentration camp identified Bartsch as the murderer of a popular and respected Jewish camp inmate, Alfred Oxhorn. They demanded the institution of legal proceedings against the murderer. Hardly anybody could understand why Austrian judiciary could not charge a man whose criminal guilt could have been proved by a large number of eye witnesses. But, as in the Kumpf case, Austrian judiciary had to respect Austrian law. In Austria, even crimes without statute of limitation like murder become statute-barred after twenty years, if the perpetrator was a minor at the time of the crime. This is contrary to German criminal law relating to juveniles. In German law there are no different statutes of limitations with respect to the age of the perpetrator. But defendants, who were minors when they committed the crime, have to stand trial according to the procedural laws for minors, even if they are already over eighty years old, and can be sentenced only to the reduced punishments for young offenders.

Some commentators in Austria used the Kumpf case to demand a change of laws to enable prosecution of Nazi criminals irrespective of the statute of limitations. I do not agree with these demands. Legal history shows that it is no good idea to change laws due to current events. I am in favour of prosecuting

also very old men and women who did commit crimes, (as long as they are still alive). They themselves killed both babies and aged people. But I do not feel comfortable with efforts to compensate failures of the judiciary during the last decades by bringing before the courts people who had been conscripted to the SS as 16 or 17 years old boys.

It is a truism, but I'd like to repeat it: Justice can be done only as long as a perpetrator is alive. Society as a whole can re-define its coming to terms with its own past. Post-Waldheim Austria is a good example for it. But criminal jurisdiction cannot make up for what it missed in a time when the perpetrators were still alive. It can only regret its own failures and draw conclusions from them, as it has been done by the Austrian judiciary for a few years now – for instance by changing the curricula of young judges, in order to make them aware of their responsibility for the preservation of human rights and the punishment of crimes against humanity.

Link:

<http://www.nachkriegsjustiz.at>

Further reading:

Winfried R. Garscha, Austrians and the Holocaust: A Reception History from the Perspective of Postwar *Volksgerichtsprozesse*. In: Günter Bischof / Fritz Plasser / Barbara Stelzl-Marx (eds.), *New Perspectives on Austrians and World War II*. Contemporary Austrian Studies, Bd. 17. Transaction Publishers: New Brunswick–London 2009, pp. 277–305

Winfried R. Garscha, The Trials of Nazi War Criminals in Austria. In: Henry Friendlander / Nathan Stoltzfus (eds.), *Nazi Crimes and the Law*. Publications of the German Historical Institute, Cambridge University Press: Cambridge–New York 2008, pp. 139–150

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