

# A NEW DEFINITION OF A WAR CRIMINAL: PRESENT DAY NAZI WAR CRIMINAL PROSECUTIONS

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## INTRODUCTION

As early as 1942, the Allied Powers were determined to punish the Axis war criminals.<sup>1</sup> The leaders of the United States, Great Britain, and Soviet Union jointly vowed to prosecute those responsible for the crimes against the civilian population; particularly those crimes involving the mass murders of the European Jewish population.<sup>2</sup> The Moscow Declaration, signed by the United States, United Kingdom, and the Soviet Union, stated that at the time of Armistice, those who had been determined responsible for war crimes would be sent back to their home country and would be tried according to the laws of their homeland.<sup>3</sup>

The majority of the post-1945 war crime trials consisted of lower level officials and functionaries.<sup>4</sup> At first, the U.S., Great Britain, France, and the Soviet Union focused on perpetrators in their respective zones of occupations – many trials involved the murder of captured Allied military personnel by Germans or Axis troops.<sup>5</sup> Over time, the Allied powers expanded their judicial mandate to include the commandants, concentration camp guards, and others who had committed crimes against Jews.<sup>6</sup> In the decades following World War II, both the German Federal Republic (West Germany) and the German Democratic Republic (East Germany) continued to try Nazi-era defendants.<sup>7</sup> To date, the Federal Republic has held 925 proceedings trying defendants of the Nazi era war crimes.<sup>8</sup> Subsequently, many of those trials ended in acquittals, light sentences due to the aging of the defendant, or defendants who claimed superior orders.<sup>9</sup>

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<sup>1</sup> *War Crimes Trials*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM HOLOCAUST ENCYCLOPEDIA (August 18, 2015), <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005140>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See id.*

Many perpetrators of the Nazi-era were able to evade the trials, and instead, they simply returned to their normal lives and professions in German society.<sup>10</sup> In the following sections, this article will highlight the trial of John Demjanjuk and identify the legal shift following Demjanjuk's trial in Germany that has allowed a broader range of Nazi-era perpetrators to be prosecuted. Additionally, it will articulate the difference in the German law and American law to explain the disparity and confusion in the sentencing of the Nazi-era perpetrators. Finally, this article will identify other trials that were made possible because of the legal shift, as well as responses domestically and abroad to the new trials.

### I. SHIFT IN LEGAL PRECEDENT – THE DEMJANJUK TRIAL

In postwar German courts, a subjective interpretation was relied upon to distinguish between those who ordered and organized the killings and those who implemented the killings. Therefore, only a few leading Nazi officials, such as Hitler, were determined to be the senior perpetrators of the Nazi murders.<sup>11</sup> Those who were not deemed senior were able to get away on technicalities and the lack of witnesses, especially as decades went by. It had already proven difficult to prosecute those who were higher up in the chain of command, but the change came in 2011.

Prior to 2011, under German law, a prosecution against a Nazi-era criminal would only be successful if he could prove a suspect committed specific crimes against specific victims at a particular time and date.<sup>12</sup> Individual guilt was necessary for any conviction and many cases were dropped because of the extreme difficulty of proving the individual guilt decades after the fact.<sup>13</sup> In 2011, the trial of John Demjanjuk changed how prosecutors could charge and ultimately convict a war criminal.

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<sup>10</sup> *See id.*

<sup>11</sup> Lee A. Spielmann, *Germany's Failures in Bringing Nazi Murderers to Justice*, NEW YORK LAW JOURNAL, (August 25, 2015).

<http://www.newyorklawjournal.com/id=1202735536173/Germanys-Failures-in-Bringing-Nazi-Murderers-to-Justice#ixzz3rgDU9iZB>.

<sup>12</sup> Diane Cole, *A Final Effort to Find Nazi War Criminals*, NATIONAL GEOGRAPHIC, (May 10, 2013),

<http://news.nationalgeographic.com/news/2013/13/130507-nazi-war-criminal-holocaust-auschwitz-hans-lipschis-simon-wiesenthal-center-demjanjuk/>.

<sup>13</sup> Benjamin Schulz, *War Crime Investigations: 'We Don't Pursue Nazis, We Pursue Murderers*, SPIEGEL ONLINE INTERNATIONAL, (February

A. *Demjanjuk's Path to a Trial in Germany*

John Demjanjuk was born in March 1920 in the Ukraine and was drafted into the Soviet Army.<sup>14</sup> German forces captured Demjanjuk in May 1942 in the Battle of Kerch.<sup>15</sup> After the war, he emigrated to the U.S. in 1952, where he became a naturalized U.S. citizen. He lived outside of Cleveland in Seven Hills, Ohio and worked for Ford Motor Company in one of their plants.<sup>16</sup>

In 1977, the U.S. Department of Justice filed denaturalization proceedings against Demjanjuk for falsifying his immigration and citizenship papers for concealing his part in World War II, specifically at the Treblinka camp.<sup>17</sup> The U.S. government pursued charges stemming from Treblinka, because Jewish survivors had viewed a photo and identified Demjanjuk as serving in the camp near the gas chambers.<sup>18</sup>

In 1981, the U.S. District Federal Court in Cleveland stripped Demjanjuk of his citizenship.<sup>19</sup> However, before the U.S. was able to deport him, the Israeli government requested he be extradited. As a result, he was extradited to Israel where he faced charges of crimes against the Jewish people and crimes against humanity.<sup>20</sup>

Demjanjuk's trial commenced in February 1987.<sup>21</sup> The prosecution claimed that while Demjanjuk was a German prisoner of war, he volunteered to join the special SS unit at Trawniki training camp, near

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21, 2014), <http://www.spiegel.de/international/germany/germany-continues-investigations-into-suspected-auschwitz-helpers-a-954897.html>.

<sup>14</sup> *John Demjanjuk: Prosecution of A Nazi Collaborator*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM HOLOCAUST ENCYCLOPEDIA, (August 18, 2015), <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007956> [hereinafter USHMM]

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; David C. Barnett, *Convicted Nazi Camp Guard John Demjanjuk Dies*, NPR, (March 17, 2012), <http://www.npr.org/2012/03/17/148814082/convicted-nazi-guard-john-demjanjuk-dies>.

<sup>17</sup> *See United States v. Demjanjuk*, 518 F.Supp. 1362 (N.D. Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir. 1982) *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447 (1982).

<sup>18</sup> USHMM, *supra* note 14.

<sup>19</sup> *See Demjanjuk*, 518 F.Supp. 1362 (N.D. Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir. 1982) *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447 (1982).

<sup>20</sup> USHMM, *supra* note 14; *see also* Barnett, *supra* note 16.

<sup>21</sup> USHMM, *supra* note 14.

Lublin, Poland, where he was trained as a police auxiliary as part of Operation Reinhard.<sup>22</sup> The prosecution additionally charged him for being at the Treblinka killing center where Jewish survivors identified him as “Ivan the Terrible” who operated the diesel engine used to pump carbon monoxide into the gas chambers.<sup>23</sup>

Despite the survivor’s identification, Demjanjuk’s camp identification card proved that he was not sent to the Treblinka killing center after his training at the Trawniki training camp.<sup>24</sup> The identification card was verified as authentic and placed Demjanjuk into the pool of those who could have been selected as a guard at Treblinka.<sup>25</sup> However, his identity card ultimately placed him as a guard of an SS estate in Okzów, near Chelm, in September 1942 and then at Sobibor as a guard in March 1943.<sup>26</sup> Regardless of the fact that his identification card did not place him at the Treblinka killing center, Demjanjuk was convicted in April 1988 and sentenced to death.<sup>27</sup>

Demjanjuk appealed the conviction, arguing that it was based primarily on the survivor identifications.<sup>28</sup> In 1991, during the appeal, the Soviet Union disintegrated, which allowed for hundreds of thousands of documents to become available to both the defense and the prosecution.<sup>29</sup> Demjanjuk’s defense team found numerous statements from former Treblinka guards who were tried by the Soviets in the early 1960’s, which did not identify Demjanjuk as one of the guards at the camp.<sup>30</sup> Those statements created reasonable doubt that Demjanjuk was ever at Treblinka and in July 1993, the Israeli Supreme Court overturned Demjanjuk’s conviction without prejudice. However, Israel failed to prosecute Demjanjuk for his time at Sobibor.<sup>31</sup> The papers the Soviets retrieved also verified Demjanjuk was at the Sobibor killing center in March of 1943, and then he was at the Flossenbürg concentration camp in October of 1943.<sup>32</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; Barnett, *supra* note 16.

<sup>24</sup> USHMM, *supra* note 14.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; Barnett, *supra* note 16.

<sup>30</sup> USHMM, *supra* note 14.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Demjanjuk was able to retain his U.S. citizenship when a U.S. court found that the U.S. prosecution had suppressed exculpatory evidence about his identity during his denaturalization proceedings and therefore his prior denaturalization was overturned.<sup>33</sup> However, years of investigation ultimately revealed Demjanjuk served as a Trawniki-trained police auxiliary at Trawniki, Sobibor, and Majdanek.<sup>34</sup> Therefore, he lost his citizenship and ordered deported, because he falsified his immigration and citizenship papers when he failed to disclose his service at Trawniki, Sobibor, and Majdanek.<sup>35</sup> Demjanjuk then appealed his deportation order arguing that because of his age and failing health, deportation would rise to level of torture under the United Nations Convention Against Torture Act.<sup>36</sup> In 2008, the Supreme Court declined to review his case.<sup>37</sup>

Also, in 2008, the German government expressed an interest in prosecuting Demjanjuk as an accessory to murder for his time and service at Sobibor.<sup>38</sup> In May 2009, Demjanjuk was removed from the U.S. to Germany, where he was immediately arrested and placed in prison.<sup>39</sup> He was indicted in July 2009 for 28,060 counts of accessory to murder at Sobibor.<sup>40</sup> The German authorities determined the number of counts based on the 15 transport trains brought in from Westerbork camp in the Netherlands during Demjanjuk's time at Sobibor between April and July 1943.<sup>41</sup>

At 89-years-old, Demjanjuk claimed he was too frail to stand trial. However, the trial court proceeded, limiting the time and number of sessions to two 90-minute sessions a day.<sup>42</sup> Unlike in Israel, the German

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<sup>33</sup> See *Demjanjuk*, 518 F.Supp. 1362 (N.D.Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir.1982) *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447 (1982).

<sup>34</sup> USHMM, *supra* note 14.

<sup>35</sup> See *Demjanjuk*, 518 F.Supp. 1362 (N.D.Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir.1982) *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447 (1982); *see also id.*

<sup>36</sup> See *Demjanjuk*, 518 F.Supp. 1362 (N.D.Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir.1982) *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447 (1982); USHMM, *supra* note 14.

<sup>37</sup> See *Demjanjuk*, 518 F.Supp. 1362 (N.D.Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir.1982) *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447 (1982).

<sup>38</sup> USHMM, *supra* note 14.

<sup>39</sup> *Id.*; Holocaust Education and Archive Research Team, *Iwan (John) Demjanjuk "Ivan the Terrible"*, HOLOCAUST RESEARCH PROJECT, (2009), <http://www.holocaustresearchproject.org/trials/demjanjuk.html>.

<sup>40</sup> USHMM, *supra* note 14; Barnett, *supra* note 16.

<sup>41</sup> USHMM, *supra* note 14.

<sup>42</sup> *Id.*

authorities' case rested on wartime documentation of his service and not on survivor testimony. However, because the majority of witnesses were deceased, the court allowed the readings of survivor testimony in order to facilitate findings of mass murder and to identify the victims and their citizenship.<sup>43</sup> On May 12, 2011, Demjanjuk was convicted and sentenced to five years in prison. Subsequently, he appealed his conviction.<sup>44</sup> Less than one year later, Demjanjuk died March 17, 2012, still innocent under German law because his appeals were not exhausted.<sup>45</sup>

The prosecution's success in Demjanjuk's case led to a new sentencing strategies in Germany and allowed the authorities to successfully pursue and ultimately convict others involved in the Holocaust who had evaded prosecution hence far.

### B. *Turning Point in German Prosecutions of Nazi-Era War Criminals*

In the past, prosecutors struggled to prove direct involvement of those low on the chain of command.<sup>46</sup> With the Demjanjuk precedent, prosecutors now only have to prove that the defendant was a cog in the Nazi killing machine.<sup>47</sup> Andreas Brendel, head of the central Nazi war crimes investigation unit in Dortmund stated that one of the things he must prove as a prosecutor is that the perpetrators knew murders were taking place.<sup>48</sup> The Demjanjuk precedent dictated a new way of thinking when it came to prosecuting Nazi war criminals: every duty performed by a guard at an extermination camp made them accessories to murder.<sup>49</sup>

Demjanjuk was found guilty as an accessory to murder based on the time period that he served as a guard at Sobibor.<sup>50</sup> Further, his case hinged on the crucial evidence of his SS identity card which placed him at

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> USHMM, *supra* note 14; Ofer Aderet, *Convicted Nazi Criminal Demjanjuk Deemed Innocent Over Technicality*, HAARETZ, (March 23, 2012), <http://www.haaretz.com/convicted-nazi-criminal-demjanjuk-deemed-innocent-in-germany-over-technicality-1.420280>.

<sup>46</sup> Schulz, *supra* note 13.

<sup>47</sup> *Id.*

<sup>48</sup> Charles Hawley, *'Blood Must Flow': Searching for the Perpetrators of a WWII Massacre*, SPIEGEL ONLINE INTERNATIONAL (February 1, 2013), <http://www.spiegel.de/international/europe/a-german-prosecutor-looks-for-those-behind-nazi-era-massacre-in-france-a-881019.html>.

<sup>49</sup> Schulz, *supra* note 13.

<sup>50</sup> USHMM, *supra* note 14; Spielmann, *supra* note 11.

the Sobibor camp.<sup>51</sup> Prior to Demjanjuk's conviction, the guards had to be found criminally liable, which meant individual guilt was necessary for a conviction.<sup>52</sup> After the Demjanjuk case, criminal culpability was sufficiently established by any service at a Nazi extermination camp.<sup>53</sup>

Demjanjuk's conviction allowed prosecutors to pursue prosecutions that used to be strictly for senior level Nazi officials which depended on individual guilt.<sup>54</sup> The Demjanjuk precedent changed that an now only requires proof the Defendant was merely part of the Nazi's highly organized killing machine and not of their individual guilt.<sup>55</sup> As a result of Demjanjuk's conviction, guards who worked at death camps could, and some would be, charged with aiding, abetting, contributing to, or being complicit in killings that took place at camps where they were guards.<sup>56</sup>

## II. CONVICTION AND SENTENCING – GERMAN LAW COMPARED TO U.S. LAW

When German authorities charged Demjanjuk with accessory to murder, the criminal liability was predicated upon the fact that his service at the camp was to ensure the continued functioning of the killing process.<sup>57</sup> The underlying theory of complicity in the charge would have been akin to conspiracy to commit murder in the U.S.<sup>58</sup> The next sections in this article will compare and contrast German and U.S. law regarding accessory to murder, conspiracy to murder, and sentencing of those crimes to show how the German authorities were able to come to the conclusions they did in regard to Demjanjuk's charges, his ultimate convictions, and sentence.

### A. German Law – Accessory to Murder

Under German law section 211(2), murder is defined as “any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that

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<sup>51</sup> USHMM, *supra* note 14; Spielmann, *supra* note 11.

<sup>52</sup> *See* Spielmann, *supra* note 11; Schulz, *supra* note 13.

<sup>53</sup> *See* Spielmann, *supra* note 11

<sup>54</sup> Cole, *supra*, note 12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See* Spielmann, *supra* note 11.

<sup>58</sup> *See id.*

pose a danger to the public or in order to facilitate or to cover up another offence.”<sup>59</sup> It is clear why prosecutors failed at successfully convicting lower level Nazis after WWII. Murder defined who a murderer was and not the crime itself.<sup>60</sup> According to Christoph Safferling, a law professor at Erlangen, “the idea behind it is that the individual is already born a murderer.”<sup>61</sup>

In order to cast a wider net and to reach all who were part of the Nazi killing machine, prosecutors started charging defendants with accessory to murder. Accessory (abetting) in section 27(1) is “any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.”<sup>62</sup>

The penalty for murder is listed under section 211(1) “[w]hosoever commits murder under the conditions of this provision shall be liable to imprisonment for life.”<sup>63</sup> Under section 27(2), “[t]he sentence for the aider shall be based on the penalty for a principal[, and i]t shall be mitigated pursuant to section 49(1).”<sup>64</sup> Section 49(1) states that as a substitution for imprisonment for life, the defendant will receive no less than three (3) years imprisonment.<sup>65</sup> The maximum imprisonment stated in section 38(2) is fifteen (15) years.<sup>66</sup> Multiple counts of the same crime do not aggregate the sentence, which is found in section 52(1) and states that “if the same act violates more than one law or the same law more than once, only one sentence shall be imposed.”<sup>67</sup> The rules of sentencing crimes in Germany reference personal guilt as a factor in sentence determination, but the courts also take into account the impact of the sentence on the offender.<sup>68</sup>

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<sup>59</sup> § 211(2) StGB (Germany) (2015) available at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html).

<sup>60</sup> Ben Knight, *Justice Ministry to Change German Law's Nazi Definition of Murder*, DW, (July 31, 2015), <http://www.dw.com/en/justice-ministry-to-change-german-laws-nazi-definition-of-murder/a-18620945>.

<sup>61</sup> *Id.*

<sup>62</sup> StGB, *supra* note 59, at § 27(1).

<sup>63</sup> StGB, *supra* note 59, at § 211(1).

<sup>64</sup> StGB, *supra* note 59, at § 27(2).

<sup>65</sup> StGB, *supra* note 59, at § 49(1).

<sup>66</sup> StGB, *supra* note 59, at § 38(2).

<sup>67</sup> StGB, *supra* note 59, at § 52(1).

<sup>68</sup> StGB, *supra* note 59, at § 49(2); see also Hans-Jörg Albrecht, *Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing*, 76 DUKE LAW & CONTEMP. PROBS. 211, 214 (2013), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4352&context=lcp>.

Additionally, section 46(2) is a non-exhaustive list of other mitigating offender-related elements must be taken into account during the sentencing.<sup>69</sup> Finally, under section 78(2), murder, and therefore accessory to murder, are not subject a statute of limitations.<sup>70</sup> To fully understand the German code, this next section will break down Demjanjuk's conviction and sentencing.

Demjanjuk was convicted of 28,060 counts of accessory to murder and sentenced to five years in prison.<sup>71</sup> Demjanjuk was not convicted of murder under section 211(2), because he was not a person who kills a person for pleasure, sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.<sup>72</sup> The prosecution was unable to prove that Demjanjuk had the murderous motive, but they were able to prove that Demjanjuk was a part of the over all Nazi killing machine.<sup>73</sup> Demjanjuk was convicted of accessory to murder, because the courts found his service to the Nazis at the killing camps was intentionally assisting the greater Nazi cause in the intentional commissions of unlawful acts.<sup>74</sup>

Section 27(2) states that the the aider's sentence will be based on the penalty of the principal, which means that Demjanjuk would receive the same penalty as that of the crime of murder.<sup>75</sup> However, section 27(2) can be mitigated by section 49(1), which states that instead of imprisonment for life, Demjanjuk can be sentenced to no less than three years in prison.<sup>76</sup> The 28,060 counts do not affect Demjanjuk's final sentence, because according to section 52(1), one sentence will be imposed if the same act violates the same law more than once.<sup>77</sup>

German authorities could sentence Demjanjuk anywhere from no less than three years and up to but not more than fifteen years.<sup>78</sup> In order for the German authorities to pinpoint a specific sentence for Demjanjuk, they had to address the non-exhaustive list of mitigating offender-related

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<sup>69</sup> *See id.*

<sup>70</sup> StGB, *supra* note 59, at § 78(2).

<sup>71</sup> USHMM, *supra* note 14.

<sup>72</sup> *See* StGB, *supra* note 59, at § 211(2).

<sup>73</sup> USHMM, *supra* note 14.

<sup>74</sup> *See* StGB, *supra* note 59, at § 27(1); *id.*

<sup>75</sup> *See* StGB, *supra* note 59, at § 27(2).

<sup>76</sup> *See id.*; StGB, *supra* note 59, at § 49(1).

<sup>77</sup> *See* StGB, *supra* note 59, at § 52(1); USHMM, *supra* note 14.

<sup>78</sup> *See* StGB, *supra* note 59, at § 38(2); StGB, *supra* note 59, at § 49(1).

elements in section 46(2).<sup>79</sup> Factors the court considered include Demjanjuk's motives and aims; his attitude reflected in the offence and the degree of force of will involved in its commission; the degree of the violation of his duties; the consequences caused by the offence to the extent that he is to blame for them; his prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused; and his efforts to reconcile with the victim.<sup>80</sup> The court took into account Demjanjuk's age and the fact that he did not have an influence over the number of prisoners who were sent to Sobibor, and they settled on a five year sentence.<sup>81</sup>

### B. U.S. Law – Conspiracy to Commit Murder

For an easier comparison, this section will focus on only the federal criminal code and not on individual state codes. Under 18 U.S.C. § 1111(a), murder is defined as the following:

The unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.<sup>82</sup>

Unlike the German law, U.S. law describes the actual crime and not just a definition of a murderer, and it defines two kinds of murder depending on intent.<sup>83</sup> 18 U.S.C. § 1111(b) specifies that “whoever is guilty of murder in the first degree shall be punished by death or by

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<sup>79</sup> See StGB, *supra* note 59, at § 46(2).

<sup>80</sup> *Id.*

<sup>81</sup> USHMM, *supra* note 14; Jack Ewing and Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, THE NEW YORK TIMES, (May 12, 2011),

[http://www.nytimes.com/2011/05/13/world/europe/13nazi.html?\\_r=0](http://www.nytimes.com/2011/05/13/world/europe/13nazi.html?_r=0) .

<sup>82</sup> 18 U.S.C. § 1111(a).

<sup>83</sup> See *id.*; *contra* StGB, *supra* note 59, at § 211(2).

imprisonment for life; whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.”<sup>84</sup>

Conspiracy to murder under section 1117 states that “if two or more persons conspire to violate section 1111...of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.”<sup>85</sup> According to the U.S. Sentencing Guidelines, the minimum sentence for murder or conspiracy to murder is a life sentence.<sup>86</sup> Murder is also a capital offense, without a statute of limitations.<sup>87</sup> On the other hand, conspiracy charges have a five year statute of limitations.<sup>88</sup> However, there are times where conspiracy offenses, such as conspiracy to murder, can still be prosecuted after the five years.<sup>89</sup>

The complexities of U.S. laws are apparent compared to German laws. Between the different charges that could have been filed to the different sentencing schemes, it would be difficult to figure out exactly how Demjanjuk’s case would have turned out in the U.S. Although, had Demjanjuk been convicted of 28,060 counts of conspiracy to commit murder, he would have likely received far more than five years in prison.

### III. DEMJANJUK PRECEDENT IN ACTION – NAZI WAR CRIME TRIALS SINCE 2011

Since 2011, Nazi hunters have been tracking down and prosecuting the remaining living Nazi criminals, particularly guards at the infamous Auschwitz camp.<sup>90</sup> The following sections describe a few of the newly emerged Nazi criminals, who were prosecuted or are being investigated for prosecution as a result of the Demjanjuk precedent.

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<sup>84</sup> 18 U.S.C. § 1111(a).

<sup>85</sup> 18 U.S.C. § 1117.

<sup>86</sup> United States Sentencing Guidelines, *Guidelines Manual*, § 2A1.1, § 2A1.5 (Nov. 2015), available at <http://www.uscourts.gov/guidelines-manual/2015/2015-ussc-guidelines-manual>.

<sup>87</sup> 18 U.S.C. § 3281.

<sup>88</sup> 18 U.S.C. § 3282.

<sup>89</sup> *Id.*

<sup>90</sup> Ian Johnston and Andy Eckardt, *Never Too Late: Nazi Hunters Tirelessly Pursue 50 Elderly Auschwitz War Criminals*, NBC NEWS, (May 12, 2013), [http://worldnews.nbcnews.com/\\_news/2013/05/12/18148965-never-too-late-nazi-hunters-tirelessly-pursue-50-elderly-auschwitz-war-criminals](http://worldnews.nbcnews.com/_news/2013/05/12/18148965-never-too-late-nazi-hunters-tirelessly-pursue-50-elderly-auschwitz-war-criminals).

### A. Hans Lipschis

In May 2013, Hans Lipschis was arrested and charged with 10,510 counts of accessory to murder.<sup>91</sup> German authorities decided there was “compelling evidence” that he was involved in crimes during his time at Auschwitz from 1941 to 1945.<sup>92</sup> During Lipschis’ time at Auschwitz, twelve prisoner convoys arrived out of which more than 10,000 prisoners were immediately determined unfit for work and sent to the gas chambers.<sup>93</sup> Prosecutors claimed that Lipschis was a guard at Auschwitz.<sup>94</sup> However, he claimed he was only a cook and was never involved in any killings.<sup>95</sup> As of February 2014, Lipschis was deemed unfit to stand trial, because of his worsening dementia.<sup>96</sup>

### B. Oskar Groening

On July 15, 2015, Oskar Groening was convicted of 300,000 counts of accessory to murder and sentenced to four years in prison.<sup>97</sup> Groening was known as the “Bookkeeper of Auschwitz,” because he was in charge of collecting money from the Jewish prisoners belongings before they were sent to the gas chambers.<sup>98</sup> “It is beyond a question that I am morally complicit,” Groening admitted at trial, “This moral guilt I acknowledge here, before the victims, with regret, and humility.”<sup>99</sup> Even with his admission in court, Groening’s attorneys argued he should have

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<sup>91</sup> *94-Year-Old Auschwitz Guard Hans Lipschis Ruled ‘Unfit’ for Trial*, REUTERS, (February 28, 2014), <http://forward.com/news/breaking-news/193620/94-year-old-auschwitz-guard-hans-lipschis-ruled-un/>.

<sup>92</sup> *Holocaust Criminal Arrest: 93 Year-Old Nazi SS Auschwitz Guard Arrested*, NATIONAL TURK, (May 7, 2013), <http://www.nationalturk.com/en/holocaust-criminal-arrest93-year-old-nazi-ss-auschwitz-guard-arrested-europe-news-37389>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; Reuters, *supra* note 91.

<sup>95</sup> Reuters, *supra* note 91; National Turk, *supra* note 92.

<sup>96</sup> Reuters, *supra* note 91.

<sup>97</sup> Kim Hjelmgaard, *Ex-Auschwitz Guard, 94, is Sentenced to Prison*, USA TODAY, (July 15, 2015), <http://www.usatoday.com/story/news/world/2015/07/15/former-auschwitz-guard-oskar-groening/30176313/>.

<sup>98</sup> *Id.*

<sup>99</sup> Laura Smith-Spark and Ben Brumfield, *Former Auschwitz Nazi Officer Oskar Groening gets 4-Year Sentence*, CNN, (July 15, 2015), <http://www.cnn.com/2015/07/15/europe/germany-nazi-death-camp-verdict/>.

been acquitted, because he did not actively facilitate or participate in the killings.<sup>100</sup> Because of the Demjanjuk precedent, Groening's defense that he was merely a "cog in the gears" did not pass muster.<sup>101</sup> Judge Franz Kompisch concluded Groening played his part, which facilitated the continued operation of the camp, and therefore the mass killings.<sup>102</sup> Groening's four-year sentence exceeded the three and a half years the prosecutors had sought.<sup>103</sup>

### C. *Hilde Michnia*

In February 2015, German authorities announced they would be investigating Hilde Michnia for her suspected role as a guard at the Bergen-Belsen concentration camp.<sup>104</sup> The investigation of Michnia came on the heels of a civilian complaint who saw an Irish documentary where Michnia was interviewed and admitted to taking part in the evacuation and death march.<sup>105</sup> Authorities are looking into allegations that Michnia was involved in the "death march" where 1,400 prisoners are believed to have died while marching from Gross-Rosen concentration camp to Gubin labor camp.<sup>106</sup>

Michnia, like Groening, admitted to being at the camp.<sup>107</sup> However, she states she was only a cook in the kitchen and was not involved in the mass killings.<sup>108</sup> Michnia was previously convicted for her work as a concentration camp guard when she was put on trial in 1945 by the British occupying forces.<sup>109</sup> Michnia was sentenced and served a year in prison. Recently, Michnia stated the investigations into her time at

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<sup>100</sup> Hjelmgaard, *supra* note 97.

<sup>101</sup> Smith-Spark, *supra*, note 99.

<sup>102</sup> Hjelmgaard, *supra* note 97.

<sup>103</sup> *Id.*

<sup>104</sup> Ben Knight, *93-Year-Old German Woman Suspected of Being Belsen SS Guard*, THE GUARDIAN, (February 2, 2015), <http://www.theguardian.com/law/2015/feb/02/93-year-old-german-woman-suspect-belsen-ss-guard>.

<sup>105</sup> *Id.*; Andy Eckardt, *Hilde Michnia, 93, Investigated Over Nazi Allegations: German Official*, NBC NEWS, (February 2, 2015), <http://www.nbcnews.com/news/world/hilde-michnia-93-investigated-over-nazi-allegations-german-official-n298376>.

<sup>106</sup> Eckardt, *supra* note 105.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Knight, *supra* note 104.

Bergen-Belsen and the death march will not yield any evidence against her.<sup>110</sup>

#### IV. CONCLUSION

Germany took over 65 years to find a way to reach beyond the senior official and to be able to prosecute all who were involved in the grand scheme of the war crimes – specifically mass killings of the European Jewish population. Unfortunately, war crimes including genocide, are not merely in the past. Germany's ground-breaking legal shift has the opportunity to lead the way. The new war criminal will not only be the one who ordered and organized the killings, but can also be the one complicit in the killings—the one who just “did his job.” This shift can potentially do what has not been done before – provide the deterrent factor that has been missing. The “every man” can now be pulled into court for war crimes. No longer can he choose to overlook his moral duty to humankind because he was simply “following orders.” And only now can the harsh reality of his actions, or lack thereof, finally sink in.

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<sup>110</sup> *Id.*