

... being able to provide any evidence.¹⁰⁴ No less problematic are Nuding's many analogies between the "Contergan crime" and the Holocaust.¹⁰⁵

The work is equally unconvincing in respect of the role of politics and the state in the Contergan scandal. Nuding imagines a broad-based conspiracy supported by a network of interests from industry, justice and federal and state governments and perpetrating a deliberate cover-up in favour of the miscreant company.¹ To corroborate this claim, it relies on assumptions of third parties (which in some cases contain a number of factual errors¹⁰⁷) or on literature which hardly supports his specific arguments or indeed even has a conspiracy theory character. There is no deployment of significant source material, including the archives of politicians or authorities, however. The book contributes little to an explanation of the Contergan scandal and is in fact misleading in some ways, but ultimately offers an impressive example for the retrospective handling of the Contergan scandal.

Even if it is not a case of serious research, we should discuss the articles which appeared in November 2014 and (also) concerned the role of the state of North Rhine-Westphalia. These posts written by Harold Evans were published in the *Guardian* and on a website of the news agency *Reuters*.¹⁰⁸ They can be seen in connection with a campaign by British Thalidomide victims in which enforcement is sought of claims against the Federal Government.¹⁰⁹ These articles primarily concern an improper influence on the Contergan proceedings by the Federal state. This allegation is supposed to be supported by files which a researcher commissioned by the English law firm *Ince & Co* claims to have newly discovered. As suggested by the very idea of the objectives of these articles and confirmed by their reading, they consist of very blatantly distorting descriptions. This is evident right at the beginning of the two articles. The text talks of 100,000 damaged children across the world, of whom 80,000 are now deceased. This multiplies all reputable estimates roughly tenfold.

The minor inaccuracies,¹¹⁰ however, are of less interest here than the supposedly new discoveries. On

¹⁰⁴ Nuding, *Profit*, 2011, p. 36-39.

¹⁰⁵ These analogies culminate in the playback of the utterance of a fellow victim, according to which "Auschwitz is a joke", compared to the "Contergan crime, because Auschwitz "at worst lasted a few years", but the Thalidomide victims "got life". (Nuding, *Profit*, 2011, p. 11). Nuding does not dissociate himself from this statement. See also p. 14f., 172-176.

¹⁰⁶ Nuding, *Profit*, 2011, p. 8, 10-15, 100, 142-44 u. ö.

¹⁰⁷ This concerns especially the interview with Peter Plichta (pp. 101-106), which is simply full of errors. Plichta says somewhere in it that "absurdly" [!] not the owners, but employees of the firm had been indicted. That in German criminal law only the person who has committed a criminal offence can be prosecuted is apparently unknown to Mr Plichta. In addition to numerous additional factual errors (e.g. that Thalidomide had been developed in 1957 or that Walter Scheel was Finance Minister of North Rhine-Westphalia in 1956), it is particularly brazen that words are put in the mouth of the former Prosecutor in the Contergan proceedings, Dr. Josef Peter Havertz, which obviously do not originate from him. Not only has Havertz expressed the contrary in other interviews. But also, these statements are so strikingly inaccurate (e.g. that only in the last year of the Contergan proceedings two more prosecutors joined the proceedings) that they can scarcely be ascribed to Havertz. It is also wrong for Plichta to claim that the Thalidomide injury could have been prevented by a simple chiral resolution of racemates, because the active ingredient of Thalidomide racemises in human blood.

¹⁰⁸ "Thalidomide: how men who blighted lives of thousands evaded justice", 14.11.2014. In: <http://www.theguardian.com/soci-ety/2014/nov/14/-sp-thalidomide-pill-how-evaded-justice> Retrieval date: 16.01.2016; "Documents raise fresh questions about thalidomide criminal trial". 13.11.2014. In: <http://blogs.reuters.com/great-debate/2014/11/13/documents-raise-fresh-questions-about-thalidomide-criminal-trial/> Retrieval date: 16.01.2016.

¹⁰⁹ See the website of the campaign: <http://www.fiftyyearfight.org/> Retrieval date: 16.01.2016.

¹¹⁰ The investigations focused not on "5,000 case histories", but only on 300 cases. Not 700 people crowded into the session hall of the Alsdorf Mining Casino "Anna" (on the well-attended first day of the

closer inspection, it becomes clear that the reasoning of Evans is not cogent. Almost every supposedly newly found document is incorrectly dated or misrepresented. This applies first of all to an alleged meeting between the main accused and Grünenthal shareholder Hermann Wirtz, his lawyers and representatives of the Federal Ministry of Health. This meeting seems to have been particularly scandalous, because at it, Wirtz was excluded from the Contergan proceedings for health reasons. Apart from the fact that this meeting did not take place, as indicated by Evans, on 21 July 1969, but on 3 July (it was only the meeting notice that dated from 21 July), the memo clearly indicates that it cannot have involved Hermann Wirtz. The specifically named guests at the Ministry include in particular the "brothers Wirtz"¹¹¹ However, since the brothers of Hermann Wirtz were already deceased at that time, only Michael and Franz Wirtz can be meant. They were indeed not brothers, but roughly equal in age and had also participated in the same period in other meetings as representatives of Grünenthal.¹¹² So the big question is why the participation of Hermann Wirtz is claimed here, if any such participation can be ruled out simply on the basis of the memo indicated.

More serious, however, is the fact that the *Guardian* article suggests that an "overall solution" was discussed at the meeting, "meaning a high-level political intervention to stop the trial."¹¹³ Actually the discussion was on whether and how in the context of a civil law settlement social assistance and social insurance institutions could be persuaded to abandon the claims assigned to them. So it was specifically *not* about the claims of victims. With respect to the criminal proceedings, it is stated in a further memo on this meeting: "For these reasons it appears advisable, after a relevant decision of the management of the company, only to join discussions about the solution of the problem when the criminal case is completed, because then even if the negotiations became public an influence of the proceedings would not be a concern."¹¹⁴ How it is possible to infer from this statement that the intention is to encourage a settlement of the criminal proceedings remains a mystery. In fact the Federal Ministry of Health largely kept out of all further negotiations up to the civil agreement between Grünenthal and the claimant representatives.¹¹⁵

That the content of the proceedings is given a tendentious and misleading description is evident at the latest in the assessment of a working paper of the Aachen public prosecutor. The undated document, which concerns the question of the discontinuance of the proceedings under § 153 StPO and which is the only one of its kind, is dated to February 1970. It is taken to prove that the prosecutors were at this time arguing against a settlement of the Contergan proceedings. In fact, however, the paper was drafted at the latest in April 1969, because a note of Prosecutor Havertz of 11 April 1969, stapled together with this paper, specifically refers to this paper.¹¹⁶ It is true that a judgment of the Supreme Court of 26 November 1969 is mentioned in the working paper. But based on the case number VI ZR 212/66 it would have been easy to establish that this is a court judgement of 1968 - and 1969 is thus a typo. That the document is rendered here completely misleadingly is confirmed by other documents, according to

proceedings) but about 200 media representatives and significantly fewer viewers (including the victims). Contrary to the suggestions, 40 defence counsels did not work for the accused simultaneously, but only about half that number. The indictment called 352, not 351 witnesses. Since one defendant (Chauvistré) died during the proceedings, it is also incorrect that in 1970 all nine defendants could walk free from the courtroom.

¹¹¹ Note BMG, 21.07.1969. In: BA Koblenz, B 189, no. 751, fol. 5-7, quote p. 5.

¹¹² The following file document (Foundation for the disabled child to BMG Strobel, 01.09.1969. In: BA Koblenz, B 189, no. 751, fol. 8-11) indicates that Franz Wirtz was involved here, who simply due to his age could hardly be regarded as the brother of Hermann Wirtz. That Franz and Michael Wirtz were also involved in other talks is also clear from an official note of LGDir Melster (LAV NRW R, Courts Rep. 139, no. 276, here p. 133).

¹¹³ "Thalidomide: how men who blighted lives of thousands evaded justice", 14.11.2014. In: <http://www.theguardian.com/socie-ty/2014/nov/14/-sp-thalidomide-pill-how-evaded-justice> Retrieval date: 16.01.2016.

¹¹⁴ Note BMG, 18.09.1969 (date marked with a question mark!). In: BA Koblenz B 189, no. 751, p 13-15, quote p. 15.

¹¹⁵ See the files of the UBL on the establishment of the Foundation: BA Koblenz, B 189, Nr. 751; No. 20854.

¹¹⁶ Note EStA Havertz, 11.04.1969. In: LAV NRW R, Rep. 139, no. 363, nf. [5].

which the three prosecutors in the Contergan proceedings had in February 1970 long advocated a discontinuance of the proceedings, if material compensation of the injured children could be obtained as a result.¹¹⁷ But why is the working paper of Evans dated February 1970? Obviously it has to do with the support of the thesis that pressure "from the top" had been put on the prosecutors to terminate the proceedings. This of course assumes the unwillingness of the prosecution representative to accept a settlement of the proceedings. As, however, will be shown in the course of this work, the deliberations in Alsdorf for a settlement of the proceedings preceded the equivalent deliberations in the State and Federal Government.

More questionable still is the following passage, originating from the *Guardian* article: "The state prosecutor Josef Havertz said "everything got worse" after Neuberger took over." I was the only state prosecutor and I was drowning in the files. It wasn't until the last year that I was provided with two young prosecutors as assistants, and they went behind my back and betrayed the victims."¹¹⁸ Anyone who has dealt even only briefly with the Contergan proceedings must know that this statement cannot be correct. In the proceedings, three prosecutors were represented from the outset and not only in the last year. For many years, two of them were involved in the investigation. Evans has probably taken these quotations from an interview with the conspiracy theorist Peter Plichta, who is in turn referring to a specific TV interview with District Attorney Havertz.¹¹⁹ In this interview, Havertz says, however, the opposite.¹²⁰ That shows just how honourable Evans' commitment is to the thalidomide victims: with such obviously misleading accounts, he does them a disservice.

Evans' article on the *Reuters* homepage contains even more inaccuracies and misinterpretations. Reference is made there, for example, to a note about a telephone conversation between the Secretaries of State in the Federal and North Rhine-Westphalian Ministries of Justice of 11 March 1970. In this conversation the Secretary of State in Düsseldorf assures his Bonn colleague (to this extent Evans' article is correct) that the prosecutors would agree to a settlement of the proceedings under certain circumstances. This is understandable, however, when one considers (as Evans does not) that the prosecutors had already by then been arguing for some time for a discontinuation with concurrent assistance payments. Also this note is incorrectly described by Evans when he refers to the head of Department and Director Kai Bahlmann here as Secretary of State in the Bonn Ministry of Justice. Hermann Maassen was Secretary of State and a party to the meeting on 11 March 1970.¹²¹ All other "newly unearthed documents" in Evans' articles are described sometimes more, sometimes less incorrectly.¹²²

¹¹⁷ See in detail chapter 3.4.4.

¹¹⁸ "Thalidomide: how men who blighted lives of thousands evaded justice", 14.11.2014. In: <http://www.theguardian.com/society/2014/nov/14/-sp-thalidomide-pill-how-evaded-justice>. Retrieval date: 16.01.2016.

¹¹⁹ Plichta, Prime numerical unit, vol. 3, 2009. There (p. 55) prosecutor "Dr. Havertz", with reference to the TV documentary by Gero Gemballa is quoted - "freely" - as follows: "I was the only District Attorney and almost drowned by the files. And one day the leader of them, Neuberger, suddenly overnight became the Minister of Justice and so my boss. Then it all got worse. Only in the last year did they give me 2 young prosecutors, who then betrayed me behind my back."

¹²⁰ In the TV documentary *Because of insignificance* by Gemballa Havertz says literally: "There was a new defence counsel to replace him, who then also became the coordinator of the defence and just a few weeks later became Minister of Justice. *Question*: How did it feel then? *Havertz*: Yes, strange, because the defence counsel was suddenly overnight my boss. [...] It was a strange feeling, but, at least for me, the former defence counsel, now Minister of Justice, did not make things too difficult." (Min. 27:24 27:46; 29:35 29:48). That it was only in the last year that two prosecutors were added is not claimed by Havertz with a single word, especially as it is simply wrong.

¹²¹ Note StS Maaßen, 11.03.1970. In: BA Koblenz, B 141, no. 59478, p. 152f.

¹²² "Documents recently unearthed". Quotation in: "Documents raise fresh questions about thalidomide criminal trial". 13.11.2014. In: <http://blogs.reuters.com/great-debate/2014/11/13/documents-raise-fresh-questions-about-thalidomide-criminal-trial/>. Retrieval date: 16.01.2016. For example a letter of Mr Waldeyer-Hartz, falsely dated to 26.01.1969 which actually originates from 05.01.1969 is reproduced wrongly. It is true that this letter is dated correctly in the *Guardian* article (see "Thalidomide: how men who blighted lives of thousands evaded justice", 14.11.2014. In:

It is also worth mentioning a published letter of the British law firm *Ince & Co* to the British *Thalidomide Trust*.¹²³ In it, the firm, on whose research Evans also relied, lists several documents in addition to the above-mentioned ones, claiming to have found evidence of an illegal intervention of the Federal Government in the direction of a settlement of the proceedings. These facts are also inadequately researched or deliberately misrepresented, however, as is easy to see: various documents from a file of the office of the Federal President are cited in the letter.¹²⁴ These documents are cited to prove there was support for a settlement of the proceedings with concurrent compensation for the victims and clarity about concerns over a link between a settlement and payment of the money. This is true. It is concealed here, however, that these documents - of which one is even explicitly mentioned! - clearly state that the Aachen prosecutors were involved in negotiations for a settlement of the proceedings with simultaneous compensation *before* the Federal Government intervened in any form.¹²⁵ Against this background the impression is inescapable that the goal of this research consists less in a thorough reconnaissance of the facts of the case, and more in the assertion of material interests. This is also reflected by the fact that more detailed references are never given, which might allow any interested reader to convince himself of the validity of the observations.

The Source Base

The sources on the subject of Contergan are very disparate overall. While the source material is in some ways hard to summarise, let alone to evaluate (in terms of the media coverage or public statements of those involved), it is also characterised by major gaps of sources (for example, with regard to the files of the health and social authorities). To that extent each of the various areas of work has to deal with its own problems. While in the following the sources consulted for the work will be discussed

<https://www.theguardian.com/society/2014/nov/14/-sp-thalidomide-pill-how-evaded-justice> Retrieval date: 16.01.2016). There, however, the official statement of DA Havertz on this letter is dated to 26.01.1969, but in fact comes from 27.01.1969. See the original documents in: LAV NRW R, NW 875, no. 14101, p. 813f.; LAV NRW R, Rep. 139, no. 276, p. 9. See Chap. 3.4.2.

¹²³ *Ince & Co* to the Thalidomide trust, 05.03.2015. In:

http://www.fiftyyearfight.org/images/Appendix_1_Ince_letter.pdf Retrieval date: 16.01.2016.

¹²⁴ This means the cases: BA Koblenz, B 122, no. 10839 (in the documents 3e, 3f, 3 g of) *Ince & Co*-Briefs). All other there cited documents can be found in: BA Koblenz, B 189, no. 751 (3a, 3 b, 3 c); BA Koblenz, B 141, no. 59478 (3 h); LAV NRW R, Rep. 139, no. 363 (in: document 3i). 3d document of the *Ince & Co* letter is not specified. It is a memorandum, according to which the total damage amounts to DM 1.5 billion. There are not only various memos that the total damage was estimated at billions of dollars (in: BA Koblenz, B 141, no. 59478; B 189, no. 20854), but similar numbers circulated in the press. See for example "Not a unique case". In: Der Spiegel No. 51, 14.12.1970, p. 87.

¹²⁵ In the letter of the law firm *Ince & Co* reference is made to a plan for an appeal where the Federal President, the Archbishop of Cologne, the President of the Evangelical Church in the Rhineland and the Chairmen of Action Child Concern called on Grüenthal and the victim associations to end all disputes, with compensation paid to the injured parties but cessation of the criminal proceedings. In a letter mentioned by *Ince & Co* of 06.11.1969 it is merely stated that: "Attorney General Dr. Drügh has privately informed the Federal President that a defence counsel of the company Chemie Grüenthal AG is already seeking a settlement in the direction desired by you and the President. Dr. Drügh has asked for this reason to wait about two weeks with the letter to stakeholders." From this it is clear that the settlement efforts between the parties to the proceedings in Alsdorf were already underway, *before* the Federal President or the Federal Government applied in any form to the parties. This is also confirmed in a memo of 08.12.1969 (not mentioned by *Ince & Co*), which is present in the same file and in which it is stated that: "He [GStA Drügh] indicated that concrete settlement negotiations between the DA, Court, defence and Plaintiffs would take place this week. The defence had made a generous offer that appeared acceptable to the DA and the Court, as well as to the plaintiffs. This week there will be further negotiations about it how it is possible to end the criminal proceedings and prevent further judicial disputes (civil litigation)." The sources for both documents are: BA Koblenz, B 122, no. 10839, p. 350, 357-359. On the background see in detail Chap. 3.4.4.

and thereby also preliminary evidence on the role and functions of the authorities and bodies concerned, in a subsequent part the problem of sources and transmission gaps will be specifically considered.

The most important source for historical research into the topic of Contergan is to be found in the North Rhine-Westphalian State Archive, Department of the Rhineland. These are the criminal files of the Contergan proceedings. This collection consists of over 400 volumes of files, often consisting of several partial volumes.¹²⁶ They contain all the central documents of the proceedings, including the 972 pages long indictment,¹²⁷ the opening and cessation order of the trial and all the evidence on which the prosecution relied (especially extensive documentation of the company Grünenthal). In addition, the files contain the criminal investigation records (correspondence, notices, interview logs, statements of suspects, etc.), the documentation of the individual claims ("Deformities: 33 files, Nerve damage: 59 files") and medical opinions, but also submissions to the Public Prosecutor's Office and the Court, the major part of the proceedings in the verbatim record, a comprehensive collection of press articles and both medical and legal specialist literature and much more.

¹²⁶ LAV NRW R, Rep. 139, no. 1-396. The repository essentially contains the files of the Contergan proceedings in full. Only the package inserts (vol. 169-170), the cost volumes (vol. 177-181), the charges (vol. 284-287) and the joint plaintiffs volumes (vol. 234-236) have been destroyed. The double documents were collected in the DA Aachen handwritten files. Unfortunately the original volume numbering does not always correspond to the numbering of the archive files. The LAV NRW R informed the author that a new numbering arrangement was being planned to fix these problems. In November 1980 the DA Aachen handed over in total 482 volumes of files as well as 540 tapes, 4 rolls of film, 2 folders and 1 stapler at the former chief prosecutor. The spatial volume of these files alone amounted to over 7 1/2 cubic meters! See for the file transfer: LOStA Aachen to chief prosecutor NRW, 06.11.1980; chief prosecutor NRW to DA Aachen, 14.06.1980. In: LAV NRW R, BR 1474, no. 243, nf. See also have the volume: LAV NRW R, Rep. 524, no. 1-19, consisting of press reports and press releases.

¹²⁷ The indictment consists of two volumes. Vol. 1 is the main volume and contains the indictment (48 pages numbered in Roman numerals) and the essential results of the investigations (565 pages). Vol. 2 is the volume of notes and has 359 pages (350 "regularly" numbered and 9 "inserted" pages: p. 4a, 160a, 160, 160 c, 209a, 209 b, 263a, 271a, 303a)