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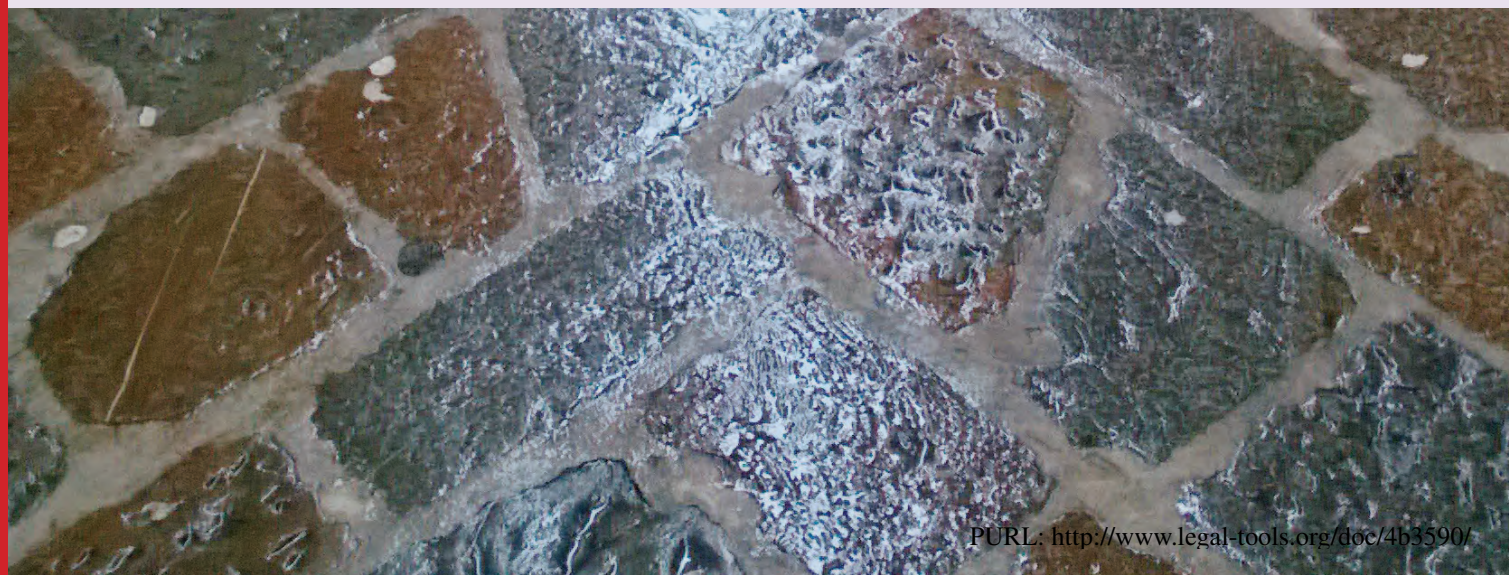

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Prosecution of War Criminals in the North: Danish and Norwegian Experiences after the Second World War

Ditlev Tamm*

35.1. Introduction

Prosecution of war criminals after the Second World War, even if based on international agreements, took very different shapes in different countries. The number of individuals in Denmark and Norway prosecuted for war crimes during and after the Second World War was rather limited. To a great degree this was a result of varying local conditions and the historical situation in these countries both during and after the war. In Denmark a total of a little more than 250 names were investigated and, of these, 83 individuals were prosecuted for war crimes, while in Norway the number of investigations was somewhat higher at around 350 but the number of prosecutions comes fairly close to the Danish figure. These numbers do not include nationals who committed crimes that can be classified as war crimes. In official statistics, only foreigners were listed as war criminals and specific statutes in Denmark and Norway were directed against non-nationals who were not included in the prosecution of nationals considered as traitors or collaborators.

Among the Nordic countries, only two experienced occupation by German forces. During the war Sweden had, in principle, kept its neutrality, while Finland had had its own wars with the Soviet Union and a different relationship with Germany. By contrast, both Denmark and Norway were occupied by German troops from 9 April 1940 onwards. The response to the German attack was different in each of these countries. Norway resisted for some months, when the Government and the King fled to London, whereas military resistance was abandoned in Denmark after a few hours of fighting and an agreement was made between the two countries in which Denmark recognised the German occupation. From that moment two different regimes of war administration were imposed in Denmark and Norway. These differences

were clearly reflected in the way in which the prosecution of war criminals was envisaged.

Before entering into the history of prosecution of war crimes in the Nordic countries it may be useful to remember how in the first century BC Cicero in his speech *Pro Milone*[1] coined the famous words "*silent enim leges inter arma*" (laws are silent when arms are raised), which have been instrumental as to the question of the degree to which warfare allows the law to be set aside. A slightly different version of this saying was given in 1998 by the US Chief Justice William Rehnquist, who, after having examined the view that necessity would curtail civil liberties during wartime, expressed his view: "The laws will thus not be silent in time of war, but they will speak with a somewhat different voice"[2]. Even more strongly, Justice Antonin Scalia has stated the view that "liberty give way to security in times of national crisis that, at the extremes of military exigency, *inter arma silent leges*" had no place in matters of constitutional rights.[3]

In the two thousand years that separate Cicero from Rehnquist and Scalia, the world has experienced a great deal of warfare and heard many different voices regarding how to handle the delicate question of the relationship between the belligerent god Mars and his subordinates and

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1 Marcus Tullius Cicero, *Pro Milone*, lV, translated by N.H. Watts, 2nd ed., Harvard University Press, Loeb Classical Library, Cambridge, MA, 1953.

2 William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime*, Vintage, New York, 2007.

3 Supreme Court of the United States, *Hamdi v. Rumsfeld*, Scalia, J., dissenting, 542 U.S. 507, 2004.

the frail woman whom we know as Justice. The story of Denmark and Norway after the Second World War is only one of many tales of the attempt to do justice in this field, an attempt which at that time was completely new in the Nordic countries.

In 1945 the International Military Tribunal ('IMT') for Germany in Nuremberg set a new standard introducing and defining crimes against peace, war crimes and crimes against humanity and by not just honouring the excuse that the defendant had acted under orders of his government or his superiors. The IMT was invested with the right to impose the death penalty or other punishment determined to be "just" upon convicted defendants. The way in which the question of war criminals was dealt with in Denmark and Norway was inspired by the IMT and the procedure and the punishments reflected the standard set by it. As is well known, the basic scheme of crimes to be punished by such a court was refined in the Rome Statute which established the International Criminal Court ('ICC') and ratified in 2002. Punishments were then adjusted to new standards and limited to imprisonment of up to 30 years, whereas the question of the death penalty plays a crucial role in the Danish and Norwegian cases.

In the quotations given here, basic notions such as "just", "different voices" and "constitutions" are used. The question of what is considered "just" in such cases must thus be seen against a background of "different voices". This raises, especially in Norway, the question of the importance of constitutional rights when judging war criminals. Thus, taken together, the judgment of war criminals in Denmark and Norway illustrates in a magisterial way some of the more complicated issues connected with international criminal justice.

35.2. Transitional Justice in the Nordic Countries

In all Nordic countries, the war and the dominant position of Germany in the area determined the policies to be followed during and after the war. After 9 April 1940 German forces occupied Denmark and Norway. Even if Sweden remained neutral, the Swedish Government was nonetheless forced to accept that, for example, German troops had access to the Swedish railway system for transportation of both troops and materials necessary for warfare, whereas Finland, to a certain extent, was allied with Germany after having been attacked by the Soviet Union. Iceland, far away in the Atlantic Ocean, and independent from Denmark since

1944, was occupied by British troops, as were the Faroe Islands, whereas Greenland was occupied by the US.

As already mentioned, the situations in Denmark and Norway during wartime were quite different from one another. The German memorandum presented to the Danish Government guaranteed that Danish political and legal institutions were respected by Germany. On the other side, Denmark accepted the fact of occupation by German forces. This memorandum gave the occupation of Denmark its own character. That is, legally it was not a normal belligerent occupation but the situation was classified as an *occupation sui generis*. The Danish King did not flee to London but remained in Denmark. The Parliament was working, as were the Courts and the administrative system including the police and the Danish Army and Navy. Official life functioned as normal with the only – and of course quite notable – difference being that the country was in fact occupied by the German *Wehrmacht* (armed forces) and thus had to conform to certain demands from the occupying power. The situation was dynamic in the sense that German demands became increasingly controversial and at a certain point led to the withdrawal of the Government. Relations between Denmark and Germany were maintained at the top level as if they were two independent countries. No war administration was organised but relations between occupied and occupier were kept at the level of the Foreign Ministers.

Nazi representation in the Danish parliament was minimal. The party never gained more than around 30,000 members and a similar number of votes out of a population of more than 4 million. This meant that the German authorities did not have sufficient interest in setting up a Nazi puppet government which would find no popular support and complicate relations between the two countries. A certain influence was exercised as to the choice of the Danish Prime Minister, but basically the election system and the Government functioned independently even when under constant pressure from Germany for more concessions.

Both Denmark and Germany benefited from this system, which in Danish history is known as the politics of negotiation. It stressing the continuous dialogue between the Danish and German authorities in order to avoid, on the one hand, unacceptable concessions and, on the other hand, a breach which would harshen conditions and force the Germans to take over jurisdiction of Danish citizens or even set up a war regime. From a German point of view there was a point in maintaining the cost of

occupation at a minimum and at the same time having access to Denmark and Danish airports as a springboard to the strategically much more important Norway. Denmark is a country without natural resources and thus completely dependent on the import of raw materials for maintaining its economy. Germany allowed these imports and provided the necessary raw materials, while from the Danish side the main contribution to the German war effort became the export to Germany of agricultural products necessary to keep Germany and its army fed. Major Danish enterprises were also instrumental in the construction of German military installations abroad. As in other occupied countries, some Danes – around 6,000 to 8,000 – even volunteered to fight as a separate unit in the Waffen-Schutzstaffel ('SS', Armed Protective Squadron) on the Eastern Front. Additionally, Danes either went to Germany as workers or were employed on the construction of airbases or fortifications directed against a possible Allied invasion on the Danish west coast.

In principle, Denmark was legally neutral but in a practical sense it definitely was not. The situation was that of extensive official collaboration both economically and physically. To a high degree, the Danish Government – up to a certain point – encouraged this collaboration. The question after the war was to find out how to balance official collaboration conceived as the national interest, *raison d'état*, and private collaboration, which deserved punishment after the war. The rather complicated and, in many ways, entangled political play between the two countries during the war can be justified as an attempt to minimise the costs of the war for the population, but on the other hand it also made boundaries unclear between active collaboration and what could be seen as political concessions.

During the war, more and more German troops were concentrated in Denmark. Gradually, too, with the growth of a Resistance movement, the German police established departments in Denmark and the Gestapo, partly staffed by Danish helpers, became instrumental in fiercely combating the Resistance, using unusual methods of interrogation. As will be seen, war crimes in Denmark – and even more so in Norway – were especially concentrated around members of the German police forces and their behaviour and methods when combating the Resistance, whereas the behaviour of members of the German *Wehrmacht* only in very few cases gave rise to prosecution.

As indicated, the Danish situation during the war was quite subtle and complicated to grasp. In the first years after the occupation, the

Danish Government still functioned. Even when the Danish Government ceased to function after having refused to accept new demands from the occupying power in August 1943, relations between high Danish officials and the representatives of the Third Reich were still maintained with the German representative, the German *Reichsbevollmächtigter*, and mutual negotiations such as handling situations involving tension could still be positive, though in a somewhat different climate. Additionally, German interest in keeping Denmark as a working economic unit led to a continuation of exports and imports to and from Germany and its allies throughout the war.

To understand the way in which the past was dealt with in Denmark after 5 May 1945, and the way in which war crimes were handled, it is necessary to keep in mind this picture of an occupied country without serious destruction, a history of officially encouraged collaboration with the occupying force, a continuously functioning judicial and administrative system, an ongoing economy and farmers who prospered from demand for their products and the high prices these fetched. The occupation itself, on the other hand, was felt in Denmark as a humiliation and a breach of trust by a neighbouring country, and also in some way with a sense of shame. In Denmark it is still a hot issue whether the country actually took too convenient a position and maintained the peace when other countries were fighting for the same cause. Seen from a military point of view, Denmark was defenceless against the German military machine, but still it is an issue whether more resistance should have been shown. Politically the country suffered from restrictions as to fundamental rights, but materially the country was nearly unharmed and there was also a definite consciousness that it could have been much worse. This was instrumental in later negotiations as to how best to deal with war crimes.

Transitional justice became an important part of the return to normal life after the war. A new government representing both traditional politicians and the Resistance movement took over and within a few months new statutes were passed by the Parliament, which had immediately reassumed its functions. Extraordinary penal and procedural statutes were issued as a supplement to the existing Criminal Code and Procedural Code.[4] The Danish Criminal Code of 1930 did not foresee a

[4] As to the following, see Ditlev Tamm, *Retsopgøret efter besættelsen*, Gyldenhal, Copenhagen, 1984.

situation of such an untypical occupation as had happened. The Code criminalised only acts of collaboration with the enemy during time of war or imminent danger of war. Even if the Resistance maintained that a war had been waged in Denmark, legal experts endorsed specific legislation with retroactive force in order to establish a valid basis for adjudication. This was especially seen as necessary if collaborators such as Danes who had volunteered as soldiers in the German Army were to be punished. The level of punishments was also changed. The death penalty had been abolished in 1930 outside military jurisdiction but it was felt in Parliament that just retribution required its reintroduction. The death penalty especially envisaged those Danes who had served in the German police and who had committed torture or murder. Representatives of the Resistance movement pushed for severe treatment of people considered as collaborators with Germany or directly as traitors. A total of about 14,000 people were convicted under these statutes, which were knowingly given retroactive force. Unlike in Norway, this question did not raise much discussion in the Danish Parliament. The line of argument, which came to be accepted as a general viewpoint, was that new statutes with retroactive force were considered necessary to placate the widespread feeling of justice having to be done and to avoid private revenge and people taking the law into their own hands. Whether this fear had a real basis is open to discussion.

Trials of German war criminals in Denmark were a part of this general picture of transitional justice with the aim of doing away with the past in an orderly manner and then returning to normality. The way in which it was done can only be understood from this historical background. However, prosecution of war criminals in Denmark has a history of its own detached from the general purge and with a different scope.

Significant differences as to the prosecution of war criminals in Denmark and Norway were due to the different war regimes in the two countries. Whereas military resistance – as already mentioned – was abandoned in Denmark in 1940 after a series of short skirmishes on 9 April, in Norway the Army continued fighting for months until their final surrendering. In the meantime, the Norwegian King and the Government had fled to London. A provisional Norwegian Government was installed. From 1942 this government was headed by the arch-collaborator Vidkun Quisling, an ardent Nazi whose name later became an eponym for a

collaborator. Unlike Denmark, Norway was subjected to a war regime headed by a brutal German *Reichskommissar*, Josef Terboven. A harsh period of occupation began, with concentration camps, persecution of Norwegian Jews and a Nazi regime all very different from the atmosphere of negotiation between ostensibly equal parties that was characteristic of the situation in Denmark. In both countries a Resistance movement gradually arose, though organised in different ways. Another important difference was that the Norwegian Nazi Party (Nasjonal Samling) had much stronger support than the corresponding Danish party (Danmarks Nationalsocialistiske Arbejderparti) and that the Norwegian police force was strongly Nazified and was the executive force of a Nazi Government.

Yet another important difference compared with the situation in Denmark was the existence of an exiled Norwegian Government based in London. Thus even during the occupation norms were laid down in the shape of so-called provisional statutes that were the necessary basis for trials of traitors and war criminals. However, this specific situation also gave rise to complicated constitutional questions which in Norway were more controversial than in Denmark as the Norwegian Constitution expressly prohibited issuing penal laws with retroactive force. This question especially became crucial in the case of war criminals. In Denmark no such constitutional prohibition existed as to retroactive force.

35.3. Dealing with War Crimes

After the war, prosecution of traitors and collaborators led to a high number of convictions in both Denmark and Norway. In both countries the post-war trials included German war criminals.[5] Prosecution of war criminals in Denmark took place under a specific statute passed in Parliament and issued on 11 July 1946. The statute was directed against non-Danish citizens who had committed crimes punishable under Danish law for disregarding international law and custom as to the rules of occupation and war. Moreover, the statute generally criminalised war crimes and crimes against humanity so far as such acts were committed against the rules of occupation and war, deportation or persecution on the grounds of religion or race or other acts punishable by the statute for the

[5] See Johs Andenæs, *Det vanskelige oppgjøret*, Tanum-Norli, Oslo, 1980 and Berit Nøkleby, *Krigsforbrytelser: brudd på krigens lov i Norge 1940–45*, Pax Forlag, Oslo, 2004 with a complete list of trials.

International Military Tribunal.[6] This Danish statute, while part of a complex of statutes with retroactive force which was introduced as a basis for transitional justice in the years after 1945, nonetheless had its own character. The statute was clearly inspired by the statute of the Nuremberg IMT and it likewise included the death penalty.

The late date of this act reflects a certain Danish reluctance to take an effective stand against war crimes.[7] In July 1945 Denmark became a member of the United Nations War Crimes Commission ('UNWCC') and only in November 1945, after Denmark had signed the London Agreement (which included the Charter establishing the IMT) did official deliberations start as to war criminals in Denmark. An argument for prosecution of war criminals in Denmark was the international position of the country. The Danish Ministry of Foreign Affairs took the initiative, and it was argued that neglecting prosecution outside Denmark could be seen as a sign that Denmark was still trying to maintain a sort of neutrality and did not want to stand up as an ally, with the result that Denmark's international reputation could be harmed. Leading politicians, on the other hand, feared that charges of war crimes against those principally responsible for German policy during the occupation would not lead to sentences harsh enough to satisfy the population. Thus, it would be better not to prosecute war criminals in Denmark. In particular, it was foreseen that international law on the rights of an occupying power to protect itself would be invoked in these cases in favour of measures taken by supposed war criminals and to the detriment of the legality of actions by the Danish Resistance movement. The question of prosecution thus had both an external and an internal aspect. Investigations were therefore made concerning the possibility of handing over German war criminals in Denmark to the British. This, however, turned out not to be a possibility and eventually the view prevailed that Denmark had an international duty to prosecute war criminals in Denmark. In February 1946 a commission was appointed with the task of deliberating legal questions in connection with prosecution of war criminals in Denmark and eventually preparing the necessary legal basis for prosecution. One discussion during preparation of a specific penal act concerning war criminals was whether

6 Lov nr. 395 af 12. Juli 1946 om kriggsforbrydelser (Act on War Crimes, 12 July 1946).

7 On this and the following discussion, see Tamm, 1984, *supra* note 4; and Winther Hansen, "Opgøret med krigsforbryderne", Unpublished Paper, p. 20.

a designated tribunal should be established or whether the ordinary Courts should handle cases. The latter standpoint prevailed in Parliament. Compared to the intense debates in Parliament concerning prosecution of Danish collaborators, interest seemed to be low in discussing war criminals and complicated questions connected to prosecution of war criminals. This was a task that had to be done according to international agreements. The Law on the Punishment of War Criminals was issued on 12 July 1946. The original draft of this law was closer to the Statute of the IMT than the end result due to the draft being amended in Parliament.

From the Danish side there was also some interest in the actual procedures at Nuremberg. A Danish delegation was formed and some of the individuals indicted in the Danish processes also gave testimony at Nuremberg. Generally, however, it can be stated that the course of the Nuremberg Trials did not influence Danish prosecutions or the way the Courts handled cases. The Danish approach to handling cases was thus completely shorn of the publicity attached to the IMT.

In Denmark, a total of 83 individuals were prosecuted for war crimes. Of these, 77 were German citizens. Three Danish citizens were also prosecuted for war crimes committed outside Denmark.[8] The Danish Courts sentenced 77 war criminals. Nothing was really prepared in these cases, which therefore only slowly started when the Act was issued in July 1946. Indeed, more than a year was to pass before the first cases could be brought before the Court. As in other countries, some of those wanted for war crimes had disappeared and the first step necessarily was to establish which of those on the list of suspected war criminals could actually be identified and found. In many cases, sufficient proof was complicated to establish, and in general the prosecutors gave priority to the ongoing purge directed towards national collaborators and postponed the more complicated issue of international war criminals. Priority was also given to the cases against the German leaders, with the prosecution expressing the wish that the smaller cases should not be handled until the Courts had established the responsibility of the leaders. As the cases against the German leadership were more complicated than the others,

[8] These cases dealt with concentration camp guards. War crimes committed by Danish soldiers in the Waffen-SS in general were neither investigated nor prosecuted and have only recently been described in Dennis Larsen, *Fortrængt grusomhed: Danske SS-Vagter 1941–45*, Gyldenhal, Copenhagen, 2010.

this point of view would necessarily lead to a general postponement of cases against war criminals.

General prosecution strategy was laid down by the Ministry of Justice, which also maintained relations with the UNWCC in London. At that time prosecution of war criminals in Norway had been in progress for some time. There, about half of the cases investigated were not pursued further and a similar course was followed in Denmark. The general rule was therefore that only cases of a certain seriousness were pursued. That would include most cases of physical torture against members of the Resistance in order to obtain a confession, whereas the Norwegians would only pursue a case if a certain number of incidents of torture had taken place. There also seemed to be a tendency to pursue criminals who were present in Denmark and abandon cases if the criminal had to be found abroad. Thus it proved impossible for any suspected war criminals to be handed over by the Soviet Union. In the case of war criminals outside Denmark only more serious crimes were pursued, such as systematic torture in several cases. This meant that a stricter line was followed than in Norway. This may reflect the fact that in Norway several more serious cases to pursue were found and a certain limit had to be set up in order to avoid too many convictions. In the summer of 1947 the Danish Ministry of Justice also became aware that the UNWCC was changing its practice and had raised the borderline between war crimes and petty cases not to be pursued. All in all, the preparation of cases for final acceptance by the UNWCC was another factor that contributed to delaying the start of prosecution of war criminals in Denmark. Originally, investigations had been directed against 234 individuals, with cases divided into A Cases, which were clear, and the more dubious B Cases. Around a third of cases, so-called C Cases were abandoned. In January 1948 around 160 individuals on the Danish list had been accepted by the UNWCC. The final prosecution was directed against 83 individuals, of whom 77 were Germans, two were Austrians, one was a former Swiss and three were Danes.

The Copenhagen Municipal Court handled all cases. The first sentence was handed down on 26 November 1947.[9] The cases concerned a member of the German police, Hans Krüger, who was convicted of two cases of rape. This was not a typical case of torture or murder. Krüger was

9 *Ugeskrift for Retsvæsen*, 1948, p. 909.

sentenced to 12 years' imprisonment and the verdict was corroborated by the High Court on appeal. Around three quarters of the remaining cases were decided during 1948. The last case, against Horst Issel, a member of one of the gangs established to execute German terror, was decided on appeal on 19 November 1950.

The most spectacular and significant cases concerned the highest German authorities in Denmark. In the second level there followed cases against German policemen who had taken part in killing or torture. The great majority of cases were directed against German police officers and concerned homicide, torture and other maltreatment of prisoners, mostly from the Danish Resistance movement. These cases resulted in a series of sentences ranging from life imprisonment to several years and generally the punishment was more lenient than in the case of Danish helpers or assistants to the German police. None of the trials resulted in a final death sentence, even if this was possible under the specific Act on the Punishment of War Criminals passed in Parliament in July 1946.

Unlike their Norwegian counterparts, the highest German leaders had neither fled the country nor committed suicide by the end of the war but did come to trial. The most significant of the two bigger war criminal trials in Denmark was directed against the so-called German *Reichsbevollmächtigter*, Werner Best, and with him the leader of the SS in Denmark, Günther Pancke, and the chief of the German Security Police, Otto Bovensiepen. This process also initially included General Hermann von Hanneken, head of the *Wehrmacht* forces in Denmark. However, he was acquitted at first instance. The second, so-called "smaller" war crime case was directed against the head of the Gestapo in Denmark, Karl Heinz Hoffmann, and a series of Gestapo officers.

A crucial figure in German politics in Denmark during the occupation was Best, who in many ways can be considered a model figure for an understanding of the complicated web of Nazi policies. The process against him was not typical but can be seen as iconic for the complicated legal questions involved in the Danish prosecution of war criminals. Unlike the two police leaders and his Norwegian colleagues, Best had not acted directly through violence and brutality. Rather, he used his power to play a much more subtle role, which as things went on was so convincingly subtle that he was not unmasked – as we tend to see the Nazi leaders today – by the somewhat naive Danish Courts, which would listen to excuses and consider his position in Denmark without regard to

his role in building up and maintaining the Nazi regime and his responsibility for Nazi crimes in general.

Best has his own biography by the German historian Ulrich Herbert.[10] Best belonged to the generation of young German academics who, disillusioned by the Peace Treaty of Versailles, were radicalised and at an early age were attracted by Hitler and Nazism. He was a lawyer, graduated as a *Doktor* of law, worked as a lawyer and joined the Nazi Party in 1930 and the SS in 1931. He was actively involved in the Nazis coming to power in 1933 and immediately became chief of police in Hessen. He was already suspected at that time of murder and was one of the first to establish a concentration camp for political adversaries. In 1934 Best joined Heinrich Himmler and took part in the murderous "Night of the Long Knives" against the paramilitary *Sturmabteilung* (SA) at the same time as he obtained a leading position in the Gestapo, where he saw to it that the Gestapo stood outside any official legal control.

In 1935 he was the editor of a *Festschrift* to Himmler in which he exposed his ideas of German supremacy, the so-called *Grossraum*, the inferiority of certain peoples and the claim by Aryan Germany to rule and organise the world. In his article, Best also exposed his view as to governing people of a higher standard. In this case brutality should not be used but as far as possible these people should govern themselves within the framework set up by German hegemony. This was exactly what he practised when he came to Denmark in 1942 as *Reichbevollmächtigter* and thus representative of the German Foreign Ministry. In 1939 he was the third in the organisation of the German police after Himmler and Reinhard Heydrich. He wrote a book on the function of the German police which was standard reading, and in Poland after the German occupation he took an active part in organising specific forces with the murder of civilians as their task. In 1940 he came to occupied France and was active in the deportation of French Jews; in 1942 he joined the foreign service and in that capacity was sent to Denmark in the same year as German representative. His prehistory was only vaguely known in Denmark and was also not taken into account in the war crimes trial against him in Copenhagen. In Court, Best took the position of not recognising the jurisdiction of any Danish Court over him as a

[10] Ulrich Herbert, *Best: Biographische Studien über Radikalismus, Weltanschauung und Vernunft 1903–1989*, Verlag J.H.W. Dietz, Bonn, 1996.

representative of a sovereign power. He therefore did not address the Court, but he accepted being defended by a Danish lawyer, who actually did quite a good job for him.

In the period between 1942 and 1945, relations between occupied Denmark and the German occupying forces changed dramatically from rather peaceful to active resistance. The Germans tried to intimidate resistance by terror, so-called *Nacht-und-Nebel* (night and fog) or anti-terror action, which implied murder and destruction of property without responsibility being taken by the occupying force. Organising such action was an important part of the indictment against Best and the police leaders. The prosecution also maintained that Best should be seen as the main person responsible for action taken in October 1943 against Danish Jews, who until then had lived peacefully in Denmark. As is well known, most of the 8,000 Danish Jews were evacuated to Sweden, but still around 500 were sent to concentration camps. A third charge, especially against the two police officers and von Hanneken, was based on action taken in September 1943 against the Danish police. Nearly 2,000 Danish policemen were arrested and taken to concentration camps in Germany, where several died.

The war crimes case against Best started in 1948. He was charged with responsibility for having himself taken the initiative for action against Danish Jews and for his part in German acts of terror. The trial had a complicated course. How active and decisive the role of Best really was in action against the Jews is still discussed and difficult to clarify completely. It is a fact that Best directed himself to his superiors in Berlin and asked for action to be carried out with the purpose of having Denmark "*Judenfrei*". However, the plan was leaked to the Danish authorities and the Jews were warned, thus enabling evacuation of the great majority of Jews to neutral Sweden without German forces really actively trying to hinder it. Whether it was Best himself who leaked the plan or authorised a subordinate to do it, or whether it was a subordinate alone, cannot be completely clarified. At first instance, however, Best was held responsible both for this action and for actively planning German terror acts and was sentenced to death. Bovensiepen, head of the German police, was also sentenced to death at first instance.

At second instance, in the High Court, the tables were somewhat turned. The Court preferred not to hold Best responsible for action against Jews and, as to the terror acts, the Court took into consideration as

mitigating circumstances that Best had tried to avoid harsher action and in general international law as to the right of an occupying power to defend itself and organise limited action to prevent sabotage was taken into consideration. The result was a sentence of five years' imprisonment. There were widespread popular protests against this mild sentence. The case was brought before the Supreme Court and the end result was a sentence of 12 years' imprisonment. The two police chiefs were sentenced by the Supreme Court to 20 years for Pancke and life imprisonment for Bovensiepen. Other German war criminals such as the Gestapo leader and those who had committed homicide as part of the terror similarly received long prison sentences. The question of using the death penalty is crucial. In modern society the death penalty seems unacceptable and, as a consequence, the rules of the ICC do not include the death penalty. After the Second World War, the death penalty was actually used and in Denmark 46 individuals were executed mostly for homicide or torture committed in German service. It remains a question whether a person such as Best, with so much intellectual responsibility for the politics and behaviour of the Third Reich, really was handled with too much leniency due to a lack of understanding of the crucial role that individuals of his stature precisely played in the atrocities of the Third Reich and for which those mainly responsible were actually executed.

Of 83 individuals prosecuted in Denmark only six were not convicted. Of the remaining 77 war criminals, 20 were in the end sentenced to five years or less in prison, 25 to prison from five to 10 years, 17 sentenced to between 10 and 15 years, and 17 to sentences of more than 15 years of which two received life sentences. At first instance, eight individuals were sentenced to death. Only one of those sentences was confirmed in the end. This was the case of a Danish concentration camp guard who had committed systematic acts of violence against prisoners in concentration camps outside Denmark. The case was handled by the Courts at a time when the death sentence was no longer carried out. All cases of life imprisonment or death had been handled at three instances. Most cases that were appealed to the High Court resulted in the punishment being mitigated.

Rough statistics of the character of the crime, based on a selection of cases at first instance, show that in 25 cases homicide was decisive for the outcome of the case, and in 39 cases torture and maltreatment. It is

thus clear that basically the general guidelines were followed and only more serious cases were brought before the Courts.

Shortly after 1950 new relations began between Denmark and the new German Federal Republic. That war criminals would be part of the negotiations with a new Germany was already foreseen when prosecution of war criminals was planned in negotiations between the Danish Foreign Ministry and the Ministry of Justice. Both the Danish and the German sides wished to overcome the past and start anew. A feature of this story is that a minority of around 25,000 Germans live north of the German–Danish border and around 50,000 Danes live south of the border. In 1955 a minority agreement was made and part of the history leading to this agreement was the release of German prisoners of war ('POW') in Danish prisons. Those who had been sentenced to less than five years' imprisonment were released more or less immediately after sentencing due to a general policy of reduction of punishments followed since 1948. Additionally, war criminals (the same as Danes convicted under acts against Danish collaborators) sentenced to imprisonment of more than five years were eventually able to benefit from this general policy of punishment reductions. A similar practice was actually followed in Norway and Belgium, whereas the Dutch were more restrictive. Best was released in 1952, and by the end of 1953, after the German government had intervened in favour of releasing the remaining war criminals, the last war criminals sentenced to life imprisonment were released. At that time, it was the position of the Danish Government that Denmark should not be more restrictive than Norway. In December 1952 the Danish Minister of Justice publicly declared that there had been no pressure from the German side for the release of the last war criminals. However, this was true with certain modifications. Danish nationals sentenced for war crimes were not included in reduction of penalty and release. They were sentenced to 14 and 18 years' imprisonment and one to death. They were only released in 1955, 1957 and 1960.

In 1950, after agreement with the Allied Powers, an ordinance was issued with the scope of having the remaining German war criminals in Danish prisons transferred to Allied prisons in Germany. This ordinance was resisted by the war criminals as they feared worse conditions in Germany. The war criminals had this ruling successfully reviewed before the Danish Courts, which stated that a transfer to German prisons would not be in conformity with the rules under which the war criminals were

actually completing their sentences. It is also part of the history of war crimes that after Best returned from Danish prison, German prosecutors tried several times to put him on trial for acts committed in Poland but that until the last moment he evaded justice, relying on his age and health.

The Danish and the Norwegian way of handling war crimes came close to one another, but their differences are also remarkable. By the end of the war, the highest German leaders had nearly all committed suicide and thus were no longer accessible for justice. The Norwegian occupation had been harsher than the Danish one and thus war criminals were more exposed in Norway than in Denmark. In the end, the Norwegian war criminals were punished more severely than the Danish ones, including the imposition of several death penalties. However, the strategy of only accepting cases of a certain seriousness was the basis of the Norwegian prosecution and served as a model in Denmark. The Norwegian guideline seemed to be that a punishment of at least ten years' imprisonment should be expected in order to start a case. The Danish authorities, as already mentioned, were not so strict. Moreover, in Norway the ordinary Courts handled these cases and many of those difficulties both of a practical and legal nature mentioned in relation to prosecution of Danish war criminals were also characteristic of the Norwegian prosecution. Generally speaking, the Norwegians started out before Denmark and the initiative to have the last remaining German war criminals released also stemmed from Norway. It was thus possible in Denmark to learn from the Norwegian experience. In the end, 81 individuals were sentenced in Norway. Of these, 15 were sentenced to death (two were pardoned) and 12 were executed (one committed suicide in prison). Another 16 were sentenced to prison for life and the rest to over 10 years' imprisonment.

A decisive difference between Denmark and Norway was that the prosecution of war criminals had already been planned before the end of the war. Prosecution of German war criminals in Norway was thus based on a provisional decree of 4 May 1945 (later amended and substituted by the Law for the Punishment of Foreign War Criminals passed by the Norwegian Parliament on 13 December 1945). As already mentioned, a Norwegian government in exile in London was able to issue legislation. The provisional statute of 4 May on punishing foreign war criminals was just such a provisional ordinance. Article 1 of this Ordinance runs as follows:

> Acts which according to their nature are subject to Norwegian criminal law can be punished under Norwegian law when they are contrary to the laws and customs of war, are committed by enemy citizens or other foreigners in the service of the enemy or subordinated to him, and the act was perpetrated in Norway or was directed against Norwegians or Norwegian interests.[11]

The Ordinance introduced the death penalty for such crimes. Already in 1942, an Ordinance from London had reintroduced the death penalty in cases of homicide and maltreatment which could be punished by prison for life. It was also stated that an order from a superior could not be used as an excuse.

The central figures in the German war regime in Norway had been the *Reichskomissar* Terboven, member number 25247 of the Nazi Party and a veteran of the Beer Hall Putsch of November 1923. Next came the commander of the *Sicherheitsdienst* (SD, Security Service) and *Sicherheitspolizei*, Gestapo in Norway, Heinrich Fehlis, a lawyer, and Wilhelm Rediess, leader of the SS in Norway. Both of the latter also had a record from Germany of participating in deportations and killings of Jews. Educated as an electrician and a member of the SA and the Nazi Party since 1925, Rediess had organised so-called gas wagons for the systematic killing of mentally disordered Jews and was known for paying a reward for each Jew killed. His position in Norway was a consequence of this initiative. In Norway he organised the *Lebensborn* programme, which furthered sexual relations between Norwegian women and German soldiers and resulted in 8,000 Aryan children being registered in Norway. He, along with Terboven and Fehlis, committed suicide immediately after the German capitulation and thus was not brought to justice. All three men were notorious for their behaviour and most probably would have been sentenced to death after the war.

The preliminary words of the Ordinance expressly stressed that it was not issued with retroactive force because crimes covered by the act were already punishable under international law. However, it was also seen as a consequence of respect for Norwegian legal culture that the Courts should not convict anybody directly under international law but that a Norwegian statute was necessary as the basis for a sentence.

[11] My translation.

The Ordinance of 4 May 1945 gave rise to a legal dispute as to whether it was the case that the Ordinance could be said not to have retroactive force because those crimes were punishable under international law, even if it was the legal position that Norwegian Courts could only consider international law if it had been converted into Norwegian legislation. This issue was important as Article 97 of the Norwegian Constitution of 1814 expressly prohibited legislation with retroactive force.

The question of retroactive force was taken up in the first war crimes trial in Norway directed against Karl-Hans Hermann Klinge, a German Gestapo official who had actively and brutally participated in the persecution and investigation of the Norwegian Resistance movement. He was charged with the systematic torture of 18 prisoners by beatings, pressure and cold baths which in some cases had led to death. The torture was bad but could only result in the death penalty if he was sentenced under the Ordinance of May 1945. In this case, which has since been a model case as to the relationship between international law and national law in the Nordic countries, Justice Reidar Skau spoke for the majority of the Supreme Court who would uphold the Ordinance as in accordance with the Constitution, stressing that the crimes were crimes not under Norwegian law but that they were war crimes against the laws of humanity and the laws and customs of war. He thus could not recognise that there was a conflict with the Norwegian Constitution. He also pointed to the fact that the Ordinance of 1945 was a consequence of Allied agreements as to punishing war criminals. To this he added the consideration that the Constitution did not aim at protection of foreigners who attacked and maltreated Norwegian society and its people. If that should be the case, he saw his sense of justice offended. A minority of two out of 11 judges saw the prohibition in the Constitution against retroactive force as absolute and stressed that it should especially be applied in extraordinary situations and therefore they could not accept the death penalty. The spokesman for the minority said that for him it was no disaster that the Courts did not choose a road that could be understood so that the border against arbitrariness was not kept in penal procedure. This case is a showcase of Norwegian respect for the rule of law. With all sympathy for the dissenting Judge Anton Holmboe, it could be argued with Justice Skau that the Courts must sometimes take a firm stand in extraordinary situations.

Many Norwegian cases had to do with Gestapo maltreatment of prisoners. The local Eichmann case was a case against Wilhelm Wagner, leader of the department for Jewish matters in the German police and responsible for the arrest and transportation of 531 Jews in 1942 by the ship *Donau*. The persecution of Jews in Norway took a disastrous course very different from the Danish case. Only 10 Norwegian Jews returned from the concentration camps to which they had been sent. The question in the case of Wagner was whether he could foresee the fatal consequences of his action. He was sentenced to death at first instance, but his punishment was reduced to 20 years' imprisonment by the Supreme Court, which heard his excuse as to having to follow orders and found that the initiative was not his.

A question that also became relevant in Danish cases was the degree to which the excuse should be admitted that certain acts of retaliation were permitted by international law. A much discussed case in Norway concerned the executioner Oscar Hans, who had conducted 215 executions. This was not the issue in the case. To be an executioner is not in itself a crime. However in 78 cases only a decision by the police authorities and no formal judgment formed the basis of the execution. The question therefore arose whether execution in these cases could be considered illegal and should be treated as homicide. Hans's excuse was that he did not understand this distinction. This excuse was not heard by the Court at first instance. The Supreme Court, however, quashed this decision in 1947 and Hans was sent to Germany. His destiny has not been traced. He is said to have been judged by a British Military Court.

The Norwegian trials of war criminals were more or less in their totality directed against German police officers. However, a number of Norwegian nationals committed crimes which would normally be counted as war crimes but, as far as Norwegian legislation and statistics were construed, count as ordinary collaborators sentenced according to legislation affecting Norwegian nationals. The most spectacular cases of breach of the rules of warfare related to the treatment of Yugoslavian and Russian POWs kept in camps in northern Norway. It is reckoned that between 3,000 and 4,000 Yugoslav prisoners, including Croats and Bosnian Muslims, some of whom were civilians, who were deported to Norway and made to do forced labour, lost their lives due to maltreatment by the SS commander Hermann Dolp and his German and Norwegian helpers. In particular, the Norwegian camp guards known as the

hirdvaktbataljon (using an old Nordic term) were notorious for their cruel treatment of prisoners. An especially ominous event was the so-called Beisfjord massacre in 1942. In this case 288 Yugoslavs afflicted by typhus in Beisfjord prison camp were simply shot after having been asked to dig their own graves. Other prisoners were burned alive in their beds.[12] To this should be added the fact that between 10,000 and 15,000 Russian POWs lost their lives in Norwegian camps.

War crimes, especially those committed against Yugoslav POWs, are still discussed in Norway, and it is an ongoing question whether these cases were judged properly, as is the case of those who participated in the arrest of the more than 700 Norwegian Jews who were sent to extermination camps. Moreover, Norwegian volunteers in the German Army participated in the extermination of Jews. These darker sides of Norwegian history during the Second World War have been, in recent years, at a comfortable distance from the events, the object of a renewed debate on Norwegian history during the war. The question is raised whether these cases were investigated and punished with sufficient energy at that time.[13] These issues were not systematically brought before Norwegian Courts after the war, although several camp guards were convicted during the ordinary court trials of Norwegian collaborators and are listed in the statistics there. Of 363 Norwegians on duty in these camps, a total of 21 were sentenced for homicide, six for participating in summary executions, 29 for maltreatment and a few for other crimes. Two were executed, while two were sentenced to death in 1947 but pardoned.

In a 1947 case the Court of the *Eidsiva Lagmannsrett* said about the camps that "it seems beyond doubt that these camps were pure annihilation camps and that the aim was the systematic annihilation of all prisoners". The experience of having Norwegian guards at the camps seemed too atrocious even for the German authorities who later took over the camps from the Norwegians. In the Norwegian Supreme Court, Justice Skau formulated his opinion opposing the view maintained by the defendants' attorney that the atrocities were more excusable than ordinary

[12] Nils Christie, *Fangevoktere i konsentrasjonsleire*, Pax Forlag, Oslo, 2010; Rakel Kamsvåg, "Yugoslav Prisoners of War", 2012, available at http://www.norveska.org.rs/News_and_events/News-and-events1/Yugoslav-Prisoners-of-War-in-Norway/#.VH2sLocWG-o.

[13] Nazi-hunter and director of the Simon Wiesenthal in Jerusalem, Efraim Zuroff, has recently addressed these questions.

homicide due to the special circumstances in the camps which had diminished respect for life. Skau said:

> The […] crime is not just a crime under aggravating circumstances, it is properly considered a war crime – a crime against the laws of humanity […] Prisoners during a war – be they military or civilians – are especially exposed and their only protection consists of that which can be offered by strong legal protection.

35.4. Final Remarks

In both Denmark and Norway, it was an important issue that transitional justice after the Second World War should be done in a way worthy of a "*Rechtsstaat*" and in accordance with the rule of law. Constitutional issues were at stake, especially in Norway. German war criminals enjoyed all the guarantees of such a system apart from the question of retroactive force. The conviction of war criminals was a necessary part of achieving justice after the war. In Norway, more Germans were executed due partly to the generally much harsher conditions of occupation. It is difficult to deny that the Danish situation was specific. The way the war crimes trials were conducted reflects this ambiguity, which also reflected a general insecurity by the judges as to how to handle difficult cases, implying unusual questions of international law. Both the magnitude of the crimes and the complex personalities of some of the leading war criminals posed a challenge to judges used to more ordinary cases and criminals. It is probably a fact that no war criminal in Denmark or Norway was punished harder than he deserved, but as always in such cases one may ask whether those who did the dirty job were punished more severely than those who planned the actions and had the power to do otherwise.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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