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

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Towards the Domestic Prosecution of Nazi Crimes Against Humanity: The British, Control Council Law No. 10 and the German Supreme Court for the British Zone, 1947–1950

Christian Pöpken*

34.1. Introduction

Against the backdrop of the Allied war crimes trials of leading representatives of the so-called Third Reich (used as a designation for the Nazi regime in Germany from 30 January 1933 to 8 May 1945), which took place in Nuremberg before the International Military Tribunal ('IMT') (1945–1946) and United States ('US') military courts (1946–1949), the most controversial German legal scholar and political theorist of the twentieth century, Carl Schmitt, dealt with the term and nature of 'crimes against humanity'. On 6 May 1948 he noted:

> What specifically remains, if one takes away from crimes against humanity the old known criminal offences of murder, robbery, rape and so on? Crimes that show an extreme will to exterminate; crimes, to which something particular is added, namely, the anti-human as a subjective element. What is added? No realus, but rather just an animus.[1]

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* **Christian Pöpken** is currently pursuing his doctorate studies at the Seminar for Modern History, University of Marburg, Germany. His research project is entitled "The German Supreme Court and its Jurisprudence about Crimes Against Humanity". He previously studied History, Political Science and Media Science at the University of Marburg. Since 2011 he has been awarded a scholarship from the Friedrich-Ebert-Foundation.

1 Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, Eberhard Freiherr von Medem (ed.), Duncker & Humblot, Berlin, 1991, p. 145 (my translation):

> Was bleibt als das Spezifische übrig, wenn man von den Verbrechen gegen die Menschlichkeit die alten bekannten kriminellen Tatbestände Mord, Raub, Vergewaltigung usw. abzieht? Verbrechen, die 'einen krassen Vernichtungswillen' erkennen lassen, also Verbrechen, zu denen auf der subjektiven Seite noch etwas Besonderes, das Gegen-Menschliche nämlich, hinzukommt. Was kommt hinzu? Kein Realus, sondern nur ein Animus.

From Schmitt's point of view these crimes were "*Gesinnungs-verbrechen*" (convictional crimes). He stated that establishing an international legal norm for such crimes would not only be obsolete but rather discriminatory treatment of the defeated side – in this case, the Germans. Polemically, he takes the part of the Allied Powers prosecuting Nazi crimes against humanity on the legal bases of the London Charter of the IMT [2] and Control Council Law No. 10 ('CCL 10'), [3] when he describes these atrocities as

> *Gesinnnungsverbrechen* on the negative side. They must have occurred with dialectical necessity, after *Gesinnungs-verbrechen* were discovered for humanitarian reasons out of a good heart. In other words: they are the deeds, emerging from inhuman attitudes and reflecting such attitudes; so, that which the person, who has been declared the enemy of mankind, does. Political in the most extreme and intense sense of the word. "Crimes against humanity" is just the most general of all general clauses for the destruction of the enemy.[4]

In order to expose the hypocrisy of the Allies, whom he accused of victor's justice, the former "Crown Jurist of the Third Reich" pointed out on 6 December 1949: "There are crimes against and for humanity. The crimes against humanity are committed by Germans. The crimes for humanity are committed against Germans".[5] This perception being quite

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[2] Charter of the International Military Tribunal, 8 August 1945 ("IMT Charter") (http://www.legal-tools.org/doc/64ffdd/).

[3] Control Council Law No. 10, 20 December 1945 ("CCL 10") (https://www.legal-tools.org/en/doc/ffda62/).

[4] Schmitt, 1991, p. 145, see *supra* note 1 (my translation):

> Gesinnungs-Verbrechen von der negativen Seite. Sie mußten mit dialektischer Notwendigkeit kommen[,] nachdem aus Humanität die Gesinnungs-Verbrechen aus guter Gesinnung entdeckt worden waren. Mit anderen Worten: es sind die aus menschenfeindlicher Gesinnung entstandenen und von solcher Gesinnung zeugenden Taten, also: das, was der zum Feind der Menschheit Erklärte tut. Politisch im extremsten und intensivsten Sinne des Wortes. 'Verbrechen gegen die Menschlichkeit' ist nur die generellste aller Generalklauseln zur Vernichtung des Feindes.

[5] *Ibid.*, p. 282 (my translation):

> Es gibt Verbrechen gegen und Verbrechen für die Menschlichkeit. Die Verbrechen gegen die Menschlichkeit werden von Deutschen

unilateral fits in with the anti-liberal approach that Schmitt had adopted already during the Weimar Republic when he wrote *The Concept of the Political*. One of the most striking phrases of this earlier enigmatic study was: "Whoever invokes humanity, wants to cheat".[6] The German intellectual, who was dismissed from his post as a professor of law in 1945 and detained by the Allies until 1947, rejected 'humanity' (in its double meaning of *Menschheit* and *Menschlichkeit*) as a political concept aimed at the destruction of the enemy.

Did Schmitt notice that German courts in the British, French and Soviet zones applied CCL 10 to punish Nazi atrocities – albeit only in cases where the victims were German or stateless persons? Probably, yes. And surely he refused to recognise this jurisdiction because of his denial of the existence of 'crimes against humanity', which he did not consider a legal norm but rather a battle cry. Were these atrocities, as the German lawyer stated, indeed nothing more than ordinary crimes, that were committed because of a conviction (*Gesinnungsverbrechen*) that was condemned by the winning side of the war?

The German Supreme Court for the British Zone (*Oberster Gerichtshof für die Britische Zone*, 'OGH'), sitting in Cologne, answered this question in the negative by way of its legal practices concerning CCL 10.[7] Though adjudicating for only two and a half years – from May 1948 to September 1950 – the OGH provided a remarkable interpretation of

begangen. Die Verbrechen für die Menschlichkeit werden an Deutschen begangen.

6 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien*, 8th ed., Duncker & Humblot, Berlin, 2009, p. 51 (my translation): "Wer Menschheit sagt, will betrügen".

7 Regarding the German Supreme Court for the British Zone and its jurisprudence on crimes against humanity, see: Justizministerium des Landes NRW (ed.), *Verbrechen gegen die Menschlichkeit – Der Oberste Gerichtshof der Britischen Zone*, Düsseldorf, 2012, Juristische Zeitgeschichte NRW, vol. 19; Werner Schubert (ed.), *Oberster Gerichtshof für die Britische Zone (1948–1950): Nachschlagewerk Strafsachen – Nachschlagewerk Zivilsachen – Präjudizienbuch der Zivilsenate*, Peter Lang, Frankfurt, 2010, Rechtshistorische Reihe, vol. 402; Hinrich Rüping, "Das 'kleine Reichsgericht': Der Oberste Gerichtshof für die Britische Zone als Symbol der Rechtseinheit", in *Neue Zeitschrift für Strafrecht*, 2000, vol. 20, no. 7, pp. 355–59; Gerhard Pauli, "Ein hohes Gericht – Der Oberste Gerichtshof für die Britische Zone und seine Rechtsprechung zu Straftaten im Dritten Reich", in Justizministerium des Landes NRW (ed.), *50 Jahre Justiz in NRW*, Düsseldorf, 1996, Juristische Zeitgeschichte, vol. 5, pp. 95–120; Karl Alfred Storz, *Die Rechtsprechung des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, J.C.B. Mohr (Paul Siebeck), Tübingen, 1969.

crimes against humanity geared towards making the Allied legal norm applicable to the German jurisdiction and promoting the judicial process of coming to terms with the Nazi past. In the context of one of its first decisions, which was made on 20 May 1948, the high appellate court gave a definition of crimes against humanity showing its claim of contribution to the coining of an international criminal law norm that was just emerging:

> If in connection to the system of violence and tyranny, as it existed in National Socialist times, human beings, goods and values were attacked and damaged in a way expressing an absolute contempt for spiritual human value with an effect on mankind, a person who caused this by way of conscious and intended acts of aggression has to be punished for a crime against humanity if he can be accused of it.[8]

The OGH was probably the first higher domestic court to provide strict guidelines for the legal protection of human dignity. Almost 50 years later, the International Criminal Tribunal for the former Yugoslavia ('ICTY') made reference to the legal practice of this appellate court when it searched for appropriate case law. Against this backdrop two questions arise. First, which historical and institutional factors enabled the OGH to contribute to international criminal law? And second, which of its legal constructions had an impact on the further development of this relatively new branch of justice?

These two approaches are crucial for this chapter. Nevertheless, the focus lies mainly on the historical issue, which is brought out in sections 34.2 to 34.4, stressing the conditions that allowed the OGH to shape its particular jurisprudence. Among these factors are the interests and conduct of political and legal institutions as well as of individuals and

[8] OGH, P. case, StS 3/48, Judgment, 20 May 1948, in Mitglieder des Gerichtshofes und der Staatsanwaltschaft beim Obersten Gerichtshof (eds.), *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, 3 vols., Walter de Gruyter, Berlin, 1949–1950 ("Entscheidungen"), vol. 1, 1949, p. 11 (i.e. headnote):

> Wenn im Zusammenhang mit dem System der Gewalt- und Willkürherrschaft, wie sie in nationalsozialistischer Zeit bestanden hat, Menschen, Menschengüter und Menschenwerte angegriffen und geschädigt wurden in einer Weise, die eine Für-Nichts-Achtung des ideellen Menschenwerts mit Wirkung für die Menschheit ausdrückte, so ist wegen Unmenschlichkeitsverbrechen zu bestrafen, wer dies durch ein bewußtes und gewolltes Angriffsverhalten verursacht hat, sofern ihm dies zum Vorwurf gereicht.

networks of relationships on both the British and the German sides. Section 34.5 gives an overview of the most important contributions that the OGH made to international criminal law. This requires investigating contemporary legal practice, especially of the ICTY.

34.2. The British Strategy and Control Council Law No. 10

34.2.1. The Emergence of the British Prosecution Will, 1944–1945

The *sine qua non* for the significant jurisprudence of the OGH regarding CCL 10 was the strong will and claim of the British authorities to secure the effective prosecution of crimes against humanity committed by Germans against Germans or stateless persons. Already during wartime, the Foreign Office had to change its attitude towards the treatment of these crimes.[9] At first the British had refused to deal with German atrocities against nationals of the Axis Powers by arguing that it would be a breach of the international law principle that prohibited intervention into the domestic affairs of other states. But in view of the radicalisation of German warfare at that time and the extermination of European Jewry, public pressure increased, and the condemning of Nazi war crimes and so-called "atrocities other than war crimes" in official declarations developed its own dynamics. In the end, London found itself forced to strike a new path. On 31 January 1945, Richard Law, Minister of State, emphasised the attitude of the Foreign Office as follows:

> [C]rimes committed by Germans against Germans are in a different category from war crimes and cannot be dealt with under the same procedure. But in spite of this, I can assure my hon. Friend that His Majesty's Government will do their utmost to ensure that these crimes do not go unpunished. It is the desire of His Majesty's Government that the authorities in post-war Germany shall mete out to the perpetrators of these crimes the punishments which they deserve.[10]

[9] See, for example, Priscilla Dale Jones, "British Policy towards German Crimes against German Jews, 1939–1945", in *Leo Baeck Institute Yearbook*, 1991, vol. 36, pp. 339–66; Arieh J. Kochavi, "The Response to Nazi Germany's Crimes Against Axis Nationals: The American and British Positions", in *Diplomacy & Statecraft*, 1994, vol. 5, no. 2, pp. 334–57.

[10] House of Commons, Debate, 31 January 1945, vol. 407, col. 1425; Jones, 1991, pp. 356–57, see *supra* note 9; Kochavi, 1994, p. 348, see *supra* note 9; Wolfgang Form, "Justizpolitische Aspekte west-alliierter Kriegsverbrecherprozesse 1942–1950", in Ludwig Eiber and Robert Sigel (eds.), *Dachauer Prozesse: NS-Verbrechen vor amerikanischen Militärgerichten in*

In the summer of 1945, after the unconditional surrender and occupation of Germany, British authorities were still insecure about how to deal with these "atrocities other than war crimes". Which jurisdiction offered the best preconditions to come to terms with the Nazi past? How could justice be restored? At least, with 'crimes against humanity', a new international legal category was developing that provided starting points for a prosecution strategy in view of German crimes against German or stateless victims.

34.2.2. The International Legal Term of 'Crimes Against Humanity', 1943–1945

The emergence and definition of the legal term 'crimes against humanity' was closely connected with the negotiations in the United Nations War Crimes Commission ('UNWCC'),[11] which began its work on 20 October 1943 in London. The UNWCC was entrusted with the collection and evaluation of evidence concerning Nazi war crimes, the clarification of legal issues and the judicial preparation of war crimes trials. It was during the debate on the delicate question of German atrocities against nationals of the Axis Powers, especially Jews, that Herbert C. Pell,[12] the US delegate, took the floor and stated: "It is clearly understood that the words 'crimes against humanity' refer among others to crimes committed against stateless persons or any persons because of their race or religion; such crimes are justiciable by the United Nations or their agencies as war

Dachau 1945–1948 – Verfahren, Ergebnisse, Nachwirkungen, Wallstein-Verlag, Göttingen, 2007, Dachauer Symposion zur Zeitgeschichte, vol. 7, p. 52.

11 For more details on the UNWCC, see The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948; Jia Bing Bing, "United Nations War Crimes Commission", in Antonio Cassese (ed.), *The Oxford Companion of International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 554–55; Dan Plesch and Shanti Sattler, "A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and its Associated Courts and Tribunals", in *Criminal Law Forum*, 2014, vol. 25, nos. 1–2, pp. 17–43; Kerstin von Lingen, "Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944", in *Criminal Law Forum*, 2014, vol. 25, nos. 1–2, pp. 45–76.

12 On Pell (1884–1961), see Leonard Baker, *Brahmin in Revolt: A Biography of Herbert C. Pell*, Doubleday, New York, 1972.

crimes".[13] Following this statement made on 16 March 1944, the UNWCC went on to discuss the characteristics of this criminal offence and the potential courses of action until December. In addition to Pell, Hersch Lauterpacht[14] became another pioneer of 'crimes against humanity' because it was he who induced Robert Jackson,[15] who was representing the US at the London Conference, to insert the notion in the IMT Charter of 8 August 1945.[16] It was this document that fixed crimes against humanity for the first time as an international criminal offence (Article 6c). In the same provision, a differentiation was introduced between murder- and persecution-type crimes. However, these atrocities were punishable only if perpetrated "in execution of or in connection with any crime within the jurisdiction of the Tribunal".[17] That meant that a connection with crimes against peace or war crimes was required.

34.2.3. The Initial Stages of a British Prosecution Strategy, 1945–1946

Thus, the British discovered that the IMT Charter was quite unsuitable as a legal basis for the prosecution of Nazi crimes of which the victims were German or stateless persons. But soon memoranda circulated fixing the central ideas that the military government aligned itself with during the following years. On 17 October 1945 the Secretary of State for War, Jack Lawson,[18] informed the Foreign Secretary, Ernest Bevin,[19] about a proposal, which stated "that certain atrocities committed since 30th January, 1933, involving the infliction of death, torture or gross physical

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13 Cited in *ibid.*, p. 292. See, for example, Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, p. 146.

14 On Lauterpacht (1897–1960), see Martti Koskenniemi, "Hersch Lauterpacht and the Development of International Criminal Law", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 3, pp. 810–25.

15 On Jackson (1892–1954), see Gary D. Solis, "Jackson, Robert", in Cassese (ed.), 2009, pp. 389–90, see *supra* note 11.

16 Antonio Cassese, *International Criminal Law*, 3rd ed., revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, Oxford University Press, Oxford, 2013, p. 86; Koskenniemi, 2004, p. 811, see *supra* note 14.

17 IMT Charter, see *supra* note 2.

18 On Lawson (1881–1965), see Duncan Bythell, "Lawson, John James (1881–1965)", in *Oxford Dictionary of National Biography*, Oxford, 2004.

19 On Bevin (1881–1951), see Alan Bullock, *Ernest Bevin: Foreign Secretary, 1945–1951*, Oxford University Press, Oxford, 1985.

maltreatment should be tried, if appropriate, by military government courts under existing German law".[20] Lawson was aware of the apparent contradiction between guaranteeing fair and just trials for Nazi criminals and the plan to decrease the number of legal officers. Foreseeing the danger that the British prosecution policy could fail and thus discredit itself, he suggested

> that it might be possible, so far as military government courts are concerned, to have three or four special trials each concerned with one of the types of crimes against humanity mentioned in Article 6(c) of the Constitution of the International Military Tribunal, e.g. one for inhumane acts, one for persecution on political, racial and religious grounds respectively, and that thereafter if possible the matter might be left to the German courts.[21]

The Legal Division[22] of the military government was aware that such representative cases being tried before British judicial panels had to be thoroughly investigated in order to constitute sound precedents.[23] Meanwhile, there was a suitable legal basis for the punishment of Nazi atrocities against German or stateless persons at the disposal of the British.

34.2.4. The Legal Basis: Control Council Law No. 10, 1945

CCL 10 had been brought into force on 20 December 1945. The Allied law served as the uniform legal basis for the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity in Germany. In its Article II (1c) it defined the latter as

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[20] Jack Lawson, Secretary of State for War, to the Foreign Secretary, 17 October 1945, Foreign Office 371, no. 46797, National Archives UK ('TNA').

[21] *Ibid.* See also Wolfgang Form, "Der Oberste Gerichtshof für die Britische Zone. Gründung, Besetzung und Rechtsprechung in Strafsachen wegen Verbrechen gegen die Menschlichkeit", in Justizministerium des Landes NRW (ed.), 2012, pp. 15–16, *supra* note 7.

[22] For more details on the Legal Division, see Joachim Reinhold Wenzlau, *Der Wiederaufbau der Justiz in Nordwestdeutschland 1945 bis 1949*, Athenäum, Königstein, 1979, pp. 74–81.

[23] Director of the Military Government Courts Branch to D/Chief, Legal Division, Advanced HQ, 29 December 1945, Foreign Office 1060, no. 747 (TNA); Peter Bahlmann, "Verbrechen gegen die Menschlichkeit? Wiederaufbau der Justiz und frühe NS-Prozesse im Nordwesten Deutschlands", Ph.D. Dissertation, University of Oldenburg, 2008, p. 60.

> [a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[24]

As a further development of the IMT Charter, the law abandoned the nexus with war. Thus, it laid the foundation for the independence of crimes against humanity as a criminal category. For the first time, there was a legal basis for the prosecution of atrocities being committed by Germans against Germans during the entire Third Reich. For this purpose, CCL 10 created favourable preconditions (most of which were admittedly already part of the IMT Charter). Apart from its quite open definition, the Allied law provided a broad range of punishments from fines to the death penalty (Article II 3) and stated that not only principals but also accessories or other persons aiding and abetting a crime could be found guilty under its provisions (Article II 2). Neither should an official position or a superior order free from criminal liability (Article II 4) nor should persons accused benefit "from any immunity, pardon or amnesty granted by the Nazi regime".[25] CCL 10 also enabled the four military governments in Germany to authorise German courts to pass judgment on crimes against humanity that were committed by Germans against other Germans or stateless persons (Article III 1d).[26]

34.2.5. The British Application of Control Council Law No. 10, 1946–1949

On the part of the Allied forces, CCL 10 was applied by the US military courts, Soviet military courts,[27] by British military government courts – respectively Control Commission courts – and by French military

[24] CCL 10, see *supra* note 3.

[25] *Ibid*.

[26] According to Art. III 1d CCL 10, each occupying authority had within its occupation zone "the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities", *ibid.*

[27] Hermann Wentker, "Die juristische Ahndung von NS-Verbrechen in der Sowjetischen Besatzungszone und in der DDR", in *Kritische Justiz*, 2002, vol. 35, pp. 62–63.

government courts.[28] Only one of these legal practices has become the object of a broad range of research: the 12 subsequent Nuremberg Trials against members of Nazi functional elites before US military tribunals.[29] In contrast to the Americans, the Soviets, British and French made use of the option to transfer jurisdiction over crimes against humanity committed by Germans against German or stateless persons to German courts. So in the Soviet,[30] French[31] and British zones, German tribunals dealt with cases under CCL 10, Art. II 1c.

British legal practice regarding war crimes and atrocities consisted of two approaches. On the one hand, military courts, which were based on the Royal Warrant of 18 June 1945, carried out about 250 war crimes trials in Germany.[32] On the other hand, the military government initiated

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28 Yveline Pendaries, *Les procès de Rastatt (1946–1954): Le jugement des crimes de guerre en zone française d'occupation en Allemagne*, Peter Lang, Bern, 1995, Contacts: Série II, Gallo-germanica, vol. 16. Relatively well known is the case of the steel magnate Hermann Röchling who was convicted in 1949 to 10 years' imprisonment for crimes against humanity the victims of which were foreign forced labourers, see Daniel Bonnard, "Kriegsprofiteure vor Gericht: Der Fall Röchling", in Kerstin von Lingen and Klaus Gestwa (eds.), *Zwangsarbeit als Kriegsressource in Europa und Asien*, Schöningh, Paderborn, 2014, Krieg in der Geschichte, vol. 77, pp. 391–408.

29 For an overview of the subsequent Nuremberg Trials, see Kim Christian Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, Berghahn Books, New York, 2012, Studies on War and Genocide, vol. 16.

30 Christian Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, Berlin Verlag Arno Spitz, Berlin, 1998, Schriftenreihe Justizforschung und Rechtssoziologie, vol. 3, especially pp. 43–84, 89–123, 211–34 and 310–13; Wentker, 2002, pp. 64–66, see *supra* note 27.

31 One of the few famous CCL 10 cases before German courts in the French Zone was the trial against Heinrich Tillessen in 1946/47. This right-wing extremist had murdered the former Reich Minister of Finance Matthias Erzberger in 1921 and had been exempted from punishment under the Nazi regime in 1933; for this see Cord Gebhardt, *Der Fall des Erzberger-Mörders Heinrich Tillessen. Ein Beitrag zur Justizgeschichte nach 1945*, J.C.B. Mohr (Paul Siebeck), Tübingen, 1995, Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, vol. 14; Martin Broszat, "Siegerjustiz oder strafrechtliche 'Selbstreinigung': Aspekte der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit 1945–1949", in *Vierteljahreshefte für Zeitgeschichte*, 1981, vol. 29, no. 4, pp. 495–500; *War Crimes News Digest*, no. XXIII, 22 January 1947, p. 9 (https://www.legal-tools.org/en/doc/ac48f8/), and no. XXVI, 21 March 1947, p. 3 (http://www.legal-tools.org/doc/0d0330/).

32 The Royal Warrant, 18 June 1945 (http://www.legal-tools.org/doc/386f77/). See Katrin Hassel, *Kriegsverbrechen vor Gericht. Die Kriegsverbrecherprozesse vor Militärgerichten in der britischen Besatzungszone unter dem Royal Warrant vom 18. Juni 1945 (1945–1949)*, Nomos, Baden-Baden, 2009. With regard to the first trial on the legal basis of the

criminal proceedings against Germans suspected of having committed war crimes or crimes against humanity under CCL 10. Since 1947 the Control Commission courts had jurisdiction over these Nazi crimes.[33] According to a British report, these courts carried out four such trials with 36 accused persons up to 30 June 1947.[34] One and a half years later a total of 148 defendants had already been tried before British courts for crimes against humanity.[35] At first, this legal practice was limited to cases with German or stateless victims[36] – with the exception of a military government court trial (which is dealt with later). In the summer of 1947 the situation changed. Proceedings on account of atrocities against Germans had become subject to German jurisdiction, whereas Control Commission court judges sat in judgment of quite a lot of persons being charged with cruelties, the victims of which were Allied civilians, especially forced labourers.[37] At the top of the Control Commission court system was the Court of Appeal in Herford. In February 1947 the New Zealander Lindsay Merritt Inglis[38] became chief judge of this higher court. Twelve of its judgments regarding CCL 10 are documented in its reports,[39] and some of them are referred to in international criminal law as

Royal Warrant in Germany, see John Cramer, *Belsen Trial 1945: Der Lüneburger Prozess gegen Wachpersonal der Konzentrationslager Auschwitz und Bergen-Belsen*, Wallstein Verlag, Göttingen, 2011, Bergen-Belsen: Dokumente und Forschungen, vol. 1.

33 Ordinance No. 68 – Control Commission Courts, 1 January 1947, in *Military Government Gazette Germany: British Zone of Control*, no. 15, p. 364.

34 Assistant Director of Prosecutions at the Zonal Office of the Legal Adviser to Secretariat Section, 17 January 1949, Foreign Office 1060, no. 4 (TNA); Form, 2012, pp. 23–24, see *supra* note 21.

35 Appendix D – Figures of people tried in Germany for war crimes, given by the Under Secretary of State for Foreign Affairs on March 28 1949 in reply to a parliamentary question, Foreign Office 370, no. 2899 (TNA); Form, 2012, p. 24, see *supra* note 21.

36 United Nations War Crimes Commission, Minutes of Meeting held on 16th October 1946 (Meeting no. 114), p. 2 (https://www.legal-tools.org/en/doc/3ebb79/).

37 This applies, for instance, to the Control Commission court proceedings against Walter (High Court of Lübeck, Walter Case, J/314, Judgment, 12 December 1947, Foreign Office 1060, no. 4145 [TNA]), Hollmann (High Court of Detmold, Hollmann Case, HC/DET/130/48, Judgment, 6 September 1948, Foreign Office 1060, no. 4140 [TNA]) and Voß (High Court of Oldenburg, *Voß et al. Case*, HC/OLD/4, Judgment, 11 April 1949, Foreign Office 1060, no. 1556 [TNA]).

38 On Inglis (1894–1966), see Paul Goldstone, "Inglis, Lindsay Merritt", in *Dictionary of New Zealand Biography. Te Ara: The Encyclopedia of New Zealand*, 23 October 2013.

39 Control Commission of Germany, *Control Commission Courts: Court of Appeal Reports – Criminal Cases*, published by order of the Supreme Court, Herford, 1947–1950 ("Court of Appeal Reports").

case law; among these are the cases of Hinselmann,[40] Neddermeier[41] and Kottsiepen.[42] However, research on the British jurisprudence over crimes against humanity and war crimes according to the Allied criminal law remains a desideratum. But three of these proceedings will be referred to below. In 1949 the Legal Division authorised German courts to try cases of Nazi atrocities committed against Allied nationals. Yet these trials were not tried under CCL 10 but under the German Penal Code.[43]

34.2.6. Ordinance No. 47 and its Gradual Implementation

CCL 10 opened up a new perspective to the British. On 3 January 1946 the Legal Division integrated it as the legal basis into its strategy concerning the prosecution of crimes against humanity being committed by Germans against German or stateless persons. At that time, the military government had received the order to "try eight or nine representative cases of the type envisaged in Control Council Law No. 10. Having tried those cases and due publicity having been given to the trials we will then hand over to the German Courts the trial of the balance".[44] Concerning its intention of bringing persons to trial for committing crimes against humanity the Legal Division noted:

> [U]ntil we ourselves have decided what crimes we are going to try, it is a bit premature to bring the full force of the German legal machine into action on this question. Further it would be advisable before we informed the

[40] British Court of Appeal, Hinselmann *et al*. case, Judgment, 24 March 1947, in Court of Appeal Reports, 1947, pp. 53–61, see *supra* note 39; Christine Byron, "Hinselmann and Others", in Cassese (ed.), 2009, pp. 725–26, see *supra* note 11; Cassese, 2013, pp. 54–55, see *supra* note 16.

[41] British Court of Appeal, Neddermeier case, Judgment, 10 March 1949, in Court of Appeal Reports, 1949, no. 1, pp. 58–61, see *supra* note 39; Emily Haslam, "Neddermeier", in Cassese (ed.), 2009, p. 840, see *supra* note 11; Cassese, 2013, p. 103, fn. 47, see *supra* note 16.

[42] British Court of Appeal, Kottsiepen case, Judgment, 31 March 1949, in Court of Appeal Reports, 1949, no. 1, pp. 108–13, see *supra* note 39; Giulia Pinzauti, "Kottsiepen", in Cassese (ed.), 2009, pp. 767–68, see *supra* note 11.

[43] Verbrechen gegen die Menschlichkeit – Zuständigkeit in Fällen, in denen alliierte Staatsangehörige als Opfer betroffen sind. Allgemeine Verordnung des Niedersächsischen Ministeriums der Justiz, 22 July 1949, in *Niedersächsische Rechtspflege*, 1949, vol. 3, no. 8, pp. 131–32.

[44] Chief Legal Division to Director of the Ministry of Justice Branch, 3 January 1946, Foreign Office 1060, no. 747 (TNA).

> *Generalstaatsanwälte* [chief public prosecutors] and *Oberlandesgerichtspräsidenten* [presidents of the higher regional courts] of our intention, to get clear in our own minds how we are going to hand it over to them. It appears there are three major problems requiring consideration. The first is the composition of the German Courts to hear these cases; secondly, the procedure in the German Courts and thirdly, the powers of sentence in the German Courts. There is a subsidiary matter namely, what supervision we are going to exercise over the Courts which may be trying these cases.[45]

By enacting Ordinance No. 47 on 30 August 1946, the British authorities used the opportunity to empower German courts to prosecute crimes against humanity with German or stateless victims.[46] At the same time, the Legal Division took precautionary measures to assure the success of this jurisdiction, in which the British public had a keen interest. Doubts prevailed among British officials about the ability and the will of the German judicial personnel to try Nazi crimes. Those doubts were legitimate on account of both the negative experience with the Leipzig Trials, which had failed to fulfil their purpose of punishing German war criminals after the First World War,[47] and the dilemma arising from the contradiction between the claim of denazification and the necessity of reconstructing the German judicial system. In fact, since the autumn of 1945 the British had already been watering down the rule that prohibited the German administration of justice from employing former members of

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45 *Ibid.*

46 Ordinance No. 47 – Crimes against Humanity (Control Council Law No. 10), 30 August 1946, in *Military Government Gazette Germany. British Zone of Control*, no. 13, p. 306, ("Ordinance of 1946"). In this ordinance the Legal Division stated that "[t]he German Ordinary Courts are authorised to exercise jurisdiction in all cases of Crimes against Humanity as defined by Article II, paragraph 1(c) of Control Council Law No. 10 committed by persons of German nationality against other persons of German nationality or stateless persons".

47 On the issue of the Leipzig trials, see Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg*, Hamburger Edition, Hamburg, 2003; Harald Wiggenhorn, *Verliererjustiz: Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg*, Nomos, Baden-Baden, 2005, Studien zur Geschichte des Völkerrechts, vol. 10; Hassel, 2009, pp. 33–56, see *supra* note 32; for a brief overall view, see Gerd Hankel, "Leipzig Supreme Court", in Cassese (ed.), 2009, pp. 407–9, *supra* note 11; Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 4th ed., Penguin, London, 2012, p. 305.

the Nazi Party because of the lack of qualified judicial personnel who were free from involvement in National Socialism.[48] Mistrust was at least one factor moving the Legal Division to follow a strategy with educational effect: in a first step limiting the German prosecution to those crimes that were also offences under German penal law and then gradually extending it to further atrocities. Implementing ordinances were published that extended the jurisdiction of German courts to cases of inhumane acts as well as of political, racial and religious persecutions.

These enactments referred to parent cases being carried out in order to set examples of how to deal with crimes against humanity. This was done – as the Legal Division itself clarified – for political considerations.[49] The proposal of Jack Lawson of October 1945 had been adopted. Three of these trials were tried before British courts and one before a German court. The former belonged to the aforementioned proceedings before military government and Control Commission courts under CCL 10.

34.2.7. Parent Cases

In the first of these trials a German soldier was found guilty by a military government court in Oldenburg on 29 August 1946 of murder and crimes against humanity. Nineteen-year-old Willi Herold had appropriated the uniform of a captain, put it on and thus succeeded in gathering a group of soldiers around him with whom he gained control of a penal camp in northwest Germany. Finally, he ordered the execution of more than 100 prisoners, many of whom he himself shot. It is worth noting that the only charge under CCL 10 in this trial concerned the murder of five Dutchmen, whereas the criminal liability for the death of a large number of German prisoners was based on Section 211 of the German Criminal Code. Herold was sentenced to death and executed.[50] In an enactment of 10 September

48 Wenzlau, 1979, p. 130, see *supra* note 22.

49 Erlass der Militärregierung – Legal Division – zur Ausführung der Militärregierungsverordnung Nr. 47, 10 September 1946, in *Hannoversche Rechtspflege*, 1946, vol. 2, no. 12, p. 142 ("Order of 10 September 1946").

50 Foreign Office 1060, no. 1674 (TNA); see also *ibid.*, no. 939, death warrant of Herold, 2 November 1946, and report to the commander-in-chief upon the proceedings of a Military Government Court, 21 October 1946; T.X.H. Pantcheff, *Der Henker vom Emsland: Dokumentation einer Barbarei am Ende des Krieges 1945*, 2nd ed., Schuster, Leer, 1995; Paul Meyer, "'Die Gleichschaltung kann weitergehen!' Das Kriegsende in den nördlichen

1946 the Legal Division reported on the end of the trial, pronouncing that German courts were from now on allowed to punish atrocities that had been perpetrated by guards or members of the Gestapo, Schutzstaffel ('SS') or civil police against inmates of prisons, concentration camps and forced labour camps according to CCL 10.[51]

The only German trial serving as a parent case was tried by the regional court of Berlin. The former accountant Helene Schwärzel was charged as an indirect perpetrator of murder in conjunction with committing a crime against humanity because she had informed the authorities of the whereabouts of Carl Goerdeler, an accomplice of the organisers of the failed assassination attempt on Hitler of 20 July 1944. On account of Schwärzel's information, Goerdeler was captured, sentenced to death and executed; the informer was rewarded for her "patriotic" act with one million Reichsmark. On 14 November 1946 she was sentenced to 15 years' imprisonment. Within the Legal Division's implementing ordinance of 21 November, this verdict was briefly announced as a precedent for the punishment of denunciations. Although, from now on, Nazi informers could be put on trial before German courts according to CCL 10, the military government also showed great understanding for the concerns of some German jurists. It took their warning seriously that in certain cases convictions would be difficult to achieve. This was aimed at cases that did not constitute violations of German law; violations the punishment of which could be easily contested as a breach of the principle of *nulla poena sine lege*. Addressing this concern, the Legal Division offered the German courts the option to submit questionable cases to the German Central Legal Office for the

Emslandlagern und der falsche Hauptmann Willi Herold im Spiegel britischer und deutscher Gerichts- und Ermittlungsakten", in KZ-Gedenkstätte Neuengamme (ed.), *Die frühen Nachkriegsprozesse*, Edition Temmen, Bremen, 1997, Beiträge zur Geschichte der nationalsozialistischen Verfolgung in Norddeutschland, vol. 3, pp. 209–13; *War Crimes News Digest*, no. XVII, 23 September 1946, p. 3, provides a brief overview of the case, yet mistakenly presupposing that this was a German trial (https://www.legal-tools.org/doc/9c410f/).

51 Order of 10 September 1946, see *supra* note 49. On 3 December 1946 the UNWCC provided an early overview of the war crimes and crimes against humanity cases being heard and pending at that time before British military government courts (https://legal-tools.org/doc/c78097/).

British Zone (*Zentral-Justizamt*)[52] for examination. It also envisaged the establishment of special tribunals in the British Zone for the prosecution of persons charged with "membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal",[53] which could also be entrusted with the punishment of denunciations.[54] But all these arrangements were finally found to be inadequate, so that the Legal Division transferred the jurisdiction over cases of denunciation without limitations to the German ordinary courts on 23 May 1947.[55]

The second British parent case led to a judgment being delivered by a military government court in Hamburg on 7 December 1946. Doctors and policemen who were involved in the forced sterilisation of at least eight Sinti and Romanies in the winter of 1944–1945 were convicted of crimes against humanity. Among the accused was the famous gynaecologist and clinic director Hans Hinselmann, who was sentenced to three years' imprisonment and a fine of 100,000 Reichsmark.[56] "This is a case of illegal operations on racial grounds", stated the Legal Division on 16 December,

> and as far as this Branch is concerned, any case relating to prosecution on racial grounds can be tried by the Germans forthwith under Control Council Law No. 10, excepting any case which may relate to Jewish persecutions, as a Trial relating to that matter will shortly be held at Aachen and as

[52] Harold Percy Romberg, "The Central Legal Office for the British Zone of Germany", in *Journal of Comparative Legislation and International Law*, 3rd series, 1950, vol. 32, pp. 6–9; Wenzlau, 1979, pp. 193–285, see *supra* note 22.

[53] CCL 10, see *supra* note 3.

[54] Aburteilung von Denunzianten – Erlaß der Militär-Regierung – Legal Division, 21 November 1946, in *Hannoversche Rechtspflege*, 1946, vol. 2, no. 12, p. 142 ("Order of 21 November 1946"). With regard to the Schwärzel case, see Inge Marßolek, *Die Denunziantin. Die Geschichte der Helene Schwärzel 1944–1947*, Edition Temmen, Bremen, 1993.

[55] Betr. Kontrollratsgesetz Nr. 10 – Verbrechen gegen die Menschlichkeit, Anordnung der Legal Division, 23 May 1947, in *Niedersächsische Rechtspflege*, 1947, vol. 1, no. 1, p. 10; Andrew Szanajda, *Indirect Perpetrators: The Prosecution of Informers in Germany, 1945–1965*, Lexington Books, Lanham, 2010, p. 112.

[56] Byron, 2009, pp. 725–26, see *supra* note 40. *War Crimes News Digest*, no. XXII, 31 December 1946, pp. 10–11 (https://www.legal-tools.org/doc/164c42/). On Hinselmann (1884–1959), see Ernst Klee, *Das Personenlexikon zum Dritten Reich. Wer war was vor und nach 1945*, Fischer Taschenbuch Verlag, Frankfurt, 2005, p. 257.

> soon as that Trial has been held this Branch will inform you as to the result.[57]

In addition, four days later the relevant British regulation was adopted proclaiming not only the conviction and sentence of the defendants but also the authorisation of German courts to adjudicate cases of sterilisations and other illegal surgical procedures that were carried out for racial or political reasons and concerned German or stateless victims.[58]

The aforementioned trial relating to Jewish persecutions was tried before a CCC in Aachen. The case dealt with the burning down of an Aachen synagogue in the *Reichspogromnacht* of 9 November 1938. On 12 June 1947 the judgment was handed down. Among the convicted were the former police chief Carl Zenner[59] and the local *Kreisleiter* (district leader). Both were sentenced to five years' imprisonment and a fine of 5,000 Reichsmark.[60] Just as in the case of Hinselmann *et al.*, the military government in its implementing ordinance of 5 July announced the names of the defendants, the verdicts of guilty and the penalties imposed before making the decision that:

> 3. Copies of the judgement of the Control Commission Court will be circulated in due course.
> 4. The German Ordinary Courts are now hereby authorised to try persons charged with committing crimes against humanity against Jews, or were Jews are involved, provided that the crimes were committed against persons who were German nationals or stateless persons.

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57 Director of the Military Government Courts Branch to Ministry of Justice, Legal Division, 16 December 1946, Foreign Office 1060, no. 1061 (TNA).

58 Verbrechen gegen die Menschlichkeit – Erlaß der Militärregierung – Legal Division – zur Ausführung der Militärregierungsverordnung Nr. 47, 20 December 1946, in *Hannoversche Rechtspflege*, 1947, vol. 3, no. 1, pp. 5–6; *War Crimes News Digest*, no. XXII, 31 December 1946, p. 11, see *supra* note 56.

59 On Zenner (1899–1969), see Klee, 2005, p. 692, *supra* note 56; Heinz Boberach, "Kein 'ganz normaler Mann' – der Polizeipräsident und SS-Brigadeführer Carl Zenner", in: *Zeitschrift des Aachener Geschichtsvereins*, 1999/2000, vol. 102, pp. 473–90; regarding his time as Aachen police chief (1937–1941), see *ibid.*, pp. 475–77.

60 Zuständigkeit der ordentlichen Gerichte für Verbrechen gegen die Menschlichkeit – Judenverfolgungen – Anordnung der Legal Division, 5 July 1947, in *Zentral-Justizblatt*, 1947, vol. 1, no. 2, p. 43. For more details on the Zenner trial, see Boberach, 1999/2000, pp. 487–88, *supra* note 59.

> 5. The effect of this instruction is to implement fully Ordinance No. 47 and the German Ordinary Courts now have complete freedom to try under that Ordinance, all cases of crimes against humanity as defined by Control Council Law No. 10.[61]

Whether the Aachen judgment was in fact distributed among the judicial administrations and German courts is unclear. Until now one must assume that its written reasons – if extant – were unknown to these institutions, for they were found neither in the archives of the Foreign Office nor in those of the German legal administrations. The same applies to the first instance decisions in the cases of Herold, Schwärzel and Hinselmann. (Since it was not common practice for British military courts to produce judgments with written reasons,[62] Control Commission courts – at least in certain cases – delivered judgments discussing legal-dogmatic problems, as can be seen by some first instance decisions on crimes against humanity[63] and by the law reports of the Court of Appeal including, for example, the second instance decision in the Hinselmann case.[64]) The purpose of the parent cases lay in demonstrating that particular criminal offences were justiciable under CCL 10. In addition, the imposed sentences and penalties should set examples for German legal practice as the Legal Division had explicitly pointed out.[65] But this approach could not provide the German lawyers with concrete instructions for handling the Allied law. It simply failed to teach them

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61 Chief Legal Division to Chief Legal Officers, 5 July 1947, Foreign Office 1060, no. 826 (TNA).

62 Wolfgang Form, "Quellen und deren Erschließung am Forschungs- und Dokumentationszentrum für Kriegsverbrecherprozesse (ICWC)", in Jürgen Finger, Sven Keller and Andreas Wirsching (eds.), *Vom Recht zur Geschichte: Akten aus NS-Prozessen als Quellen der Zeitgeschichte*, Vandenhoeck & Ruprecht, Göttingen, 2009, p. 248; Cramer, 2011, pp. 249–50, see *supra* note 32.

63 This applies, for instance, to the Hollmann case, see *supra* note 37.

64 On 24 March 1947 the British Court of Appeal dismissed the appeals of a couple of defendants confirming, for example, the sentence against Hinselmann, who was still held responsible for the crimes under discussion, see British Court of Appeal, Hinselmann *et al*. case, pp. 58–59, *supra* note 40. Meanwhile, the court changed the conviction of another accused to bodily injury according to the German Criminal Code (Sec. 230) because he acted negligently (*fahrlässig*). To meet the *mens rea* requirements of CCL 10 a crime would have had to be committed with at least gross negligence, see Cassese, 2013, pp. 54–55, *supra* note 16.

65 Order of 21 November 1946, see *supra* note 54.

how to deal dogmatically with CCL 10 Article II 1c. What was missing was the case law of a supreme court interpreting the provisions of the Allied law for legal practice.

The Legal Division monitored German legal practice regarding crimes against humanity in the British Zone by demanding reports from the court districts and carrying out inspection missions. But upon evaluating the German courts' jurisdiction, it must have been apparent that the judicial process of coming to terms with the past was difficult: The proceedings made slow progress and yielded results that were unsatisfying. With the establishment of the OGH as an appellate court for the entire zone, the British particularly aimed at a breakthrough for CCL 10.

34.3. The German Application of Control Council Law No. 10 in the British Zone

Apart from the British impetus to secure the prosecution of German crimes against humanity committed against German or stateless persons, the German debate about the application of CCL 10, reflecting widely shared reservations, played a decisive role for the jurisprudence of the OGH that will be focused on later. It will be shown how the underlying interactions between administrative structures and the participating protagonists influenced the legal practice of German courts in regard to the prosecution of the atrocities under discussion.

As a result of its total defeat in the Second World War, Germany had lost its sovereignty and had been divided up into four occupation zones. Starting in June 1945 the Allied Control Council in Berlin exercised governmental authority. At the same time the Supreme Court of the Reich (*Reichsgericht*) in Leipzig was closed – an act symbolising both the collapse of Germany and the preceding destruction of its legal culture and tradition under Nazi rule. The German judicial system came to a complete standstill.[66] Its reconstruction was characterised by the Allied efforts to denazify the German law and judicial personnel.[67] In the British Zone, courts were reopened, beginning in the summer of 1945, starting

[66] Wenzlau, 1979, p. 64, see *supra* note 22.

[67] With regard to the denazification of the German judicial personnel in the British Zone, see *ibid.*, pp. 119–42; Broszat, 1981, pp. 508–16, *supra* note 31.

with the local and regional courts (*Amts- und Landgerichte*) and ending with the higher regional courts (*Oberlandesgerichte*).[68]

In view of the prosecution of crimes against humanity, the regional courts were courts of first instance. According to an ordinance of the *Zentral-Justizamt* of 22 August 1947, courts of assizes, which were re-established at the regional courts, were charged with trying atrocities under CCL 10.[69] Above these judicial panels were the eight higher regional courts (in Brunswick, Celle, Cologne, Düsseldorf, Hamburg, Hamm, Oldenburg and Schleswig), which functioned as appellate courts until the OGH was entrusted with their jurisdiction on 1 January 1948.

Yet the prosecution of Nazi atrocities encountered serious obstacles for the law enforcement authorities. Among these were logistical problems, for instance the difficulty to gain access to defendants and witnesses still being detained in Allied internment camps or living in other occupation zones. Furthermore, the gathering of evidence often reached its limits, especially when crimes being investigated had been committed several years before the investigation was started.[70] This applied not least to cruelties against political opponents and Jews in the course of the Nazi seizure of power or during the *Reichspogromnacht*. Lastly, it was the German jurists who constituted a heavy burden for the enforcement of CCL 10, in so far as a majority of them were either unable or unwilling to apply it.

On the one hand, the prosecutions and courts showed significant uncertainties in the handling of the Allied law, especially in cases being described by Ordinance No. 47 under the heading "Offences under German Law":

> If in any case the facts alleged, in addition to constituting a crime as defined by Article II, paragraph 1(c) of Control Council Law No. 10, also constitute an offence under ordinary German Law, the charge against the accused may be framed in the alternative and the provisions of Article II, paragraph 5

[68] *Ibid.*, pp. 509–10, fn. 86a.

[69] Verordnung zur Wiedereinführung von Schöffen und Geschworenen in der Strafrechtspflege, 22 August 1947, in *Verordnungsblatt für die Britische Zone*, 1947, no. 16, pp. 115–22; Form, 2012, p. 26, see *supra* note 21.

[70] Chief Legal Officer of the Military Government of North Rhine Westphalia to Legal Division and others, 3 June 1947, Foreign Office 1060, no. 1075 (TNA).

> of Control Council Law No. 10 shall apply mutatis mutandis to the offence under ordinary German law.[71]

To make a long story short, many lawyers – a lot of them intentionally – misunderstood this provision as the granting of a freedom of choice concerning the application or non-application of CCL 10. The clause "the charge […] may be framed in the alternative" revealed a clear trend towards ignoring the Allied law. This tendency forced the British authorities to react. On 16 January 1948 the chief of the Legal Division, Jack Rathbone,[72] informed the chief legal officers in the *Länder* (federal states) of the British Zone about this awkward situation and gave instructions:

> As a consequence of this procedure criminal proceedings have resulted in acquittals of persons accused in accordance with German law and the Courts have declined to substitute a conviction under Control Council Law 10, since no charge has been laid under this law. […] It is the opinion of this Division that an offence offending against both Control Council Law 10 and ordinary German law falls under § 73 StGB (Idealkonkurrenz [concurrence of offences]). You are therefore requested please to instruct German prosecutors through the Ministers of Justice or other appropriate authorities in your Länder to lay a charge in every relevant case both under Law No. 10 and under the German Criminal Code, in accordance with § 73 StGB.[73]

On the other hand, a large number of judges and prosecutors were biased in the matter of the punishment of Nazi criminals. Shaped by the nationalist, undemocratic and patriarchal society of the Wilhelmine Germany they had, in general, loyally served the Nazi state and refused CCL 10 as victor's justice. As the Legal Division stressed they

> have always had little sympathy for persons with a different political and religious outlook from their own. The victims of crimes against humanity were either Jews or persons of left wing politics. The judges and prosecutors have less sympathy for such persons than for the accused. The fact that millions of innocent persons were put to death by the

71 Ordinance of 1946, see *supra* note 46.

72 On Rathbone (1909–1995), see Wenzlau, 1979, pp. 76–77, *supra* note 22.

73 Chief Legal Division to the Chief Legal Officers at the four *Länder* headquarters, 16 January 1948, Foreign Office 1060, no. 924 (TNA) (emphasis in original).

> Nazis seems to have made little or no impression on many legal officials.[74]

In addition, notable legal experts pointed out that the Allied law could not be put to use by German penal courts because it meant a violation of the principle of *nullum crimen, nulla poena sine lege*.[75] This argument was also put forward by the president of the higher regional court in Celle, Hodo von Hodenberg.[76] As an opponent of the Nazi regime, the former lawyer had quickly won the trust of the military government. "Jurisprudentially conservative and politically nationalistic",[77] he also earned recognition within the German judiciary. Later, Hodenberg became a protagonist of the "Heidelberg Circle" (*Heidelberger Juristenkreis*), which was joined by leading law professors and attorneys having participated in the IMT defence and aiming at amnesty for German war criminals in Germany and abroad.[78] To the displeasure of the British, he developed into the most important opponent of the application of CCL 10 before German courts, who even managed to disseminate his standpoint in a famous legal magazine. "Rigidly positivistic in his jurisprudence […] Hodenberg appealed to the likes of Montesquieu, Beccaria and Feuerbach to demonstrate the importance of *nulla poena* as a bulwark against arbitrary power".[79] Insinuating that the retroactivity of the Allied law was an alarming echo of the Nazi disregard of legality, he pointed out "the fresh danger that draconian punishments are being demanded as the result of the influence of political perspectives, punishments that cannot be justified by an objective grasp of the

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74 Zonal Executive Offices of the Legal Division to Director of Ministry of Justice Control Branch, 11 November 1947, *ibid.*, no. 1075 (TNA).

75 Lawrence Douglas, "Was damals Recht war … *Nulla Poena* and the Prosecution of Crimes against Humanity in Occupied Germany", in Larry May and Elizabeth Edenberg (eds.), *Jus Post Bellum and Transitional Justice*, Cambridge University Press, Cambridge, 2013, pp. 44–73.

76 On Hodenberg (1887–1962), see Barbara Simon, *Abgeordnete in Niedersachsen 1946–1994: Biographisches Handbuch*, Schlüter, Hannover, 1996, pp. 166–67.

77 Douglas, 2013, p. 69, see *supra* note 75.

78 With regard to the "Heidelberg Circle", see Norbert Frei, *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit*, 2nd edition, Deutscher Taschenbuch Verlag, Munich, 2003, pp. 163–66.

79 Douglas, 2013, p. 65, see *supra* note 75.

situation".[80] By stressing that the definition of crimes against humanity was so general and unspecific that German lawyers would have to raise objections against it, the controversial Celle court president contested its character as an independent criminal offence. For him – as for Schmitt – it seemed that 'crimes against humanity' served as a collective term for more or less ordinary crimes distinguishing themselves from others only through a mode of perpetration that was inhuman and highly worthy of punishment.[81]

As a consequence of this point of view that was shared by the majority of German jurists, there would not have been a legal basis for the prosecution of certain atrocities not being punishable under German penal law. This applied especially to denunciations because informing the state authorities about undesirable behaviours of members of the German "national community" (*Volksgemeinschaft*) – such as listening to enemy broadcasts and making defeatist comments – had not violated any positive law. The Nazis had rather requested it. In order to criminalise denunciations, a change of perspective was necessary: Who willingly denounced a person while at the same time being aware of the inhumane consequences to be expected – for instance, a death sentence – could be considered as an indirect perpetrator. However, such a reading demanded the confession that the laws being applied had been unlawful.[82] It is no wonder that the jurists concerned often resisted accepting this interpretation.

But it was already in August 1946 that the highly respected legal scholar Gustav Radbruch[83] provided an interpretation that legitimated the retroactive punishment of Nazi atrocities and accordingly the prosecution of denunciations. In view of the Third Reich, he developed his theory of "lawful illegality" (*gesetzliches Unrecht*) according to which the positive law had to make way for justice in cases where it was intolerably unjust

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80 Hodo von Hodenberg, "Zur Anwendung des Kontrollratsgesetzes Nr. 10 durch deutsche Gerichte", in *Süddeutsche Juristenzeitung*, 1947, vol. 2, Sondernummer, March 1947, col. 120; the English translation is quoted from Douglas, 2013, p. 65, see *supra* note 75.

81 Hodenberg, 1947, col. 116, see *supra* note 80.

82 Peter Bahlmann, "Der Oberste Gerichtshof und die materielle Rechtsprechung im OLG-Bezirk Oldenburg", in Justizministerium des Landes NRW (ed.), 2012, p. 145, see *supra* note 7.

83 On Radbruch (1878–1949), see Marijon Kayßer, "Radbruch, Gustav (1878–1949)", in Michael Stolleis (ed.), *Juristen: Ein biographisches Lexikon: Von der Antike bis zum 20. Jahrhundert*, C. H. Beck, Munich, 2001, pp. 525–26.

and lacked the quality of law in a proper sense.[84] The IMT against the major Nazi war criminals provided a complementary approach in its judgment of 1 October 1946 by stressing – though concerning the criminal liability of those accused who were alleged to have committed crimes against peace –

> that the maxim '*nullum crimen sine lege*' is not a limitation of sovereignty, but it is in general a principal of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong.[85]

Those lawyers, who endorsed the prosecution of crimes against humanity and considered CCL 10 to be the appropriate legal basis, regularly agreed with the above interpretations of the Nuremberg Tribunal and Radbruch's formula. Two of them – the chief public prosecutor of Brunswick, Curt Staff,[86] and the presiding judge at the Cologne higher regional court, August Wimmer[87] – were later appointed to judgeships at the German Supreme Court for the British Zone. It is worth noting that even Schmitt, in his legal expertise on the punishability of the crime of aggression of August 1945, conceded that certain Nazi atrocities,

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[84] Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", in *Süddeutsche Juristenzeitung*, 1946, vol. 1, no. 5, p. 107:

> Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als >unrichtiges Recht< der Gerechtigkeit zu weichen hat.

See, for example, Douglas, 2013, pp. 56–57, *supra* note 75. With regard to Radbruch's role in the natural law debate at that time, see Lena Foljanty, *Recht oder Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit*, Mohr Siebeck, Tübingen, 2013, Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, vol. 73, pp. 52–66.

[85] IMT in Nuremberg, Göring *et al.* case, Judgment, 1 October 1946, p. 52 (https://www.legal-tools.org/doc/45f18e/).

[86] On Staff (1901–1976), see Thomas Henne, "Curt Staff zum 100. Geburtstag", in *Neue Juristische Wochenschrift*, 2001, vol. 54, no. 41, pp. 3030–31.

[87] On Wimmer (1899–1988), see Friedrich Wilhelm Bosch, "August Wimmer", in *Neue Juristische Wochenschrift*, 1989, vol. 42, no. 27, p. 1660.

"especially the monstrous atrocities of the SS and the Gestapo",[88] constituted crimes *mala in se* for which the principle of *nullum crimen* could not be a bar against retroactive prosecution.[89]

Nevertheless, the jurisdiction over crimes against humanity led to a legal confusion and lenient sentences for Nazi perpetrators. This fact was criticised not only by the Legal Division but also by sections of the public and some representatives of the German justice. And of course, it played an important role in the establishment of the OGH and its later legal practice. However, it is important to consider that the German judicial system as a whole had a great interest in the creation of a supreme court, mainly due to the need of an institution which re-established legal unity.

34.4. The German Supreme Court for the British Zone and its Legal Practice in Regard to Crimes against Humanity

34.4.1. The Establishment, Jurisdiction and Judicial Personnel

With Ordinance No. 98 of 1 September 1947 the British military government established the OGH.[90] It was entrusted with a dual jurisdiction in so far as it functioned as a supreme court guaranteeing legal unity and as an appellate court for cases that were adjudicated by courts of assizes, including crimes against humanity trials.[91] But its opening was delayed on account of negotiations with the US military government (and the German *Länder* concerned) with regard to the idea of a united supreme court for both zones of occupation. Probably due to these exploratory talks, the choice for the court's seat fell on Cologne being located near the British-American Zone border.[92] After the bi-zonal option had been cancelled, the OGH was opened in May 1948.[93]

At the same time, the legal authorities had dealt with the recruitment of the judicial personnel. The Legal Division claimed that

88 Carl Schmitt, *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege"*, with remarks and an epilogue by Helmut Quaritsch (ed.), Duncker & Humblot, Berlin, 1994, p. 81.

89 *Ibid.*, p. 23; Douglas, 2013, p. 59, see *supra* note 75.

90 Ordinance No. 98 – German Supreme Court for the British Zone, 1 September 1947, in *Military Government Gazette Germany. British Zone of Control*, 1947, no. 20, p. 572.

91 Pauli, 1996, p. 99, see *supra* note 7; Rüping, 2000, p. 355, see *supra* note 7.

92 Form, 2012, p. 41, see *supra* note 21.

93 Wenzlau, 1979, pp. 303–8, see *supra* note 22; Form, 2012, pp. 42–43, see *supra* note 21.

judges and prosecutors who had been members of the Nazi Party or who had somehow been involved in Nazism should not be appointed.[94] This provision made the search for candidates quite difficult. Finally, six judges and one chief public prosecutor were found so that one civil and one criminal division, each consisting of three judges, could be set up. It was not until 1 January 1950 that a second criminal division took up its work. However, the workload constantly exceeded the court's capacities, even though further judges were appointed.[95] The vice-president of the OGH, Ernst Wolff, who later became the president in February 1949, had been a distinguished lawyer in Berlin known for his expertise in civil law. Yet in 1938 his admission to the Bar was revoked for racial reasons. In 1939 he escaped the anti-Semitic persecution of the Nazis by emigrating to England. In London he worked as an advocate and as a member of commissions dealing with the European post-war order.[96]

There were two other men who became key figures for OGH jurisprudence concerning crimes against humanity: the aforementioned Curt Staff and August Wimmer. The former – a member of the Social Democratic Party of Germany – had been dismissed as a judge in 1933 and spent 14 months as a prisoner in Dachau concentration camp without being charged of a crime.[97] In 1945 he was appointed as the chief public prosecutor in Brunswick, where he set up a task force to promote the prosecution of Nazi criminals.[98] From October 1946 to February 1947 Staff headed the penal law department at the *Zentral-Justizamt*,[99] holding a key position between the Legal Division and the German judicial administration with regard to the implementation of CCL 10. Thus, he gained the confidence of the British – notably of Rathbone who characterised him as a "staunch upholder of democracy and an opponent of the Nazi regime"[100] as well as "the best legal official I have yet met".[101]

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94 Wenzlau, 1979, p. 308, see *supra* note 22; Rüping, 2000, p. 356, see *supra* note 7.

95 Storz, 1969, p. 3, see *supra* note 7; Wenzlau, 1979, pp. 308–9, see *supra* note 22.

96 On Wolff (1877–1959), see Georg Maier-Reimer, "Ernst Wolff (1877–1959): Führender Anwalt und Oberster Richter", in Helmut Heinrichs *et al.* (eds.), *Deutsche Juristen jüdischer Herkunft*, C.H. Beck, Munich, 1993, pp. 643–54.

97 Henne, 2001, p. 3031, see *supra* note 86.

98 Werner Sohn, *Im Spiegel der Nachkriegsprozesse: Die Errichtung der NS-Herrschaft im Freistaat Braunschweig*, Appelhans, Braunschweig, 2003, p. 51.

99 Broszat, 1981, pp. 518–19, see *supra* note 31.

100 Cited in Edith Raim, *Justiz zwischen Diktatur und Demokratie. Wiederaufbau und Ahndung von NS-Verbrechen in Westdeutschland 1945–1949*, Oldenbourg

Taking into account Staff's approval of CCL 10, it was not surprising that he became the presiding judge of the OGH criminal division on 1 January 1948.[102]

The certificate of appointment for Wimmer was dated on the same day. He was married to a Jewish woman who had converted to Catholicism. For this reason and because of his Christian humanist opposition to the Nazis, he was dismissed as a judge in 1938 and detained by the Gestapo in 1944. After his appointment as a presiding judge at the higher regional court in Cologne in 1945,[103] he wrote an article on the prosecution of crimes against humanity and the principle of *nullum crimen sine lege*. Taking a stand for the retroactivity of CCL 10 he stated that:

> The state has an inescapable ethical responsibility to punish all perpetrators of crimes against humanity; there is no other way to atonement and prevention. German criminal law does suffice to cover every case and situation; anomalously, the principle of 'n.c.s.l.' has to defer to the ethical necessity of promulgating a new special retroactive law.[104]

Like Staff, Wimmer had experienced political – and indirectly racial – persecution during the Third Reich, which meant that both looked at the issue of prosecuting such atrocities from a perspective differing from that taken by those jurists who had come to an arrangement with National Socialism. They were convinced that the Allied law offered the best

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Wissenschaftsverlag, Munich, 2013, Quellen und Darstellungen zur Zeitgeschichte, vol. 96, pp. 133–34.

101 Cited in *ibid.*, p. 259.

102 Storz, 1969, p. 4, see *supra* note 7.

103 Bosch, 1989, see *supra* note 87.

104 August Wimmer, "Die Bestrafung von Humanitätsverbrechen und der Grundsatz *nullum crimen sine lege*", in *Süddeutsche Juristenzeitung*, 1947, vol. 2, Sondernummer, March 1947, col. 130 (emphasis in original):

> Es besteht eine unabweisbare ethische Verpflichtung des Staates, *alle* Humanitätsverbrecher zu bestrafen, und es gibt keinen anderen Weg zur Sühnung und Prävention; das deutsche Strafrecht reicht hierzu nicht in allen Fällen und in jeder Beziehung aus; insoweit hat der Grundsatz 'n.c.s.l.' ausnahmsweise zurückzustehen hinter der ethischen Notwendigkeit, ein neues, rückwirkendes Ausnahmegesetz zu schaffen.

The English translation is quoted from Douglas, 2013, p. 65, see *supra* note 75. See, for example, Foljanty, 2013, pp. 70–71, *supra* note 84.

preconditions to restore justice, whereas their opponent Hodenberg, higher regional court president in Celle, argued that its retroactive application undermined the confidence of the German people in the still fragile legal system. Both judges brought the demand for justice into position against the primacy of legal certainty. (Similar to the Heidelberg Circle member Hodenberg, Schmitt, who had not held any public office since the end of the war, imposed the far-reaching and general requirement of an amnesty for Nazi criminals in 1949.[105]) Their appointment to the OGH, which was proposed by the *Zentral-Justizamt* and approved by the Legal Division, was closely connected with the British efforts to ensure the punishment of Nazi crimes against German nationals, as both were known to be supporters of CCL 10.[106] Referring to natural law arguments, Staff and Wimmer had an important stake in the legal practice of the OGH under CCL 10 as can be shown by a glance at the leading cases bearing their judicial signatures.

34.4.2. Prosecution of Crimes Against Humanity

From May 1948 to September 1950 the OGH produced 583 decisions and judgments concerning crimes against humanity with German or stateless victims. Among these were atrocities against Communists, Social Democrats, Jews, Sinti and Romanies, disabled people and others, for example: denunciations (202), brutal behaviour of officials (73) – especially maltreatment of concentration camp prisoners –, crimes connected with the Nazi seizure of power (110), the *Reichspogromnacht* (118) or the final period of Nazi rule (24).[107]

Contrary to the IMT and the subsequent Nuremberg Trials, the focal point of the German law enforcement in accordance with CCL 10 was on the middle- and low-level perpetrators – among them neighbours, husbands and employees having delivered people from their immediate surroundings to the Nazi state or men of the "Storm Division"

[105] Carl Schmitt, "Amnestie oder die Kraft des Vergessens", in *id.*, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916–1969*, with a preface and remarks by Günter Maschke (ed.), Dunker & Humblot, Berlin, 1995, pp. 218–21.

[106] Broszat, 1981, p. 534, see *supra* note 31.

[107] Form, 2012, p. 50, see *supra* note 21. For a concise overview of the Nazi policy of exclusion and repression, see Nikolaus Wachsmann, "The policy of exclusion: repression in the Nazi state, 1933–1939", in Jane Caplan (ed.), *Nazi Germany*, Oxford University Press, Oxford, 2008, pp. 122–45.

(*Sturmabteilung*) who had detained, abused and murdered their own countrymen for racial or political reasons. By 30 September 1949 German courts had conducted 1,385 trials for crimes against humanity, which involved 3,269 persons. In a significant percentage of cases the parties filed appeals. In total, the OGH tried 539 appeal cases involving 978 defendants (909 men, 69 women) and leading to 583 decisions.[108]

Because of its dual jurisdiction as a supreme court and as an appellate court for German trials under CCL 10, the OGH was in charge of defining 'crimes against humanity' and how they differ from 'ordinary' crimes under German penal law. This was crucial, especially in view of denunciation cases on which the court focused immediately after starting its judicial work. Characteristically, 50 out of 84 decisions collected in the first volume of the OGH law reports covering the time between May 1948 and April 1949 dealt with cases of crimes against humanity – among these no less than 26 dealt with denunciations.[109] By devoting a great deal of attention to the question of which objective and subjective elements were required for crimes against humanity, the criminal division aimed at providing a systematic interpretation of the Allied legal norm, thus facilitating and enforcing its application. Due to the necessity of these efforts to unify the prosecution, the OGH created legal constructions which made its decisions valuable case law for international criminal law. With its first judgment the court already laid the foundation for the later development when it stated that

> [r]etroactive punishment is unjust when the action, at the time of its commission, not only does not fall foul of a positive rule of criminal law, but also does not contravene the moral law. This is not the case for crimes against humanity. In the view of any morally-oriented person, serious injustice was perpetrated, the punishment of which would have been a legal obligation of the state. The subsequent cure of such dereliction of a duty through retroactive punishment is in keeping with justice. This also

[108] Form, 2012, p. 54, see *supra* note 21.

[109] Entscheidungen, vol. 1, 1949, see *supra* note 8. The relevant information provided by Broszat, 1981, p. 534, see *supra* note 31, is misleading.

> does not entail any violation of legal security but rather the re-establishment of its basis and presuppositions.[110]

In this way the OGH confirmed the applicability of the controversial CCL 10 and contributed to an appropriate prosecution of serious Nazi crimes. In the following period, the court set aside a lot of acquittals by insisting on the application of the Allied law and dismissed the appeals of many defendants.[111] It is not the purpose of this essay to address in detail the issue of the contribution of the OGH to the German judicial process of coming to terms with the Nazi past. Nevertheless, it should be mentioned that for a short time, the appeal court gained recognition for establishing a legal practice that helped to make the German prosecution of crimes against humanity more consistent. Thus it probably achieved a breakthrough for the legal construction of *Idealkonkurrenz* (see section 34.3) facilitating not least the prosecution of denunciations.[112]

But on the German side, there were also many jurists refusing to recognise the merits of the OGH – among them some judicial panels which explicitly declined its jurisprudence. A judgment given by a court of assizes in Lower Saxony (Niedersachsen) affected Staff, presiding

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[110] OGH, Bl. case, StS 6/48, Judgment, 4 May 1948, in Entscheidungen, vol. 1, 1949, p. 5, see *supra* note 8:

> Rückwirkende Bestrafung ist ungerecht, wenn die Tat bei ihrer Begehung nicht nur nicht gegen eine positive Norm des Strafrechts, sondern auch nicht gegen das Sittengesetz verstieß. Bei Verbrechen gegen die Menschlichkeit ist davon nicht die Rede. Nach der Auffassung aller sittlich empfindenden Menschen wurde schweres Unrecht begangen, dessen Bestrafung rechtsstaatliche Pflicht gewesen wäre. Die nachträgliche Heilung solcher Pflichtversäumnis durch rückwirkende Bestrafung entspricht der Gerechtigkeit. Das bedeutet auch keine Verletzung der Rechtssicherheit, sondern die Wiederherstellung ihrer Grundlage und Voraussetzung. Unrechtssicherung ist nicht Aufgabe der Rechtssicherheit.

The English translation is mainly quoted from Cassese, 2013, p. 89, fn. 18, see *supra* note 16. With regard to the Bl. Case, see for example, Christoph Burchard, "BL.", in Cassese (ed.), 2009, see *supra* note 11, pp. 606–7

[111] For a quantitative analysis of OGH jurisprudence regarding crimes against humanity, see Form, 2012, pp. 49–63, *supra* note 21.

[112] Broszat, 1981, pp. 533–34, see *supra* note 31.

judge of the OGH criminal division, so strongly that he considered the submission of a complaint to the *Land* minister of justice.[113]

From a historical point of view, there is another interesting dimension. The OGH delivered judgments and decisions with elaborate reasoning also providing a critical interpretation of Germany under Nazi rule. This applies for example to the case of the German director Veit Harlan who was indicted of a crime against humanity because he had shot the anti-Semitic propaganda film *Jud Süß* (1940). The criminal division set aside the contested acquittal and pointed out that the film was a part of the whole of the inhuman campaign against the Jews. In this context, the OGH analysed the mechanisms of the racial persecution of the Jews in a very clear-sighted way.[114] Addressing the courts of first instance, the OGH set forth, in the headnotes of the decision, that it was an infringement of the law not to take sufficiently into account the historical facts and experience for the legal assessment of the factual findings.[115] In another decision, it claimed that judges could commit crimes against humanity by imposing inhuman sentences – even if the penalty was in conformity with the law. The reasoning contained the admission that parts of the legal system – especially the "People's Court" (*Volksgerichtshof*) and the "Special Courts" (*Sondergerichte*) – had handled the law in such a way as to turn it into an instrument of the terrorist suppression and extermination of entire groups of the population.[116] Of course, in view of

[113] Rüping, 2000, p. 358, see *supra* note 7.

[114] OGH, Harlan case (*Jud Süß* case), StS 365/49, Judgment, 12 December 1949, in Entscheidungen, vol. 2, 1950, pp. 291–312, see *supra* note 8; Boris Burghardt, "Harlan (*Jud Süß* Case)", in Cassese (ed.), 2009, pp. 720–21, see *supra* note 11; Pauli, 1996, pp. 116–19, see *supra* note 7; Broszat, 1981, pp. 537–39, see *supra* note 31.

[115] OGH, Harlan case, p. 291 (i.e. headnote), see *supra* note 114: "Die unzureichende Berücksichtigung geschichtlicher Tatsachen und der Erfahrung bei der rechtlichen Würdigung der Tatfeststellungen ist ein Rechtsverstoß".

[116] OGH, Müller case, StS 36/49, Judgment, 10 May 1949, in Entscheidungen, vol. 2, 1950, pp. 23–46, especially p. 43, see *supra* note 8:

> Wenn auch viele deutsche Richter dem während des Krieges von den nationalsozialistischen Machthabern ausgeübten Druck widerstanden und ihre Entscheidungen nach ihrer vom Gesetz und ihrem Gewissen gelenkten Überzeugung trafen, so gehört es doch zu den offenkundigen Erfahrungstatsachen, daß zahlreiche Gerichte, vor allem der Volksgerichtshof und viele Sondergerichte, das Strafrecht in einer Weise handhabten, die dazu führte, daß das Recht, statt begangenes Unrecht zu sühnen, mehr und mehr zum Mittel der

the current state of knowledge, this interpretation did not go far enough in its analysis of the entanglement of the judiciary in National Socialism. But taking into account that at the same time jurists were seeking to create the legend that "the overwhelming majority of German judges did not capitulate to Hitler",[117] the statement of the OGH was quite bold and far from mainstream thinking.[118]

Sinking into oblivion after the closing on 30 September 1950, the appeal court's approach to restore justice was highly valued by historians and legal scholars. With regard to the Harlan decision, Martin Broszat dignifies the reasoning as remarkable,[119] while Gerhard Pauli describes it as a highlight of the post-war jurisprudential culture.[120] Similarly, Hinrich Rüping points out the pioneering role of the appeal court in view of its CCL 10 handling, though conceding that it was also disputable both dogmatically and in reference to the underlying criminal justice theory.[121] More recently, Antonio Cassese and Kai Ambos have dealt with the legal practice of the OGH concerning crimes against humanity. As will be shown in the next section, both jurists emphasise the pioneering role of the Cologne court regarding several aspects of international criminal law.

terroristischen Unterdrückung und Ausmerzung ganzer Bevölkerungsgruppen wurde.

See, for example, Pauli, 1996, pp. 109–13, *supra* note 7; Helmut Irmen, "Der Oberste Gerichtshof für die Britische Zone und der Umgang mit NS-Juristen", in Justizministerium des Landes NRW (ed.), 2012, pp. 99–103, see *supra* note 7.

117 Cited in Douglas, 2013, pp. 63–64, see *supra* note 75.

118 Pauli, 1996, pp. 112–13, see *supra* note 7.

119 Broszat, 1981, p. 539, see *supra* note 31: "Solche Urteilsbegründungen konnten sich […] sehen lassen".

120 Pauli, 1996, p. 119, see *supra* note 7: "Diese Entscheidung […] stellt einen Höhepunkt der Rechtsprechungskultur in der Nachkriegsjudikatur dar".

121 Rüping, 2000, p. 358, see *supra* note 7:

> In der strafrechtlichen Spruchpraxis […] beschreitet [der OGH] in der Handhabung des KRG Nr. 10 richtungweisend für die Nachkriegsjudikatur neue Wege. […] Seine Rechtsprechung zu den Humanitätsverbrechen bleibt dogmatisch angreifbar, ebenso die darauf bezogene Straftheorie.

34.5. The Contribution of the OGH to International Criminal Law

A review of the legal practice of the ICTY shows that during the late 1990s, the jurisprudence of the OGH regarding crimes against humanity served as a central source for case law. References to the appeal court's decisions were made in several ICTY proceedings and judgments – for example, in the cases against Tadić,[122] Erdemović,[123] Furundžija,[124] Kupreškić,[125] Blaskić[126] and Kunarac.[127]

Against this backdrop, it is not surprising that the international criminal law compendia being published by the former President of the ICTY, Cassese, dignify the legal practice of the OGH. In his textbook *International Criminal Law*, the famous legal practitioner and scholar quotes not less than 30 of its judgments,[128] whereas *The Oxford Companion of International Criminal Justice* includes 20 contributions on trials held by the German appeal court.[129] Another expert, the law professor Kai Ambos, submitted a detailed study on the general part of international criminal law attending thoroughly to the OGH jurisprudence about crimes against humanity.[130] A significant portion of the OGH decisions regarding atrocities committed against German or stateless victims has been made available in

[122] ICTY, Tadić case, Trial Chamber, Judgment, 7 May 1997, paras. 657–58; Appeals Chamber, Judgment, 15 July 1999, paras. 201 (fn. 247), 257–62, 290 (fn. 351); Appeals Chamber, Judgment in Sentencing Appeals, Separate Opinion of Judge Shahabuddeen, 26 January 2000, p. 41. With regard to the Tadić case, see Robertson, 2012, pp. 469–76, *supra* note 47.

[123] ICTY, Erdemović case, Appeals Chamber, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 17 (fn. 12).

[124] ICTY, Furundžija Case, Trial Chamber, Judgment, 10 December 1998, paras. 205–9. Discussing these paragraphs, it was the International Criminal Tribunal for Rwanda ('ICTR') which also made reference to the related OGH decisions dealing with the legal doctrine of aiding and abetting, see ICTR, Bagilishema case, Trial Chamber, Judgment, 7 June 2001, para. 34.

[125] ICTY, Kupreškic case, Trial Chamber, Judgment, 14 January 2000, paras. 555, 625 (fn. 900).

[126] ICTY, Blaskić case, Trial Chamber, Judgment, 3 March 2000, para. 210.

[127] ICTY, Kunarac *et al.* case, Trial Chamber, 22 February 2001, para. 432 (fn. 1109); Appeals Chamber, Judgment, 12 June 2002, para. 98 (fn. 114).

[128] Cassese, 2013, pp. xix–xxxviii (i. e. Table of Cases), see *supra* note 16.

[129] Among these are the aforementioned Bl. case, see Burchard, 2009, *supra* note 110, and Harlan case, see Burghardt, 2009, *supra* note 114.

[130] Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, Duncker & Humblot, Berlin, 2004, Strafrecht und Kriminologie, vol. 16, pp. 163–82.

the Legal Tools database of the International Criminal Court ('ICC') in The Hague, most of which deal with cases of the brutal behaviour of officials.[131]

Why was the OGH jurisprudence under CCL 10 so well received by international criminal law? Apart from its judicial quality, the decisive factor was that the court's criminal division had published three volumes of law reports containing its most important decisions concerning crimes against humanity.[132] This was probably the most valuable collection of domestic case law available to the prosecutors and judges at the ICTY. After all, the OGH followed in the footsteps of the *Reichsgericht* in so far as it provided full written judgments discussing legal-dogmatic issues on the basis of an analysis of superior court case law and the jurisprudential literature. Despite the fact that they were published in abridged versions, many judgments still exceeded 10 pages. Obviously, the judges paid no regard to a provision which was adopted on 16 June 1948 and stated that the findings should be delivered as briefly as possible and limited to the legal question at hand.[133] But this was not a disadvantage – it was rather due to these elaborate decisions that Ingo Müller characterised the OGH law reports as a rare element of German legal culture[134] standing in contradiction to a general legal practice that refused to accept the legal force of CCL 10.

Below, a brief overview of the OGH interpretation of crimes against humanity shall be given. For this purpose, it is instructive to recall the headnote of one of the court's first decisions, which was already quoted in the beginning (section 34.1).[135]

34.5.1. "If in connection to the system of violence and tyranny, as it existed in National Socialist times": The Contextual Element

The OGH made use of historic narratives – for example, concerning the role of the German judiciary during the Third Reich (see section 34.4) –

[131] Under the heading "National Cases Involving Core International Crimes" (http://www.legal-tools.org/en/go-to-database/ltfolder/0_2399/#results) and the sub-category "Germany" the Legal Tools database currently offers access to important legal documents of 73 OGH trials under CCL 10.

[132] Entscheidungen, 1949, see *supra* note 8.

[133] Pauli, 1996, pp. 100–1, see *supra* note 7.

[134] Ingo Müller, *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz*, Kindler, Munich, 1987, p. 211.

[135] OGH, P. case, p. 11 (i. e. headnote), see *supra* note 8.

to demonstrate the contextual element that allowed the differentiation between an "ordinary" crime under German law and a crime against humanity. Atrocities under CCL 10 required, as the appeal court stressed repeatedly, that "the aggressive behaviour of the agent and the inhumane injury to the victim have to be objectively connected with the Nazi system of violence and tyranny".[136] Thus, the court provided an interpretation that anticipated the development of international criminal law. According to the Rome Statute of the ICC, a crime against humanity must meet the requirement of "a widespread or systematic attack directed against any civilian population".[137] Such atrocities must "be of extreme gravity and not be a sporadic event but part of a pattern of misconduct".[138]

34.5.2. "[H]uman beings, goods and values were attacked and damaged in a way expressing an absolute contempt for spiritual human value with an effect on mankind": The Legally Protected Interest

With this wording the OGH gave an interpretation of human dignity and humanity as supra-individual, legally protected interests, the violation of which constituted an attack on mankind, that is the bearer and protector of "spiritual human value".[139] This was probably the first such interpretation handed down to a domestic jurisdiction and certainly one of the most distinguished. Meanwhile, this legal conception has become an important element of customary international law. As Cassese states in his textbook, crimes against humanity require "particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons".[140]

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[136] OGH, J. and R. case, StS 65/48, Judgment, 16 November 1948, in Entscheidungen, vol. 1, 1949, p. 168, see *supra* note 8:

> [D]as Angriffsverhalten des Täters und die unmenschliche Schädigung des Opfers müssen objektiv im Zusammenhang stehen mit dem System der nazistischen Gewalt- und Willkürherrschaft.

The English translation is quoted from Cassese, 2013, p. 93, fn. 26, see *supra* note 16. See, for example, Christoph Burchard, "J. and R.", in Cassese (ed.), 2009, p. 731, *supra* note 11; Ambos, 2004, pp. 165–66, *supra* note 130.

[137] Rome Statute of the International Criminal Court, 17 July 1998, p. 3 (https://www.legal-tools.org/doc/7b9af9/).

[138] Cassese, 2013, p. 92, see *supra* note 16.

[139] Ambos, 2004, p. 165, see *supra* note 130.

[140] Cassese, 2013, p. 90, see *supra* note 16.

34.5.3. "[A] person who caused this by way of conscious and intended acts of aggression": Intent and *Dolus Eventualis*

Crimes against humanity require two mental elements: the *mens rea proper* to the underlying offence – for instance, murder or torture – and "the awareness of the existence of a widespread or systematic practice".[141] When the OGH began its work in May 1948, such a definition was missing because CCL 10 lacked any provisions for dealing with the subjective elements of the criminal offences it defined. As a result, the appeal court had to use general legal principles to clarify the circumstances under which individual criminal responsibility could be established.[142] For the intent of a perpetrator, the OGH declared in view of a case of denunciation that neither a concrete idea of the consequences nor an abominable attitude was required. The informer did not need to share the Nazi ideology, it was not necessary that he acted out of racist or political motives – it was enough that he acted intentionally and knew that through his actions he would deliver someone over to a system of violence and tyranny.[143] It was this very question – whether a crime against humanity could be committed for purely personal motives – that concerned the ICTY judges in the Tadić case and led them to search the OGH law reports for appropriate case law. In the opinion of the Appeals Chamber in The Hague, this German jurisprudence concerning over Nazi atrocities appeared to be more pertinent than the decisions that had been made between 1946 and 1949 by US tribunals under CCL 10 in Nuremberg which

> involve Nazi officials of various ranks whose acts were, therefore, by that token, already readily identifiable with the Nazi regime of terror. The question whether they acted "for

[141] *Ibid.*, p. 98.

[142] Ambos, 2004, p. 171, see *supra* note 130.

[143] OGH, E. and A. case, StS 43/48, Judgment, 17 August 1948, in Entscheidungen, vol. 1, 1949, p. 60 (i. e. headnote), see *supra* note 8:

> Bei der Denunziation ist zur inneren Tatseite erforderlich und genügend, daß der Täter sein Opfer bewußt an Kräfte der Willkür ausliefert. Er braucht weder eine bestimmte Vorstellung von den Folgen seines Tuns gehabt zu haben, noch ist ein Handeln aus unmenschlicher oder verwerflicher oder niedriger Gesinnung erforderlich.

See, for example, Ambos, 2004, pp. 171–72, *supra* note 130; and Cassese, 2013, p. 99, fn. 38, *supra* note 16.

> personal reasons" would, therefore, not arise in a direct manner, since their acts were carried out in an official capacity, negating any possible "personal" defence which has as its premise "non-official acts". The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons.[144]

The Appeals Chamber in the Tadić case referred to several OGH judgments – among these, of course, some denunciation cases – before it came to the conclusion "that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated".[145]

In this regard, the OGH even held that *dolus eventualis* (*Eventualvorsatz*), being equivalent to recklessness (*Fahrlässigkeit*), sufficed to establish liability for a crime against humanity.[146] In another denunciation case, the court pointed out that in order to be considered a crime against humanity, it was necessary that

> the offensive behaviour of the perpetrator be conscious and intentional (or at least the perpetrator took the risk), that it actually occurred and the perpetrator, through his act, willed that the victim be handed over to powers that did not obey the rule of law, or at least, that he took this possibility into account.[147]

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[144] ICTY, Tadić case, Appeals Chamber, 1999, para. 263, see *supra* note 122.

[145] *Ibid.*, para. 270.

[146] With regard to recklessness and *dolus eventualis* in international criminal law, see Cassese, 2013, pp. 45–49, *supra* note 16; Alberto di Martino, "Dolus eventualis", in Cassese (ed.), 2009, pp. 302–4, *supra* note 11.

[147] OGH, R. case, StS 19/48, Judgment, 27 July 1948, in Entscheidungen, vol. 1, 1949, p. 47, see *supra* note 8:

> Notwendig und ausreichend ist, daß das Angriffsverhalten des Täters bewußt und gewollt, zumindest evtl. mitgewollt, geschah und weiter,

34.5.4. "[H]as to be punished for a crime against humanity if he can be accused of it": Unavailability of Duress as an Excuse where a Person has Knowingly Joined a Criminal Organisation

In a trial against two defendants, who were alleged to have participated in the destruction of a synagogue and committed arson on 10 November 1938, the OGH rejected duress as an excuse for those persons who had knowingly and voluntarily joined a criminal organisation. It stated:

> As an old member of the [National Socialist] Party T. knew the programme and the fighting methods of NSDAP. If he nevertheless made himself available as official *Standartenführer*, he had to count from the start that he would be ordered to commit such crimes. Nor, in this condition of necessity for which he himself was to blame, could he have benefited from a possible misapprehension of the circumstances that could have misled him as to the condition of necessity or compulsion.[148]

Almost half a century later, Cassese issued a separate and dissenting opinion in the ICTY Erdemović appeal stressing that case law had established that

> duress and necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.[149]

> daß der Täter das Opfer durch die Tat nichtrechtsstaatlichen Kräften ausliefern will, oder das zumindest in Kauf nimmt.

The English translation is quoted from Cassese, 2013, p. 47, fn. 16, see *supra* note 16.

[148] OGH, T. and K. case, StS 40/48, Judgment, 21 December 1948, in Entscheidungen, vol. 1, 1949, pp. 200–1, see *supra* note 8:

> Als alter Parteigenosse kannte T. das Programm und die Kampfmethoden der NSDAP. Wenn er sich ihr dennoch als hauptamtlicher Standartenführer zur Verfügung stellte, so hatte er von vornherein damit zu rechnen, zu derartigen Verbrechen befohlen zu werden. Bei selbstverschuldetem Notstande aber käme ihm weiter auch ein etwaiger Irrtum über Umstände, die ihm eine Nötigungs- oder Notstandslage vorgetäuscht haben könnten, nicht zugute.

The English translation is quoted from Cassese, 2013, p. 216, fn. 24, see *supra* note 16.

[149] ICTY, Erdemović case, para. 17, see *supra* note 123.

In this respect, he made reference to the above quoted OGH judgment in the T. and K. case, approving its reasoning and characterising it as "particularly significant in this respect".[150]

34.5.5. Causality

In several cases the appeal court dealt with the question of causality, most prominently in the Harlan Case (see section 34.4). In the related decision, the OGH held the opinion that the court of first instance was wrong by assuming that for the commission of a crime against humanity it was absolutely necessary that the alleged conduct constituted a *conditio sine qua non* for concrete persecution measures. It stated that Harlan's anti-Semitic film *Jud Süß*, which had been viewed by about 20 million people, was "an integral element of the Nazi propaganda machinery against Jews, which provided the setting for the German population to accept not only the racial discrimination of the Jews but even their violent persecution".[151] By directing such a film, the OGH criminal division stressed, the director had fulfilled the *actus reus* of an offence according to Art. II 1c of CCL 10 because his conduct contributed – among other factors – substantially to the inhuman Nazi policy against the Jews.[152]

34.5.6. The "Approving Spectator"

In the Furundžija case, the ICTY Appeals Chamber gave a great deal of attention to case law in respect of the legal doctrine of aiding and abetting. Among the examined judgments were the so-called "Synagogue case"[153] and the "Pig-cart parade case"[154], which had been decided by the

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[150] *Ibid.*, para. 17, fn. 12.

[151] Burghardt, 2009, p. 720, see *supra* note 114.

[152] OGH, Harlan case, p. 300, see *supra* note 114:

> Angesichts dieser Entwicklung der Dinge steht die *Mit*ursächlichkeit des Films für die Judenverfolgung *durch hetzerische Beeinflussung der öffentlichen Meinung im judenfeindlichen Sinne als einer wichtigen Grundlage der Verfolgung und Schädigung der Juden* […] fest (emphasis in original).

See, for example, Ambos, 2004, pp. 168–69, *supra* note 130; and Burghardt, 2009, p. 720, *supra* note 114.

[153] OGH, K. and A. case (Synagogue case), StS 18/48, Judgment, 10 August 1948, in Entscheidungen, vol. 1, 1949, pp. 53–56, see *supra* note 8.

OGH in 1948. They were referred to as examples of how to deal with the "approving spectator" scenario.[155] In view of the "Synagogue case" the ICTY judges held that "[i]t may be inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity".[156] Trying the "Pig-cart parade case", the OGH completed the picture by emphasising that several defendants, who had participated in an SA "parade" in a small German town in May 1933, had a part in the humiliation and maltreatment of a Socialist senator and a Jewish inhabitant, whereas the conduct of another accused did not meet the objective requirements of a crime against humanity. The criminal division found that

> [P.] followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown […] His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability.[157]

34.5.7. Private Persons as Perpetrators

The OGH repeatedly pointed out that not only officials of the state but also private persons could commit crimes against humanity. This is best illustrated by the numerous decisions the appeal court made concerning

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[154] OGH, L. *et al*. case (Pig-cart parade case), StS 37/48, Judgment, 14 December 1948, in Entscheidungen, vol. 1, 1949, pp. 229–34, see *supra* note 8. See, for example, Christoph Burchard, "L. and Others", in Cassese (ed.), 2009, p. 791, *supra* note 11.

[155] With regard to the "approving spectator" scenario, see Cassese, 2013, pp. 195–96, *supra* note 16.

[156] ICTY, Furundžija case, para. 207, see *supra* note 124. See also Ambos, 2004, p. 170, *supra* note 130.

[157] OGH, L. *et al*. case, p. 234, see *supra* note 154:

> P. ist dem Umzuge lediglich unter den Zuschauern in Zivilkleidung gefolgt, wenn er auch dabei war, einem Dienstbefehle der SA. zu einem ihm noch unbekannten Zwecke Folge zu leisten. […] Sein Verhalten kann nicht einmal sicher als objektive und subjektive Zustimmung gedeutet werden. Zudem wäre eine nicht mitursächliche stumme Billigung auch keineswegs tatbestandsmäßig.

The English translation is quoted from ICTY, Furundžija case, para. 208, see *supra* note 124.

denunciations.[158] Under the presiding Judge Cassese, the ICTY investigated this legal issue in the Kupreškić case in 2000,[159] whereupon it referred to the so-called "Weller case", which had been tried by the OGH.[160] In May 1940 Weller, a member of the SS, and two other men had broken into a house that was known to be inhabited by Jewish families. The intruders (probably drunken) maltreated and abused at least 10 inhabitants. The fact that Weller – unlike his comrades – wore civilian clothes led the court of first instance to conclude that his actions did not constitute a crime against humanity. The OGH did not agree. Rather, it held that state officials, who acted in a private capacity and on their own initiative, could commit atrocities according to Article II 1c of CCL 10, like any other private person. The prerequisite was that the crime was connected to the Nazi system of violence and tyranny.[161]

34.5.8. Military Persons as Victims

The ICTY emphasised that the German Supreme Court "gave a very liberal interpretation to the notion of crimes against humanity as laid down in Control Council Law No. 10, extending it among other things to inhumane acts committed against members of the military".[162] This statement was related to an OGH judgment against members of a German court martial, who had imposed the death penalty on three marines for desertion on 5 May 1945 in Denmark.[163] The judges found that the defendants were guilty of complicity in a crime against humanity. "[T]he glaring discrepancy between the offence and the punishment constituted", as the ICTY summarised the reasoning of the OGH, "a clear manifestation of the Nazi's brutal and intimidatory system of justice, which denied the very essence of humanity in blind reference to the allegedly superior exigencies of the Nazi State".[164] With this interpretation, the German appellate court anticipated recent

158 Cassese, 2013, p. 100, see *supra* note 16.

159 ICTY, Kupreškić case, para. 555, see *supra* note 125.

160 OGH, Weller case, StS 139/48, Judgment, 21 December 1948, in Entscheidungen, vol. 1, 1949, pp. 203–8, see *supra* note 8.

161 *Ibid.*, p. 206. See, for example, Cassese, 2013, p. 101, fn. 41, *supra* note 16.

162 ICTY, Tadić case, Appeals Chamber, 1999, para. 290, fn. 351, see *supra* note 122.

163 OGH, P. *et al.* case, StS 111/48, Judgment, 7 December 1948, in Entscheidungen, vol. 1, 1949, pp. 217–29, see *supra* note 8.

164 ICTY, Tadić case, Appeals Chamber, 1999, para. 290, fn. 351, see *supra* note 122.

developments in international criminal law in so far as there is a recognisable "trend towards loosening the strict requirement that the victims of murder-type crimes against humanity be civilians".[165]

34.6. Summary and Outlook

The OGH probably did not succeed in convincing the controversial Carl Schmitt or the conservative Hodo von Hodenberg of the necessity and importance to understand 'crimes against humanity' as an independent legal norm. They refused to support the appeal court's approach to promote the judicial process of coming to terms with the Nazi past. While Schmitt considered the new legal concept a despicable political instrument to destroy an enemy, Hodenberg warned of the danger to the rule of law that the retroactive application of CCL 10 could represent. The latter argument, which was agreed to by the majority of the German jurists, was rejected by the OGH. In its first decision, the criminal division stated that retroactive punishment of perpetrators for the atrocities under discussion did not constitute a "violation of legal security but rather the re-establishment of its basis and presuppositions". In this context, the judges also adopted the Radbruch formula, which provided a natural law reasoning for the precedence of justice over the "lawful illegality" (*gesetzliches Unrecht*) of substantial parts of the Nazi legislation and judiciary. Thus, the court laid the foundation for its further interpretation of crimes against humanity, which aimed at making the Allied law applicable in German courts and guaranteeing legal unity. For this purpose, it was important to define legally protected interest and to develop criteria for individual criminal liability. This included, in particular, the objective and subjective elements of the criminal offence as well as guidelines for the handling of legal issues like causality, perpetration, aiding and abetting or the availability of excuses. As demonstrated in the previous section, the attempt of the OGH to shape the legal concept of crimes against humanity was well received as case law both by the ICTY and scholars of international criminal law.

Sections 34.2, 34.3 and 34.4 were guided by the question: Which historical and institutional factors enabled the German appeal court to make its concrete contribution to international criminal law? As a starting

[165] Cassese, 2013, p. 103, see *supra* note 16.

point for answering that question, the British policy towards Germany was chosen; for it was the will and claim of the Foreign Office and the military government to secure the prosecution of Nazi atrocities against Germans or stateless persons. This impetus resulted in a strategy that provided the German judiciary with guidelines and parent cases, which aimed at teaching the wartime enemy how to restore justice. Indeed, transferring the prosecution of those atrocities to domestic courts was based on the idea that this was a German matter and the only suitable means for the German society to come to terms with its past. Of course, cost savings also played a role for the British.

At first glance, it is surprising that only a few years after the collapse of the Third Reich a German higher court could develop an interpretation of crimes against humanity, which has had a notable impact on international criminal law since the 1990s. But a closer look reveals that within the judiciary of the post-war period, there was a trend towards a serious examination of the possibilities and limits of the Allied legal norm. Two opposing camps struggled with this issue. The majority of German jurists rejected the retroactive application of CCL 10, whereas a minority of judges and prosecutors endorsed it as the appropriate legal basis for the punishment of Nazi crimes, referring to natural law and ethical arguments. Like Curt Staff and August Wimmer, quite a lot of them had experienced Nazi persecution, so that the restoration of justice was a central concern to them. The aforementioned debate was closely connected with the question of informers, whose prosecution was highly disputed among German lawyers. A legal basis was missing, until the military government empowered German courts to try cases of denunciations under CCL 10.

As has been shown in section 34.4, a large part of the remarkable jurisprudence of the OGH over crimes against humanity was derived from these very proceedings: 202 out of 583 CCL 10 decisions respectively 26 out of 84 judgments, which the appellate court published in the first volume of its law reports, were related to denunciation cases. It was, in general, the specific jurisdiction over atrocities, which were committed by mid- and low-level perpetrators against their own nationals, and its dual nature as a supreme court and an appellate court that gave the OGH particular reason for its strict interpretation of legal-dogmatic aspects. Finally, it must be underlined that the profile of the judicial personnel, which was characterised not only by judicial qualification but also by the

personal experiences and democratic attitudes of the judges and prosecutors, shaped the legal practice of the German Supreme Court.

After the closing of the OGH on 30 September 1950,[166] its legal practice approach, which aimed to restore justice, was soon dropped and forgotten. In the face of the Cold War, the British will to secure the prosecution of Nazi crimes had gradually disappeared. Since the spring of 1948 the military government called for a rapid completion of the German CCL 10 proceedings and reduced its own efforts to put Nazi criminals on trial before courts martial.[167] At the same time, the situation of the German judiciary changed fundamentally. After the founding of the Federal Republic of Germany in May 1949, the new government granted amnesty to those Nazi criminals whose penalty was expected not to exceed six months' imprisonment.[168] Furthermore, it was significant that Staff and Wimmer, the two prominent supporters of CCL 10, were not appointed to the German Federal High Court (*Bundesgerichtshof*, 'BGH') in Karlsruhe when this court was established in October 1950. The BGH stayed all proceedings still pending under the Allied law until the British military government finally withdrew the authorisation of its application by German courts on 31 August 1951.[169] Since the middle of the 1950s, the BGH developed a legal practice, which permitted the German justice system to exculpate many Nazi perpetrators by categorising them as aiders and abettors (*Gehilfen*), whose guilt was, allegedly, lesser than those of the perpetrators.[170] Taking this into account, the contribution of the OGH to the further development of international criminal law might have been greater than its impact on the German process of coming to terms with the past. That was surely not intended – but it was a side effect, which is to be highly regarded.

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[166] Ordinance No. 218 – Repeal of Military Government Ordinances Nos. 15 and 98, 1 October 1950, in *Official Gazette of the Allied High Commission for Germany*, no. 36, p. 618.

[167] Broszat, 1981, pp. 534–37, see *supra* note 31.

[168] Form, 2012, p. 59, see *supra* note 21.

[169] Ordinance No. 234 – Repeal of Military Government Ordinance No. 47, 31 August 1951, in *Official Gazette of the Allied High Commission for Germany*, no. 65, p. 1138.

[170] Nathalie Gerstle, "III.A11 Gehilfenjudikatur", in Torben Fischer and Matthias N. Lorenz (eds.), *Lexikon der 'Vergangenheitsbewältigung': Debatten- und Diskursgeschichte des Nationalsozialismus nach 1945*, 2nd ed., Transcript Verlag, Bielefeld, 2009, pp. 145–47.

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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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