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Prosecuting Indirect Perpetrators of Crimes against Humanity in Eastern Germany*

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Abstract

This article examines the practices and experiences of administering transitional justice in postwar eastern Germany after 1945, focusing on the adjudication of informers as indirect perpetrators of crimes against humanity. Allied occupation law allowed for the prosecution of informers retroactively in the German courts through legislation specifically enacted for the purpose of prosecuting crimes against humanity. This paper examines implementation of the law and the prosecution of informers in the Soviet occupation zone, under the auspices of the Soviet military government administration, and later in the nascent German Democratic Republic of Germany. This paper also addresses the theoretical and practical problems associated with the implementation of the law and the lessons to be drawn from this historically significant attempt to call individuals to account for their crimes against humanity after they had occurred through the use of retroactive legislation.

Keywords: transitional justice, retroactive legislation, Allied occupation law, Soviet occupation zone.

Introduction

Bringing the perpetrators and supporters of National Socialist crimes to justice by calling them to account for their actions was one of the aspects of dealing with the past in Germany after the Second World War. The Allied occupation powers opened the way for the retroactive prosecution of these crimes through the enactment of Allied Control Council Law No. 10 of 20 December 1945 on "Punishment of Persons Guilty of War Crimes."[1] Article II section c of this law provided the grounds for the prosecution of all types of crimes against humanity perpetrated during the National Socialist regime, which also included actions committed by third parties who had reported another to the authorities to initiate actions against them, while being conscious of the consequences that could be incurred by the denounced victims subject to the laws of a totalitarian regime. Being aware of the regime's methods of suppressing dissent meant they could be accused of acting on political grounds, even when the motives were completely personal, since their actions were seen as contravening the commonly accepted universal laws of humanity. The defendant could therefore be subject to prosecution for having caused the commission of a criminal act, while not committing the act themselves. These truthful denunciations could lead to severe consequences. This made the informers indirect perpetrators of crimes against humanity, since the act of denunciation was the initiating factor for the commission of a crime against humanity while the law during the National Socialist regime was exploited for upholding its purposes. The postwar restoration of justice thus allowed for the law to be administered retroactively for the adjudication of crimes that had been perpetrated under the National Socialist regime.

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1 Art. 3 (1d), "Law No.10: Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity," *Official Gazette of the Control Council for Germany* No.3 (31 January 1946), pp. 52-53.

Restoration of the Administration of Justice in the Soviet Occupation Zone

The restored administration of justice in the Soviet occupation zone developed separately from those in the western occupation zones. While Germany was under four power allied authority, with each occupation power exercised its authority in the separate occupation zones. Administration of justice was restored independently in each zone. The newly-created judicial organizations in the Soviet occupation zone thus adjudicated National Socialist crimes according to the jurisdiction that the Soviet military administration conferred upon them through extraterritorial Allied Control Council occupation law for Germany as a whole and occupation zone military government legislation, as well as German law, thus constituting a wide jurisdiction that empowered the postwar judiciary with the authority to prosecute all forms of crimes against humanity. In addition to justice being administered in accordance with legislation and evidence presented in court proceedings, there was also an underlying current of political interests that influenced judgements in cases that were perpetrated during the National Socialist regime. German courts in the Soviet occupation zone were initially set up in May and June 1945 at the instigation of local commanders of the Soviet army.[2] They were empowered with adjudicating cases of National Socialist war crimes and crimes against humanity soon after the collapse of the National Socialist regime, passing judgements in accordance with the German criminal code,[3] with the first courts beginning to operate in Berlin, Dresden and Wittenberg.

2 "Aufbau der Justiz in Berlin und erste Gerichtsurteile," p. 5. Bundesarchiv. Berlin. DP1 VA 7686.

3 "Ministerium der Justiz der Deutsche Demokratischen Republik. Berlin, den 19.10.1949. Verfügung," Bundesarchiv. Berlin. DP1 VA 6229.

Criminal prosecution of informers

The first court proceedings against denunciations as National Socialist crimes adjudicated by the German judicial organization took place in Wittenberg in the summer of 1945, on the basis of German law with the approval of the Soviet military administration.[4] Further legislation would follow to deal with how National Socialist crimes could be prosecuted. The director of the German administration of justice for the Soviet occupation zone issued an ordinance for this purpose on 31 October 1945, which set forth instances in which the law could be administered retroactively, and preceded occupation law while prosecution was to be undertaken through the provisions of the German criminal code. It outlined how anyone accused of being responsible for committing crimes against humanity either through direct action or neglect, or had either tolerated or approved of such offences while occupying a position of responsibility, were to be called to account for their actions for possessing a National Socialist disposition. This encompassed a wide ranging scope of offences, including causing bodily harm or mental distress, illnesses, spiteful or careless denunciations, and loss of property. Such offenses could have been considered to have been encouraged directly or indirectly, either verbally or in writing, and resulted in court proceedings, or violent consequences or intimidation from other forms of authority. They were to be judged as offenses against the precepts of humanity, regardless of whether these actions were committed in conformity with the law or orders at the time. Penalties could range from the death sentence or life imprisonment or prison sentences, along with deprivation of civil rights, to the imposition of police supervision, confiscation of property and payment

4 Hilde Benjamin, et al. *Zur Geschichte der Rechtspflege der DDR: 1945-1949* (Berlin: Staatsverlag der Deutschen Demokratischen Republik, 1976), 44-47.

of a fine to the victims.[5]

Discussion later took place about granting the German courts jurisdiction over prosecuting crimes against humanity on the basis of Control Council Law No. 10,[6] which led to a much greater range of possibilities for the German courts in the Soviet occupation zone to prosecute crimes against humanity.[7] Specific discussion on how to deal with denunciation cases later took place at a jurists' conference in Weimar on 24 January 1946, where Professor Richard Lange set forth his proposals. He resolved that these cases could not be generally prosecuted according to Article 164 of the German criminal code on false accusations. One of the reasons was that the range of sentences would be insufficient in most such cases. Moreover, the so-called political reports during this time almost always ensued from self-centred rather than political motives. In certain cases, those reporting others sought favour from their superiors by filing a report against others who they hoped would be removed from their positions so that the reporting individuals could take over those positions. In other cases, married women wanted to dissolve their marriages by denouncing their husbands. Regardless of the examples, there remained the underlying factor that the prosecution of informers was required to fulfil the requirements of a healthy sense of justice and public support by which the law would be seen to work, and would be based on legislation and the restored administration of justice. This raised the question of whether the pre-1933 law could be effective in prosecuting these cases, whether it was necessary to draft new legislation in accordance with the revised criminal code on the basis of Article 2 of the German criminal

5 "Der Chef der Deutschen Justizverwaltung für das Gebiet der Sowjetischen Besatzungszone in Deutschland. Berlin, 31. Okt. 1945. Entwurf. Verordnung über die Bestrafung der Naziverbrecher," Bundesarchiv. Berlin. DP1 VA 7347.

6 "Ministerium der Justiz der Deutsche Demokratischen Republik. Berlin, den 19.10.1949. Verfügung," Bundesarchiv. Berlin. DP1 VA 6229.

7 "Ministerium der Justiz der Deutsche Demokratischen Republik. Berlin, den 19.10.1949. Verfügung," Bundesarchiv. Berlin. DP1 VA 6229.

code, or whether it was necessary to draft a special law that could be applied retroactively.[8]

Lange proposed that new legislation according to the second option was to be rejected, since it would lead to errors. The principle of *nulla poena sine lege* was to remain a fundamental element on which a democratic administration of justice was to be based. Any deviation from this principle of legal security would be contrary to the spirit of democracy, as well as Proclamation No. 3 of the Allied Control Council on "Fundamental Principles of Judicial Reform." The third option was also not viable, since it would create unjustifiable political martyrdom for those affected, especially since these cases had overwhelmingly been the result of personal rather than political motives. In contrast, pre-1933 legislation was considered to be completely sufficient in bringing about the justifiable prosecution of informers. Anyone who during the National Socialist regime had reported another because of an allegedly political offense, thus causing another to be subject to the National Socialist administration of justice, had been conscious of the fact that they were delivering another into the hands of violence, rather than into orderly judicial proceedings. There was also not any legal obligation for ordinary citizens to file political reports during this time. Denunciations had thus served the purpose of unlawfulness in the interest of preserving the interests of the National Socialist regime, rather than upholding the law. Having willingly abused the administration of justice, informers were therefore guilty of aiding and abetting murder, manslaughter, bodily harm or unlawful imprisonment that was perpetrated by a criminal state apparatus.[9]

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8 "Notiz über die Arbeitstagung in Weimar am 24. Januar 1946," Z21/1334. Bundesarchiv. Koblenz, p. 3.

9 "Notiz über die Arbeitstagung in Weimar am 24. Januar 1946," Z21/1334. Bundesarchiv. Koblenz, pp. 3-4.

Supplementary criminal legislation was promulgated in Thuringia soon thereafter on 8 February 1946, which would allow for the prosecution of indirect perpetration of crimes. Defendants could be prosecuted for committing an illegal action themselves or through another, regardless of whether their action was undertaken in compliance with existing law. This measure would thus facilitate the prosecution of denunciation cases on the basis of the provisions of the German criminal code.[10] The supreme regional court in Gera put this legislative measure into practice in its judgement on 19 February 1947, ruling that German law could be applied in cases of indirect perpetration of crimes without necessarily applying Control Council Law No. 10, even when the crime constituted a crime against humanity. This law could be applied in prosecuting these types of crimes perpetrated during the National Socialist regime to assist and supplement German legislation, thus compensating for potential shortcomings in adjudicating these types of cases, upon initially evaluating the facts of these cases in accordance with German law.[11] There was therefore not any conflict between German and occupation law. Crimes against humanity were to be prosecuted through both means that were placed at the judiciary's disposal, while also confirming how German law could be applied to the circumstances in which National Socialist crimes had been perpetrated, regardless of the motives for these types of crimes.

Denunciation cases were one of the types of National Socialist crimes that were also adjudicated according to Control Council Law No. 10, whereby the defendants in these types of cases were convicted on the

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10 "Gesetz zur Ergänzung des Gesetzes über die Anwendung des Srafgesetzbuchs im Lande Thüringen. Vom 8. Februar 1946," *Regierungsblatt für das Land Thüringen*. Teil I: Gesetzsammlung, 1946 Nr. 6, p. 8. Petra Weber, *Justiz und Diktatur. Justizverwaltung und politische Strafjustiz in Thüringen, 1945-1961* (München: R. Oldenbourg Verlag, 2000): 102.

11 "OLG Gera, Urteil v. 19.2.1947 – Ss 14/47," *Juristische Rundschau* 1947: 67.

grounds of their intentions, regardless of their political convictions.[12] In early 1946, German public prosecutors and courts dealing with such pending cases in Thuringia were to cooperate with the Soviet state police, the NKVD, in the investigation proceedings concerning denunciation cases. All files concerning individuals who were under suspicion of having committed this type of offense were to be handed to the local NKVD offices, which would forward these cases to the Soviet public prosecutor in Thuringia in Weimar.[13] These cases would then be tried by Soviet military courts, while German prosecutors remained responsible for the questioning of those accused, for witnesses, and for collecting documentary evidence.[14] Cases of crimes against humanity still had to be sent to the Soviet military administration in Potsdam to evaluate whether German courts could be given responsibility for adjudicating them.[15] These included an increasing number of denunciation cases. Investigations during the early months of 1946 indicated that these types of cases composed most of the crimes against humanity that were perpetrated by Germans against other Germans.[16]

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12 Hermann Wentker, "Die juristische Ahndung von NS-Verbrechen in der sowjetischen Besatzungszone und in der DDR," *Kritische Justiz* 35 2002: 64-65; Christian Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone* (Berlin: Arno-Spitz Verlag, 1998): 114-117.

13 "Abschrift von Abschrift. Der Generalstaatsanwalt. Gera, den 28. Febr. 1946. 405 E - 1.1," Z21/1334. Bundesarchiv. Koblenz. Bundesarchiv. Berlin. DP 1 VA 6411.

14 "Der Oberlandesgerichtspräsident. Gera, den. 23. Februar 1946. – 4000 E -. Rundschreiben Nr. 40/46," Z21/1334; Bundesarchiv. Berlin. DP1 VA 6411.

15 "Abschrift. Potsdam, den 15. April 1946. Provinzialverwaltung Mark Brandenburg Abt. IV Justiz. Az. VI-1771-1l/46, An die deutsche Justizverwaltung der Sowjetischen Besatzungszone in Deutschland. Betrifft: Berichterstattung über die Geschäftsentwicklung. Bundesarchiv," Berlin. DP1 VA 6349.

16 "Abschrift. Potsdam, den 15. April 1946. Provinzialverwaltung Mark Brandenburg Abt. IV Justiz. Az. VI-1771-1l/46. An die deutsche Justizverwaltung der Sowjetischen Besatzungszone in Deutschland. Betrifft: Berichterstattung über die Geschäftsentwicklung," Bundesarchiv. Berlin. DP1 VA 6349; "Deutsche

Adjudication of denunciation cases in German courts in the Soviet occupation zone

The NKVD later conceded jurisdiction over denunciation cases to the German administration of justice, either out of disinterest or to test its responsibility. The first denunciation case that was heard in Thuringia at the jury court at Erfurt-Nordhausen - the case against Josef Puttfarcken - demonstrated the interests of the Soviet military administration and the ruling Socialist Unity Party (SED) in the adjudication of denunciation cases and would set a precedent for further such cases thereafter in the interests of upholding the postwar administration of justice in view of the public. The Soviet military administration ordered this to be a show trial that was to involve significant participation by the population to maximize its propaganda effect, demonstrating the independence of the German administration of justice and how legal defense was guaranteed, which took precedence over judging a criminal action.[17]

In February 1942, a trader named Göttig wrote the following words on a pasteboard sheet attached to the wall of a lavatory stall at the Nordhausen finance office: "Hitler is a mass murderer! He is guilty of starting the war. His picture belongs here. Long live the Red Army!" [18] The defendant, an employee at the finance office named Puttfarcken, had seen Göttig come out of the stall and presumed he had written these words, or at least had seen them, and then confronted him about them. The matter was forwarded to the office manager, who then informed the police. Göttig was arrested soon thereafter and was brought to trial before the

Justizverwaltung der Sowjetischen Besatzungszone in Deutschland an den Herrn Chef der Rechtsabteilung der SMA in Karlshorst. Statistischen Zahlenübersicht für das 1. Quartal des Jahres 1946," Bundesarchiv. Berlin. DP1 VA 1061.

17 Weber, *Justiz und Diktatur*, 102; Wentker, "Die juristische Ahndung von NS-Verbrechen in der sowjetischen Besatzungszone und in der DDR," 65.

18 "Abschrift. 3 Ks. 1/46", Z21/1334," Bundesarchiv. Koblenz. 3 Ks.1/46, p. 2.

supreme regional court in Kassel, where Puttfarcken appeared as a witness for the prosecution. Göttig later admitted having written these remarks and was sentenced to death on 20 May 1942 for preparing to commit high treason. After he was arrested, the local *Ortsgruppenleiter* also extorted a confession from his wife in which she said that he had listened to these foreign radio broadcasts from outside German-occupied Europe late at night. Göttig was therefore also charged with listening to enemy radio broadcasts.[19]

In evaluating the facts of the case, the jury court at Erfurt-Nordhausen regional court ruled that the offense of listening to foreign radio broadcasts did not warrant the death sentence since it could not be established whether Göttig he had conveyed what he had heard; therefore it could not be established that he had undermined the war effort, as had been cited in National Socialist law. It was also ruled that the Kassel supreme regional court had also passed an excessively harsh sentence, since Göttig's actions also had not constituted high treason according to the definition found in the German criminal code at the time, and was therefore ruled to have been an example of "purely judicial murder," to which Puttfarcken had delivered him through his report. Puttfarcken was therefore to be called to account for the sequence of events that had led to the execution of this unlawful death sentence.[20]

It was argued in Puttfarcken's defense that he had not anticipated the course of future events between the time he found the writing and when he confronted Göttig, whom he had not known or had any particular hatred or other such personal feeling against, and otherwise had not intended to cause his death. He had merely intended to make himself appear important and distinguish himself as being especially competent while feeling obliged, as a member of the NSDAP, to report Göttig. On the other hand,

19 "Abschrift. 3 Ks. 1/46," Z21/1334. Bundesarchiv. Koblenz. 3 Ks.1/46, p. 3.

20 "Abschrift. 3 Ks. 1/46," Z21/1334. Bundesarchiv. Koblenz. 3 Ks.1/46, pp. 3-4.

Puttfarcken had known that his report would lead to an especially harsh judgement in view of the administration of the law at the time, when everyone had known the consequences of what a report about political matters entailed. This was also known to him through his work as a propagandist for the NSDAP and through reports about political processes in the newspapers at the time. The jury court therefore ruled that Puttfarcken had intentionally aided and abetted judicial murder, and had approved of this consequence. He was therefore convicted according to Articles 211, 49 and 44 of the German criminal code for having committed murder indirectly[21] in accordance with German law, rather than Control Council Law No. 10. This case therefore confirmed how German law could be applied in passing judgement in view of the circumstances of this case, since it did not include facts concerning new material criminal law.[22] The defendant was found guilty of having incited National Socialist authorities to commit murder through his actions, regardless of the Allied occupation law that necessitated National Socialist crimes to be prosecuted. The objective facts of this case did not entail examining political circumstances.

In evaluating potential mitigating circumstances, this court did not accept Puttfarcken's claim that he had been shocked by the verdict- having expected the sentence would be imprisonment for two to four years - considering that his intentions superseded this claim and he had not had prior reservations about the potential consequences of his actions. The court also dismissed his claim that he was obliged by law to report Göttig for having undertaken a treasonous action or else face a prison sentence for not doing so, in view of the fact that Göttig's actions could not be judged as such. Puttfarcken had also not disputed the verdict during the trial. Nor had he expressed any remorse or regret after Göttig's death or

21 "Abschrift. 3 Ks. 1/46"Z21/1334," Bundesarchiv. Koblenz. 3 Ks.1/46, pp. 4-7.

22 "Abschift 3 Ks.1/46", Z21/1334," Bundesarchiv. Koblenz., p. 8.

during the present proceedings.[23] Judgement was thereby pronounced on 7 May 1946, with Puttfarcken sentenced to life imprisonment with a lifetime deprivation of civil rights for aiding and abetting murder.[24] An appeal was not filed by the defense, and this case remained a landmark precedent for further denunciation cases after this judgement was passed.

Considerable further attention was to be given to such cases involving Germans suspected in criminal acts against other Germans, which public prosecutors continued investigating.[25] While the judgement in the Puttfarcken case appeared to demonstrate that the provisions of German criminal law could be administered in National Socialist crimes, the Soviet military administration also pressed for the application of Control Council Law No. 10.[26] German courts were granted jurisdiction over pronouncing judgements on National Socialist crimes on the basis of German law, while Law No. 10 was an extension of German legislation[27] by extending the scope of the spirit of postwar law on the basis of broadly defined crimes against humanity, in addition to the letter of the law found in the specific provisions of pre-National Socialist legislation.

There remained uncertainty about how Control Council Law No. 10 could be administered in prosecuting denunciation cases, while it was maintained that it was unnecessary to enact new retroactive legislation for

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23 "Abschift 3 Ks.1/46", Z21/1334," Bundesarchiv. Koblenz. 3 Ks.1/46, pp. 5-6.

24 "Abschift 3 Ks.1/46", Z21/1334," Bundesarchiv. Koblenz. 3 Ks.1/46, p. 2.

25 "Der Generalstaatsanwalt be idem Oberlandesgericht Gera, den 9. Juli 1946. 313-L-1.2 an den Herrn Oberlandesgerichtspräsidenten hier. Auf den Erlass der Rechtsabteilung der SMA in Deutschland vom 9.3.1946 – Nr. 15/24134," Bundesarchiv. Berlin. DP1 VA 6349.

26 Weber, *Justiz und Diktatur*, 103.

27 Günther Wieland, "Ahndung von NS-Verbrechen in Ostdeutschland," *DDR Justiz und NS-Verbrechen: Sammlung ostdeutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen*, ed. C.F. Rüter (Amsterdam: Amsterdam University Press, 2002): 22.

these cases, since existing law was considered to be sufficiently effective.[28] In contrast to the application of Control Council Law No. 10 in the British and French occupation zones, where jurists hesitated to implement this law due to theoretical considerations and corresponding reservations, the courts of the Soviet occupation zone generally adopted a more straightforward view that they were conforming to the principles of international criminal law, apart from initial such concerns in Thuringia, where Control Council Law No. 10 was initially applied as subsidiary legislation when the prescriptions found in German criminal law were considered insufficient. This had resulted in what were considered to be rather lenient sentences in denunciation cases.[29]

National Socialist crimes were interpreted in accordance with the provisions of the criminal code, concurrently with Control Council Law No. 10, in relation to various charges that could also be considered crimes against humanity, such as unlawful imprisonment, manslaughter and murder. Applying German criminal law in such cases also served to circumvent reservations about violating the principle of *nulla poena sine lege*, and judging them as criminal actions in accordance with the law as it was defined in the criminal code. In practice, most judgements in denunciation cases were adjudicated on the basis of unlawful imprisonment, as cited in § 239 of the German criminal code. From January to 27 August 1947, these accounted for 90 percent of 243 investigation proceedings relating to Control Council Law No. 10. Control Council Law No. 10 was otherwise cited in cases in which the application of German law was not possible on legal grounds or did not prescribe a sufficiently severe sentence.[30]

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28 "Abschrift. Professor Dr. R. Lange. Jena. 11. Dezember 1946. Gutachten," Z21/1334. Bundesarchiv. Koblenz, pp. 1-2.

29 Benjamin, *Zur Geschichte der Rechtspflege der DDR, 1945-1949*, 218.

30 "3221 – III (V) 1831.47. Protokoll der Konferenz vom 29. August 1947," DP 1 VA 19.

Jurisdiction over denunciation cases as political crimes later followed in the other states of the Soviet occupation zone, in which the enactment of new legislation had been decentralized. The provincial administration in Brandenburg was instructed on 13 July 1946 through circular directive 224/VT that the Soviet military administration in Potsdam conferred German prosecutors and courts there with the specific jurisdiction to adjudicate denunciation cases in accordance with Article 2, 1c of Control Council Law No. 10. In view of the political and criminal significance of these cases, which had aroused considerable public interest, they were to be adjudicated by jury courts at the county or district court levels, depending on the gravity of the consequences,[31] thereby granting private individuals a voice in such proceedings, supplementing the deliberations of jurists. The German judicial organizations throughout the Soviet occupation zone were later granted the jurisdiction to administer Control Council Law No. 10 according to different types of crimes, which was in turn granted by the different regional occupation authorities in each state.[32] New precedents became set as judgements were pronounced in denunciation cases at separate courts, which would establish practice for their prosecution thereafter.

A denunciation case that was appealed to the supreme regional court in Gera on 2 October 1946 demonstrated how Control Council Law No. 10 could be administered by a German court as an extension of German legislation in conformity with Allied occupation objectives for prosecuting

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Bundesarchiv. Berlin, pp. 38-39.

31 "Provinzialverwaltung Mark Brandenburg. Abteilung IV – Justiz – Az. VI 5 – 4010 – 1033/46. Potsdam, den 13. Juli 1946. Runderlass Nr. 224/VI. Betrifft: Zuständigkeit der deutschen Gerichte für Strafsachen gegen Denunzianten. Bezug. Kontrollratsgesetz Nr. 10 vom 20. 12. 1945, Art. II, Ic und Art. III d. 2. Abs," DP1 VA 326. Bundesarchiv. Berlin.

32 Benjamin, *Zur Geschichte der Rechtspflege der DDR: 1945-1949*, 208; Hermann Wentker, *Justiz in der SBZ/DDR 1945-1953. Transformation und Rolle ihrer zentralen Institutionen* (München: R. Oldenbourg Verlag, 2001): 400.

crimes against humanity. The defendants in this case reported another to the criminal police in Saalfeld on 12 August 1944 for having remarked that the 20 July 1944 conspirators had intended to start a movement toward a rapid end to the war, which represented the interests of the nation. This report led to his arrest and his being charged by a Special Court (*Sondergericht*) with undermining the state. He was thereafter imprisoned until February 1945, and incurred severe physical impairment as a result. This court ruled that the imprisonment was unlawful since the law by which he had been judged- the so-called "Law of 20 December 1934 against Insidious Attacks on the State and Party and for the Protection of the Party Uniform" - had a purely political character that served to uphold the National Socialist regime. The defendants were thereby to be judged according to the current legal interpretation of events that occurred before National Socialist legislation was abolished through Control Council Law No. 1, and were to be judged according to Control Council Law No. 10, which German courts were bound to administer.[33] This court thus upheld how the spirit of postwar legislation was to be put into practice in accordance with Allied occupation law that had been enacted for this purpose, and demonstrated how German courts were to assist in the prosecution of crimes committed during the National Socialist regime.

The supreme regional court in Dresden specifically addressed the problem of redressing defendants prosecuted for their indirect actions in contributing to crimes against humanity, decisively setting forth the underlying principles of denunciation cases in the Soviet occupation zone. This court ruled in its judgement on 14 March 1947 that denunciation constituted a crime against humanity, resolving that making a report against another constituted persecution on racial, political or religious grounds whenever it had led to the initiation of criminal proceedings or there had been another form of persecution that had supported the National Socialist regime. In contrast to an interpretation made by the

[33] "OLG Gera, Urteil v. 2.10.46 – 1 Ss. 50/46," *Neue Justiz* 1947: 67-68.

Highest Appeal Court for the British Zone on 6 June 1950, it was ruled that judgements did not necessarily need to be limited to the externally manifested hostile conduct by a perpetrator. Their overall conduct could be considered inhumane, even when they did not report another to National Socialist authorities. They could also be indicted for having testified against another upon being summoned to do so by the Gestapo, insofar as they were able to deviate from reporting the truth, and thereby weaken the incriminating evidence without placing themselves in danger.[34] The spirit of Allied occupation law was thus further reinforced through its verdict.

The defendant in this case had been an engineer employed at a company owned by an individual hereafter cited as T., who handed him his dismissal notice on 31 March 1945. This infuriated the defendant, who was going to lose his deferment for military service. He thereafter reported T. to a representative of the economic chamber, hereafter cited as K., accusing him of economic sabotage while saying that a witness, cited as M., was in possession of incriminating evidence against him, which the defendant forwarded to K. This included how T. had exchanged the company's products that were essential to the war effort for foodstuffs, had stockpiled large provisions of radio parts without reporting them, and had consistently not provided accurate reports about the company's production output. K. told the defendant that he was obliged to forward this report to the Gestapo, to which the defendant responded that this is what he wanted, and would go to the Gestapo himself. T. was arrested before this report was sent, and it was later used as incriminating evidence

[34] Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, 111-112; "Urteil des OLG Dresden vom 16. 5. 47 – 21/18/47," *Juristische Rundschau* 1948: 167; "Denunziationsverbrechen und Zeugenpflicht, KRG 10. Urteil des OGH f. d.brit. Z. vom 6. 6. 50 – Ss 522/49," *Juristische Rundschau* 1950: 564-565; "OLG Dresden, v. 18. 7. 1947 – 20.100/47," *Neue Juristische Wochenschrift* 1947/1948: 311-312.

against him while investigation proceedings had already been initiated before this time. Before court proceedings could take place, T. was murdered by the Gestapo among fifty-two victims on 14 April 1945 upon the approach of advancing American troops.[35]

It was evident that the defendant had committed a crime against humanity since he had been aware that T. would be accused of perpetrating economic crimes undermining the war effort when the National Socialist regime was coming to an end and was fighting for its very existence, and had known that there would be inhumane treatment and punishment for those who were imprisoned during this time while approving of these consequences. The jury court that had initially heard this case questioned whether the facts of the case ought to be interpreted as a crime against humanity following National Socialist convictions, or as persecution of ordinary criminal conduct. The Dresden supreme regional court ruled that the defendant had acted out of unpolitical and self-centred motives, which could not be excluded as having led to the perpetration of a crime against humanity, since political motives were not necessary in evaluating such cases in accordance with Control Council Law No. 10. The decisive factor was how the underlying circumstances resulted in the initiation of criminal court proceedings that served to uphold the interests of the National Socialist regime.[36] The defendant in this case, who had acted against his employer and used the regime's secret police apparatus to be directed against him, was judged accordingly.

35 "OLG Dresden. Art. II. Ziff. 1c Kontr.G. 10. Zur Strafbarkeit der Denunziation als Verbrechen gegen die Menschlichkeit," *Süddeutsche Juristenzeitung* 2 1947: 519-520.

36 "OLG Dresden. Art. II. Ziff. 1c Kontr.G. 10. Zur Strafbarkeit der Denunziation als Verbrechen gegen die Menschlichkeit," *Süddeutsche Juristenzeitung* 2 1947: 520.

Establishing hostile intentions and consequences in denunciation cases

The matter of adjudicating denunciation cases was taken into consideration at different levels of the German judicial organisations during this time when such cases began to be adjudicated in the different states of the Soviet occupation zone. While the principle of prosecuting denunciation cases as criminal acts was accepted by the German courts, there was still no consensus on which cases were to be prosecuted and which cases were to be stayed. The general state prosecutor in Saxony had previously directed that denunciation cases were not to be prosecuted in cases that did not have severe consequences, such as deprivation of liberty, mistreatment or death of those denounced. Cases that did not have such consequences as a result of complicity with informers were to be stayed. While this could serve to concentrate attention on cases in which there had been serious consequences and reduce the potential amount of cases on the dockets, this was later considered unsatisfactory, since there were unforeseen consequences to informers' actions that they could not influence after the persecution of another had been set in motion. This would also be in keeping with the spirit of Allied Control Council legislation, which served the purpose of prosecuting attempted as well as actual crimes against humanity. This could not be interpreted and applied within the sphere of the German criminal code, which could not serve judicial-political purposes.[37] Informers were therefore to be prosecuted for the underlying hostility of their actions against others, regardless of the consequences that followed, on the basis of the reprehensibility of these actions. They were to be prosecuted on the basis of their disposition

[37] "Der kommisarische Generalstaatswanwalt im Lande Sachsen. Dresden, am 16. April 1947. GStA I 1800/46 zu Sdbd. XXXIII. Über das Büro des Herrn Ministerpräsidenten der Landesregierung in Dresden and die Deutsche Justizverwaltung der Sowjetischen Besatzungszone in Deutschland. Betr.: Einstellung in Verfahren nach Kontrollratsgesetz Nr. 10. Auf Ihr Schreiben vom 2. April 1947," DP1 VA 326. Bundesarchiv. Berlin..

against others, rather than the consequences that had incurred.

In order to remedy the discrepancy between hostile intentions and consequences, the state public prosecutors of Saxony were instructed on 10 March 1947 to examine how the increasing number of relatively inconsequential denunciations that did not result in severe consequences, such as deprivation of liberty or mistreatment, could be prosecuted. While convictions could not be imposed on the basis of the provisions of Control Council Law No. 10 in such cases, they nevertheless represented reprehensible actions since those denounced for personal reasons faced intimidation from the Gestapo or other National Socialist authorities, and were therefore could not remain unpunished. It was therefore ordered that denunciation cases that did not involve political, racial or religious motives, or did not result in severe consequences for those denounced, would have to result in the imposition of a certain monetary fine to be paid to the Victims of Fascism or the People's Solidarity.[38] Such cases were later adjudicated in Berlin and Saxony-Anhalt on the basis of terror resulting from having been interrogated by the Gestapo; such interrogations were interpreted as having been inhumane[39] experiences. However, reasonable fairness and impartiality were maintained through instructing that other cases of denunciation that resulted in severe consequences could also be dismissed on the grounds of there being insufficient evidence to sustain a conviction.[40]

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38 "Der Generalstaatsanwalt im Lande Sachsen. GStA I 1800/46. An alle Herrn Oberstaatsanwälte bei den Landgerichten. 10 März 1947. Betr.: Handhabung der Einstellung in Verfahren nach Kontrollratsgesetz Nr. 10," DP1 VA 326. Bundesarchiv. Berlin.

39 "Deutsche Justizverwaltung usw. Berlin. An den Herrn Generalstaatsanwalt. Betrifft: Einstellung in Verfahren nach Kontrollgesetz Nr. 10 Bericht vom 10.3.1947 – GstA. I 180C/46. 2. April 1947," DP1 VA 326. Bundesarchiv. Berlin..

40 "3 Kls 4/47. In der Strafsache gegen die Fleischmeister F. K. … wegen Verbrechen gegen die Menschlichkeit … Grosse Strafkammer des Landgericht Cottbus in der

The Dresden supreme regional court further added clarity for the prosecution of denunciation cases in a judgement pronounced on 16 May 1947. It was ruled that prosecuting the act of denunciation did not necessitate the intention to commit a crime against humanity, since this type of action supported the unlawfulness of the National Socialist regime and thereby violated the principles of humanity. Those who had been conscious of the unlawfulness of their actions in connection with National Socialist crimes by denouncing others were to be prosecuted in accordance with Control Council Law No. 10,[41] and could not be absolved of their responsibility for being called to account for their actions.[42] The scope for prosecuting acts of denunciations was thereby extended to all possible forms on the basis of initiating proceedings against others, regardless of the consequences that resulted.

This court also set forth in another case on 18 June 1947 how a truthful statement in criminal court proceedings during the National Socialist regime could constitute a crime against humanity.[43] The defendant had owned a barber shop and had employed a Mrs. H. who was later ordered to go work in the armaments industry. A few weeks later, a stranger asked the defendant about Mrs. H.'s political attitude and to provide any information about whether she had made remarks that were hostile to the state. The defendant willingly described Mrs. H.'s anti-fascist disposition without asking the stranger about his authority to make such queries, and repeated her statements to the Gestapo after they had

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Sitzung vom 6. Mai 1947. DP1 VA 326 Bundesarchiv. Berlin; "Ks. 2/47. In der Strafsache gegen 1.) den. Schumacher F. … 2.) den Glasschliefer F. K. … 3) den Kaufmann J. L. … wegen Denunziation … Schwurgericht Eisenach-Gotha in der Sitzung vom 18.3.1947," DP1 SE 3508. Bundesarchiv. Berlin.

41 "OLG Dresden, Urteil v. 16.5.47 – 21.19./47," *Neue Justiz* 1948: 25-26.

42 "Urteil des OLG Dresden vom 16.5.47 – 21/18/47," *Juristische Rundschau* 1948: 166-167.

43 "OLG Dresden, v. 18. 7. 1947 – 20.100/47," *Neue Juristische Wochenschrift* 1947/1948: 311; "Urteil des OLG Dresden v. 18.7.47," *Deutsche Rechts-Zeitschrift* 1948: 32.

summoned her for questioning a few weeks later. Mrs. H. was later arrested and was sentenced to six months' imprisonment by a Special Court for making disparaging remarks about the regime. The defendant also appeared as the only witness testifying against Mrs. H. at these proceedings, where she considered herself obliged to provide incriminating testimony since Mrs. H. had worked in the armaments industry; workers in that industry were supposed to be politically reliable, unlike Mrs. H., who had an anti-fascist attitude, whose brother-in-law was in a concentration camp, and whose husband was part Jewish.[44]

It was to be determined whether the defendant's conduct toward Mrs. H. was to be considered inhumane, in view of whether it was possible for her to avoid freely giving incriminating testimony against Mrs. H. without incurring detrimental effects, considered that the stranger who had approached her concerning Mrs. H. had not established his credentials. Since political criminal justice during the National Socialist regime was to be considered unlawful and even criminal, it was to be determined whether the defendant had an interest in not deviating from reporting the truth, and would not have exposed herself to harmful consequences if she had tried to protect Mrs. H. from adverse circumstances. This would contribute to determining whether her conduct could be considered inhumane, while she was not under any moral obligation to speak the truth under the circumstances of that time. It was also found that she had political motivations for acting against Mrs. H.,[45] and was therefore to be called to account for her actions, regardless of the fact that she did not initiate the action that was taken against another who was prosecuted. The defendant was thus prosecuted for her hostile attitude toward a victim of National Socialist law that she had been willing to denounce, since she

44 "OLG Dresden, v. 18. 7. 1947 – 20.100/47," *Neue Juristische Wochenschrift* 1947/1948: 311-312.

45 "OLG Dresden, v. 18.7.1947 – 20.100/47," *Neue Juristische Wochenschrift* 1947/1948: 312.

had not chosen to withhold incriminating evidence that would lead to severe consequences.

In another case, this same court ruled in its judgement on 18 June 1947 how a crime against humanity was perpetrated through denunciation when the informer had a certain personal interest in the report that was filed.[46] In July 1943, the defendant told her acquaintance K. that her daughter worked as an assistant for military intelligence in Russia. K. responded that if she had a daughter, she would not let her become a whore, implying that officers would not tolerate her daughter not "going along with everything."[47] The defendant thereafter reported these remarks to the local *Ortsgruppenleiter*, who in turn conveyed this report to the Gestapo, which in turn led to Special Court proceedings in Dresden against K. on 13 January 1944, in which the defendant appeared as a witness. K. was sentenced to eight months' imprisonment for insulting the officer corps and making spiteful remarks against military intelligence assistants. This court ruled that if an informer had prior knowledge that the individual who would be affected by their report would face the terroristic methods of the National Socialist regime and be subject to considerable danger, they were obliged from the viewpoint of humanity to consider the potential consequences of their actions whenever there was a chance that it would result in the prosecution of a political offense,[48] thus confirming the basis of the earlier judgement that had been pronounced.

In a later judgement on 8 August 1947, this court also set forth how the rules of establishing evidence were to take precedence in such cases. The defendant in this case spoke about defeatist remarks about how the

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46 Ledig, "Zum Kontrollratsgesetz Nr. 10," *Neue Justiz* 1948: 191.

47 "Kontrollratgesetz Nr. 10," *Deutsche Rechts-Zeitschrift* 1948: 32.

48 "Kontrollratgesetz Nr. 10," *Deutsche Rechts-Zeitschrift* 1948: 32; "Urteil des OLG v. 18. 7. 47 – 20.108.47,"*Juristische Rundschau* 1947: 121-122; "OLG Dresden, v. 18. 7. 1947 – 20.108/47," *Neue Juristische Wochenschrift* 1947/1948: 312.

war could not be won in a conversation during a card game with an *Ortsgruppenleiter*, who then filed a report against the individual, hereafter cited as H., who had made these remarks. The defendant also reported what she had heard to the Gestapo and testified as a witness in the court proceedings. H. was then prosecuted for high treason and undermining the war effort, for which she was executed. The court ruled that a prosecution of a crime against humanity required evidence of at least limited intent. An accusation in this type of crime entailed judgement of inhumane action, while simple negligence could not be perceived as such, and was therefore insufficient. This condition of intent was not indisputably determined in this case. Since the defendant and H. had an amicable relationship in spite of their political differences, it was inferred that the defendant did not intend to cause harm and that she had not have known with certainty that the *Ortsgruppenleiter* would take action against her.[49] Evidence of the defendant's hostile intentions thus could not be established with certainty, and therefore reasonable objectivity was maintained.

Order No. 201 and the politicization of denunciation cases

A new precedent for the prosecution of National Socialist crimes was later set forth through new zonal legislation. Order No. 201 of the Soviet military administration on 16 August 1947 on "Guidelines on the Application of Control Council Directives No. 24 and No. 38 on Denazification" [50] was enacted as a measure to institute uniformity to the denazification process in the Soviet occupation zone by bringing both measures into force simultaneously through this Order as an extension to

49 "Urteil des OLG Dresden v. 8. 8. 47 – 20.131/47," *Juristische Rundschau* 1948: 80-81.

50 "Befehl Nr. 201. Richtlinien zur Anwendung der Direktiven Nr. 24 und Nr. 38 des Kontrollrats. 16. August1947," Zentralverordnungsblatt 1947 Nr. 13: 153-154; "Befehl Nr. 201. 16. August 1947. Berlin. Richtlinien zur Anwendung der Direktiven Nr. 24 und Nr. 38 des Kontrollrats," *Zentralverordnungsblatt* 1947 Nr. 18: 185-216.

Control Council Law No. 10,[51] combining their provisions to be administered jointly through the German courts in the Soviet occupation zone. They were henceforth granted the jurisdiction over applying Control Council Directive No. 38 that had been earlier enacted on 12 October 1946, which was to enable them to resolve cases in a just manner by separating major offenders, offenders and lesser offenders from former nominal members of the NSDAP. The courts were hereby to prosecute the major offenders and offenders, thus limiting the scope of individuals to be prosecuted.[52] This Order hereafter established the basis for the prosecution of most denunciation cases in formal judicial proceedings in applying the provisions of Control Council Law No. 10, Control Council Directive No. 38, and German law,[53] and gave further expression to the application of Control Council Law No. 10 in these cases.[54] It also added a politicized element to these types of cases, since the defendants were to be judged on the basis of their political dispositions in addition to the facts of these cases. Occupation law was therefore used as a pretext for advancing political interests, while prosecuting cases that were considered political in nature, and thereby undermined the objectivity of further proceedings that were otherwise to be adjudicated on the basis of legislation and available evidence.

This Order also initiated a second phase of the prosecution of National Socialist crimes in eastern Germany by conferring this authority

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51 Ernst Melsheimer, (1948). "Der Kampf der deutschen Justiz gegen die Naziverbrecher," *Neue Justiz,* 128.

52 "Ministerium der Justiz der Deutsche Demokratischen Republik. Berlin, den 19.10.1949. Verfügung." DP1 VA 6229. Bundesarchiv. Berlin.

53 Richard Lange, (1948). "Zum Denunziantenproblem," *Süddeutsche Juristenzeitung,* 302.

54 Albert Eberhardt, "Die Denunziation im Spiegel des Kontrollratsgesetzes Nr. 10, mit einem ergänzenden Überblick ihre sonstige Strafrechtliche Qualifizierung" (Diss.: Ludwig-Maximilian-Universität zu München, 1950): 8.

to the German judicial organisation[55] to undertake what the Soviet military administration considered to be democratic renewal in the Soviet occupation zone through denazification, and accelerating judicial proceedings against National Socialist crimes.[56] Most convictions for these crimes were brought about under Control Council Directive No. 38, which had the same status as Control Council Law No. 10 as a criminal law, although they served different purposes. Whereas Control Council Law No. 10 conferred the jurisdiction to adjudicate conduct on the basis of crimes against humanity, Control Council Directive No. 38 was to scrutinize political conduct during the National Socialist regime and impose more severe sanctions accordingly on the basis of a much wider scope,[57] just as denazification tribunals were responsible for such proceedings in the American occupation zone. In contrast, the Soviet military administration had considered the denazification tribunals to be inconsistent and sluggish.[58]

Political interference in the administration of justice

The German administration of justice was also criticized for not implementing Order No. 201 with sufficient severity. The legal division of the Soviet military administration claimed there had been too many acquittals and lenient judgements in Thuringia and Saxony, and many judges had been altogether hesitant to take part in judging cases in

55 Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, 155.

56 "3221 – III (V) 1831.47. Protokoll der Konferenz vom 29. August 1947," DP 1 VA 19. Bundesarchiv. Berlin, pp. 1-2.

57 "3221 – III (V) 1831.47. Protokoll der Konferenz vom 29. August 1947," DP 1 VA 19. Bundesarchiv. Berlin, p. 21

58 Wentker, "Die juristische Ahndung von NS-Verbrechen in der sowjetischen Besatzungszone und in der DDR," 66.

accordance with this Order.[59] This Order was thus also used as a test of political disposition of German judges in serving the interests of the Soviet military administration under the guise of "the interests of the democratization of Germany," and expose "reactionary elements" within the judiciary, or those who were merely indifferent to the interests of the Soviet military administration.[60]

The legal division of the Soviet military administration thus expected the German administration of justice to interpret the application of Control Council Law No. 10 on the basis of its political content. Jurists were expected to take into consideration how the National Socialist crimes were to be interpreted as having been politically motivated, rather than comparing them with ordinary crimes, as cited in the criminal code. Judges who were considered to be "maliciously" unwilling to administer this law were to be removed from office,[61] as they would be considered politically unreliable in contributing to the so-called democratization of the German administration of justice as a corresponding goal of the military occupation. By the summer of 1948, the Soviet military administration in Thuringia resorted to dismissing judges who they considered to have pronounced insufficiently severe sentences.[62] The guarantee of the principle of judicial independence, a vital element in any democratic administration of justice in which the law and the state's interests are separate and jurists are free from executive restrictions, was thus abolished in order to induce German jurists in the Soviet occupation zone to adjudicate cases with the spirit of the interests of the Soviet occupation authorities. This was imposed in addition to the letter of the

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59 "Bericht über die Besprechung bei der Rechtsabteilung in Karlhorst am 5. März 1948." DP1 VA 11. Bundesarchiv. Berlin.

60 Weber, *Justiz und Diktatur*, 105.

61 "3221 – III (V) 1831.47. Protokoll der Konferenz vom 29. August 1947," DP 1 VA 19. Bundesarchiv. Berlin, pp. 41-42.

62 Weber, *Justiz und Diktatur*, 106.

law, which necessarily undermined their objectivity as a result of political interference.

The German judicial organisation was to hereby demonstrate how it could execute the will of the Soviet military administration in prosecuting National Socialist crimes[63] while taking their political conduct into account at the same time. Whoever had cooperated with the Gestapo, SD, or SS or a similar organisation by denouncing another for personal gain, or had contributed to their persecution, was to be classified as a major offender, as cited in Article II, paragraph 9 of Part II of Control Council Directive No. 38. Whoever had not acted out of motives of personal gain in having denounced another, which caused criminal proceedings to be initiated against them because of race, religion, or political opposition to the National Socialist regime or contravening its legislation, were to be classified as offenders, as cited in Article II, paragraph 8 of Part II of this directive.[64] Perpetrators who had contributed to committing a crime, as interpreted under Control Council Law No. 10, were to be prosecuted accordingly, and could also be considered major offenders as defined in Control Council Directive No. 38, regardless of whether they were accused of only aiding and abetting the crimes that had been committed. This designation in this directive would also contribute to judging the extent of their guilt in establishing a conviction by evaluating the severity of the crime.[65] However, although not every case of denunciation constituted a crime against Control Council Law No. 10, public prosecutors and courts were instructed to prosecute the many lesser offenders on the basis of Control Council Directive No. 38 whenever

63 Wentker, "Die juristische Ahndung von NS-Verbrechen in der sowjetischen Besatzungszone und in der DDR," 68; Hermann Wentker, *Justiz in der SBZ/DDR 1945-1953*, 431.

64 Karl Gurski, (1947). "Rechtsfragen zum Befehl Nr. 201," *Neue Justiz,* 1 8/9: 176.

65 "OLG Dresden, Urteil v. 11. 5. 48 – 21. ERKs 112/48," *Neue Justiz* 1948 2: 115.

inhumane actions could not be substantiated.[66]

Prosecution of denunciation cases according to this directive widely eliminated disputes arising from defining what constituted a crime against humanity, as cited in Article II 1c of Control Council Law No. 10.[67] Denunciation was set forth as a political crime, and informers who had inflicted consequences on others resulting from the actions they had taken against them were to be called to account for their actions accordingly.[68] This also alleviated the problem of defining malicious intentions in denunciation cases, as informers did not necessarily need to anticipate the consequences of their actions in reporting others, since the facts in these cases were based on having initiated criminal proceedings.[69]

The adjudication of denunciation cases became directly cited as National Socialist crimes that were to be judged as criminal actions. Perpetrators in these cases were to be called to account for their actions in view of the specific consequences they had inflicted on others, in addition to evaluating the added element of conduct during the National Socialist regime as an aggravating circumstance to be taken into consideration against perpetrators of denunciations. Further clarity on how political denunciation cases were to be judged would also be established in practice through new precedents in subsequent cases in varying circumstances, while later denunciation cases also exemplified the increasingly political nature of these types of trials.

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66 "Der Chef der deutschen Justizverwaltung der Sowjetischen Besatzungszone in Deutschland, 4200 – III. 611/48. Berlin, den _ April 1948. An das Landesregierungen – Justizministerium - . Betrifft: Durchführung des Befehls Nr. 201," DP1 VA 7132. Bundesarchiv. Berlin.

67 Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, 295.

68 Karl Gurski, (1947). "Rechtsfragen zum Befehl Nr. 201," *Neue Justiz,* 1 8/9: 173-174.

69 Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, 296.

Political denunciation trials

A review of an appeal at the Berlin appeal court (*Kammergericht*) on 22 October 1947 set forth how acting according to the prevailing law of the time a crime against humanity was committed did not justify the act of denouncing another, while being conscious of the consequences that would ensue. The defendant had been studying to be a nurse at a Berlin military hospital where she became acquainted in early 1944 with a first lieutenant, hereafter cited as W., who was later arrested in connection with the 20 July assassination attempt on Hitler. She later visited his foster mother, hereafter cited as F. While they spoke about W.'s whereabouts, they turned to talking about political matters. F. expressed her regrets that the attempt on Hitler's life had failed, and told the defendant that a new attempt was planned for September in which she was involved.[70]

The defendant thereafter sought out an SS Brigadier, hereafter cited as A., who she had come to know briefly at the *Reich* Chancellery. She told him about this planned assassination attempt, and asked him to reinforce protective measures for Hitler. When asked by A. from whom she had heard about this, she named F. and told A. about F.'s political remarks. A. in turn reported this matter to the Gestapo. The defendant was then questioned, and told them exactly what F. had told her. F. was then arrested, and People's Court (*Volksgerichtshof*) proceedings were initiated against her. She was sentenced to death and executed. The defendant was later found guilty of crimes against humanity under Article II section 1c of Control Council Law No. 10, and sentenced to ten years' imprisonment with five years' deprivation. The Berlin appeal court subsequently rejected her appeal.[71]

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70 "Urteil des KG. vom 22.10.47 – 1 Ss 217/47 (213/47)," *Juristische Rundschau* 1948: 164.

71 "Urteil des KG. vom 22.10.47 – 1 Ss 217/47 (213/47)," *Juristische Rundschau* 1948: 164.

This case constituted political persecution. What the defendant F. had told the SS Brigadier would inevitably lead to questions about the source of the information about an attempted assassination attempt, and it was common knowledge at the time that whoever had been suspected of making such an attempt or was involved in planning such an attempt would receive the death penalty. This court set forth that the defendant had foreseen the inhumane consequences of her actions and had approved of them. The fact that she had delivered F. into the hands of the Gestapo in order to protect Hitler constituted persecution on political grounds. Her actions were also considered inhumane, in terms of the foreseen consequences and having intentionally betrayed F.'s trust while F. had known of the defendant's National Socialist disposition.[72]

Her actions could not be justified by her claim in her defence that she had intended to prevent a murder and that she was legally obliged under § 139 of the criminal code to report her knowledge of a crime that was going to be committed. This claim was refuted by the fact that the attempt on Hitler's life that F. professed to be involved in was not illegal, since it entailed taking an action of national emergency against an illegal regime, which involved the right to revolt against injustice that could not be prevented by any legal obligation to report this matter to the authorities. The obligation to report illegal action could also only have been justified in upholding the law for victory to be achieved, rather than averting the law being violated against injustice. Even if the defendant had not recognized this and supported Hitler as the *Führer* whose life she believed had to be protected, she remained subject to taking responsibility for her actions, as defined in Article II, section 4b of Control Council Law No. 10. This verdict was therefore sustained[73] in view of the defendant's political disposition in adhering to the interests of the National Socialist regime.

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72 "Urteil des KG. vom 22.10.47 – 1 Ss 217/47 (213/47)," *Juristische Rundschau* 1948: 164.

73 "Urteil des KG. vom 22.10.47 – 1 Ss 217/47 (213/47)," *Juristische Rundschau* 1948: 165.

Another case heard at the Berlin appeal court set forth that relaying a so-called remark that was hostile to the state that was forwarded to a third party was subject to prosecution when this led to an offense having been perpetrated, regardless of whether they had taken the initiative in filing a report against another. In 1935, the defendant had heard a visitor at her mother's home, hereafter cited as B., make disparaging remarks about Hitler and National Socialism. She then told her husband, a member of the NSDSAP and the SA, about these remarks, who in turn filed a report about this incident. B. was sentenced to eight months' imprisonment on 12 November 1947 as a result. The defendant in this case was later sentenced to eight months' imprisonment in accordance with Control Council Law No. 10. This court determined that persecution was to be defined by circumstances under which a report was filed and the intentions of the informer. In this case, the perpetrator had recognized and approved of the consequences of her actions, which resulted in her husband taking action against B.[74] The defendant was therefore prosecuted for having instigated the action that had been taken against another individual, although she had not taken the initiative for action to be taken.

Another case that was reviewed by the supreme regional court in Dresden on 6 February 1948 set a precedent concerning mitigating circumstances. The defendant had reported another to the Gestapo in July 1944 for having heard him say that he was greatly saddened about the assassination attempt of 20 July not having been successful. He was later imprisoned in Dresden where he perished in the bombing attack in February 1945. The jury court that had initially heard this case had considered the defendant's lack of previous convictions and the circumstance of having felt obliged to file a report while acting out of "falsely misunderstood patriotism."[75]

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74 "Urteil des KG. vom 12.11.47 – 1 Ss 284/47," *Juristische Rundschau* 1948: 166.

75 "Zum Kontrollratsgesetz Nr. 10. OLG Dresden, Urteil vom 6.2.1948 – 21 ERKs 8/47,"

This verdict was quashed for having grossly misjudged the meaning and purpose of Control Council Law No. 10 for the moral and intellectual liquidation of the National Socialist regime. It was ruled that whoever had denounced another for making a remark against Hitler in July 1944 and had thereby delivered them into the hands of the Gestapo and caused their death would have to be judged for having perpetrated a crime against humanity, while any indications for support for the staggering regime during this time were to be prosecuted as evidence of fascist activity that was to be punished accordingly.[76] A lack of previous convictions was also not to be taken into consideration as a mitigating circumstance in cases of political offenses for National Socialist activity, as political and criminal guilt were to be separated while sentences were to be judged in accordance with the principles of Control Council Law No. 10 and Control Council Directive No. 38. Appeal courts would necessarily intervene in further cases in which a lack of previous convictions would be wrongfully considered a mitigating circumstance in favor of the defendant in evaluating the extent of the sentencing,[77] thus increasing the severity of sentencing in all such cases involving political circumstances.

Politicization of the judiciary

Measures taken against National Socialist crimes began to be brought to an end through an amnesty through Order No. 43, enacted on 18 March 1948, by which sentences for up to a year's imprisonment would be suspended.[78] Nevertheless, the Soviet military administration nevertheless expected the German courts in their occupation zone to deal with National Socialist crimes with greater severity; it claimed the German courts

Neue Justiz 1948: 55.

76 "OLG Dresden, Urteil vom 6.2.1948 – 21 ERKs 8/47," *Neue Justiz* 1948: 55-56.

77 "OLG Dresden, Urteil v. 13.2.1948 – ERKs 39/47," *Neue Justiz* 1948: 56.

78 Ernst Melsheimer, (1948). "Der Kampf der deutschen Justiz gegen die Naziverbrecher," *Neue Justiz,* 128.

appeared to be too lenient from the beginning of the occupation. Karl Gurski, the director of the justice administration until 1948, also criticized German courts for not imposing sufficiently heavy sentences under Control Council Law No. 10 and German criminal law after Order No. 201 was promulgated, especially in denunciation cases.[79] Courts were found to have classified major offenders in lower levels of culpability by allowing for the mitigating circumstances of the defendants having acted out of necessity, or occasionally taking the earlier anti-fascist disposition of the defendant into consideration, or unjustifiably not having taken the potential severe consequences of denunciations into account as grounds for reducing the extent of the sentencing. The courts were thus criticized for neglecting to assess the extent of sentencing in view of providing security for society against subversive fascist activities in the future.[80] The Soviet military administration legal authorities also criticized the German administration of justice for having proceeded too slowly in its investigation proceedings, for having imposed extraordinarily lenient judgements on serious offenders - especially in Thuringia, Saxony and Mecklenburg, and most especially in Saxony-Anhalt - while being diverted by offences of secondary importance.[81]

The number of trials promulgated rose rapidly after the promulgation of Order 201,[82] which included all forms of denunciation cases from August 1947 to October 1949.[83] In comparison to the prosecution of

79 Wieland, "Ahndung von NS-Verbrechen in Ostdeutschland," *DDR Justiz und NS-Verbrechen*, 40, 47; "Stellungnahme des rechtspolitischen Beirates zur Durchführung der Verfahren nach Befehl 201," (n.d.) DP1 VA 6596. Bundesarchiv. Berlin..

80 "Stellungnahme des rechtspolitischen Beirates zur Durchführung der Verfahren nach Befehl 201," (n.d.) DP1 VA 6596. Bundesarchiv. Berlin..

81 "Protokoll über die Justizkonferenz der deutsche Justizverwaltung vom 11./12. Juni 1948," p. 22. DP1 VA 264. Bundesarchiv. Berlin..

82 Wieland, "Ahndung von NS-Verbrechen in Ostdeutschland," *DDR Justiz und NS-Verbrechen*, 40-41.

83 "Ministerium der Justiz der Deutsche Demokratischen Republik. Berlin, den 19.10.1949.

National Socialist crimes in the western occupation zones, including denunciation cases, German courts in the Soviet occupation zone judged such cases with far fewer grounds for not imposing convictions.[84] According to the interpretation of the Berlin appeals court, denunciation cases were to be judged as crimes against humanity on the basis of having subjected another to the terroristic power apparatus of the National Socialist regime as a form of persecution under the provisions of Control Council Law No. 10. The consequences of denunciation, such as the life or freedom of another, were neither a necessary nor a decisive factor in the judgements in evaluating guilt in such cases.[85] The burden of proof of innocence shifted to the defendant, which had begun with the adjudication of members of National Socialist organizations after the promulgation of Order No. 201, and continued to be common practice against political opposition in the German Democratic Republic,[86] beginning from 1950 when the administration of criminal justice was sharpened in all types of political cases[87] as a consequence of the Stalinization of the administration of justice.

A new precedent in denunciation cases was set in a judgement passed on 17 August 1951, demonstrating the forcefulness with which these cases could be prosecuted. This case demonstrated how even those who had not taken the initiative to denounce others were also subject to prosecution,

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Verfügung," DP1 VA 6229. Bundesarchiv. Berlin.

84 Ledig, (1948). "Zum Kontrollratsgesetz Nr. 10," *Neue Justiz,* 190.

85 Hans Ranke, (1950). "Zur Entwicklung der Rechtsprechung des Kammergerichts bei Verbrechen nach KontrRG No. 10 und KontrR-Direktive Nr. 38," *Neue Justiz,* 49.

86 Weber, *Justiz und Diktatur*, 112-113.

87 Richard Lange, (1950). "Die Entwicklung des Strafrechts in der sowjetischen Besatzungszone," *Bonner Berichte aus Mittel- und Ostdeutschland. Die Justiz in der sowjetischen Besatzungszone Deutschlands*. Bonn/Berlin: Bundesministerium für Gesamtdeutsche Fragen, 1959: 110; Günther Scheele, "Die Justiz muß schneller und entschlossener den Kampf gegen die Feinde unserer Republik führen," *Neue Justiz,* 4: 387.

regardless of their intentions. The defendant was charged with crimes against humanity for having appeared as a witness for the prosecution. The Chemnitz regional court sentenced a defendant to five years' imprisonment with confiscation of property for having given incriminating testimony against a defendant at the People's Court. In contrast with other such cases, she had not filed a report against them in those proceedings, and had hoped to avoid being questioned by the Gestapo or appearing as a witness at this court.[88] She was thus prosecuted for the consequences of her actions, although she had not taken the initiative in taking hostile action against another.

The defendant, hereafter cited as A. W., had owned a mansion where she had a lodger hereafter cited as Mrs. S., who had not made any secret of being against the National Socialist regime. Mrs. S. was sentenced to death on 29 October 1943 and executed a few weeks later. Another individual, hereafter cited as Mrs. R., told her husband about Mrs. S., and filed a report against her with the Gestapo. The Gestapo questioned A. W. about this matter, and told them that Mrs. S. was not a National Socialist and did not believe in the final victory. After being intimidated by the Gestapo, A. W. also repeated this statement in her testimony at the People's Court, which formed the basis of the death sentence along with R.'s testimony.[89]

A. W. had not reported Mrs. S. to the Gestapo, having been summoned by them, and had initially attempted to protect her. However, she succumbed to their threats while they demanded to know the truth. She had considered that there was nothing she could do to influence the verdict of the People's Court to which she was summoned to provide the

88 "An das Ministerium der Justiz der DDR." P1/SE/1045/2. Nr. 75/51 (23) Abt. I AR 52/51 (11/51) Bundesarchiv. Berlin.

89 "An das Ministerium der Justiz der DDR." P1/SE/1045/2. Nr. 75/51 (23) Abt. I AR 52/51 (11/51). Bundesarchiv. Berlin.

incriminating testimony, and was afraid of the consequences of not telling the truth to its notorious judge, Roland Freisler. Nevertheless, although she could not be held responsible for the external circumstances while she had been placed in a difficult situation, she was considered to be equally liable for the death sentence as was R. who had taken the initiative in taking action against Mrs. S. A. W. had shared Mrs. S.'s political disposition to some degree, and had never thought of reporting her frequent hostile remarks about Hitler. She had even warned Mrs. S. many times not to express her opinion too loudly in order to avoid being overheard by strangers. Despite these mitigating circumstances, she was charged with having betrayed another after having accepted the appalling possibility of a death sentence as an example of judicial terror at a time when the regime feared for its continued existence.[90] Hence, in this new landmark case, the defendant was prosecuted for having acted as a witness in court proceedings, and had not intended to take action against another.

The legal basis for the adjudication of National Socialist crimes did not change with the establishment of the German Democratic Republic. These crimes continued to be prosecuted on the basis of Control Council Law No, 10 and Control Council Directive No. 38 in connection with Order No. 201,[91] which continued to form the basis for the prosecution of crimes against humanity. Subsequent cases otherwise continued to contribute to new conclusions that followed previous precedents in judgements that were passed on how the facts in these cases were examined in accordance with military government legislation. When the Soviet Union proclaimed the sovereignty of the German Democratic Republic in 1955, earlier Control Council legislation became invalid. The provisions of the German criminal code and those in Article 6 of the

90 "An das Ministerium der Justiz der DDR." P1/SE/1045/2. Nr. 75/51 (23) Abt. I AR 52/51 (11/51). Bundesarchiv. Berlin.

91 Hermann Wentker, (2002). "Die juristische Ahndung von NS-Verbrechen in der sowjetischen Besatzungszone und in der DDR," *Kritische Justiz,* 35: 64.

International Military Tribunal of 8 August 1945 were retained. Crimes against humanity were later incorporated into the criminal code of the German Democratic Republic in 1968.[92]

Conclusion

German jurists were to carry out their functions under political circumstances that were underscored by legislation against crimes that were committed during the National Socialist regime; this legislation also emphasised guilt according to political circumstances. Whereas crimes were adjudicated on the basis of the facts of the cases, political crimes in the Soviet occupation zone were also to be viewed simultaneously in a different light, especially after the promulgation of Order No. 201, which combined criminal prosecution with imposing sanctions for political offenses. Such cases were also prosecuted with greater forcefulness. While the application of criminal law was administered objectively in accordance with the facts presented, adjudicating offenses for their political motives and consequences undermined this objectivity while advancing underlying political interests. Guilt could be established when the accused had not taken the initiative in committing a crime, which widened the scope of those who could be accused of being associated with the consequences of another's actions with regard to having perpetrated actions of a political nature.

Occupation law was thus employed as a pretext for advancing political interests while prosecuting cases that were considered political offenses. There were also inconsistencies and other biases in these trials aimed at appeasing the different interested parties, such as the victims and

92 Hermann Wentker, "Die juristische Ahndung von NS-Verbrechen in der sowjetischen Besatzungszone und in der DDR," *Kritische Justiz* 35 2002: 70; *Gesetzblatt der Deutschen Demokratischen Republik* 1968 Teil I Nr. 1: §§ 84, 91. 93, 95.

the political interests of the Soviet military administration and the Socialist Unity party. This politicization of the trials eventually undermined the objectivity of the legal proceedings for prosecuting these informers, while also undermined the independence, and consequently the objectivity, of the newly reformed German judiciary.

German law was initially used for the adjudication of denunciation cases, but the Soviet military occupation authorities required that German jurists also had to administer Control Council Law No. 10 in these cases. According to the interpretation of the Berlin appeal court, denunciation cases were to be judged as crimes against humanity on the basis of having subjected another to the unjust apparatus of the National Socialist regime, which constituted a form of persecution under the provisions of Control Council Law No. 10. The consequences of denunciation, such as the life or freedom of another, were neither a necessary nor a decisive factor in the judgements in evaluating guilt in such cases.[93] The promulgation of Order 201 by the Soviet occupation authorities in 1947 changed the nature of these trials, and marked the beginning of the complete politicization of this process.

The number of trials of denunciation cases increased after the promulgation of Order 201,[94] especially during the period from August 1947 to October 1949.[95] In comparison to the prosecution of denunciation cases in the western occupation zones, the German courts in the Soviet zone adjudicated these cases with far fewer reasons for not imposing convictions.[96] The major change introduced into the legal process by

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93 Hans Ranke, (1950). "Zur Entwicklung der Rechtsprechung des Kammergerichts bei Verbrechen nach KontrRG No. 10 und KontrR-Direktive Nr. 38," *Neue Justiz,* 49.

94 Wieland, "Ahndung von NS-Verbrechen in Ostdeutschland," 40-41.

95 "Ministerium der Justiz der Deutsche Demokratischen Republik. Berlin, den 19.10.1949. Verfügung," DP1 VA 6229. Bundesarchiv. Berlin.

96 Ledig, (1948). "Zum Kontrollratsgesetz Nr. 10," *Neue Justiz,* 190.

Order 201 was that the defendants were to be judged on the basis of their political dispositions, in addition to the facts of these cases, and the burden of the proof of innocence shifted to the defendant. This practice continued to be a common practice against political opposition in the German Democratic Republic[97] for the duration of its existence.

97 Weber, *Justiz und Diktatur*, 112-113.

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東德對違反人道的間接犯罪者之審判*

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摘　要

本文探討 1945 年第二次世界大戰後，東德施行轉型正義的實踐與經驗，尤其是對因密告而違反人道的間接犯罪者之判決。盟國佔領法允許德國法院通過起訴違反人道的犯罪而特別制定的法規，意即告密者的起訴追溯期。亦探討在蘇聯佔領區內蘇聯軍政府的管理下，以及之後初期的德意志民主共和國中，法律的實施和對告密者之起訴。本文同時提出該法實施後，通過追溯已發生違反人道的犯罪的法律，所產生來自歷史角度上重大的獨特觀點與教訓，以及相關的實際問題。

關鍵詞：轉型正義、溯及既往的法律、盟國佔領法、蘇聯佔領區

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